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ENDORSED FILED
SAN MATEO COUNTY

JUL 24 2009

Clerk of the Superior Court
By S. Peyrot
DEPUTY CLERK

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO (UNLIMITED JURISDICTION)

DANIEL L. BALSAM,	)	Case No.:	CIV471797
)		
Plaintiff,	)	PLAINTIFF'S OPPOSITION TO	
	)	DEFENDANTS' MOTION TO	
vs.	)	STAY/CONTINUE	
)		
TRANCOS INC. et al,	)	Date:	August 10, 2009
	)	Time:	9:00 a.m.
Defendants.	)	Dept:	3
)		
	)	Action Commenced:	April 4, 2008
	)	Trial Date:	October 13, 2009

"Justice delayed is justice denied."

– William E. Gladstone, British Statesman and Prime Minister (1868-1894)

1 **I. INTRODUCTION**

2 Plaintiff Daniel L. Balsam (“Balsam”) filed this Action against unrepentant spammers¹
3 Defendants Trancos Inc. (“Trancos”), its Chief Executive Officer Brian Nelson (“Nelson”), and
4 its Chief Operating Officer Laure Majcherczyk (“Majcherczyk”), and other parties (since
5 dismissed), for advertising in and sending unlawful spams to Balsam in July-August 2007 that
6 violated Cal. Business & Professions Code (“B&P”) § 17529.5 and the Consumers Legal
7 Remedies Act, Civ. Code § 1750 *et seq.*

8 Balsam alleged in the Verified Complaint at ¶¶ 64-102 that the spams violated B&P
9 § 17529.5 in four different ways:

- 10 1. Misleading Subject Lines
- 11 2. Misrepresented From/Sender Names
- 12 3. Multiple sending domain names
- 13 4. Misrepresented registration for sending domain names

14 Trial was initially set for June 15, 2009. Balsam and Defendants appeared, both fully
15 expecting to go to trial, but due to the unexpected unavailability of a courtroom, trial was
16 delayed until October 13.

17 Defendants now ask this Court to stay/continue the Action because *only* the third theory
18 of liability under B&P § 17529.5 – the question of whether “sending unsolicited commercial
19 email advertisements from multiple domain names for the purpose of bypassing spam filters
20 constitute[s] falsified, misrepresented, or forged header information under Cal. Bus. & Prof.
21 Code § 17529.5(a)(2)” – is currently before the California Supreme Court. The Ninth Circuit
22 certified the question in *Kleffman v. Vonage Holdings Corp.*, 551 F.3d 847 (9th Cir. Dec. 19,
23 2008), and the Supreme Court accepted the question on January 26, 2009. Defendants have not
24 indicated why they waited until now to file the instant motion.

25 Defendants clutter their Motion to Stay with two pages of arguments about whether the
26 federal CAN-SPAM Act preempts B&P § 17529.5 in this Action (it does not) and whether
27 “falsity” and “fraud” are the same thing (they are not). These issues are important, and Balsam
28

29
30 ¹ “Spam” is the commonly accepted term to describe “unsolicited commercial email.” The
31 California Legislature and courts have also used the term. *See* B&P § 17529(a), *Ferguson v.*
FriendFinders Inc., 94 Cal. App. 4th 1255, 1267 and n.5 (1st Dist. 2002).

1 fully briefed them in his Motion for Summary Judgment and his Opposition to Defendants’
2 Motion for Judgment on the Pleadings (both on file with this Court), but those issues are
3 irrelevant as to Defendant’s Motion to Stay.

4 California Rules of Court Rule 3.1332(d)(10) allows a court to consider if “the interests
5 of justice are best served by a continuance.” But regardless of how the California Supreme
6 Court answers the question of multiple domain names, it will not be dispositive of this Action,
7 because Balsam has three other theories of liability under B&P § 17529.5, and an entirely
8 separate cause of action under the CLRA.

9 Furthermore, Defendants’ Motion to Stay is untimely; Defendants had ample opportunity
10 to make a Motion to Stay prior to the initial trial date but failed to do so. The interests of justice
11 are best served by denying Defendants’ Motion to Stay.

12 **II. ARGUMENT**

13 **A. Legal Standard for a Motion to Stay**

14 The U.S. Supreme Court has held that “[o]nly in rare circumstances will a litigant in one
15 cause be compelled to stand aside while a litigant in another settles the rule of law that will
16 define the rights of both.” *Landis v. North Am. Co.*, 299 U.S. 248, 255 (1936). The moving
17 party bears the burden of showing why a stay should be granted and “must make out a clear case
18 of hardship or inequity in being required to go forward.” *Id.* at 256.

19 Courts also decline to stay cases pending decisions in independent proceeding where
20 there are *other grounds* to proceed. In *Jonathan Club v. City of Los Angeles*, 680 F. Supp. 1405
21 (C.D. Cal. 1988), plaintiff argued that the court should stay a ruling on a motion pending
22 resolution of a case before the Supreme Court on another matter. *Id.* at 1407. The court agreed
23 that the matter before the Supreme Court “appears to involve similar issues,” but denied
24 plaintiffs’ motion to stay because resolution of the Supreme Court case would not be of any
25 assistance in resolving the pending motion concerning abstention. Thus, where a decision can be
26 reached on grounds independent of those addressed in the other action, a stay is unwarranted.
27 *See also McDonald v. Director, Office of Workers' Compensation Programs*, 897 F.2d 1510
28 (9th Cir. 1990) (holding district court did not abuse discretion in denying motion to stay the
29 action pending the decision on a petition for rehearing in another case where legal issues were
30 distinguishable).
31

1 **B. This Court Should Not Stay the Action Because the Decision from the California**
2 **Supreme Court as to Multiple Domain Names Will Not Be Dispositive of this Action**

3 Here, there are three other theories of liability under which Balsam can proceed under
4 B&P § 17529.5, regardless of the California Supreme Court’s decision on the question of
5 multiple domain names, and Balsam has an entirely separate cause of action under the CLRA.
6 Therefore, whichever way the Supreme Court rules, it will not be dispositive of this Action.

7 It is quite possible that the Supreme Court may say “it depends” on case-specific fact-
8 finding by the trial court as to *why* a spammer sent spams from multiple domain names. If so,
9 the preponderance of evidence demonstrates that Defendants knowingly and willfully send
10 spams from multiple domain names for deceptive purposes.²

11 **1. Misleading Subject Lines**

12 B&P § 17529.5(a)(3) prohibits subject lines likely to misleading a reasonable recipient.

13 One of the spams at issue advertising Strategic Financial Publishing Inc. dba “Survey
14 “Adventure” had a Subject Line “Get Paid 5 Dollars for One Survey.” Verified Complaint at
15 ¶ 69. The Subject Line failed to refer to material conditions of the offer as required by 16 C.F.R.
16 § 251.1(c). The webpage Survey Adventure: How It Works, [http://www.surveyadventure.com/](http://www.surveyadventure.com/works.php)
17 [works.php](http://www.surveyadventure.com/works.php) clearly states that consumers have to complete “promotional offers” first before they
18 can “get paid” 5 dollars. Verified Complaint at ¶ 69.

19 Nelson admitted that after reading the “Survey Adventure” website extensively, including
20 the Frequently Asked Questions section, he thought that Survey Adventure was “a very good
21 site” and *free*, not realizing that there were any requirements – like “completing promotional
22 offers” (and expending monies to do so) – in addition to registering in order for consumers to
23 receive \$5. If Defendants’ CEO, reviewing the Survey Adventure website specifically in context
24

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26 ² A company like Walt Disney may have legitimate reasons for sending email from multiple
27 domain names, because Disney has thousands of *branded properties* – movies, TV shows,
28 consumer products, Broadway shows, TV and cable TV networks, theme parks, publishing
29 ventures, etc. But Defendants have no such empire of branded properties. Nelson admitted that
30 Trancos owns more than 1,000 domain names, and admitted that Trancos sends spam from
31 multiple domain names specifically because spam filters will stop emails if too many are sent
from the same domain name in a short period, but sending spam from multiple domain names
can bypass spam filters to “get the emails through.” Thus, Defendants admitted their deceptive
intent in using multiple domain names to send their spams.

1 of this litigation, was misled as to the true nature of the Survey Adventure offer, then surely the
2 Subject Line is misleading to a reasonable consumer.

3 Judy Hopelain, Balsam's expert witness and an experienced marketer, has also stated that
4 the Subject Line was deceptive and violated 16 C.F.R. § 251.1.

5 Therefore, regardless of the Supreme Court's ruling on multiple sending domain names,
6 Balsam has a valid theory of liability for at least one misleading Subject Line.

7 **2. Misrepresented From/Sender Names**

8 B&P § 17529.5(a)(2) prohibits misrepresented information in email headers.

9 The From Names in seven of the eight spams at issue – “Your Promotion,” “Bank Wire
10 Transfer Available,” “Join Elite,” “Paid Survey,” “Your Business,” “ChristianDating,” and
11 “Dating Generic” – did not identify Defendants or any of the other advertised entities. Verified
12 Complaint at ¶¶ 71-78.

13 In fact, the From Names were *so* misleading that Nelson admitted that he could not
14 identify his *own* advertisers based on the From Names “Paid Survey,” “ChristianDating,” and
15 “Dating Generic.”

16 Judy Hopelain, Balsam's expert witness and an experienced marketer, has also stated that
17 the From Names were deceptive.

18 Therefore, regardless of the Supreme Court's ruling on multiple sending domain names,
19 Balsam has a valid theory of liability for seven misleading From Names.

20 **3. Misrepresented Registration for Sending Domain Names**

21 B&P § 17529.5(a)(2) prohibits misrepresented information accompanying email headers.

22 All eight spams had misrepresented information accompanying the email headers in
23 violation of B&P § 17529.5(a)(2), because the registration information for the sending domain
24 names does not identify Defendants. Defendants utilized Domains By Proxy Inc. to privately
25 register their domain names; the sole purpose and effect of private registration is to prevent a
26 person querying the public Whois database from being able to identify the actual operator of the
27 domain names, which means that Defendants can avoid consumer complaints, disassociate
28 themselves from the spamming domain names, and avoid damaging their brand and business by
29 linking them to spamming. In other words, private registration of the domain names was a
30 deceptive action that misrepresented the undisputed fact that Defendants were the true registrants
31 and operators of the domain names. Verified Complaint at ¶¶ 16, 23, 26, 98-102.

1 Nelson admitted that Defendants “privately registered” domain names to make it
2 impossible for anyone conducting a Whois query to identify them as the operator of the domain
3 names, and to ensure that consumers with complaints cannot call Trancos or come to their
4 offices.

5 Here, Defendants *did* successfully stop Balsam from identifying them through Whois
6 queries. Verified Complaint at ¶ 26.

7 Therefore, regardless of the Supreme Court’s ruling on multiple sending domain names,
8 Balsam has a valid theory of liability for misleading domain name registrations.

9 Although Balsam is suing under California law, the Court should note that sending spam
10 from two or more domain names registered so as to impair a person’s ability to identify the
11 sender is an express violation of the federal CAN-SPAM Act (18 U.S.C. § 1037(a)(4), (d)(2)).

12 **C. This Court Should Not Stay the Action Because Defendants’ Motion is Untimely**

13 Although trials may be continued upon showing of good cause, “continuances of trials
14 are disfavored.” Cal. Rule of Court 3.1332(c). And, the moving party “must make out a clear
15 case of hardship or inequity in being required to go forward.” *Landis*, 299 U.S. at 256.

16 “A party seeking a continuance of the date set for trial . . . must make the motion or
17 application as soon *as reasonably practical once the necessity for the continuance is*
18 *discovered.*” Cal. Rule of Court 3.1332(b) (emphasis added).

19 On October 23, 2008, this case was scheduled for trial to begin on June 15, 2009.
20 Defendants had the opportunity to make a Motion to Stay long before the initial trial date,
21 because the California Supreme Court accepted the *Vonage* question of multiple domain names
22 on January 26, and Defendants were aware of it no later than May 14 (since Defendants’ attorney
23 and Balsam discussed *Vonage* at the time of Balsam’s deposition). Nevertheless, Defendants did
24 not make a Motion to Stay at any time prior to the initial June 15 trial date.

25 If Defendants thought the California Supreme Court’s answer to the *Vonage* question of
26 sending spam from multiple domain names were dispositive of this Action, then Defendants
27 should have made their Motion to Stay “once the necessity for the continuance [was] discovered”
28 and *before* the initial trial date of June 15. Instead, Defendants appeared on June 15, prepared to
29 go to trial. And since Defendants *were* expecting to go to trial on June 15, Defendants can
30 hardly claim now that it would be a hardship for them to go to trial on October 13. This Court
31 should not grant Defendants’ untimely Motion to Stay and allow an unexpected courtroom

1 overbooking that postponed the trial to give Defendants a windfall opportunity to delay
2 imposition of liability and thereby prejudice Balsam.

3 **D. Defendants May Argue That Litigating Now Would Be A Waste Of Judicial Resources**

4 While Defendants claim that litigating the issue of multiple domain names prior to the
5 ruling of the California Supreme Court would be a waste of scarce judicial resources, the fact is
6 that Defendants have not demonstrated that the ruling by the Supreme Court, whatever the ruling
7 might be, will eliminate even one of the two causes of action now before this Court. Defendants'
8 profound misunderstanding of the "big picture" with regard to spam laws leaves them with no
9 way to argue that a declaration of law by the Supreme Court would necessarily alter a judgment
10 in this Action. In fact, based upon the briefs before the Supreme Court, the overwhelming
11 likelihood is that the California Supreme Court will rule that this Court is compelled to find that
12 these Defendants *have* violated California law through their knowing and deliberate use of
13 multiple, privately registered domain names to send spam with the express intent of evading
14 spam filters.

15
16 **III. CONCLUSION**

17 Balsam asks that this Court deny Defendants' Motion to Stay because the California
18 Supreme Court's decision cannot be dispositive of this Action. Unless this Court grants
19 Defendants' Motion for Judgment on the Pleadings or Balsam's Motion for Summary Judgment,
20 this Action will go to trial regardless of the California Supreme Court's decision on the *Vonage*
21 question of multiple domain names. Defendants do not allude to any of the briefing before the
22 California Supreme Court, nor even hazard a guess about the likely outcome.

23 Additionally, Defendants' Motion to Stay is untimely. Defendants did not file their
24 Motion when they first discovered that the California Supreme Court accepted the *Vonage*
25 question of multiple domain names; indeed, Defendants did not file this Motion to Stay until
26 *after* the initial trial date. Since Defendants were fully expecting to go to trial in June, they
27 cannot demonstrate hardship by going to trial in October. Balsam should not be prejudiced by
28 the unexpected unavailability of a courtroom.

29 THE LAW OFFICES OF DANIEL BALSAM

30 By *Daniel L Balsam*

31 Daniel L. Balsam
Attorneys for Plaintiff

Dated: July 23, 2009

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15 **SUPERIOR COURT OF CALIFORNIA**

16 **COUNTY OF SAN MATEO (UNLIMITED JURISDICTION)**

17 DANIEL L. BALSAM,	)	Case No.:	CIV471797
)		
18 Plaintiff,	)	[PROPOSED] ORDER DENYING	
	)	DEFENDANTS' MOTION TO	
19 vs.	)	STAY/CONTINUE	
)		
20)		
21 TRANCOS INC. et al,	)	Date:	August 10, 2009
	)	Time:	9:00 a.m.
22 Defendants.	)	Dept:	3
)		
23)		
24	)	Action Commenced:	April 4, 2008
	)	Trial Date:	October 13, 2009

25
26 Defendant's Motion to Stay/Continue the Instant Proceedings came on regularly for
27 hearing before the Court on August 10, 2009, in Department 3, in the Superior Court of San
28 Mateo County. The parties appeared through their counsel of record.

29 This Court finds that the California Supreme Court's pending decision as to the question
30 of sending email advertising from multiple domain names will not be dispositive of this Action.
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Defendants’ Motion to Stay is untimely, as it should have been filed before the initial trial date.

As Defendants were expecting to go to trial in June, Defendants have not shown that they would suffer any hardship by going to trial in October.

Therefore, Defendants’ Motion to Stay is DENIED.

IT IS SO ORDERED.

Dated: _____

By _____
JUDGE OF THE SUPERIOR COURT