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TRANCOS, INC., BRIAN NELSON and  
LAURE MAJCHERCZYK  
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8 SUPERIOR COURT OF CALIFORNIA  
9 COUNTY OF SAN MATEO

10 DANIEL L. BALSAM, an individual,  
11 Plaintiff,  
12

13 vs.

14 TRANCOS INC., a California corporation;  
15 LEWIS J. WRIGHT, an Individual; BRIAN  
NELSON, an Individual; LAURE  
16 MAJCHERCZYK, an Individual; AD  
SPONSORS LLC, an Oklahoma limited  
17 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;  
EHARMONY.COM INC., a California  
22 corporation; QUINSTREET INC., a California  
23 corporation; STRATEGIC FINANCIAL  
PUBLISHING INC., an Indiana corporation;  
24 and DOES 1-100,

25 Defendants.  
26  
27  
28

Case No. CIV471797

NOTICE OF MOTION AND MOTION  
TO STAY/CONTINUE THE INSTANT  
PROCEEDINGS PENDING A DECISION  
BY THE CALIFORNIA SUPREME  
COURT ON THE QUESTION  
PRESENTED BY THE NINTH CIRCUIT  
IN *KLEFFMAN V. VONAGE HOLDINGS  
CORP.*)

Date: August 10, 2009  
Time: 9:00 AM  
Dept: Law and Motion

Complaint filed on April 4, 2008  
Trial Date: October 13, 2009

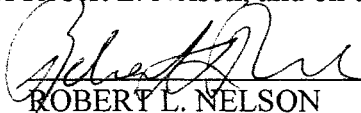
MOTION FOR JUDGMENT ON THE  
PLEADINGS FILED CONCURRENTLY

1 To Plaintiff DANIEL L. BALSAM and to his attorneys of record:

2 NOTICE IS HEREBY GIVEN that, on August 10, 2009, at 9:00 AM, or as soon  
3 thereafter as the matter may be heard, in the Law and Motion Department of this court, located at  
4 400 County Center, Redwood City, California, Defendants, TRANCOS, INC., BRIAN  
5 NELSON, and LAURE MAJCHERCZYK, will, and hereby do, move this Court for a  
6 stay/continuance of the trial currently scheduled for October 13, 2009. This Motion is made on  
7 the ground that a central issue in the case at bar shall be addressed by the California Supreme  
8 Court. The California Supreme Court has granted the request for certification of the question  
9 from the Ninth Circuit in *Liftman v. Voyage Holdings Corp.*, 551 F.3d 847 (9th Cir., 2008), as  
10 follows: "Does sending unsolicited commercial email advertisements from multiple domain  
11 names for the purpose of bypassing spam filters constitute falsified, misrepresented, or forged  
12 header information under Cal. Bus. & Prof. Code § 17529.5(a)(2)?"

13 The motion will be based on this notice of motion, on the supporting memorandum  
14 served and filed herewith, the declaration of Robert L. Nelson, and on the records and file herein.

15 Dated: July 15, 2009

16   
17 ROBERT L. NELSON  
18 Attorney for Defendants,  
19 Trancos, Inc., Brian Nelson, and  
20 Laure Majcherczyk

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendants, TRANCOS, INC., BRIAN NELSON AND LAURE MAJCHERCZYK, file  
3 this Motion in the aforementioned action to stay/continue the instant proceedings until the  
4 California Supreme Court has ruled on the question presented to it by the Ninth Circuit in  
5 *Kleffman v. Vonage Holdings Corp.*, 551 F.3d 847 (9th Cir., 2008) (“*Kleffman*”). The District  
6 Court’s decision can be found at 2007 WL 1518650 (C.D. Cal. May 23, 2007).

7 The question presented is: “Does sending unsolicited commercial email advertisements  
8 from multiple domain names for the purpose of bypassing spam filters constitute falsified,  
9 misrepresented, or forged header information under Cal. Bus. & Prof.Code § 17529.5(a)(2)?”  
10 *Kleffman, supra*. The California Supreme Court granted the request for certification on January  
11 28, 2009, in Case No. S169195.

12 The question posed is a central issue in the case at bar.

13 **1. INTRODUCTION**

14 Moving Defendants respectfully request that the trial set in this matter for October 13,  
15 2009 be stayed/continued. A key issue to be decided during the course of the trial shall soon be  
16 subject to determination by the California Supreme Court as a result of its grant of the request for  
17 certification to that Court by the Ninth Circuit Court of Appeals.

18 The outcome before the California Supreme Court will certainly provide key guidance to  
19 this Court and perhaps be dispositive. Accordingly, moving Defendants submit that staying this  
20 action (and continuing the trial herein) is in the interests of justice within the meaning of  
21 California Rule of Court 3.1332, in that the interest of judicial economy will be served, a  
22 continuance will allow for a more efficient determination of the issues, and a continuance may  
23 ultimately avoid unnecessary and duplicative appeals.

24 **2. STATEMENT OF FACTS**

25 On April 4, 2008, Plaintiff, Balsam, filed his Verified Complaint (“Complaint”) against  
26 these responding Defendants, and other named Defendants. Balsam bases this action on  
27 California Business and Professions Code §17529.5 (the “California Act”), the Consumers Legal  
28 Remedies Act (Civil Code §1750, *et seq.*), and seeks Declaratory Relief. Balsam asserts that he

1 received eight unsolicited commercial e-mails (“UCE”) between July 21, 2007 and August 13,  
2 2007. Complaint at ¶1; 2:1-12. In pertinent part, Balsam alleges that the headers of these eight  
3 UCE contained or were accompanied by “numerous falsified, misrepresented, or forged header  
4 information, in violation of Business and Professions Code §17529.5” (Complaint at ¶2; 2:13-  
5 14), and contained deceptive information prohibited by Civil Code §1750, *et seq.* (Complaint at  
6 ¶2; 2:15-16). Plaintiff seeks statutory damages in the amount of \$1,000 per electronic e-mail  
7 advertisement pursuant to Section 17529.5, which allows recovery of liquidated damages “for  
8 each unsolicited commercial email advertisement” sent in violation of Section 17529.5.  
9 Complaint at ¶3; 2:17-21 and Prayer. Balsam further seeks an injunction to prohibit Defendants  
10 from engaging in such purported deceptive marketing practices. Complaint at ¶4; 2:22-3:3.

11 A central contention by Balsam is that Defendant Trancos, Inc. utilized multiple domain  
12 names and this makes it harder for a recipient to identify the sender of a UCE and that the sender  
13 should be forced to use a “consistent” domain name in its marketing efforts. Complaint at ¶80;  
14 18:14-23 and ¶88; 21:15-19. Whether Balsam is correct in his assertions shall be determined by  
15 our Supreme Court, and is why the Ninth Circuit found it an important enough issue to request  
16 certification by the Supreme Court. See Notice from the California Supreme Court’s website  
17 announcing that the Court was going to address the question presented by the Ninth Circuit,  
18 which Notice is Exhibit “A” to the Declaration of Robert L. Nelson filed concurrently herewith.

## 19 **2. LEGAL ARGUMENT**

20 California Rule of Court, Rule 3.1332 provides that a trial may be continued upon a  
21 showing of good cause. Among the stated circumstances that this Court must consider in ruling  
22 on an application for a continuance is that “the interests of justice are best served by a  
23 continuance ...” The interests of justice are best served by a stay/continuance of the instant trial.

24 Business and Professions Code §17529.5 contains the substance of the California Act,  
25 and provides, in pertinent part, that:

26 (a) It is unlawful for any person or entity to advertise in a commercial email  
27 advertisement either sent from California or sent to a California electronic mail address  
28 under any of the following circumstances:

(1) The email advertisement contains or is accompanied by a third-party’s domain name

1 without the permission of the third party.

2 (2) The email advertisement contains or is accompanied by **falsified, misrepresented, or**  
3 **forged header information**. This paragraph does not apply to truthful information used  
4 by a third party who has been lawfully authorized by the advertiser to use that  
5 information.

6 . . . .

7 (b)(1)(A) In addition to any other remedies provided by any other provision of law, the  
8 following may bring an action against a person or entity that violates any provision of this  
9 section:

10 . . . .

11 (iii) A recipient of an unsolicited commercial email advertisement, as defined in Section  
12 17529.1.

13 (B) A person or entity bringing an action pursuant to subparagraph (A) may recover either  
14 or both of the following:

15 (i) Actual damages.

16 (ii) Liquidated damages of one thousand dollars (\$1,000) for each unsolicited commercial  
17 email advertisement transmitted in violation of this section, up to one million dollars  
18 (\$1,000,000) per incident.

19 (C) The recipient, an electronic mail service provider, or the Attorney General, if the  
20 prevailing plaintiff, may also recover reasonable attorney's fees and costs.

21 (D) However, there shall not be a cause of action under this section against an electronic  
22 mail service provider that is only involved in the routine transmission of the email  
23 advertisement over its computer network.

24 (2) If the court finds that the defendant established and implemented, with due care,  
25 practices and procedures reasonably designed to effectively prevent unsolicited  
26 commercial email advertisements that are in violation of this section, the court shall  
27 reduce the liquidated damages recoverable under paragraph (1) to a maximum of one  
28 hundred dollars (\$100) for each unsolicited commercial email advertisement, or a  
maximum of one hundred thousand dollars (\$100,000) per incident.

. . . .

To ensure that American businesses had clear guidance on commercial e-mail advertising  
since each state was enacting its own regulatory legislation, Congress enacted the federal CAN-  
SPAM Act, which included a provision preempting "all state laws expressly regulating the use of  
electronic mail to send commercial messages, except to the extent that [the state statute] prohibits  
**falsity or deception** in any portion" of a commercial email. (Emphasis added) 15 U.S.C.  
§7707(b)(1). Thus, **courts have consistently held that the preemption clause in the CAN-  
SPAM Act "left states room only to extend their traditional fraud prohibitions and**

1 **deception prohibitions into cyberspace.”** (Emphasis added) See *Kleffman v. Vonage Holdings*  
2 *Corp.*, WL 1518650 at \*5 (C.D. Cal. 2007).<sup>1</sup>

3 Accordingly, Defendants submit that §17529.5, with a limited fraud exception, is  
4 preempted by the provisions of the CAN-SPAM Act; CAN-SPAM preempts the entirety of  
5 §17529, including §17529.5(b), except “to the extent” it regulates fraudulent email headers and  
6 subject lines. 15 U.S.C. §7707. Thus, to the extent §17529.5 regulates anything beyond  
7 fraudulent e-mail headers and subject lines it is preempted by CAN-SPAM.

8 Our Supreme Court has not yet addressed what amounts to falsified, misrepresented, or  
9 forged header information. See a fuller discussion on this issue in Defendants’ companion  
10 Motion for Judgment on the Pleadings.

11 However, on December 19, 2008, the Ninth Circuit Court of Appeals presented a  
12 question to the California Supreme Court in connection with the *Kleffman* case on this issue.  
13 The question presented by the Ninth Circuit, which question is set forth in full above, was further  
14 discussed by the Court at 848-849:

15 Pursuant to Rule 8.548 of the California Rules of Court, a panel of the United  
16 States Court of Appeals for the Ninth Circuit, before which this appeal is pending,  
17 certifies to the California Supreme Court a question of law concerning interpretation of  
18 California's anti-spam law, Cal. Bus. & Prof.Code § 17529.5. The decisions of the  
19 California Courts of Appeal and California Supreme Court provide no precedent to the  
20 certified question, and the answer may be determinative of this appeal. [] The California  
21 Supreme Court is respectfully requested to answer the certified question presented below.  
22 The phrasing of the issue is not meant to restrict the court's consideration of the case. We  
23 agree to follow the answer provided by the California Supreme Court.

24 The certification was accompanied by an Order that all further proceedings in *Kleffman*  
25 be stayed/continued pending receipt of the answer to the certified question.

26 In the instant case, with respect to his Business and Professions Code §17529.5 claim,  
27 Balsam alleges that the headers in the eight e-mails received by him are false as they do not  
28 literally and truthfully identify the sender, and as such, are designed to avoid anti-spam filters. In  
other words, the “From” line does not identify Trancos, Inc. Complaint at ¶35; 9:8-15, and ¶105;

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<sup>1</sup> This case was not reported in F. Supp.

1 25:1-5.

2 Accordingly, the contention by Balsam that Trancos was required to identify itself as the  
3 sender and could not use multiple domain names to send its e-mails will be directly affected by  
4 the California Supreme Court's response to the certification in *Kleffman*. This is a major part of  
5 Balsam's case, and the ultimate resolution of key issues will be affected by the California  
6 Supreme Court's response to the certified question.

7 Moreover, it appears that it will be more likely than not that, in order to reach a decision  
8 on the certified question, our Supreme Court will have to address what amounts to falsified,  
9 misrepresented, or forged header information, and the Court could also determine whether the  
10 elements of the tort of fraud must be shown by a plaintiff.

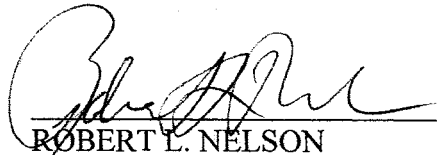
11 It is logical that given the potential effect of the *Kleffman* certification, and the striking  
12 similarity between the issue presented by that certification and the outcome of the instant trial, a  
13 stay/continuance of the trial serves the interests of justice within the meaning of California Rule  
14 of Court 3.1332.

15 Thus, moving Defendants submit that the interests of justice are best served by a  
16 continuance of the instant trial pending the California Supreme Court's response to the  
17 certification and resolution of the issue.

18 **3. CONCLUSION**

19 For the reasons set forth above, moving Defendants submit the interests of justice are best  
20 served by a continuance of the trial.

21 Dated: July 15, 2009

  
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ROBERT L. NELSON  
Attorney for Defendants,  
Trancos, Inc., Brian Nelson, and Laure Majcherczyk