NO. 09-17625

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL L. BALSAM,
Plaintiff – Appellant

vs.

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

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

PLAINTIFF – APPELLANT'S OPENING BRIEF

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III. INTRODUCTION AND BACKGROUND ON SPAM AND INTERNET DOMAIN NAME REGISTRATION

A. Nature of the Case

This Action arose because Respondents breached an agreement to which Appellant is a third party beneficiary – the Registrar Accreditation Agreement[1] ("RAA") between ICANN[2] (the entity that coordinates Internet functionality) and Respondents – by refusing to accept liability for harm caused by their licensee after refusing to identify their licensee.

In 2009, the Ninth Circuit held in *U.S.A. v. Kilbride* that "Proxy Registered" (also known as "Privately Registered") Internet domain names used for spamming[3] constitutes materially false registration information. 584 F.3d 1240, 1259 (9th Cir.

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[1] The Registrar Accreditation Agreement (May 17, 2001) is the ICANN contract that enables entities such as Tucows to become Registrars. Registrars enable Registrants to create Internet domain names.

[2] ICANN – the Internet Corporation for Assigned Names and Numbers – is charged with keeping the Internet secure, stable and interoperable. ICANN manages the allocation of Internet Protocol addresses and the domain name system, and runs an accreditation system for Registrars. For more information on ICANN, domain names, and Proxy Registration, *see* About ICANN, http://www.icann.org/en/about/ and *Solid Host NL v. NameCheap Inc.*, 652 F. Supp. 2d 1092, 1094-96 (C.D. Cal. May 19, 2009) (order denying defendant NameCheap's motion to dismiss).

[3] "Spam" is the commonly accepted term to describe "unsolicited commercial email." *See, e.g., Kilbride*, 584 F.3d at 1244. "Spammers" are persons who send spam.

2009). Proxy Registration is a common and unfortunately easy means for spammers to hide their identities, because when a Proxy Registration Service takes legal title to a domain name and licenses it back to its customer, anyone who queries the Whois database[4] for the domain name cannot identify the spammer; the only information that appears is that of the legal owner – the Proxy Registration Service. (ER 64-65, 167, 190.) Proxy Registration has no purpose other than hiding the identity of the person(s) using the domain name.

Respondents profit by knowingly providing Proxy Registration services and conspiring with unlawful spammers to hide the their identities. Here, Tucows took legal title to the domain name *AdultActionCam.com* (a website that displays pornographic images and video and promotes random sexual encounters), and then licensed use of the domain name back to its customer.

Nothing in the RAA immunizes a Registered Name Holder ("RNH") – the legal owner of a domain name – from liability to harmed third parties. Indeed, ¶¶ 3.7.7 and 3.7.7.3 expressly constitute an acceptance by RNHs of all liability for wrongful use of their domain names that they license to third parties, unless they promptly identify their licensees upon presentation of actionable harm. Respondents breached the RAA by refusing to do either.

[4] The publicly-accessible Whois database contains identity/contact information for legal owners of domain names – either the original Registrants or, as in this case, the Proxy Registration Service. *See Solid Host*, 652 F. Supp. 2d at 1095.

The facts are undisputed; this Action is purely a question of law, and a matter of first impression for the Ninth Circuit. In the district court below, Respondents' entire defense was that Balsam is supposedly not a third party beneficiary of the RAA. However, generally accepted rules of contractual interpretation, logic, ICANN's statements, industry standards, and public policy all support Balsam's argument that he is an intended third party beneficiary of at least ¶¶ 3.7.7 and 3.7.7.3. No one benefits from these terms *except* someone like Balsam – not ICANN, not the Registrar, not the RNH, and certainly not the spammer-licensee whose identity should be disclosed.

If the district court was correct, and if this Court does not hold Proxy Registration Services such as Tucows to the terms of the RAA, there may be a dramatic increase in the amount of unlawful and *untraceable* spam. The potential liability for RNHs created by ¶¶ 3.7.7 and 3.7.7.3 is the only means of preventing every spammer in the world from Proxy-Registering domain names with impunity. Without these provisions, Proxy Registration Services – the legal owners of Internet domain names – could hide their licensees' identities despite actual knowledge of unlawful activity, with no adverse repercussions to them and no remedy for harmed parties.

This Court should reverse the order of the district court below.

B. Parties

Plaintiff-Appellant Daniel L. Balsam ("Balsam") is an advocate for protecting consumers' rights and combating unlawful spam. (ER 63.) Balsam was harmed by Defendants-Respondents' business model and their refusal to comply with ¶¶ 3.7.7 and 3.7.7.3 of the RAA. (ER 63, 193-94, 223-25.) These provisions show intent to benefit a class of third parties of which Balsam is a member. (ER 68, 121-22, 195.)

Defendants-Respondents Elliot Noss ("Noss") and Paul Karkas ("Karkas") are Chief Executive Officer and Compliance Officer, respectively, of Defendants-Respondents Tucows Inc. and Tucows Corp. (collectively, "Tucows"). (ER 63, 188-89.) Tucows is a Registrar, but Tucows also engages in *other*, non-Registrar functions, such as offering Proxy Registration services to its spammer-customers. (ER 64, 167, 189.) Tucows is the RNH – the legal owner – of *AdultActionCam.com*. (ER 27, 167, 190.)

C. Proxy Registration, ICANN, and the Registrar Accreditation Agreement

1. Proxy Registration for "Spamvertised" Domain Names Creates Materially False Registration Information

Proxy Registration allows Internet users to transfer legal title of their domain names to Proxy Registration Services, who become the RNHs. RNHs then license use of the domain names back to their customers, the original Registrants. (ER 28-29, 64, 190.) A Proxy Registration Service thus acts as a "straw man," in that only

its identity appears in Whois query results, and not the identity of the person actually using the domain name. (ER 29, 65, 167, 189-90.)

Here, by providing Proxy Registration Services, Tucows dba *Contact Privacy.com* became the RNH (legal owner) of *AdultActionCam.com* – a website with pornographic content that purportedly facilitates random sexual encounters – and then licensed use of the domain name back to Respondents' customer. (ER 23-24, 64-65, 189-90.)

While there are legitimate uses of Proxy Registration, such as protected political speech or whistleblowers of unlawful conduct (ER 65), there are no First Amendment rights for misleading or otherwise unlawful spam. Proxy Registration can provide a haven for scofflaws, which ICANN sought to prevent through the RAA (ER 30-31, 65, 121-22), the California Legislature sought to prevent by enacting Business & Professions ("B&P") Code § 17529.5(a)(2), and Congress sought to prevent by enacting 18 U.S.C. § 1037(a)(4), (d)(2).

Here, since Tucows is *both* Registrar and RNH for *AdultActionCam.com* (ER 64-65, 166-67, 189), this Court should find that: 1) Tucows-the-Registrar had actual knowledge of the RAA's requirements when it chose to act as a Proxy Registration Service/RNH, and 2) Tucows-the-Registered Name-Holder was informed by Tucows-the-Registrar of the requirement that it *shall* accept liability

for harm caused by wrongful use of its domain names licensed to third parties, unless it promptly discloses its licensees' identities.

2. ***ICANN Included Contractual Terms in the RAA to Provide Remedies for Parties Harmed by Wrongful Use of Licensed, Proxy-Registered Domain Names***

ICANN included a provision in the RAA to reduce Proxy Registration Services' incentive to conspire with spammers to hide their identities. (ER 65, 121-22, 191.)

> 3.7.7 Registrar shall require all Registered Name Holders to enter into an electronic or paper registration agreement with Registrar including at least the following provisions:
>
> > 3.7.7.3 Any Registered Name Holder that intends to license use of a domain name to a third party is nonetheless the Registered Name Holder of record []. 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.

ICANN thus ensured that harmed parties would have a remedy from the legal owner of the wrongfully-used domain name.

Balsam repeatedly asked Respondents to provide him with the identity of their licensee(s) operating *AdultActionCam.com*. Respondents consistently refused and/or ignored Balsam's requests (ER 65-66, 167, 190-94), even though it would have cost them nothing to provide the information, and the RAA required them to do so.

3. ***The RAA Includes a General "No Third Party Beneficiaries" Paragraph, But it Does Not Apply to Registered Name Holders/Proxy Registration Services***

The RAA includes a generic, catch-all "no third party beneficiary" provision. (ER 131.)

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

However, ¶ 5.10 on its face *only* applies to ICANN and Registrars; nothing in the RAA provides any immunity for RNHs. (ER 17, 27.)

4. ***The Responses of Other Proxy Registration Services to Demands Under ¶ 3.7.7.3 Establish Industry Standards***

Other Proxy Registration Services have promptly identified their licensees to Balsam when Balsam showed them evidence of unlawful spam using their Proxy-Registered, licensed domain names. (ER 72, 80.)

D. The Problem of Spam

The California Legislature found and declared that spam may threaten "the continued usefulness of the most successful tool [email] of the computer age." B&P Code § 17529(b). In 2003, spam cost Californians $1.2 *billion*, and at that time spam comprised only 40% of all email. B&P Code § 17529(a), (d). By all accounts, the volume and percentage of spam have increased dramatically since then.

In addition to causing skyrocketing complaints from irate email users, B&P Code § 17529(c), the volume of spam puts an enormous burden on Internet Service Providers and forces them to buy more equipment and hire more staff to attempt to block the spam. These costs are passed on to customers – consumers and businesses – built into monthly access fees.

The California Legislature found that spam shifts costs from advertisers to recipients, just like sending junk faxes, sending junk mail postage due, or making telemarketing calls to a pay-per-minute cell phone. Recipients of spam suffer actual damages, B&P Code § 17529(e), (g), (h), whether or not they click and purchase anything. Recipients may bear additional costs if they access their email through hotel business centers, cell phones, Personal Digital Assistants, or at cybercafes that charge by time spent online.

For these reasons, *Ferguson v. FriendFinders Inc.* held that

> California has a substantial legitimate interest in protecting its citizens from the harmful effects of deceptive spam and that [B&P Code] section 17538.4 [California's previous anti-spam law] furthers that important interest.

94 Cal. App. 4th 1255, 1268 (1st Dist. 2002).

E. Spam Litigation in the Ninth Circuit

Spam litigation is a new area of law, but unfortunately growing quickly in reflection of vast quantities of unlawful spam plaguing the Internet. Therefore, the Ninth Circuit has not dealt with spam cases often. Many of the cases have

involved child pornography, and most of the others have been in the context of preemption and standing standing under the federal CAN-SPAM Act.

Neither of these fact patterns is implicated in the related judgment, and the fact that those spams were unlawful is not in dispute. (ER 223-25.) The instant action is for breach of a third party beneficiary contract, not spam, and Balsam believes that the proper interpretation of ¶¶ 3.7.7 and 3.7.7.3 of the RAA is a matter of first impression for the Ninth Circuit.

There is only one published opinion from the Ninth Circuit relevant to the facts of the related judgment.[5] *Kilbride* held that domain names registered with false contact information, and Proxy-Registered domain names, had materially false registration information. 584 F.3d at 1259. The domain names in the related action were all registered to non-existent names and addresses, and these domain names redirected to *AdultActionCam.com*, which was Proxy-Registered through Respondents.

Last year, in *Gordon v. Virtumundo Inc.*, the Ninth Circuit addressed issues of what makes an Internet Service Provider "bona fide," standing under the CAN-SPAM Act, and the scope of federal preemption. 575 F.3d 1040, 1048, 1052, 1061-62 (9th Cir. 2009). But *Gordon* has nothing to do with the RAA. *Gordon* is

[5] There are also two (somewhat conflicting) cases from the Central District of California: *Solid Host v. NameCheap, supra*, and *Silverstein v. E360Insight.com et al*, No. CV 07-2835 CAS (VBKx) at *6 (C.D. Cal. Oct. 1, 2007) (order denying defendant Moniker Online Services LLC's motion to dismiss), discussed below.

distinguishable on other grounds too – Gordon admitted to deliberately opting in to receive the commercial email for which he sued, and claiming damages for emails sent to family and friends' email addresses, *id*. at 1046, and, in sharp contrast to the instant action, the spams at issue in *Gordon* were all sent from domain names that were publicly registered, *not* Proxy-Registered, so that Gordon's Whois queries identified defendant Virtumundo, *id.* at 1064.

Furthermore, in *Gordon*, the Ninth Circuit repeatedly stressed that the CAN-SPAM Act was intended to ensure that *legitimate* businesses could benefit from a uniform, national standard. *Id*. at 1045, 1057, 1063. Here, the *AdultActionCam.com* spams and website are *not* legitimate business activities, of the sort that Congress intended should benefit from uniform standards, because Tucows' licensee sent Balsam 1,125 false and deceptive spams advertising the pornographic website. (ER 64, 188, 211-14, 223-25.) Nor is Tucows, as the RNH/legal owner of *AdultActionCam.com*, a legitimate business, in that Respondents conspired to hide the identities of the tortfeasors, even after they had actual knowledge that their domain name was being used for unlawful spamming.

IV. JURISDICTIONAL STATEMENT

Balsam filed a Verified Complaint against Defendants-Respondents in the Superior Court of California, County of San Francisco (ER 186-247), where Balsam suffered harm from Respondents' business practices (ER 188).

Respondents removed to the U.S. District Court for the Northern District of California. (ER 180-82.)

The district court entered final judgment dismissing the entire action on October 27, 2009 pursuant to FRCP 12(b)(6). (ER 6.)

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because Balsam filed a timely Notice of Appeal within 30 days of judgment, on November 20, 2009. (ER 4.)

V. NINTH CIRCUIT LOCAL RULE 28-2.6 STATEMENT

Balsam has no knowledge of any pending cases related to the issues herein. There is a related action – *Balsam v. Angeles Technology Inc. et al*, No. CV-06-04114 JF (N.D. Cal. Mar. 28, 2008) (order granting motion for default judgment). (ER 64, 223-26.)

VI. STATEMENT OF ISSUES

1. Did the district court below err in holding that a person who suffers actionable harm by receiving unlawful spam is not a third party beneficiary of ¶¶ 3.7.7 and 3.7.7.3 of the RAA when:

a) The general "no third party beneficiary" provision only applies to ICANN and Registrars, not to RNHs, and

b) Paragraphs 3.7.7 and 3.7.7.3 specifically requires that the RNH of an Internet domain name that licenses the domain name to a third party accept responsibility for damages unless it promptly discloses the licensee's identity upon presentation of reasonable evidence of actionable harm, and

c) ICANN's Director of Contractual Compliance advised Balsam, in a previous unrelated dispute, that "The only way that the RNH can be absolved from liability is when the RNH discloses the identity of the licensee to a party [such as Balsam] providing the RNH reasonable evidence of actionable harm" (ER 89), and

d) Respondents' interpretation of the RAA disregards industry standards, and

e) Respondents' interpretation ignores public policy?

2. Did the district court below abuse its discretion by dismissing the complaint with prejudice and not permitting Balsam to amend his complaint, even though Balsam identified multiple ways in which he could amend the complaint and allege facts that would entitle him to relief?

The answer to both questions is "yes."

VII. STATEMENT OF THE CASE

The facts are not in dispute.

Balsam filed a Verified Complaint in the Superior Court of California, County of Santa Clara, on May 23, 2006 against Angeles Technology Inc. ("Angeles") and other defendants for sending/advertising in unlawful spams. (ER 64, 190.) One defendant removed the action to federal court in San Jose. (ER 190.) On March 23, 2008, the district court entered a default judgment in Balsam's favor. *Angeles*, *supra*. (ER 64, 192, 223-26.)

During the course of the litigation, the domain name *AdultActionCam.com* – for which Angeles was previously the legal owner – became Proxy-Registered through Tucows. (ER 190, 202-03, 205-06.) Thus, Tucows dba *ContactPrivacy.com* became the RNH/legal owner of the domain name of a pornographic website advertised by unlawful spam. (ER 64-65, 167, 189-90.)

Before and after judgment was entered in the related action, Balsam presented Respondents (specifically, Karkas as agent of the other Respondents) with reasonable evidence of actionable harm – the *AdultActionCam.com* spams themselves with explanation of why they were unlawful – and Balsam repeatedly informed Respondents that all they had to do to avoid liability was provide him with the identity of their licensee. Respondents consistently refused/ignored Balsam. (ER 65-66, 167, 190-94, 208-14, 219-21, 239, 241-42.)

Balsam filed a Verified Complaint against Respondents on June 26, 2009 in the Superior Court of California, County of San Francisco (ER 186-246) because

that is where, ultimately, Balsam was injured by Respondents' actions. (ER 188). Respondents removed to the U.S. District Court in San Francisco on August 5, 2009. (ER 180-82.)

On October 23, 2009, the district court below entered an order granting Respondents' motion to dismiss with prejudice. (ER 8-20.) On October 27, 2009, the district court entered judgment for Respondents. (ER 6.)

On November 20, 2009, Balsam filed a timely Notice of Appeal to the Ninth Circuit. (ER 4.)

VIII. STATEMENT OF UNDISPUTED FACTS

A. Related Action Judgment: The District Court Found that Balsam was Harmed by Unlawful Spam Advertising *AdultActionCam.com*

Balsam received 1,125 unlawful spams in 2005-2006 advertising the *AdultActionCam.com* website, which purports to facilitate random sexual encounters and displays pornographic images and video. (ER 64, 189, 211-14.)

At one time, *AdultActionCam.com* was registered to Angeles. (ER 64, 167, 190, 202-03.)

Balsam filed suit against Angeles and other defendants for violating B&P Code § 17529.5 and the Consumers Legal Remedies Act ("CLRA"), Cal. Civil Code § 1750 *et seq.* (ER 64, 190.)

Since October 2005, *AdultActionCam.com* has been Proxy-Registered through Tucows' *ContactPrivacy.com* service. (ER 64, 167, 190, 205-06.) Tucows' decision to offer Proxy Registration for *AdultActionCam.com* had two immediate, direct, and foreseeable results: 1) Tucows became the RNH (legal owner) of *AdultActionCam.com*, and 2) anyone who queried the publicly accessible Whois database could no longer identify Tucows' licensee operating *AdultActionCam.com*, because *ContactPrivacy.com* appeared as the RNH. (ER 64-65, 167, 190, 205-06.)

The district court in the related action authorized service via email to *adultactioncam.com@contactprivacy.com* (the Tucows-operated email address that appeared in the Whois query after Proxy Registration) and to *webmaster@adult actioncam.com*. (ER 37, 64, 193.)

The district court in the related action found that Balsam was harmed by the spams and entered judgment in Balsam's favor, *Angeles*, *supra* (ER 64, 192, 223-225), but the identity of the true operator of *AdultActionCam.com* – the person(s) actually served with process – still remains unknown, because Respondents refused to provide Balsam with the identity of their licensee(s). (ER 66, 190-94.)

B. Related Action Judgment: The District Court Denied Balsam's Motion to Amend Judgment and Seize Domain Names

Because Respondents refused to identify their licensee, Balsam signed up for *AdultActionCam.com*, strictly for the purposes of identifying the operator. (ER 37,

192.) Balsam's credit card was charged by Epoch/Paycom. (ER 37, 192.) Balsam served a levy on PayCom, but PayCom refused to honor it, claiming that it was not processing payments for Angeles. (ER 37, 193, 229-30.) Balsam served a subpoena on PayCom, and PayCom produced a document purporting to be an assignment of revenues from Angeles to Belvedere St. James Ltd. ("Belvedere"), a Maltese company. (ER 37, 193, 229-30.)

Balsam filed a motion to amend the judgment to add Belvedere as a judgment debtor, order Epoch/Paycom to honor the writ of execution, and seize the domain name *AdultActionCam.com*. (ER 37, 193.) Belvedere specially appeared but argued that it had never been served. (ER 193, 231.) The district court found that Belvedere did not have adequate notice, and the true operator of *AdultActionCam.com* remains unknown. (ER 233-236.)

Because Tucows had not identified its licensee to Balsam, Balsam could not prove what entity was controlling the domain name *at the time of service*. (ER 64, 193.) If Respondents had confirmed that Angeles still controlled *AdultActionCam.com*, the court would have had sufficient grounds to order the domain name transferred to Balsam. (ER 38, 64, 193.) Alternatively, if Respondents had confirmed that Belvedere controlled the domain name, then the court would have had sufficient grounds to find that Belvedere had been served with process. (ER 37-38, 64, 193.)

Because Balsam could not meet his burden of proof in either direction, the court in the related action denied Balsam's motions. (ER 64, 229.) Therefore, to the extent the judgment is uncollectible, that is due to Respondents' refusal to identify their licensee.

Paragraph 3.7.7 and 3.7.7.3 of the RAA on their face evidence Respondents' agreement to accept liability for harm caused by their licensed domain names, unless they promptly identify their licensee. Contrary to Respondents' argument (ER 48), the RAA imposes no other conditions, such as requiring Balsam to prove that he absolutely could have collected on the default judgment if Respondents had identified their licensee.

C. Respondents Actively Conspire with Unlawful Spammers, Assist Them in Hiding Their Identities, and Profit Therefrom

Tucows is the Registrar of the domain name *AdultActionCam.com* (ER 167, 189), but Tucows is not *just* the Registrar, and Balsam does not bring this suit against Tucows as the Registrar (ER 27).

Tucows profits by conspiring with and entering into agreements with spammers to hide their identities by providing Proxy Registration services for their domain names. (ER 23-24, 29, 64-65, 189-90.) This is not a function of a *Registrar*. Proxy Registration causes Tucows itself to become the RNH/legal owner of the domain names; Tucows then licenses use of the domain names back to its spammer-customers. (*Id.*) This causes Tucows (dba *ContactPrivacy.com*) to

appear in Whois query results for Proxy-Registered domain names, instead of the spammers' identities. (*Id.*)

D. Respondents Agreed to Accept Liability for Wrongful Use of Their Licensed Domain Name

Tucows is an ICANN-accredited Domain Registrar, which means that Tucows signed the RAA and knows the contents thereof. (ER 65, 111-46, 166-67.) To the extent – and *only* to the extent – that Tucows acts as a *Registrar*, the RAA at ¶ 5.10 states that there are no third-party beneficiaries as to Tucows-the-Registrar. (ER 26-27, 131.) Balsam never alleged that Respondents had any liability for merely being the *Registrar* of the domain name *AdultActionCam.com*. (ER 27.)

But here, Tucows is *also* the RNH (ER 24, 27, 64, 190), and Tucows knows that ¶ 3.7.7.3 holds a RNH liable for wrongful use of a domain name that it chooses to license to a third party, unless the RNH promptly provides the harmed party with the identity of the licensee. (ER 65, 121-22.) Since the RNH is the proxy of the domain name Registrant, and the legal owner of the domain name, it is responsible for the actions of the person actually controlling the domain name.

Balsam repeatedly provided Respondents with "reasonable evidence of actual harm," beginning in October 2007, and asked Respondents to produce the identity of Tucows' licensee wrongfully using the domain name *AdultActionCam.com*. Respondents refused to do so. (ER 65-66, 190-94.) Instead, Respondents

denied their responsibility to Balsam – and to the Internet community at large – by protecting the identity of a pornography spammer actually adjudged to have sent 1,125 unlawful spams advertising a pornographic website. (ER 64-66, 166, 190-94, 223-25.)

IX. SUMMARY OF THE ARGUMENT

The nature of a Proxy-Registered domain name is that a spam recipient querying the public Whois database cannot identify the person actually operating/controlling a domain name. The only identification that appears in the Whois query is that of the Proxy Registration Service/Registered Name Holder. (ER 23-24, 28-29, 64-65, 167, 189-90.)

Congress criminalized registering domain names used for spamming in a manner that impairs someone's ability to identify the sender. 18 U.S.C. § 1037(a)(4), (d)(2). Proxy-Registered domain names creates materially false information and violates federal law. *Kilbride*, 584 F.3d at 1259. California similarly prohibits falsified or misrepresented accompanying email headers. B&P Code § 17529.5(a)(2).

Knowing that spammers often try to hide their identities, ICANN created a mechanism to discourage Proxy Registration Services from helping spammers to hide. (ER 30-31, 65.) To become a Registrar, an entity must sign the RAA, which includes a requirement that a RNH licensing use of a domain name to a third

party must accept liability for wrongful use of the domain name, unless the RNH promptly discloses the identity of the licensee upon presentation of reasonable evidence of actionable harm. (ER 65, 111-46, 166-67.)

Because Balsam is an intended third party beneficiary of ¶¶ 3.7.7 and 3.7.7.3 of the RAA, he has standing to enforce those provisions.

It is undisputed that: 1) By providing Proxy Registration services, Tucows became the RNH (legal owner) of the domain name *AdultActionCam.com* (ER 27, 64, 188-89), a website dedicated to promoting random sexual encounters and pornography (ER 64, 189), 2) Balsam was harmed by wrongful use of the domain name, as confirmed by the judgment in the related action (ER 63, 187, 222-25), 3) Tucows is bound by the RAA (ER 166-67), 4) Balsam repeatedly presented Respondents with reasonable evidence of actual harm (ER 65-66, 190-94), and 5) Respondents refused to provide Balsam with the identity of their licensee using their domain name *AdultActionCam.com (id.)*.

The plain text of ¶ 3.7.7.3, established rules of contractual interpretation, ICANN's statements, industry standards, and public policy all support Balsam's argument that he is an intended third party beneficiary at least of ¶¶ 3.7.7 and 3.7.7.3, even if not of the entire RAA. Paragraph 5.10, the general "no third party beneficiaries" provision, expressly applies only to ICANN and *Registrars*, not to *RNHs*. But even *if* it applied to RNHs, specific contractual provisions

control over general language. It is not necessary that the RAA identify Balsam by name; it is sufficient that Balsam is a member of a class for whose benefit the contract was made. Courts will disregard general, catch-all "no third party beneficiary" contractual language if specific provisions show an intent to benefit third parties. Nevertheless, the district court below held that Balsam is not a third party beneficiary (ER 18), without identifying who might ever benefit from ¶ 3.7.7.3 if not someone like Balsam.

ICANN itself rejects Respondents' interpretation of ¶ 3.7.7.3. ICANN's Director of Compliance informed Balsam in a previous dispute, with a nearly identical fact pattern, that the RNH was liable to Balsam and that ICANN would not take action on Balsam's behalf to enforce the harm suffered by Balsam, and implicitly indicated that Balsam had the right to seek a remedy from the RNH/Proxy Registration Service. (ER 71, 79-80, 89.)

Other Proxy Registration Services/RNHs have provided Balsam with the identity of their licensees under identical circumstances, without requiring lawsuits or subpoenas, establishing industry standards for responding to demands under ¶ 3.7.7.3. (ER 72, 80.)

Balsam never claimed that Respondents were *required* to provide him with the identity of their licensee sending spam advertising the pornographic website *AdultActionCam.com*. Respondents had a choice. Respondents *could* have

provided Balsam with the identity of their licensee and avoided all liability. Instead, Respondents chose to protect the identity of their licensee sending unlawful spam. (ER 65-66, 190-94.) Respondents had the right to make that choice, but Respondents must live with the consequences of that choice. And Respondents knew full well what the consequences were, because the consequences were set forth in ¶ 3.7.7.3 of the RAA to which Tucows is a signatory (ER 166-67): RNHs *shall* accept liability for the harm caused by the wrongful use of their licensed domain names, *unless* they promptly identity their licensee to the harmed party.

The only other published case addressing the liability of a Proxy Registration Service, *Solid Host v. NameCheap*, *infra*, is based on distinguishable facts – namely, the Registrar and RNH/Proxy Registration Service were two different parties (ER 31), whereas here Tucows wears both hats (ER 27). But to the extent the facts are somewhat similar, *Solid Host* actually supports Balsam's argument that he is a third party beneficiary of ¶¶ 3.7.7 and 3.7.7.3 of the RAA.

Nevertheless, the district court below effectively said that a person sending unwanted and unlawful spams for a pornographic website may remain anonymous, with no ramifications for the Proxy Registration Service/RNH that chooses to shield its spamming licensee. The district court's order disregarded the plain language of the RAA, ignored established rules for contractual interpretation,

failed to follow California and federal case law, defied logic, paid no attention to ICANN's statements, rejected industry standards, slighted public policy, and denied a remedy for the harmed party.

This Court should reverse the judgment of the district court below.

X. DISCUSSION

Balsam is an intended third party beneficiary of the obligation that ICANN requires of Registered Name Holders who choose to license use of their domain names to third parties. The requirement, as discussed herein, is that RNHs *shall* accept liability for the wrongful use of their domain names that they license to third parties, *unless* they promptly disclose the identity of their licensee. Respondents have not shown any other reason for the existence of ¶¶ 3.7.7 and 3.7.7.3 of the RAA.

A. Standard of Review

"Principles of contract interpretation are legal issues subject to our *de novo* interpretation." *Lucas v. Bechtel Corp.*, 800 F.2d 839, 848 (9th Cir. 1986).

Similarly,

> If . . . the issue is presented to the court on the basis of undisputed facts and uncontroverted evidence and only a question of the application of the law to those facts need be answered, our review is de novo: "[W]here ... the issue [of whether a third party is an intended beneficiary] can be answered by interpreting the contract as a whole and doing so in light of the uncontradicted evidence of the

> circumstances and negotiations of the parties in making the contract, the issue becomes one of law that we resolve independently."

Souza v. Westlands Water District et al, 135 Cal. App. 4th 879, 891 (5th Dist. 2006) (citation omitted).

B. Nothing in the RAA Immunizes Registered Name Holders from Liability to Third Parties

The district court erred when it held that ¶ 5.10 of the RAA relieves Respondents of any obligation or liability to Balsam. (ER 12-13.)

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

Although the section heading of ¶ 5.10 states "*No* Third-Party Beneficiaries," the text of the provision immediately clarifies: only *ICANN* and *Registrars* have no obligations to any third parties. The implication is that someone other than ICANN and Registrars should have liability; otherwise, ¶ 5.10 could have *just* said "No Third-Party Beneficiaries" without further clarification.

Specific contractual terms control over general terms, *infra*. Therefore, even within ¶ 5.10, the specific text referencing *only* ICANN and Registrars controls over the general "*No* Third-Party Beneficiaries" language of the section heading. Someone must have liability for unlawful actions. (And ¶¶ 3.7.7 and 3.7.7.3 identify that someone: the RNH.)

Additionally, case law holds that the section heading of a statute "cannot undo or limit that which the text makes plain." *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co. et al*, 331 U.S. 519, 529 (1947). Of course, the instant dispute involves a contract and not a statute, but California law treats interpretation of contracts and statutes identically. "In the construction of a statute the intention of the Legislature, and in the construct of the instrument the intention of the parties, is to be pursued, if possible…" Cal. Code Civ. Proc. § 1859. Therefore, this Court should hold that the specific text of ¶ 5.10 controls over the general section heading, so "no third party beneficiaries" applies *only* as to ICANN and *Registrars*… not to *RNHs*.

When Respondents chose to venture into non-Registrar functions – such as offering Proxy Registration services, becoming the RNH of their spammer-customers' domain names, and licensing use of the domain names back to their spammer-customers (ER 23-24, 28-29, 64-65, 167, 189-90) – Respondents voluntarily and knowingly exposed themselves to potential liability for such non-Registrar functions. Nor is this a theoretical, unknown exposure, for Tucows signed the RAA (ER 166-67), and ¶ 3.7.7.3 specifically creates liability for RNHs.

Tucows is the Registrar of *AdultActionCam.com* (ER 27, 167, 189), but Balsam did not sue Tucows when it wore its *Registrar* hat. Rather, Balsam sued Tucows when it wore its *RNH* hat. (ER 27, 64, 167, 189). Nothing in ¶ 5.10

immunizes RNHs from liability to third parties. (ER 131.) The district court below erred in finding that ¶ 5.10 still immunized Respondents when they took on the additional, *non-Registrar* role of a Proxy Registration Service/RNH. (ER 64-65, 167, 189-90.)

The legal analysis could actually stop here. Since ¶ 3.7.7.3 specifically assigns liability and nothing in the general ¶ 5.10 immunizes RNHs from liability to third parties, there really is no conflict between specific and general contractual terms. Nevertheless, the law suggests that even *if* ¶ 5.10 immunized RNHs, the specific provisions of ¶¶ 3.7.7 and 3.7.7.3 would still control.

C. Registrars are Liable for Wrongful Actions Taken Outside the Scope of Mere Domain Name Registration

Registrars can avoid obligations to third parties *only* when they act as Registrars. But when Registrars act as RNHs, they are subject to liability for wrongful use of the domain names for which they are the legal owners.

In *Verizon California Inc. v. OnlineNIC Inc.*, Verizon sued OnlineNIC (a Registrar) for registering at least 663 cybersquatting domain names that infringed on Verizon's trademarks, and the district court entered a $33 million default judgment. No. C-08-2832 JF (RS), 2008 U.S. Dist. LEXIS 104516 at *1-3 (N.D. Cal. Dec. 19, 2008), *aff'd* 2009 U.S. Dist. LEXIS 84235 at *3 (N.D. Cal. Aug. 25, 2009). The district court assessed damages *not* because OnlineNIC was the *Registrar*, but rather because OnlineNIC was the *RNH* of the infringing domain

names. *OnlineNIC*, 2009 U.S. Dist. LEXIS 84235 at *17-19, 33. Thus, when OnlineNIC stepped outside its role as a *Registrar*, the court held it liable for its wrongful actions as a *RNH*.

Similarly, in *Solid Host v. NameCheap*, the district court refused to dismiss the complaint against NameCheap because, even though NameCheap argued that it is an accredited Registrar, it was not *acting* as a Registrar when it became the RNH of the (allegedly) cybersquatting domain name. 652 F. Supp. 2d at 1103-06. The district court stated that "to the extent that NameCheap was the registrant of the domain name and 'used' the name, [the Anti-Cybersquatting Protection Act] would support the imposition of liability on it, not a grant of immunity to it." *Id*. at 1105.

While these examples are based on trademark violations, the general point is that Registrars who act outside of that limited role and become RNHs are liable for wrongful use of their domain names.

D. Specific Contractual Provisions Control Over General Language, and ¶ 3.7.7.3 of the RAA Specifically Assigns Liability to Registered Name Holders

Under California law, specific contractual terms control over more general terms.

> In the construction of the instrument . . . when the general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.

Cal. Code Civ. Proc. § 1859. *See also* Cal. Civil Code § 3534 ("Particular expressions qualify those which are general").

The Ninth Circuit addressed the core of the instant dispute – a specific requirement conflicting with a "catch-all" term – by following California law in *Southern California Gas Company v. City of Santa Ana*:

> Moreover, while section 8(b) authorizes demands for harms to "public property" *in general*, section 10 *specifically* provides remedies for damage to streets. A standard rule of contract interpretation is that when provisions are inconsistent, specific terms control over general ones. *See, e.g., Cal. Code Civ. Proc. § 1859* (2001) []. Thus . . . section 10 supercedes it in the context of damage to streets.

336 F.3d 885, 891 (9th Cir. 2003) (emphasis added).

The Ninth Circuit came to the same conclusion in *Shawmut Bank N.A. v. Kress Associates et al.*:

> Nothing indicates that § 8.01 – a general provision – is meant to subsume the more specific requirement for reasonable detail in the requisition certificates. Indeed, principles of construction provide otherwise. *See Broad v. Rockwell International Corp., 642 F.2d 929, 947* (5th Cir.) ("A specific provision will not be set aside in favor of a catch-all clause").

33 F.3d 1477, 1494 (9th Cir. 1993).

Similarly, *Jadwin v. County of Kern* cited to Cal. Code of Civil Procedure § 1859 and *Prouty v. Gores Technology Group*, 121 Cal. App. 4th 1225 (3d Dist. 2004) and held that specific contractual terms controlled over general terms.

> The term in the employment contract discussing "termination" deals with the general cessation of the employment relationship between the

> parties and grants the County right to terminate the entire relationship for cause. On the other hand, the bylaw provision, which is also a term of Plaintiff's contract, deals specifically with the removal of a department chair from his position and grants the power to remove a department chair at-will. Assuming the termination clause and the bylaw are inconsistent, with respect to the conduct at issue (i.e., the removal), the bylaw is far more specific and particularized than the termination clause. Accordingly, the bylaw controls.
>
> The determination that the bylaw controls is also supported by other rules of contract construction. "The preferable approach is to interpret a contract in a manner which will give effect to all of its provisions," and "where two clauses of an agreement appear to be in direct conflict, it is the duty of the court to reconcile the two clauses to give effect to the whole of the instrument."

610 F. Supp. 2d 1129, 1190-91 (E.D. Cal. 2009) (citations omitted) (emphasis added).

In fact,

> a specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, even though the latter, standing alone, would be broad enough to include the subject to which the more specific provision relates.

Kavruck v. Blue Cross of California, 108 Cal. App. 4th 773, 781 (2d Dist. 2003) (citation omitted). *Kavruck* held that Blue Cross' *general* authority to modify insurance contracts under Part IV D did *not* include the authority to change the *specific* term in Part XV promising that entry age rating would continue unless the subscriber changed contract type. *Id*. at 780-81.

If ¶ 3.7.7.3 of the RAA did not exist, perhaps ¶ 5.10 could somehow be stretched to immunize RNHs from third-party liability if the RNHs are also

Registrars. But ¶ 3.7.7.3 *does* exist. Therefore, even *if* the general ¶ 5.10 immunized RNHs from liability to third parties, which appellant does not concede (ER 26-29, 131), ¶ 3.7.7.3 is far more specific and particularized than ¶ 5.10 as to a RNH's liability for harm caused by wrongful use of its licensed domain names (ER 121-22). Thus, Respondents accepted liability for Balsam's harm caused by wrongful use of Respondents' domain name *AdultActionCam.com*, which they licensed to a third party, when Respondents did not promptly identity their licensee. (ER 66, 190-94.) This interpretation reconciles the general "no third party liability" language of ¶ 5.10 with the specific exception of ¶¶ 3.7.7 and 3.7.7.3. There is no other logical implication behind the inclusion of ¶¶ 3.7.7.3 in the RAA.

Balsam does not contend that he is a third party beneficiary of the *entire* RAA. However, ¶¶ 3.7.7 and 3.7.7.3 describe obligations and benefits to Balsam, or to a class of which Balsam is a member. Therefore, Balsam is a third party beneficiary of these provisions.

E. A Third Party Beneficiary Can Be Identified by Class; A Contract Need Not Identify the Third Party by Name

California and federal courts have held that it is not necessary that a contract identify a third party by name for that person to be a third party beneficiary. A third party may recover on the contract if s/he can show that s/he is a member of a class for whose benefit the contract was made.

> Neither is it necessary that the contract identify or refer to the third party beneficiary by name; the beneficiary may recover if he or she can show that it was intended that he or she be benefited by the contract.

Alling v. Universal Manufacturing Corp., 5 Cal. App. 4th 1412, 1440 (1st Dist. 1992). *See also Garratt v. Baker*, 5 Cal. 2d 745, 748 (1936).

In *Whiteside v. Tenet Healthcare Corp.*, the court held that Whiteside was a third party beneficiary of the contract between Blue Shield of California and Tenet, although he was not expressly named in the contract, because he was a member of a group – Blue Shield subscribers – who benefitted from reduced hospital rates at Tenet hospitals negotiated by Blue Shield on their behalf. 101 Cal. App. 4th 693, 698, 709 (2d Dist. 2002). The court reasoned:

> [A] party not named in the contract may qualify as a beneficiary under it where the contracting parties must have intended to benefit the unnamed party and the agreement reflects that intent.

Id. at 708 (citation omitted).

Similarly, in *Johnson v. Superior Court*, plaintiffs signed a form agreement with a sperm bank that included confidentiality language as to the donor such that the Johnsons would never seek to learn his identity. 80 Cal. App. 4th 1050, 1064-65 (2d Dist. 2000). When their daughter was born with kidney disease, the Johnsons sued, alleging the sperm bank falsely claimed that it had performed genetic screening on donor sperm. *Id*. at 1056. A discovery dispute arose as to the identity of the donor. *Id*. at 1057. The donor argued that he was the intended third

party beneficiary of the confidentiality provisions of the form agreement[6] between the sperm bank and the Johnsons, which only identified "donors" and did not identify him by name or by donor number. *Id*. at 1065. The court of appeal

> agreed that [the donor] is a third party beneficiary… the Cryobank agreement with the Johnsons expresses the clear intent of both the Johnsons and Cryobank that the donor's identity and related information would be kept confidential and that such intent was for the benefit of all parties, including the donor. *While John Doe or Donor No. 276 are not specifically named in the agreement, it is clear that he belongs to the class of persons – Cryobank sperm donors – who are to benefit from the agreement's confidentiality provisions.*

Id. at 1064-65 (emphasis added).

The Ninth Circuit has made the same holdings, as has the Northern District of California.

In *Paulsen v. CNF Inc. et al*, this Court reversed the district court's dismissal of employees' claims against the accounting firm hired by CNF, because the California Supreme Court recognized in *Bily v. Arthur Young & Company*, 3 Cal. 4th 370 (1992) that third party beneficiaries could recover for an auditor's professional negligence, and

> it is not necessary that an express beneficiary be specifically identified in the relevant contract; he or she may enforce it if he or she is a member of a class for whose benefit the contract was created.

[6] The form agreement included a provision by which "Cryobank shall destroy all information and records which they may have as to the identity of said donor, it being the intention of all parties that the identity of said donor shall be and forever remain anonymous." *Id.* at 1056.

559 F.3d 1061, 1079 (9th Cir. 2008) (citation omitted).

And in *Sepulveda v. Pacific Maritime Association*, this Court held that "Although the beneficiary need not be named in the contract, he must be a member of a class referred to and identified in it." 878 F.2d 1137, 1139 (9th Cir. 1989) (citation omitted). *See also KnowledgePlex Inc. v. Placebase Inc.*, No. C 08-4267 JF (RS), 2008 U.S. Dist. LEXIS 103915 at *17 (N.D. Cal. Dec. 17, 2008), citing *Prouty*, 121 Cal. App. 4th at 1225.

The above-referenced cases involved contracts benefitting groups of people, where at least one contracting party might have been able to identify all potential members of the group (e.g., in *Whiteside*, Blue Shield *could* have listed all of its subscribers). However, the Ninth Circuit recognizes that contracts can have third party beneficiaries, identified only by group and not by name, even when neither party could have possibly identified all of the members of the group.

In *Flagstaff Medical Center Inc. v. Sullivan*, this Court was asked

> to answer important and pressing questions affecting the provision of free medical care to indigent people under the Hill-Burton Act. . . . In exchange for grant monies, [health care] facilities were required to give assurances to provide "a reasonable volume of" uncompensated indigent care to the community.

962 F.2d 879, 882 (9th Cir. 1992).[7] Plaintiffs sued for violation of the Hill-Burton Act and under Arizona contract law,[8] alleging that they had been denied health care. *Id.* at 883. The court found that plaintiffs were intended beneficiaries of the contracts and had valid third party beneficiary claims, even though the Hill-Burton Act referred to "indigents" and "the community." I.e., neither Flagstaff Medical Center nor Congress could have possibly identified every indigent person living in Flagstaff by name. *Id*. at 890-91.

F. Balsam is an Intended Third Party Beneficiary and Can Enforce ¶ 3.7.7.3 of the RAA

1. For Every Wrong, There Is a Remedy

The district court below ignored the maxim of jurisprudence "For every wrong there is a remedy." Cal. Civ. Code § 3523. Balsam was wronged by Respondents, but the district court denied Balsam a remedy, even though Respondents had agreed, pursuant to ¶ 3.7.7.3 of the RAA, to the remedy: Tucows (as the *RNH*, not the Registrar) agreed to accept all liability for harm caused by a

[7] The published order was amended by an unpublished order – 1992 U.S. App. LEXIS 12152 (9th Cir. June 2, 1992) – affirming the third party beneficiary claim.

[8] Arizona contract law as to third party beneficiaries is comparable to California law. "Arizona law provides that one can recover as a third party beneficiary only if (1) the contract itself indicates an intention to benefit the third party, (2) the benefit contemplated is intentional and direct and (3) the contracting parties intend to recognize the third party as the primary party in interest." *Id*. at 891.

licensee, unless it promptly identified its licensee.[9] Respondents refused to provide Balsam with the identity – promptly or *ever* – despite manifest evidence of actionable harm. (ER 66, 187-90, 223-26.) Therefore, Respondents accepted liability pursuant to the RAA.

2. ***Balsam is a Member of the Class that Benefits from ¶¶ 3.7.7 and 3.7.7.3 – Parties Harmed by Wrongful Use of Licensed Domain Names***

"A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Cal. Civ. Code § 1559. Persons who are more than incidentally or remotely benefited by a contract may enforce Civil Code § 1559.

> The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract. [Citation.] If the terms of the contract necessarily require the promisor to confer a benefit on a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person. The parties are presumed to intend the consequences of a performance of the contract.

Prouty, 121 Cal. App. 4th at 1232-33.

Therefore, it is not necessary that the RAA identify Balsam by name for him to be a third party beneficiary of ¶¶ 3.7.7 and 3.7.7.3 (ER 121-22); it is sufficient

[9] Respondents incorrectly claimed that "All of Balsam's claims for relief rest on his assertion that Defendants had a legal duty to release a customer's contact details to Balsam upon his letter requests." (ER 167.) Balsam never said that Respondents must identify their licensee. They *can* choose to protect its identity, so long as they accept liability for the harm. ICANN itself made that point to Balsam in 2007. (ER 89.)

that Balsam is a member of a class referred to and identified in those paragraphs, and for whose benefit those paragraphs were made.

Paragraph 3.7.7.3 defines the class: parties harmed by wrongful use of licensed domain names who provide RNH with reasonable evidence of actionable harm. It does not matter that ICANN and Tucows did not refer to Balsam by name or that they did not even know Balsam's name when they drafted/signed the RAA. *Johnson, Flagstaff Medical Center, supra*.

Paragraph 3.7.7.3 also defines the remedy: RNHs shall accept liability for the harm, unless they promptly identify their licensees. Just as the form contract in *Johnson* demonstrated intent by the sperm bank and the Johnsons to benefit the third party sperm donor even though it identified him only by class and not by name, ¶¶ 3.7.7 and 3.7.7.3 of the RAA form contract demonstrate intent by ICANN and Registrars to benefit members of the class defined by those paragraphs.

Only a person such as Balsam – someone harmed by wrongful use of a licensed domain name – benefits from these provisions of the RAA… not ICANN, not the Registrar, not the RNH, and certainly not the licensee/spammer trying to hide its unlawful activity. But even if someone else also benefitted from these provisions, that does not eliminate Balsam as an intended third party beneficiary. *Johnson*, 80 Cal. App. 4th at 1064. ICANN did not intend that domain Registrants could act wantonly and capriciously, without anyone accepting the liability for the

harm caused by unlawful actions. Tucows promised the performance that Balsam sought – promptly identifying the licensee, or accepting liability for the harm.

3. ***The District Court Ignored the Plain Language of ¶ 3.7.7.3; the Court and Respondents' Interpretation Would Make ¶ 3.7.7.3 Superfluous and Unenforceable by Anyone***

The district court's statement that there was no evidence that the parties to the RAA intended to benefit third parties (ER 15), cannot be reconciled with the plain language of ¶ 3.7.7.3:

> 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.

The district court held that even though Balsam was indisputably harmed by receiving unlawful *AdultActionCam.com* spam, and even though Balsam precisely meets the class definition set out in ¶ 3.7.7.3, Balsam is nevertheless not a third party beneficiary of that paragraph. This holding begs the questions: Who does benefit from these provisions? What purpose do they serve? Who could ever enforce them?

ICANN and Registrars are the only signatory parties to the RAA. However, neither a Registrar nor ICANN could enforce ¶ 3.7.7.3 because neither has standing; neither is damaged by unlawful spam received by third parties – the sort of harm that the district court in the related action found that Balsam suffered.

The district court's interpretation violates Cal. Civil Code § 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity") because it would make ¶ 3.7.7.3 entirely superfluous and unenforceable by *anyone*. Courts must avoid a statutory construction that makes some words surplusage. *Moyer v. Workmen's Comp. Appeals Board*, 10 Cal. 3d 222, 230 (1973); *see also* Cal. Civil Code § 1643 ("A contract must receive such an interpretation as will make it . . . operative . . . and capable of being carried into effect []"). Therefore, the district court's interpretation of ¶¶ 3.7.7 and 3.7.7.3 cannot be correct.

4. Solid Host v. NameCheap *is Distinguishable, But to the Extent that the Facts are Somewhat Similar,* Solid Host *Supports Balsam's Claims*

The district court below ordered the parties to address *Solid Host v. NameCheap Inc.*, 652 F. Supp. 2d 1092 (C.D. Cal. May 19, 2009) (order denying defendant NameCheap's motion to dismiss) (ER 45), the only other published opinion specifically addressing third party beneficiary claims under ¶ 3.7.7.3 of the RAA. However, the order *barely* addresses the issue. The district court below was incorrect when it stated that *Solid Host* was factually similar to the instant dispute. (ER 16.) But, to the extent that the facts are not entirely dissimilar, *Solid Host* actually supports Balsam's argument that he is a third party beneficiary and Respondents are liable in the instant Action.

Solid Host was a complicated lawsuit; the operative second amended complaint contained eight causes of actions against multiple defendants, eNom Inc. (the Registrar), Demand Media Inc. (eNom's parent company), and NameCheap Inc. (an eNom "reseller"). The case involved computer hacking, trademark infringement, ransoming of domain names, violations of the Computer Fraud and Abuse Act, conversion, intentional interference with prospective economic advantage, Washington's Consumer Protection Act, breach of contract (third party beneficiary), California's Unfair Competition Law, and Declaratory and Injunctive Relief. In contrast, the instant Action is *just* for breach of third party beneficiary contract.

In light of the factual disputes and multiple causes of actions, the *Solid Host* court gave short shrift to Solid Host's claim that it was a third party beneficiary of ¶ 3.7.7.3 of the RAA. In fact, in the 30 page order, the court devoted only four sentences to the issue. The court simply quoted ¶ 5.10 and stated that the RAA has *no* third party beneficiaries; the court failed to note that ¶ 5.10 *only* relieved ICANN and *Registrars* of obligations to third parties, not *RNHs*. The court failed to address interpretation of specific vs. general contractual provisions, the fact that ¶ 3.7.7.3 becomes unenforceable by anyone and superfluous if parties harmed by wrongful use of licensed domain names are not third party beneficiaries, industry standards, or public policy implications. *Id*. at 1118-19.

In addition to claiming that it was a third party beneficiary of the RAA, Solid Host *also* alleged that it was a third party beneficiary of the separate agreement (required by ¶ 3.7.7) between eNom and NameCheap, that bound NameCheap to ¶ 3.7.7.3. *Id*. The court held:

> Given the substance of paragraph 3.7.7.3, the court concludes, at this stage, that Solid Host *has adequately alleged a breach of the eNom/NameCheap contract as a third party beneficiary*. It therefore denies NameCheap's motion to dismiss Solid Host's third party beneficiary claim.

Id. (emphasis added). The district court below made no reference to this part of the *Solid Host* order – the fact that the *Solid Host* court found third party beneficiary liability under ¶ 3.7.7.3 in the contract between eNom and NameCheap that was created by ¶ 3.7.7.[10]

A careful reading of *Solid Host* reveals that the opinion is distinguishable from the instant dispute because in *Solid Host*, eNom the Registrar was a different entity from NameCheap the RNH. (ER 31.) But in the instant Action, it's *all* Tucows. Tucows is the Registrar/signatory to the RAA, *and* Tucows is the Proxy Registration Service/RNH. (ER 27-29, 64-66, 166-67.)

Following the *Solid Host* court's analysis, since Solid Host was a third party beneficiary of the eNom-NameCheap agreement created by ¶ 3.7.7, and since here Tucows was both Registrar *and* Proxy Registration Service/RNH, this Court

[10] Tucows never showed that a separate agreement between Tucows-the-Registrar and Tucows-the-Registered-Name-Holder, as required by ¶ 3.7.7, exists.

should similarly find liability here. Although Tucows signed the RAA in its role as a Registrar (ER 35, 166-67), that cannot immunize it when it takes on additional, *non-Registrar* functions as a Proxy Registration Service/RNH (ER 27, 29, 64-65, 167). Respondents cannot pretend that they were unaware of the implications of ¶¶ 3.7.7 and 3.7.7.3 because Tucows is a signatory to the RAA (ER 166-67), and Balsam's letters and emails to Respondents, long before filing this Action, advised them of the implications of refusal to provide the identity of their licensee. (ER 208-09.)

There is also an unpublished order from the Central District of California, in which the court denied the motion to dismiss filed by Moniker Online Services LLC on similar underlying facts – Moniker is a Proxy Registration Service and RNH of domain names used for unlawful spamming. *Silverstein v. E360Insight. com et al*, No. CV 07-2835 CAS (VBKx) at *6 (C.D. Cal. Oct. 1, 2007) (order denying defendant Moniker Online Services LLC's motion to dismiss). (ER 90-92, 99.)

G. California and Federal Courts Have Held that Specific Provisions of Contracts Have Intended Third Party Beneficiaries, Notwithstanding Catch-All "No Third Party Beneficiary" Language

1. Balsam is an Intended Third Party Beneficiary Who Can Enforce ¶ 3.7.7.3 of the RAA

In *Prouty v. Gores Technology Group*,[11] the court acknowledged a general "no third party beneficiary" statement but found that particular contractual provisions were intended to benefit third parties, and held that plaintiffs could enforce the contract.

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

121 Cal. App. 4th at 1232. The court rejected GTG's argument that Section 10.5 precluded plaintiffs from being third party beneficiaries:

> [Section 10.5] cannot be harmonized with section 6. . . . In this circumstance, under well established principles of contract interpretation, when a general and a particular provision are

[11] Defendant Gores Technology Group ("GTG") agreed to buy VeriFone Inc. from Hewlett-Packard. *Prouty*, 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. The appellate court reversed, holding that the plaintiffs could enforce the agreement. *Id.* at 1235.

> inconsistent, the particular and specific provision is paramount to the general provision. *Section 6 of the amendment thus is an exception to section 10.5 of the original contract [], and plaintiffs can enforce it*.

Id. at 1235 (emphasis added).

2. The District Court Erred in Distinguishing Prouty

The district court below erred by over-relying on a nuance of *Prouty* – the general "no third party beneficiaries" language appeared in the original agreement whereas the provision that benefitted third parties appeared in an amendment. But taken as a whole, the *Prouty* agreement plus amendment have a general "no third party beneficiaries" provision and a specific provision that benefitted third parties. *Prouty* stands for the application of the established rule that specific contractual terms control over general terms, in the context of third party beneficiaries. Other courts, *infra*, have relied on *Prouty* for that holding even when the conflicting terms appear in the *same* agreement; i.e., without an amendment.

The district court below also erred when it stated that the clause in *Prouty* protecting the employees was aimed at protecting a narrow, specifically-identified class of people, but yet *distinguished* the RAA as "a form agreement that refers generally to 'a party.'" (ER 14.) The contractual language in the *Prouty* agreement and the RAA is comparable – the *Prouty* clause identified a class of people (employees of one party's subsidiary), just as ¶ 3.7.7.3 identifies a class of people (those people harmed by wrongful use of a RNH's licensed domain name

who provide reasonable evidence of actionable harm) (ER 121-22). Both contracts are intended to benefit non-signatory third parties. Therefore, the district court below should have followed *Prouty*.

3. ***The District Court Erred in Distinguishing* Milmoe**

In *Milmoe v. Gevity HR Inc.*, the U.S. District Court for the Northern District of California considered conflicting general "no third party beneficiaries" language and a specific provision *in the original contract* – not an amendment – that seemed to show intent to benefit a third party. The court cited *Prouty* with approval – even though the *Milmoe* contract was a single, non-amended contract – and denied defendant's motion to dismiss. No. C 06-04721 SBA, 2006 U.S. Dist. LEXIS 71121 at *9, 12-13 (N.D. Cal. Sep. 20, 2006). This Court should find that *Prouty* is the state of California law, recognized by the federal courts, whether the specific language promising benefits to third parties is in the original contract or in an amendment.

Nor is *Milmoe* the only Northern District case to hold that plaintiffs are third party beneficiaries even when the conflicting language appears in the *original* contract – i.e., without the "amendment factor" the district court below used to distinguish *Prouty*. In *Aspitz v. Witness Systems Inc.*,

> Aspitz relies on a statement that disavows any intent to benefit third parties, with specified exceptions. Aspitz argues he does not fall within an exception for persons with a right to "compensation" from the escrow fund, but his contention that the exception was only

> intended to apply to third party claimants against the fund, not former Blue Pumpkin shareholders, is less than compelling.

No. C 07-02068 RS, 2007 U.S. Dist. LEXIS 61429 at *9 (N.D. Cal. Aug. 10, 2007). The court held that

> The escrow fund represented part of the "compensation" Aspitz and other Blue Pumpkin shareholders were to receive in the transaction, and the exception to the "no-third party beneficiaries" provision appears to be an explicit recognition of that fact.

Id.

The district court below also erred when it distinguished *Milmoe* from the instant Action merely because the RAA does not refer to Balsam by name. (ER 15.) The district court ignored ample California and federal case law that a contract does *not* have to identify a party by name for that party to be a third party beneficiary; it is sufficient that a contract identifies a group of people who benefit from the contract for a member of that group to sue as a third party beneficiary. *See e.g. Prouty, Alling, Whiteside, Johnson, Paulsen, Sepulveda, KnowledgePlex, Flagstaff Medical Center Inc.*, all *supra.* As above, no one benefits from ¶ 3.7.7.3 except someone like Balsam.

Less than two months ago, in *Farhang v. Indian Institute of Technology et al*, the U.S. District Court for the Northern District of California denied defendants' motion to dismiss and granted plaintiff leave to amend her third party beneficiary claim. No. C-08-02658 RMW, 2010 U.S. Dist. LEXIS 5781 at *18

(N.D. Cal. Jan. 26, 2010). Farhang was not named in the Non-Disclosure Agreement, *id*. at *11, but claimed she was an intended third party beneficiary of the NDA because "she was entitled to receive 100% of any money that M.A. Mobile might obtain from or through the Technology covered by the NDA," *id*. at *16. While the court did not rule that Farhang *was* a third party beneficiary of a Non-Disclosure Agreement, the court cited *Prouty* with approval and held that "Because the terms of the NDA necessarily benefit Farhang, it appears that the parties contemplated for the NDA to benefit Farhang." *Id*. at *18.

Therefore, the RAA does not *have* to identify Balsam by name; ¶¶ 3.7.7 and 3.7.7.3 are intended to promise benefits (monetary or information) from RNHs to a discernible class (people harmed by wrongful use of licensed domain names who present evidence of harm) of which Balsam is a member.

4. ***Even if* Prouty *and* Milmoe *Were Distinguishable, the General Rule that Specific Contractual Provisions Control over General Language Still Applies to ¶¶ 3.7.7 and 3.7.7.3, and ¶ 5.10***

Courts only need to reconcile specific vs. general contractual terms if there are specific and general terms that actually conflict, and here, there is no conflict because the general ¶ 5.10 does not immunize RNHs from liability. (ER 131.) But, even assuming that it did, this Court should review the general catch-all ¶ 5.10 in light of the specific language of ¶¶ 3.7.7 and 3.7.7.3 that expressly makes promises and confer benefits to third parties harmed by wrongful use of RNHs'

licensed domain names (ER 121-22) in a way that makes the RAA valid, follows industry standards, and serves – or at least does not undermine – public policy.

Although the specific vs. general term dispute in the instant Action turns on the question of third party beneficiaries, the analysis is no different from a contractual dispute in any other substantive area, be it choice of law, forum selection, arbitration, or anything else. As described above, California and federal courts consistently hold that specific contractual language controls over general language. Therefore, a RNH's specific acceptance of liability in ¶¶ 3.7.7 and 3.7.7.3 of the RAA cannot be thrown aside by the catch-all "no third party beneficiary" language of ¶ 5.10.

H. ICANN Itself Rejects Respondents' Interpretation of ¶ 3.7.7.3

In 2007, prior to and unrelated to this Action, Balsam complained to ICANN – the entity charged with coordinating the functioning of the entire Internet – because a different Registrar (eNom) refused to provide Balsam with the identity of its licensee who had used eNom's Proxy Registration Service to hide its identity for domain names used to send unlawful spams. (ER 71.)

Stacey Burnette, Director of Compliance at ICANN, responded to Balsam via email. (ER 71, 89.) Burnette first discussed ¶ 3.7.7.3 of the RAA in general, and advised Balsam that

> 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.

(ER 89.) Burnette then continued to address Balsam's specific complaint against eNom:

> Under Section 3.7.7.3 of the RAA, Enom may withhold the identity of a licensee indefinitely. Enom is under no obligation to disclose the name of the licensee, even if Enom is presented with reasonable evidence of actionable harm. However, Enom must accept liability for harm caused by the wrongful use of the Registered Name as long as Enom continues to withhold the identity of the licensee.

Id.

Tellingly, *nothing* in Burnette's response stated that only ICANN can enforce ¶ 3.7.7.3 of the RAA, or that Balsam had no rights under ¶ 3.7.7.3. In fact, just the opposite is true: Burnette acknowledged that Balsam was harmed by the spam at issue, that Balsam is a member of the class intended to be protected by ¶ 3.7.7.3, and that eNom would be liable to Balsam if eNom continued to withhold the identity of its licensee. And since Burnette also said that "ICANN will not pursue compliance action against Enom," Burnette implicitly affirmed Balsam's right to take action against eNom for the harm suffered by Balsam.

Thus, ICANN itself takes the position that individuals harmed by wrongful use of licensed domain names *can* enforce ¶ 3.7.7.3 against RNHs.

I. Respondents' Interpretation and the District Court's Ruling as to ¶ 3.7.7.3 Disregard Industry Standards

The parol evidence rule bars the use of extrinsic evidence to create an ambiguity when no ambiguity exists in the plain language of a contract. Cal. Code Civ. Proc. § 1856; *see also Pace v. Honolulu Disposal Service Inc.*, 227 F.3d 1150, 1157 (9th Cir. 2000). Balsam maintains that the language of ¶¶ 3.7.7 and 3.7.7.3 is clear on its face as to RNHs' acceptance of liability for harm caused by wrongful use of their licensed domain names.

Nevertheless, *if* the language were ambiguous, this Court can and should look to industry standards to aid in contractual interpretation. "The terms set forth in a writing . . . may be explained or supplemented by course of dealing or usage of trade or by course of performance." Cal. Code Civ. Proc. § 1856(c) (emphasis added). *See also Stewart v. Life Insurance Co. of North America*, 388 F. Supp. 2d 1138, 1142 (E.D. Cal. 2005), *Los Angeles County Metropolitan Transportation Authority v. Shea-Kiewit-Kenny*, 59 Cal. App. 4th 676, 682 (2d Dist. 1997).

Balsam has received unlawful spams, other than those in the related action, from domain names Proxy-Registered through several other major Proxy Registration Services (ER 72, 80).

Balsam presented reasonable evidence of actionable harm to the Proxy Registration Services, and asserted that since they were licensing use of domain names back to their spammer-customers, they had agreed, pursuant to ¶ 3.7.7.3, to

accept all liability for the harm unless they promptly identified their licensees. (*Id.*)

Without the need for a lawsuit or a subpoena, the other Proxy Registration Services identified their licensees sending unlawful spam (*id.*), establishing industry standards for Proxy Registration Services/RNHs presented with demands under ¶ 3.7.7.3 from recipients of unlawful spam.

Respondents (and Moniker Online Services LLC) have taken the position that they do not have to disclose the identity of their licensee *and* they do not have to accept liability for the harm wrought by their licensee. The U.S. District Court for the Central District of California denied Moniker's motion to dismiss on similar underlying facts. *Silverstein, supra.* (ER 90-92, 99.)

Respondents' position, and the ruling of the district court below, disregard industry standards as to the interpretation and application of ¶ 3.7.7.3. Even *if* the language of ¶ 3.7.7.3 were ambiguous, this Court should interpret the "acceptance of liability" requirement upon Respondents in light of industry standards – which is to promptly identify the licensee if the RNH is to avoid accepting liability itself.

J. Respondents' Interpretation and the District Court's Ruling as to ¶ 3.7.7.3 Disregard Public Policy

Paragraph 3.7.7.3 of the RAA should be read literally because it was not drafted by Respondents or any other Registrar, but instead by ICANN – an organization charged with managing the entire Internet, including Registrars,

RNHs, and consumers and other Internet users. Presumably, ICANN was acting in the public's interest when it created the RAA, not least because it is under contract with the United States government.

Contracts, especially ones involving far-reaching public interests that the RAA addresses, should be interpreted in a manner that serves the public interest.

> "In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred." (*Rest.2d Contracts, § 207*, p. 106.) Here, public policy is succinctly expressed by *Civil Code section 1559* []. Barring plaintiffs from enforcing section 6 despite 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.

Prouty, 121 Cal. App. 4th at 1235.

The Ratcliff Architects v. Vanir Construction Management went even further, holding that "public policy may dictate the existence of a duty to third parties," even if a contract "specifically excluded third party beneficiaries from having any rights under the contract." 88 Cal. App. 4th 595, 605 (1st Dist. 2001).

Prouty and *The Ratcliff Architects* illustrate the public policy factor in contractual interpretation.

> All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for . . . violation of law, whether willful or negligent, are against the policy of the law.

Cal. Civ. Code § 1668.

Tucows is the RNH (legal owner) of *AdultActionCam.com*, and Tucows licensed use of the domain name back to its customer. (ER 24, 29, 64-65, 167.) Respondents claim that they have no obligation to provide Balsam with the identity of their licensee, *and* they have no obligation to accept liability for harm caused by wrongful use of their domain name. Respondents' interpretation would thus have the effect of exempting Proxy Registration Services/RNHs, and their licensees, from any responsibility for violations of law caused by wrongful use of domain names for which the Proxy Registration Services are the legal owners. Such an interpretation violates Cal. Civil Code § 1668, and cannot be valid.

Interpreting the RAA to favor protecting the public is consistent with the plain language of ¶ 5.10, which states that the RAA creates no third party liability for ICANN or *Registrars*, but nothing absolves anyone else of liability, in particular, *RNHs*. (ER 131.) If ¶ 5.10 were intended to absolve RNHs from liability to third parties, then ¶ 5.10 would not have limited the exempted groups to only ICANN and Registrars. Therefore, the plain language confirms that potential liability for RNHs – the legal owners of the domain names – in ¶ 3.7.7.3 was intentional.

A RNH should not be able to conduct unlawful business, or mask the unlawful business of its licensees, and walk away not only scot-free because it also happens to be a Registrar, but actually enriched because unlawful spammers will

pay such a Proxy Registration Service to hide them from those consumers harmed by their unlawful actions.

The only logical interpretation of ¶ 3.7.7.3, consistent with public policy and the plain language of the paragraph, is that people harmed by a Proxy-Registered domain name (*AdultActionCam.com*) can present reasonable evidence of actionable harm to the RNH, who shall accept liability for the harm suffered by the third party, unless it identifies the licensee to the harmed party.

The district court's interpretation of ¶ 3.7.7.3 furthers no one's interest – except that of unlawful spammers hiding behind Proxy-Registered domain names – and would make ¶ 3.7.7.3 superfluous. *Moyer, supra.* If this Court removes the "stick" of potential liability for Proxy Registration Services created by ¶ 3.7.7.3, it will likely open the door to a flood of untraceable spam. Demand for Proxy Registration by unlawful spammers will increase, and the supply of Proxy Registration Services will increase to match, because *everyone* will be immune from liability – the legal owner of the domain name *and* the licensee actually using it. If this Court were to find that Respondents have no liability, despite the plain language of ¶¶ 3.7.7 and 3.7.7.3, it would undermine the purpose and importance of this Court's *Kilbride* judgment, entered just last year.

Respondents' refusal to identify their licensees engaged in wrongful acts also constitutes unfair competition because their willingness to provide a haven for

unlawful spammers gives Tucows an unfair advantage versus other Proxy Registration Services who *will* identify their licensees causing harm with their domain names.

K. Corporate Officers are Liable for Their Own Wrongful Actions

Although officers of corporations are not liable for a judgment *solely* because they are officers, under California law, a person's status as a corporate officer does not provide an absolute immunity from personal liability.

> Directors and officers of a corporation are not rendered personally liable for its torts merely because of their official positions, but may become liable if they directly ordered, authorized or participated in the tortious conduct. . . . Personal liability, if otherwise justified, may rest upon a "conspiracy" among the officers and directors to injure third parties through the corporation.

Wyatt v. Union Mortgage Co. et al, 24 Cal. 3d 773, 785 (1979) (citations omitted).

See also Frances T. v. Village Green Owners Assn., 42 Cal. 3d 490, 503 (1986) (holding that corporate directors can be held liable for their own tortious conduct), *People v. Pacific Landmark LLC*, 129 Cal. App. 4th 1203, 1215 (2d Dist. 2005) (holding that a manager is not insulated from liability for participation in tortious conduct merely because the conduct occurs within the scope and role as a manager), *People v. Conway*, 42 Cal. App. 3d 875, 886 (2d Dist. 1974) (finding that the president "was in a position to control the activities of the [corporation] and thus could be held criminally liable for false advertising").

Elliot Noss is the Chief Executive Officer of Tucows. (ER 63, 188.) Balsam's attorney sent a letter to Noss in February 2009 demanding that Tucows accept liability pursuant to ¶ 3.7.7.3 and pay Balsam the judgment in the related action, since Tucows had refused to produce the identity of its licensee. Noss ignored the letter. (ER 196.) This Court should hold Noss liable for Tucows' policy decisions and wrongful actions that occur on his watch and at his direction.

Paul Karkas is the Compliance Officer of Tucows. (ER 63, 189.) Karkas, on behalf of Tucows, responded to Balsam's initial request for the identity of its licensee, but refused to produce the identity. (ER 208-14, 219-21.) Before and after judgment was entered in the related action, and before Balsam filed the instant Action, Karkas consistently refused to identify Tucows' licensee, even after Karkas asked Balsam for *more* proof of actionable harm and Balsam provided Karkas with everything he asked for. (ER 239, 241-42.)

Balsam has not yet an opportunity to seek discovery about the individuals' actions within the scope of their employment.

This Court should hold Noss and Karkas jointly and severally liable on the judgment for *their* wrongful actions, or at least allow Balsam to make discovery requests.

L. The District Court Abused its Discretion by Refusing to Give Balsam the Opportunity to Amend the Complaint Before Dismissing With Prejudice

The Ninth Circuit has held that "A claim should be dismissed [under FRCP 12(b)(6)] only if it appears beyond doubt that the plaintiff can establish no set of facts under which relief could be granted." *Platt Electric Supply Inc. v. EOFF Electrical Inc.*, 522 F.3d 1049, 1054 (9th Cir. 2008) (citation omitted). The complaint is construed in a light most favorable to the plaintiff and all properly pleaded factual allegations are taken as true. *Hearns v. Terhune*, 413 F.3d 1036, 1043 (9th Cir. 2005).

Balsam could have amended the complaint to state facts that would entitle him to relief. (ER 76-77.) For example:

- Even if Balsam were not an intended third party beneficiary of ¶ 3.7.7.3 of the RAA, Balsam could have pled that Respondents had "direct" liability as the legal owner of the *AdultActionCam.com* domain name, which means that *Tucows* advertised in 1,125 unlawful pornographic spams.
- Balsam could have added a cause of action for violations of the Consumers Legal Remedies Act. In addition to the CLRA violations within the spams themselves (e.g., misrepresenting that services were free, misrepresenting the name and address of the sender,

misrepresenting the number of members of the *AdultActionCam.com* website), Respondents violated the CLRA by misrepresenting the source of services, by claiming that one party is the source when in fact it is someone else. The domain name owner also misrepresented the nature of its affiliation/connection with its customer.

- Balsam could have added a cause of action for violations of the Unfair Competition Law (B&P Code § 17200), which supports an important public policy in California of prohibiting deceptive advertising.
- Balsam could have added more allegations about his previous attempt to petition ICANN, and ICANN's acknowledgement that Balsam has standing to enforce ¶ 3.7.7.3.
- Balsam could have added allegations, after conducting discovery, regarding any contract between the Registrar and the RNH, pursuant to ¶ 3.7.7.

Furthermore, "Because they involve factual questions of intent, third party beneficiary claims are often not appropriate for resolution via motion to dismiss." *Solid Host*, 652 F. Supp. 2d at 1119 (citations omitted).

Thus, the district court below erred in dismissing the case with prejudice, implicitly holding that there were *no* facts that could possibly entitle Balsam to relief.

XI. CONCLUSION/RELIEF SOUGHT

The Ninth Circuit recently held that Proxy Registered domain names used for spamming constitutes materially false registration information. *Kilbride*, 584 F.3d at 1259.

Tucows is the undisputed legal owner of *AdultActionCam.com*, and Respondents refused to identify any other potential party who wrongfully used the domain name in unlawful spam advertising a pornographic website.

Respondents voluntarily seek to profit, and actually profit, by venturing into *non*-Registrar functions, including offering Proxy Registration services to hide the identity of their customers whom they know are sending unlawful spam. *Verizon California* held that Registrars are liable for damages when they act as Registered Name Holders.

Respondents chose to become the RNH – the legal owner – of *AdultActionCam.com* and license it back to their customer. Not only are such non-Registrar functions not immunized by ¶ 5.10 of the RAA, but Respondents had actual knowledge that ¶¶ 3.7.7 and 3.7.7.3 constitute an express acceptance of liability for harm caused by the wrongful use of *AdultActionCam.com* unless they promptly identify their license… which they did not do, promptly or ever. Balsam brought this action against Respondents for their role as the *RNH* of *AdultAction Cam.com*, not the Registrar.

Balsam contends that ¶¶ 3.7.7 and 3.7.7.3 of the RAA, on their face, evidence an intent to benefit third parties by imposing liability on RNHs, unless those RNHs identify their licensees causing harm by the wrongful use of Internet domain names. Indeed, the two provisions, taken together, make no sense unless read to create potential liability for RNHs who fail to promptly disclose the identity of their anonymous licensees who have caused actual harm. Even if the general ¶ 5.10 immunized RNHs, which it does not, the specific language of ¶ 3.7.7.3 would still control.

ICANN itself rejected Respondents' interpretation of ¶ 3.7.7.3 and acknowledged Balsam's right to pursue damages under that specific paragraph.

The industry standard among Proxy Registration Services – at least for now – is to produce the identity of their licensee when a consumer/spam recipient makes a demand under ¶ 3.7.7.3. Most Proxy Registration Services (other than Respondents) choose to identify their licensees, rather than face liability themselves for their unlawful actions.

The district court offered no other possible explanation for the existence of ¶¶ 3.7.7 and 3.7.7.3, or how any signatory or non-signatory to the RAA might ever enforce these provisions for any purpose *other* than to benefit some third party, such as Balsam, who was harmed by wrongful use of a licensed domain name.

No public policy is served by allowing a Proxy Registration Service/RNH to hide the identity of an unlawful spammer with impunity. Here, Balsam was harmed because Respondents' refusal to identify its licensee prevented service of process in the related action, seizure of the domain name, or other enforcement of a validly-entered judgment.

This Court should not allow these well-funded Respondents, who knowingly conspire with unlawful, pornographic spammers, to take legal title to *AdultAction Cam.com*, hide their licensee's identity, and evade the liability that they voluntarily accepted by signing the RAA.

The importance of the proper interpretation of the RAA – a matter of first impression for the Ninth Circuit – goes far beyond the instant dispute. Proxy Registration Services frequently conspire with spammers and other scofflaws to hide their identities and create materially false domain registration information. *Kilbride, supra*. Only ¶¶ 3.7.7 and 3.7.7.3 of the RAA – *if* they can be enforced by harmed parties – create a disincentive for Proxy Registration Services/RNHs to shield tortfeasors. If this Court holds that Balsam is not a third party beneficiary and cannot enforce ¶¶ 3.7.7 and 3.7.7.3, that means that *anyone* harmed by wrongful use of Proxy-Registered domain names has no remedy at all. Proxy Registration Services will have a "free pass" to refuse to produce the identity of their customers engaged in unlawful actions, and *that* will likely lead directly to

even more Proxy-Registered, and thus untraceable, domain names used for unlawful purposes.

The district court should not have dismissed the Action, not least because Balsam could have amended the complaint to allege direct liability against Tucows for advertising in unlawful spam and other violations of California law.

This Court should reverse the order of the district court and hold Respondents liable for the harm suffered by Balsam; i.e., the related judgment.

THE LAW OFFICES OF DANIEL BALSAM

Dated: March 8, 2010

By /s/ Daniel L. Balsam
Daniel L. Balsam
Attorneys for Plaintiff

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