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FILED
SAN MATEO COUNTY
OCT 01 2009
Clerk of the Superior Court
[Signature]
DEPUTY CLERK

8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SAN MATEO

10 DANIEL L. BALSAM, an individual,
11 Plaintiff,

12 vs.

13
14 TRANCOS, INC., a California corporation;
15 LEWIS J. WRIGHT, an Individual; BRIAN
16 NELSON, an Individual; LAURE
17 MAJCHERCZYK, an Individual; AD
SPONSORS LLC, an Oklahoma limited
liability company;
18 CASHONLINEAMERICA.COM LLC, a New
York limited liability company;
19 AFFILIATENETWORK.COM LLC, a New
York limited liability company;
20 AFFILIATENETWORK.COM MARKETING
21 LLC, a New York limited liability company;
22 EHARMONY.COM INC., a California
corporation; QUINSTREET INC., a California
23 corporation; STRATEGIC FINANCIAL
PUBLISHING INC., an Indiana corporation;
24 and DOES 1-100,

25 Defendants.

Case No. CIV471797

**ORDER ON DEFENDANTS' MOTION
FOR JUDGMENT ON THE PLEADINGS**

Date: August 10, 2009
Time: 9:00 A.M.
Dept: Law and Motion, Dept. 3
Judge: Honorable John L. Grandsaert

Complaint Filed: April 4, 2008
Trial Date: October 13, 2009

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27 CAPTION ONLY - NO TEXT
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1 The Motion for Judgment on the Pleadings filed by Defendants Trancos, Inc.,
2 Brian Nelson and Laure Majcherczyk came on regularly for hearing before the Court on August
3 10, 2009, in Department 11, Courtroom 2D, in the Superior Court of San Mateo County. The
4 parties appeared through their counsel of record.

5 Having read and considered the moving and responding papers, and good cause appearing
6 therefor,

7 IT IS ORDERED THAT:

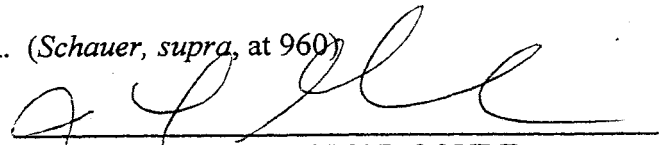
8 1. Plaintiff's Request for Judicial Notice of the Letter Opinion dated May 10, 2004,
9 is denied;

10 2. The Motion for Judgment on the Pleadings is DENIED as to the first cause of
11 action. On federal questions, this Court is bound by decisions of the United States Supreme
12 Court. "[D]ecisions of the lower federal courts, although entitled to great weight, are not binding
13 Where lower federal court precedents are divided or lacking, state courts must necessarily
14 make an independent determination of federal law." (*Elliot v. Albright* (1989) 209 Cal.App.3d
15 1028, 1034.) Neither *Omega World Travel, Inc. v. Mummographics, Inc.* (4th Cir. 2006) 469
16 F.3d 348 nor *Asis v. Consumerbargaingiveaways, LLC* (N.D. Cal. 2009) 2009 U.S. Dist. LEXIS
17 36523 is binding. The Court also reviewed *Gordon v. Virtumundo, Inc.*, 2009 WL 2393433
18 (C.A.9 (Wash.)). The Court finds the reasoning of *Asis, supra*, more persuasive. The *Omega*
19 case, *supra*, fails to consider that "falsity" and "deception" can give rise to claims other than just
20 common law fraud, such as false advertising or unfair competition. Further, the Court in *Omega*
21 repeatedly noted that the "falsity" at issue was "immaterial error," "immaterial
22 misrepresentations (*Omega* at 353), "bare error" (*Id.* at 354), and "bare immaterial error." *Id.* at
23 359).

24 3. The Motion is DENIED as to the second cause of action. The Complaint
25 sufficiently alleges damage, because the receipt of spam email is damaging. (See Bus. & Prof.
26 Code ¶17529, subd. (d), (e), (g) and (h).) The Complaint sufficiently alleges standing. The
27 definition of "consumer" in Civil Code section 1761(d) merely defines what a consumer is. It
28 does not define standing. Rather, standing is defined by section 1780. The *Kleffman* case is not

1 binding. The *Schauer* case (cited by *Kleffman*) is not persuasive. The plaintiff lacked standing
2 because she had no dealings with the defendant and “without an assignment of [her former
3 spouse’s] rights,” she fell outside the CLRA. (*Schauer, supra*, at 960)

4 Dated: SEP 28 2009


JUDGE OF THE SUPERIOR COURT

7 APPROVED:

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9 _____
DANIEL L. BALSAM
10 Attorney for Plaintiff
Daniel L. Balsam