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21 Attorneys for Plaintiffs and Putative Class Members

17 **UNITED STATES DISTRICT COURT**
 18 **EASTERN DISTRICT OF CALIFORNIA**
 19 **SACRAMENTO DIVISION**

21 ROBIN PHILLIPS, individually and on behalf
 22 of all those similarly situated and on behalf of
 23 the general public,
 24 Plaintiffs,
 25 vs.
 26 180SOLUTIONS, INC. a Washington
 27 Corporation; METRICS DIRECT, KEITH
 28 SMITH, DANIEL TODD, KENNETH SMITH
 and DOES 1 through 50, Inclusive,
 Defendants.

Case No. 2:07-CV-01167-FCD-EFB

**JOINT STATUS REPORT BY PLAINTIFF
 ROBIN PHILLIPS AND DEFENDANTS
 ZANGO, INC., 180SOLUTIONS, INC. (n/k/a
 ZANGO, INC.), METRICSDIRECT (n/k/a
 ZANGO AD SERVICES), KEITH SMITH,
 DANIEL TODD AND KENNETH SMITH**

1 **JOINT STATUS REPORT**

2 Pursuant to the Court’s Order Requiring Joint Status Report dated June 15, 2007, plaintiff
3 Robin Phillips (“Plaintiff”) and defendants Zango, Inc., 180solutions, Inc. (n/k/a Zango, Inc.),
4 MetricsDirect (n/k/a Zango Ad Services), Keith Smith, Daniel Todd and Kenneth Smith
5 (“Defendants”), through their respective counsel, provide their Joint Status Report, as follows:

6 **I. BRIEF SUMMARY OF CLAIMS AND LEGAL THEORIES UNDER WHICH**
7 **RECOVERY IS SOUGHT OR LIABILITY IS DENIED.**

8 Plaintiff contends that Defendants have engaged in unlawful advertising, marketing and
9 distributing of software and other products through Defendants’ allegedly unlawful efforts to
10 covertly place software code onto the general public’s computers. Plaintiff further contends that
11 Defendants’ allegedly covert placement of software code affects computers by, among other things:
12 (a) redirecting home pages; (b) installing numerous advertising and other software programs; (c)
13 installing icons onto computer desktop screens, including some that are sexually explicit icons; (d)
14 installing tool bars in the browser window; (e) causing computer slow down; (f) causing computer
15 crashes; (g) causing loss of computer data; and (h) causing continuous pop-up advertisements.
16 Plaintiff contends that all of these alleged issues interfere with the use and enjoyment of the
17 computer.

18 Plaintiff seeks injunctive relief and compensatory and punitive damages based on the
19 following primary theories of liability: Invasion of privacy and the Right of Association, trespass to
20 chattels, interference with use and enjoyment of personal property; and nuisance, conversion, and
21 computer malfunction and destruction of personal property, in violation of California Civil Code
22 §1770 et seq. and California Business and Professions Codes §17200, 17500 and 22947.

23 Defendants contend that their business practices are lawful. Contrary to Plaintiff’s position,
24 Defendants do not covertly install software on anyone’s computer. Rather, Defendants make
25 valuable online entertainment content – such as videos, games and screensavers – available to the
26 public to enjoy, free of charge. In exchange for access to this free content, customers expressly and
27 consensually agree to download Defendants’ “ad-serving” software. The ad-serving software
28 delivers targeted advertisements for products and services that are likely to be of interest to a

1 particular customer based on what the customer is searching or shopping for online. If, at any time,
2 the customer decides he or she no longer wants to receive free access to Defendants' online content
3 (or the attendant advertising), the customer need only remove Defendants' ad-serving software using
4 the standard Add/Remove Programs function of the Windows operating system.

5 Defendants note that no specific actionable conduct is attributed to the individual defendants
6 apart from their association with the corporate defendants. Accordingly, the individual defendants
7 should never have been named as parties, and should be dismissed. Further consolidation of the
8 corporate entities is also appropriate and will be suggested in due course.

9 **II. STATUS OF SERVICE UPON ALL DEFENDANTS AND CROSS-DEFENDANTS.**

10 All Defendants have answered. No cross-complaint was filed.

11 **III. POSSIBLE JOINDER OF ADDITIONAL PARTIES.**

12 Neither party contemplates joinder of additional parties. Defendants request that a deadline
13 for the joinder of additional parties be set for a date prior to the deadline for Plaintiff to file any
14 Motion for Class Certification.

15 **IV. CONTEMPLATED AMENDMENTS TO THE PLEADINGS.**

16 Plaintiff does not expect to amend the complaint, but reserves the right to move for any
17 appropriate amendments that may become necessary in light of discovery or other further
18 developments in the case. Defendants request that a deadline for filing any motions seeking to
19 amend the pleadings be set for a date prior to the deadline for Plaintiff to file any Motion for Class
20 Certification.

21 **V. THE STATUTORY BASIS FOR JURISDICTION AND VENUE.**

22 Diversity jurisdiction exists pursuant to 28 U.S.C. § 1441(b). Venue is proper because
23 Plaintiff's original complaint was filed in, and removed from, the state court embraced by this
24 judicial district.

1 **VI. ANTICIPATED DISCOVERY AND SCHEDULING OF DISCOVERY.**

2 **A. What Changes Should Be Made In The Timing, Form Or Requirement For**
3 **Disclosures Under Rule 26(a).**

4 The parties do not seek any modification to the timing, form or requirement for disclosures
5 under Rule 26. The parties will exchange disclosures by August 31, 2007.

6 **B. Subjects On Which Discovery May Be Needed; When Discovery Should Be**
7 **Completed, And Whether Discovery Should Be Conducted In Phases.**

8 Although Defendants propose limiting discovery through requiring phases, plaintiff
9 vehemently objects to any limitation or intrusion upon plaintiff's right to discovery. Defendants
10 have no legal authority to support an order limiting plaintiff's discovery as proposed. . Any type of
11 phasing discovery will severely interfere overall with discovery and serve as an unnecessary
12 nuisance and unconstitutional denial of plaintiff's right to discovery.

13 Plaintiff asserts class allegations concerning Defendant's alleged covert download of
14 Defendants' software onto the general public's computers. Accordingly, in Defendants' view,
15 discovery will be needed on three discrete subjects and should be conducted in phases. First,
16 Defendants believe that discovery concerning Plaintiff's competence to be a class representative is
17 necessary. To address this issue, discovery is needed on the fundamental question of whether
18 Defendants' software currently resides (or has ever resided) on Plaintiff's computer(s). As a
19 practical matter, this will involve inspection and forensic imaging of Plaintiff's computer(s),
20 including any hard drive(s) and/or other electronic storage media. Any additional documents upon
21 which Plaintiff intends to rely upon in attempting to demonstrate that Defendants' software resides
22 or resided on Plaintiff's computer(s) must also be produced during this phase. Defendants urge that
23 the first phase of discovery be limited to discovery on this issue. Defendants recommend that this
24 phase should be limited to 60 days.

25 Defendants suggest that the second subject on which discovery will be needed is class
26 certification. Defendants propose that class certification discovery be conducted as a second phase
27 of discovery. Defendants propose that discovery be limited exclusively to class certification issues
28 for a minimum of 180 days, or until a class is certified, whichever comes first.

1 Defendants believe that the third subject on which discovery will be necessary is liability,
2 *i.e.*, whether Defendants have engaged in the conduct alleged in the complaint and denied in the
3 answer. Defendants propose that this phase be conducted only after class certification, if ever, and
4 proceed for a minimum of 120 days.

5 **C. What Changes Should Be Made In The Limitations On Discovery Imposed**
6 **Under The Civil Rules And What Other Limitations, If Any, Should Be**
7 **Imposed.**

8 Plaintiff vehemently objects to phasing or otherwise limiting plaintiff's right of discovery as
9 proposed by defendants.

10 The parties agree that the Civil Rules should not be modified. Defendants assert that no
11 other limitations, apart from phased discovery as set forth above, should be imposed. The parties
12 reserve their respective rights to seek appropriate relief as the case proceeds.

13 **D. The Timing Of Disclosure Of Expert Witnesses And Information Required By**
14 **Rule 26(a)(2).**

15 At this time, the parties do not see a need to modify the statutory timing for expert witness
16 disclosures.

17 **E. Proposed Dates For Discovery Cut-Off.**

18 The parties propose any date during the week of October 20, 2008 as a final discovery cut-
19 off, with intermittent deadlines set for each phase of discovery, if the Court adopts Defendants'
20 proposed procedure (*see* Section VI.B., above).

21 Plaintiff vehemently object to any limitation or phasing of discovery.
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1 **VII. CONTEMPLATED DISPOSITIVE MOTIONS AND PROPOSED DATE BY WHICH**
2 **ALL NON-DISCOVERY MOTIONS SHALL BE HEARD.**

3 Plaintiff contemplates filing a Motion for Temporary and Permanent Injunction enjoining the
4 practices complained of in her complaint. Plaintiff will also file a Motion for Class Certification as
5 soon as is practicable. Defendants contemplate filing motions for summary judgment. Defendants
6 propose that March 31, 2008 be set as the last day to hear a motion to amend the pleadings or to join
7 additional parties. Defendants propose that April 30, 2008 be set as the last date by which Plaintiff
8 must file any Motion for Class Certification, and that June 23, 2008 be set as the last day that a
9 Motion for Class Certification may be heard. The parties propose November 21, 2008 as the last
10 date to hear all other non-discovery motions.

11 **VIII. PROPOSED DATE FOR FINAL PRETRIAL CONFERENCE.**

12 The parties propose any date during the week of January 12, 2009 for the final pretrial
13 conference.

14 **IX. PROPOSED DATE FOR TRIAL, ESTIMATE OF DAYS OF TRIAL, AND**
15 **WHETHER ANY PARTY HAS DEMANDED A JURY.**

16 The parties propose any date during the week of January 26, 2009 for trial. Plaintiff
17 estimates six days for jury trial. Defendants estimate ten days if a jury trial, and eight days if the
18 case is tried to the Court. Plaintiff's complaint demands a jury. Defendants reserve any rights they
19 may have to seek to try this case, in whole or in part, to the Court.

20 **X. APPROPRIATENESS OF SPECIAL PROCEDURES SUCH AS REFERENCE TO A**
21 **SPECIAL MASTER OR AGREEMENT TO TRY THE MATTER BEFORE A**
22 **MAGISTRATE JUDGE PURSUANT TO 28 U.S.C. § 636(c).**

23 The parties respectfully decline to stipulate to trial by the Magistrate. Appointment of a
24 special master is premature at this time. Given the claims asserted and technical and evidentiary
25 issues involved, appointment of a special master may ultimately become warranted, depending on
26 the manner in which the case progresses. The parties reserve their respective rights to seek
27 appointment of a special master should the need arise.

28

1 **XI. PROPOSED MODIFICATION OF STANDARD PRETRIAL PROCEDURE**
2 **BECAUSE OF THE SIMPLICITY OR COMPLEXITY OF THE CASE.**

3 Although defendants claim this case has the potential for complexity, plaintiff believes the
4 case is straightforward, easily proven and through the court's entry of an injunction prohibiting
5 defendant's from, among other things, coverting downloading software and payment to plaintiff to
6 cover the expenses she has incurred to replace her computer that was damaged by defendants'
7 software, nothing more would be warranted in concluding the case. Complexity just does not exist.

8 As pled, this case has the potential to become highly complex. Defendants believe that, at
9 this stage, however, the proposed phased discovery procedure and schedule should preserve
10 manageability without the need for further modification of pretrial procedures at this time. If
11 modification becomes necessary, or if the Court does not adopt Defendants' proposal for phased
12 discovery, the parties will seek appropriate relief.

13 **XII. WHETHER THE CASE IS RELATED TO ANY OTHER CASE PENDING IN THIS**
14 **DISTRICT, INCLUDING THE BANKRUPTCY COURTS OF THIS DISTRICT.**

15 The parties are unaware of any related cases in this jurisdiction, although there have been
16 other cases against defendants with similar complaints as those stated in plaintiff's
17 complaint.

18 **XIII. THE PROSPECTS FOR SETTLEMENT, INCLUDING WHETHER A**
19 **SETTLEMENT CONFERENCE SHOULD BE SCHEDULED AND WHETHER, IN**
20 **THE CASE OF A JURY TRIAL, THE PARTIES WILL STIPULATE TO THE**
21 **TRIAL JUDGE ACTING AS SETTLEMENT JUDGE.**

22 At this stage in the proceedings, it does not appear that settlement is likely. However,
23 Defendants would participate in a settlement conference and would stipulate to the Court acting as
24 settlement judge.

25 **XIV. ANY OTHER MATTERS THAT MAY BE CONDUCIVE TO THE JUST AND**
26 **EXPEDITIOUS DISPOSITION OF THE CASE.**

27 In Defendants' view, the question of whether Defendants' software ever resided on
28 Plaintiff's computer is fundamental. Defendants believe that the phased discovery and proposed

1 discovery and trial schedule are absolutely necessary to the just and expeditious disposition of the
2 case.


3 In addition, as contemplated in Section VII, above, Defendants propose that the Court set a
4 deadline by which the parties must file any motion to amend the pleadings and/or join additional
5 parties, and that such date be as early in the litigation as possible, and certainly prior to the deadline
6 by which Plaintiff must seek Class Certification.

7 Plaintiff vehemently objects to the court limiting her right to discovery in any fashion. There
8 is no legal authority cited for defendant's request and in view of the plaintiff's right to discovery,
9 any limitation to discovery in phases or otherwise, would serve to impede upon plaintiff's
10 constitutional right to discovery.

11 Respectfully submitted,

12 Dated: August 15, 2007

KATTEN MUCHIN ROSENMAN LLP

13 By: 
14 _____
Gregory S. Korman

15 Attorneys for ZANGO, INC., 180SOLUTIONS, INC.
16 (n/k/a ZANGO, INC.), METRICSDIRECT (n/k/a
17 ZANGO AD SERVICES), KEITH SMITH, DANIEL
TODD and KENNETH SMITH

18 Dated: August 15, 2007

BRONSON & ASSOCIATES

19 By: /s/ Martha Bronson, Esq. _____
20 Martha Bronson, Esq. #133396

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My name and business address is Katten Muchin Rosenman LLP 2029 Century Park East, Suite 2600, Los Angeles, California 90067-3012. On **August 15, 2007**, I served the within document(s):

JOINT STATUS REPORT BY PLAINTIFF ROBIN PHILLIPS AND DEFENDANTS ZANGO, INC., 180SOLUTIONS, INC. (n/k/a ZANGO, INC.), METRICSDIRECT (n/k/a ZANGO AD SERVICES), KEITH SMITH, DANIEL TODD AND KENNETH SMITH

BY FACSIMILE: I sent such document from facsimile machine 310.788.4471 on 8/15/2007. I certify that said transmission was completed and that all pages were received and that a report was generated by facsimile machine 310.788.4471 which confirms said transmission and receipt. I, thereafter, mailed a copy to the interested party(ies) in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed to the parties listed below.

X BY U.S. MAIL: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, addressed as set forth below.

BY OVERNIGHT MAIL VIA FEDERAL EXPRESS: by placing the document(s) listed above in a sealed FEDEX envelope and affixing a pre-paid air bill and causing the envelope to be delivered to a **FEDERAL EXPRESS** agent for delivery to the person(s) at the address(es) set forth below.

Martha Bronson, Esq.
BRONSON & ASSOCIATES
Attorneys At Law
15 West 8th Street
Suite A
Tracy, CA 95376
**ATTORNEY FOR PLAINTIFF AND
PUNITIVE CLASS MEMBERS**

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day

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1 with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of
2 the party served, service is presumed invalid if postal cancellation date or postage meter date is more
3 than on day after the date of deposit for mailing in affidavit.

4 I declare under penalty of perjury under the laws of the United States that the above is true
5 and correct.

6 Executed on August 15, 2007, at Los Angeles, California.

7 CRYSTAL MCCABEY
8 PRINT NAME


SIGNATURE

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