

1 **Deborah Bailey-Wells (114630)**  
 2 **Kevin C. Trock (161787)**  
 3 **Harold H. Davis, Jr. (235552)**  
**KIRKPATRICK & LOCKHART NICHOLSON GRAHAM LLP**  
 4 Four Embarcadero Center, 10<sup>th</sup> Floor  
 San Francisco, CA 94111  
 Telephone (415) 249-1000  
 5 Fax: (415) 249-1001  
 6 [dbaileywells@klnq.com](mailto:dbaileywells@klnq.com)  
 7 [ktrock@klnq.com](mailto:ktrock@klnq.com)  
[hdavis@klnq.com](mailto:hdavis@klnq.com)

8 Attorneys for HELIO LLC

9 UNITED STATES DISTRICT COURT FOR THE  
 10 NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

12 HELIO LLC,

13 Plaintiff,

14 vs.

16 PALM INC.,

17 Defendant.

Case No. \_\_\_\_\_

**PLAINTIFF HELIO LLC'S APPLICATION  
 FOR TEMPORARY RESTRAINING  
 ORDER AND FOR ORDER TO SHOW  
 CAUSE WHY A PRELIMINARY  
 INJUNCTION SHOULD NOT ISSUE;  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT**

Date Filed: December 19, 2006

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1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on December 19, 2006 or as soon thereafter as counsel  
3 may be heard, in the United States District Court for the Northern District of California, 450  
4 Golden Gate Avenue, San Francisco, CA 94102, before a U.S. District Court judge to be  
5 announced by the Court, Plaintiff Helio LLC ("Helio") will apply for a temporary restraining  
6 order and order to show cause why a preliminary injunction should not issue pursuant to  
7 Fed. R. Civ. P. 65 and Local Rule 65-1. Notice of Helio's Application was delivered to Palm,  
8 Inc. on December 19, 2006.

9 Specifically, Plaintiff Helio moves this Court for a temporary restraining order  
10 immediately restraining Defendant Palm Inc. ("Palm") and its agents, servants, employees,  
11 attorneys and all persons in active concern and participation with Defendant Palm, from  
12 using Palm's "NOT JUST A CELL PHONE" advertising and any other advertising  
13 confusingly similar to Helio's DON'T CALL IT A PHONE and DON'T CALL US A PHONE  
14 COMPANY marks (1) in connection with Palm's sale of mobile media devices and service  
15 including, without limitation, mobile telephones; and (2) in any print, billboard, television,  
16 radio, broadcast, direct marketing, internet advertising or other advertising or marketing  
17 media related to Palm's "NOT JUST A CELL PHONE" campaign.

18 Helio moves that this restraining order stay in effect pending a hearing and  
19 determination of Helio's motion for a preliminary injunction, on the grounds that immediate  
20 and irreparable injury, loss and damage will result to Helio before notice can be given and  
21 Defendant Palm and its attorneys can be heard in opposition, as is more fully argued below,  
22 and the Declarations of Jessica Weeks and Kathryn Wheble submitted herewith. Palm  
23 intends to use and is using the "NOT JUST A CELL PHONE" slogan as a prominent tagline  
24 in the centerpiece of its recently launched \$25 million advertising campaign which is  
25 confusingly similar to Helio's DON'T CALL IT A PHONE and DON'T CALL US A PHONE  
26 COMPANY marks.



1 Helio further moves for leave to take expedited discovery after entry of the  
2 Temporary Restraining Order including a) taking the deposition of Palm, Inc. and up to two  
3 employees thereof, as to its intent in using marks confusingly similar to Helio's DON'T CALL  
4 IT A PHONE mark, the goodwill in Palm's marks, and any evidence of actual, likely or  
5 possible confusion that has arisen therefrom, or any anticipation of such confusion; b)  
6 requesting the production of documents from Palm relating to its intent in using marks  
7 confusingly similar to Helio's DON'T CALL IT A PHONE mark, the goodwill in Palm's marks,  
8 and any evidence of actual, likely or possible confusion that has arisen therefrom, or any  
9 anticipation of such confusion and c) subpoenaing the deposition and documents from  
10 Palm's advertising agencies or companies relating to its knowledge of Helio's DON'T CALL  
11 IT A PHONE marks and any intent to infringe these marks by creating a likelihood of  
12 confusion in creating Palm's infringing, holiday advertising campaign.

13 Helio further moves the court for an expedited time period for this discovery so that  
14 thirty-six (36) hours notice shall be deemed sufficient for any deposition provided by the  
15 order and forty-eight (48) hours notice shall be deemed sufficient for the production of any  
16 such documents.

17 This Application is based on this Application, the attached Memorandum of Points  
18 and Authorities, the attached Declarations of Jessica Weeks and Kathryn Wheble filed  
19 separately, the Proposed Temporary Restraining Order, all pleadings, records and files in  
20 this action, and upon all other matters that may be presented at the hearing on this  
21 Application.



1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Overview**

3 Palm's just launched holiday advertising campaign promoting its Treo mobile media  
4 devices as "NOT JUST A CELL PHONE" is an unmistakable example of infringement of  
5 Helio's intellectual property including its DON'T CALL IT A PHONE trademarks. Not only  
6 has Palm publicly recognized the substantial similarity between its new campaign and  
7 Helio's prior used DON'T CALL IT A PHONE marks, Palm has put up nearly \$25 million  
8 dollars in its most "significant marketing efforts" to date to place advertisements in the very  
9 same magazines and advertising channels that Helio's DON'T CALL IT A PHONE  
10 advertising appears. Palm's advertising campaign seeks to take advantage of the goodwill  
11 that Helio established through great expenditure and effort. Thus, Palm's actions will likely  
12 cause confusion, mistake or deceive consumers into believe that there is some affiliation,  
13 connection, association, origin, sponsorship or approval with respect to Palm's and Helio's  
14 products and services.

15 Moreover, Palm has intentionally timed its scheme to trade on Helio's established  
16 goodwill during the "peak" holiday shopping season. The fact that Helio sold Palm's Treo  
17 phones, and that it provides services to Treo users, further compounds the likelihood that  
18 the relevant public will be confused by Palm's advertising campaign because the messages  
19 of the parties' slogans are identical and the wording and consumer impression are  
20 confusingly similar.

21 The timing, size, and design of Palm's advertising campaign to piggy-back on Helio's  
22 trademarks and goodwill associated therein make time of the essence and render this case  
23 ripe for a temporary restraining order to preserve the status quo between the parties. Thus,  
24 the Court should enter a temporary restraining order and an order to show cause why a  
25 preliminary injunction should not issue which prohibits Palm from using the "NOT JUST A  
26 CELL PHONE" advertising and other confusingly similar infringements of Helio's DON'T  
27 CALL IT A PHONE marks.

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**II. FACTUAL BACKGROUND**

**A. Helio Has Exclusive Rights in its DON'T CALL IT A PHONE Marks**

Helio is a Mobile Virtual Network Operator ("MVNO") that provides wireless communication products and network services to consumers. Declaration of Jessica Weeks in Support of Application for a Temporary Restraining Order ("Weeks Decl.") ¶ 2. In part, Helio combines wireless telephone, audio, video, data, GPS and Internet innovation with noteworthy service and support designed to deliver a breakthrough mobile experience for consumers. *Id.* As an MVNO, Helio offers its wireless services under its own brand name but procures these wireless network services from large network providers such as Sprint Nextel Corporation and Verizon Wireless. *Id.* Helio currently offers for sale three different mobile media devices that utilize its wireless services for sale to consumers which are known as the KICKFLIP<sup>tm</sup>, the HERO<sup>tm</sup>, and the DRIFT<sup>tm</sup>. *Id.* at ¶ 3.<sup>1</sup> Helio also offered for sale Treo smartphones until August 2006. *Id.* at ¶ 35. As of November 30, 2006, Palm Treo devices represented approximately 10% of Helio's paid subscriber base. *Id.*

Helio was started in January 2005 as a joint venture between Earthlink, Inc., a US internet service provider, and SK Telecom Co., Ltd., a Korean telecommunications and mobile phone operator. Weeks Decl. ¶ 3. From its inception, Helio developed a new marketing strategy to directly target technology-savvy consumers who were interested in more than standard wireless telephone service. *Id.* ¶¶ 4-9. The main goal of Helio's new marketing and branding strategy was to differentiate and distinguish Helio from other major US wireless carriers in that it offered the latest in cutting-edge handset technology and services. *Id.*

Based on this marketing strategy, Helio engaged IPG/Deutsch LA, a well respected Los Angeles-based advertising agency to manage the company's debut to the mobile telecommunications marketplace. Weeks Decl. ¶¶ 5-6. Helio ultimately developed a branding strategy that would inform consumers about the highly demanded, multiple non-

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<sup>1</sup> More information and display of Helio's brand can be found at [www.helio.com](http://www.helio.com).

1 cellular phone functions that Helio branded devices offered, including GPS capabilities, full-  
2 motion video streaming, portable music functions (similar to devices such as Apple's iPod),  
3 direct access to MySpace (the largest internet social networking site), peer-to-peer location  
4 services using advanced satellite technology, and a camera/video camera. Id.

5 Helio officially launched its branding campaign in May 2006 when Helio used the  
6 slogans "DON'T CALL IT A PHONE" and "DON'T CALL US A PHONE COMPANY" in  
7 commerce on such internet sites as MySpace.com and Yahoo.com. Weeks Decl. ¶ 9;  
8 Declaration of Kathryn Wheble ("Wheble Decl.") ¶¶ 4-13 (Exhibits A-B). This branding  
9 initiative expanded to more traditional media such as magazines, newspapers, radio and  
10 television advertising in the weeks that followed. Weeks Decl. ¶¶ 9-13. Print  
11 advertisements have been featured in many of the most widely distributed US magazines  
12 including Rolling Stone, GQ, Wired, Details, Spin and Lucky among many others. Id. Major  
13 broadcast and cable television stations have run three different television advertisements  
14 which all prominently use Helio's marks DON'T CALL IT A PHONE and DON'T CALL US A  
15 PHONE COMPANY. Id. These television commercials have appeared hundreds of times  
16 on ESPN, MTV, VH-1, Comedy Central, BET, E! Entertainment Television, Cartoon  
17 Network, and Spike TV.<sup>2</sup> Id.

18 Helio has also featured its DON'T CALL IT A PHONE marks in online campaigns on  
19 such websites as AOL, YAHOO!, GOOGLE, MYSPACE, CNET, IDG ENTERTAINMENT,  
20 MSN.COM, MTV.COM, and PLANETOUT, among others. Weeks Decl. ¶ 10.

21 Further, local media outlets such as San Francisco's "Live 105" radio station (KITS  
22 105.3 MHz) have broadcast Helio advertisements using Helio's marks DON'T CALL IT A  
23 PHONE and DON'T CALL US A PHONE COMPANY. Weeks Decl. ¶ 12.

24  
25  
26 <sup>2</sup> These commercials include (1) "Meet The Parents" (viewable at  
27 <http://www.youtube.com/watch?v=dwQkU7jLXRY>); (2) "Frenchie" (viewable at  
28 <http://www.youtube.com/watch?v=o5ed2F4bFsw&mode=related&search=>); and (3) "Scuba" (viewable at  
<http://www.youtube.com/watch?v=YZES-rix6yM&mode=related&search=>), which are all available to be seen  
over the Internet on various sites including [www.youtube.com](http://www.youtube.com).

1 Helio has also sponsored special events that incorporate the DON'T CALL IT A  
2 PHONE marks. Weeks Decl. ¶¶ 15-18. These include many widely attended parties at  
3 fashionable nightlife establishments in Los Angeles, San Francisco, Dallas, Chicago,  
4 Boston, Philadelphia, Washington DC, New York, Miami and Atlanta. Id. Thousands of  
5 influential trendsetters (including celebrities such as Justin Timberlake and Cameron Diaz)  
6 attended these parties where Helio distributed branded material that included the "DON'T  
7 CALL IT A PHONE" marks. Id.

8 Helio branded devices and service are offered for sale at thousands of retail  
9 establishments throughout the country. Weeks Decl. ¶ 12. Helio has also opened its own  
10 branded retail stores to distribute Helio products and services in Santa Monica, San Diego  
11 and Palo Alto, California. Id. at ¶ 12. Helio will be opening new stores in Denver and New  
12 York, and has plans to open stores in Miami, Chicago, Boston, Dallas, Seattle, and Atlanta.  
13 Id. Helio's "DON'T CALL IT A PHONE" marks appear on screen savers on in-store  
14 computers, on signage in the store, and on the uniforms worn by store employees. Id.

15 Helio has spent over \$30 million to establish the HELIO brand, with the prominent  
16 use of the "DON'T CALL IT A PHONE" and "DON'T CALL US A PHONE COMPANY" marks  
17 representing over 85% of such spending. Weeks Decl. ¶ 14. Most, if not all, Helio branded  
18 consumer media advertising features Helio's "DON'T CALL IT A PHONE" marks. Id.

19 Helio's broad-based use and promotion of its slogans "DON'T CALL IT A PHONE"  
20 and "DON'T CALL US A PHONE COMPANY" are the subject of Helio-owned federal  
21 trademark applications U.S. Ser. Nos. 78735805, 78735810 and 78735812 (for the slogan  
22 DON'T CALL IT A PHONE) and U.S. Ser. Nos. 78735814, 78735817 and 78735819 (for the  
23 slogan DON'T CALL US A PHONE COMPANY) for use with computer software programs,  
24 communication services, and audio-video broadcasting via wireless communication  
25 networks, among other things (collectively the "DON'T CALL IT A PHONE" marks). The  
26 applications were filed on October 18, 2005 under 15 U.S.C. §1051(b) with a first use date  
27 on May 2, 2006. Wheble Decl. ¶¶ 11-13. Notices of Allowance have been issued for  
28

1 Application Ser. Nos. 78735805 and 78735812 and statements of use are being filed this  
2 week. Id. at ¶ 6

3 “To establish ownership of a mark, the prior user must establish not only that at  
4 some date in the past it used the mark, but that such use has continued to the present.”  
5 Thomas McCarthy, McCarthy on Trademarks § 16:9 (2005); *Chance v. Pac-Tel Teletrac Inc.*  
6 242 F.3d 1151, 1158 (9<sup>th</sup> Cir. 2001) (“evidence showing, first, adoption, and second, use in  
7 a way sufficiently public to identify or distinguish the marked goods in an appropriate  
8 segment of the public mind as those of the adopter of the mark is competent to establish  
9 ownership, even without evidence of actual sales.”); Honor Plastic Indus., Co., Ltd. v.  
10 Lollicup USA, Inc., No. Civ-F-06-0707, 2006 WL 3199143, \*5 (E.D. Cal. Nov. 3, 2006) citing  
11 Sengoku Works v. RMC Int’l, 96 F.3d 1217, 1219. (“[O]nce an application for trademark is  
12 granted that party is presumed to have established ownership of the mark as of the filing  
13 date of the application.”). Consequently, Helio now has exclusive rights to the DON’T CALL  
14 IT A PHONE marks.

15 **B. Helio’s DON’T CALL IT A PHONE Marks Are Distinctive And Have Obtained**  
16 **Consumer Recognition**

17 Since the development of its DON’T CALL IT A PHONE branding campaign  
18 beginning in 2005 and first use in May 2006, Helio has consistently used the DON’T CALL  
19 IT A PHONE marks in the marketing, advertising, sale, and distribution of their mobile media  
20 devices throughout the United States with respect to its Helio brand. Weeks Decl. ¶ 21.

21 As a result of Helio’s extensive use of its DON’T CALL IT A PHONE marks in its  
22 national media campaign, Helio has built up valuable recognition among consumers that  
23 associate the DON’T CALL IT A PHONE marks with Helio, and Helio owns the valuable  
24 consumer goodwill that is associated with the DON’T CALL IT A PHONE marks. See  
25 Weeks Decl. ¶ 21. The internet’s largest social networking site, MySpace, lists Helio as  
26 having over 180,000 linked “friends,” many of which have posted comments recognizing  
27 and approving of Helio’s DON’T CALL IT A PHONE marks. Weeks Decl. ¶ 20, Ex. G  
28 (MySpace page showing over 180,000 “friends”). In fact, the largest free internet



1 encyclopedia, Wikipedia, recognizes Helio's DON'T CALL IT A PHONE marks as a key  
2 identifier for Helio. See <http://en.wikipedia.org/wiki/helio>.

3 To confirm the effectiveness of its DON'T CALL IT A PHONE marks, Helio  
4 commissioned a brand equity study of over 1,900 individuals. Weeks Decl. ¶ 19. Of those  
5 surveyed, approximately sixty-one (61%) correctly attributed the DON'T CALL IT A PHONE  
6 to Helio. Id. When asked to state in their own words what the key message is for Helio  
7 devices, a substantial percentage of individuals responded "it's not just a phone." Id.

8 Further, the PTO has not determined that any of Helio's DON'T CALL IT A PHONE  
9 marks are not distinctive and no examiner has required any limitation or required a showing  
10 of consumer recognition of the marks during prosecution of Helio's trademark applications.  
11 Wheble Decl. ¶¶ 5-10.

12 Consequently, the DON'T CALL IT A PHONE marks are distinctive and have  
13 developed substantial consumer recognition among members of the public.

14 **C. PALM Recently Launched An Extensive, Infringing Advertising Campaign**

15 Palm Inc. is a publicly traded personal digital assistant manufacturer based in  
16 Sunnyvale, California. Wheble Decl. Exhibit D (March 27, 2006 Press Release). Founded  
17 in 1992, Palm Inc. has developed into one of the leading manufacturers personal digital  
18 devices. Id. and [http://en.wikipedia.org/wiki/Palm%2C\\_Inc](http://en.wikipedia.org/wiki/Palm%2C_Inc). Palm, Inc. is now a subsidiary  
19 of 3Com, a publicly traded computer networks company. Id. On November 24, 2003, Palm  
20 launched its Treo 600 series of smartphones. See Exhibit E to Wheble Decl. Palm touted  
21 these devices as a "full-featured mobile phone and Palm OS organizer with wireless  
22 communication applications, such as email, messaging and web browsing, and even a  
23 digital camera." Id.

24 Three years after its initial launch of this cell phone line, and months after Helio's  
25 well-recognized and well-received DON'T CALL IT A PHONE branding initiative, Palm  
26 embarked on an entirely new advertising campaign. On December 11, 2006, Palm  
27 announced that it was launching a \$25 million campaign to promote its newest phone in the  
28 Treo 600 line, the Treo 680, using the "the **category-defining** tagline '**Not just a cell**