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 TRANCOS, INC., doing business as COREGMEDIA

8 SUPERIOR COURT OF CALIFORNIA
 9 COUNTY OF SAN MATEO

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

Case No. CIV471797

13 vs.

**REPLY OF DEFENDANTS TRANCOS,
 INC., BRIAN NELSON AND LAURE
 MAJCHERCZYK TO PLAINTIFF'S
 OPPOSITION TO DEFENDANTS'
 MOTION FOR STAY/CONTINUANCE**

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 MARKETING
 20 LLC, a New York limited liability company;
 EHARMONY.COM INC., a California
 21 corporation; QUINSTREET INC., a California
 corporation; STRATEGIC FINANCIAL
 22 PUBLISHING INC., an Indiana corporation;
 23 and DOES 1-100,

**Date: August 10, 2009
 Time: 9:00 AM
 Dept: Law and Motion, Dept. 3**

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

24 Defendants.

25 As an alternative to Defendants' Motion for Judgment on the Pleadings, Defendants,
 26 through the instant Motion, have asked this Court to stay these proceedings in light of the
 27 California Supreme Court's acceptance of the Ninth Circuit Court of Appeal's certified question
 28 in *Kleffman v. Vonage Holdings Corp.* ("Kleffman"), 551 F.3d 847 (9th Cir., 2008).

1 In his Opposition, Plaintiff Balsam does not dispute that resolution of the certified
2 question will have an effect on the outcome of this lawsuit, but instead focuses on the idea that it
3 will not be *dispositive*. Balsam argues that he has four theories of liability, and that no stay
4 should be imposed because the Supreme Court's decision on the *Kleffman* question will not
5 affect three of those theories. However, even if true, no matter how many theories of liability
6 Balsam comes up with, this does not change the fact that, as Balsam concedes in his Opposition,
7 a central issue is affected by the answer to the *Kleffman* question.

8 Balsam's argument that the answer to the *Kleffman* question does not matter is belied by
9 the allegations of his Complaint. Balsam repeatedly alleges that Trancos' use of multiple domain
10 names violates Business & Professions Code §17529.5. *See, e.g.*, Complaint ¶¶ 23, 24, 26, 33-
11 35, 38-45, 50-54, and, most specifically, 79-97 (37 paragraphs of his Complaint). Balsam does
12 not offer to drop the theory that is affected by *Kleffman*, or to strike related allegations from his
13 Complaint. He unquestionably intends to pursue the liability theory at trial, and thus presents
14 resolution of the issue touched by *Kleffman* as an important part of this case. There is no
15 authority for the proposition that a stay is inappropriate pending resolution by the Supreme Court
16 on a central issue just because other issues are presented in the case to be stayed.

17 Given the allegations of the Complaint and Defendants' arguments regarding the
18 preemptive effect of the CAN-SPAM Act, an efficient outcome to this litigation may not be had
19 while the state of the law on a central issue is in limbo. The Supreme Court's answer will
20 constitute precedential law on a fundamental issue in the lawsuit.¹ Indeed, our Supreme Court
21 may well delve into the issue of whether the elements of fraud must be alleged and proved in
22 order to meet the requirements of Business and Professions Code §17529.5. Thus, if Balsam's
23 allegations regarding Trancos' alleged use of multiple domain names is decided before the
24 Supreme Court answers the *Kleffman* question, this Court will be forced to guess as to what the
25 Supreme Court will say, and, if this Court answers differently than the Supreme Court, decisions
26

27
28 ¹ California Rule of Court, Rule 8.548 governs requests to the California Supreme Court to answer a question of California law. Rule 8.548(f)(7) provides that: "Supreme Court decisions pursuant to this rule are published in the Official Reports and have the same precedential effect as the court's other decisions."

1 in this Court will have to be revisited through any number of procedural mechanisms, including
2 appeals and remands. Thus, if this Court issues legal rulings or gives jury instructions prior to
3 the Supreme Court's *Kleffman* answer, duplicative trial and/or appellate proceedings are a
4 certainty. As a matter of judicial efficiency, and in the interests of justice, the only logical course
5 here is to wait until the *Kleffman* question is answered.

6 Balsam argues that "Defendants' profound misunderstanding of the 'big picture' with
7 regard to spam laws leaves them with no way to argue that a declaration of law by the Supreme
8 Court would necessarily alter a judgment in this Action." See Plaintiff's Opposition at p. 7.
9 Balsam consistently resorts to this kind of broad, inflammatory statement, but such statements
10 only highlight that he lacks any rational legal arguments. The fact is that in their Motion,
11 Defendants concisely and clearly explained how a resolution of the *Kleffman* decision would
12 likely impact the outcome of this case. The certified question in *Kleffman* is "Does sending
13 unsolicited commercial email advertisements from multiple domain names for the purpose of
14 bypassing spam filters constitute falsified, misrepresented, or forged header information under
15 Cal. Bus. & Prof. Code § 17529.5(a)(2)?"

16 In the instant case, Defendants argue that §17529.5 is preempted by the federal CAN-
17 SPAM Act, except to the extent that the California statute regulates fraudulent e-mail headers
18 and subject lines. Whether or not Trancos' header information was falsified, misrepresented or
19 forged within the meaning of §17529.5 is extremely likely, if not certainly, to be affected by the
20 California Supreme Court's answer to the certified question. Even likelihood is enough.

21 Balsam suggests that Defendants' failure to "hazard a guess about the likely outcome" in
22 *Kleffman* somehow means that the outcome will not affect this litigation. See Plaintiff's
23 Opposition at p.7. Incredibly, Balsam attempts to step into the shoes of the Supreme Court and
24 tell this Court what the Supreme Court will and will not do. That is not for him or any other
25 party to do here. In connection with the instant Motion, it is not Balsam's place to preemptively
26 decide what the Supreme Court will do, or to unilaterally determine how the issues presented in
27 the instant case will be decided, based only on his purported judicial analysis of the briefs in
28 *Kleffman*. Nor, for that matter, is it Defendants' function in the instant Motion to convince this

1 Court that *Kleffman* will be decided favorably to them.²

2 The role of this Court in deciding this Motion is to determine whether or not the Supreme
3 Court's answer to the *Kleffman* question potentially has enough of an impact on central, if not
4 sole, issues in this case, such that it serves the interests of justice to wait until the Supreme Court
5 has spoken. A cursory reading of the *Kleffman* question, particularly in light of the allegations of
6 the Complaint, leads inevitably to the answer. In the instant case, Balsam alleges that Business
7 & Professions Code §17529.5 exception to CAN-SPAM Act preemption applies without a
8 showing of actual fraud, and the Supreme Court's answer to the *Kleffman* question will answer
9 legal questions that are central to a proper application of that exception in this case.

10 Balsam further argues that this Motion should be denied because it was not filed earlier.
11 He makes much of the fact that this case was set for trial in June, and that the Motion was not
12 filed until after the trial was continued. This is true. However, Balsam cites no authority (and
13 moving Defendants have found none) to the effect that a Motion to Stay must be filed prior to an
14 original trial date, and fails to explain how a stay at this stage of the proceedings, approximately
15 two and a half months before the trial date, is different than if the proceedings had been stayed
16 earlier. In contrast, if the stay had been put in place earlier, the case would still be stayed, and no
17 October trial date would have been set; the case would still be pending. The timing of the stay
18 request has no impact on the propriety of imposing a stay.

19 Balsam's argument regarding "hardship" and "prejudice" is similarly unavailing. Balsam
20 states in his Opposition that moving Defendants "can hardly claim now that it would be a
21 hardship for them to go to trial on October 13." See Plaintiff's Opposition at p.6. But moving
22 Defendants do not assert "hardship." They assert efficiency, and interests of justice, both of
23 which would be served by waiting for the Supreme Court to answer the *Kleffman* question.

24 Balsam neither articulates how a stay would prejudice him, nor cites any supporting
25

26 ² Simultaneously with the instant Motion, Defendants have brought a Motion for Judgment on the Pleadings in
27 which they urge this Court to follow the reasoning expressed in *Omega World Travel, Inc. v. Mummagraphics, Inc.*,
28 469 F.3d 348, (4th Cir., November 17, 2006), and the District Court's decision in *Kleffman v. Vonage Holdings
Corp.*, 2007 WL 1518650 (C.D. Cal. May 23, 2007). Even in Defendants' Motion for Judgment on the Pleadings,
they do not express an opinion on what our Supreme Court will conclude with respect to the *Kleffman* question.
Neither Defendants nor Balsam is omniscient.

1 authority, likely because delaying proceedings pending the Supreme Court's resolution of a key
2 legal issue does *not* constitute prejudice. Even viewing the prejudice question most favorably to
3 Balsam, the only conceivable prejudice to him is that the *Kleffman* decision will be other than he
4 would wish, and that his desire for immediate income as a result of this case is thwarted. Neither
5 of these constitutes legal prejudice.

6 Balsam's arguments regarding hardship and prejudice should be outright dismissed
7 because there is no authority requiring a showing of hardship, or disproving prejudice, in
8 connection with a motion to stay brought, as here, on grounds of the pendency of the Supreme
9 Court's voice on a key legal issue. Because he has no applicable California authority, Balsam
10 resorts to citing federal authority, none of which is even remotely applicable to this Motion.

11 First, Balsam cites *Landis v. North Am. Co.*, 299 U.S. 248, 256, for the proposition that
12 the moving party "must make out a clear case of hardship or inequity in being required to go
13 forward." Plaintiff's Opposition at p. 6. *Landis* involved a challenge to the constitutionality of
14 the Public Utility Holding Company Act of 1935 before the District of Columbia district court in
15 the face of the same constitutional challenge pending in over 40 other civil cases being
16 prosecuted by completely separate and unrelated plaintiff utility companies throughout the
17 country. Thus, the stay question had everything to do with the avoidance of duplicative rulings,
18 and nothing to do with a trial court having the benefit of its own Supreme Court's view of
19 applicable law. Moreover, even if there were some arguable relevance to *Landis*, its hardship
20 requirement is not as represented by Balsam. Under Balsam's reading of *Landis*, a showing of
21 hardship would be required in every case because a stay will always delay a plaintiff's right to
22 relief. However, if that were true, the *Landis* Court would have had no reason to assert that
23 hardship must be shown only in cases in which there is a fair possibility of working damage to
24 someone else. *Landis*, 299 U.S. at 255.

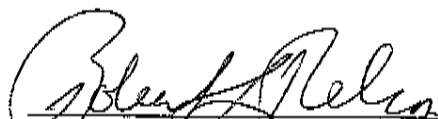
25 Second, Balsam relies on *Jonathan Club v. City of Los Angeles* ("*Jonathan Club*"), 680
26 F. Supp. 1405 (C.D. Cal. 1988), which is likewise inapplicable. In *Jonathan Club*, plaintiff
27 sought a stay of defendant's motion to dismiss or, in the alternative, for summary judgment
28 (brought on abstention grounds), based on a pending United States Supreme Court decision.

1 The court denied plaintiff's request, finding that resolution of the Supreme Court case would not
2 be of any assistance in resolving the pending motion, without explaining its reasoning. This is
3 not the case here. Thus, the *Jonathan Club* ruling is not useful to Plaintiff.

4 Third, the motion to stay in *McDonald v. Director, Office of Workers' Compensation*
5 *Programs*, 897 F.2d 1510 (9th Cir. 1990), a disability benefits case, was based on the pendency of
6 a rehearing in another case, and the defendant thought a decision in that case might affect his
7 case. *Id.* at 1513. The *McDonald* court rejected defendant's suggestion, indeed finding it
8 "peculiar" because the other pending case was plainly inapplicable. Like *Landis* and *Jonathan*
9 *Club*, *McDonald* sheds no light on the issue presented by the present Motion.

10 For the foregoing reasons, and those presented in the moving papers, Defendants
11 respectfully request that their Motion be granted.

12 Dated: July 31, 2009

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14 ROBERT L. NELSON,
15 Attorney for Defendants,
16 Trancos, Inc., Brian Nelson,
17 and Laure Majcherczyk