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7 RE/MAX Marquee Partners, Inc. (formerly CF Real Estate Loans, Inc.)

8  
9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**  
11 **SOUTHERN DIVISION**

12  
13 ALL CITIES REALTY, INC., a  
California Corporation,

14 Plaintiff,

15 v.

16 CF REAL ESTATE LOANS, INC., a  
17 California Corporation, Doing  
Business As RE/MAX ALL CITIES  
18 REALTY, AND DOES 1 TO 20,

19 Defendant.  
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) Case No. SACV05-615 AHS (MLGx)

) **EX PARTE APPLICATION TO  
CONTINUE TRIAL DATE TO  
OCTOBER 13, 2009, OR IN THE  
ALTERNATIVE, REQUEST FOR  
LEAVE TO CONDUCT TRIAL  
DEPOSITION**

) [Declarations of David B. Sandelands and  
Jill M. Pietrini filed concurrently  
herewith]

) [Proposed Order filed concurrently  
herewith]

1 **TO THE COURT, ALL PARTIES, AND ALL COUNSEL OF RECORD:**

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3 Pursuant to Local Rule 7-19 and the Court's inherent power to control its  
4 docket, Defendant RE/MAX Marquee Partners, Inc. (formerly CF Real Estate  
5 Loans, Inc.) will and hereby does apply *ex parte* for an order continuing trial in  
6 this action from September 15, 2009 to October 13, 2009, or in the alternative  
7 for leave to conduct a trial deposition.

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**I.**

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**SPECIFIC RELIEF SOUGHT**

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RMP seeks to have trial in this action continued by four weeks to October  
13, 2009 or to such other date as may be convenient for the Court, or in the  
alternative, leave to conduct a trial deposition of its trademark expert who is  
unavailable for trial from September 11<sup>th</sup> through October 4<sup>th</sup>, 2009.

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**II.**

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**NOTICE OF APPLICATION**

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Defendant brings this request on an *ex parte* basis because trial in this  
action is fast approaching and because Plaintiff's counsel has failed to  
substantively respond to Defendant's counsel's four requests that Plaintiff's  
counsel state whether Plaintiff will oppose this motion and whether Plaintiff  
would agree to waive the 20 day meet and confer requirement for filing a  
regularly noticed motion and thereby alleviate the need to bring this motion on an  
*ex parte* basis. (See Sandelands Decl. Exh. ¶¶4-8, Exhs. C, D, E, F and G.)

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1 **MEMORANDUM**

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3 **III.**

4 **THIS COURT HAS THE INHERENT AUTHORITY AND DISCRETION**  
5 **TO GRANT THE REQUESTED RELIEF**

6 It is well established that the Court has the inherent authority to schedule  
7 trial and other case proceedings in its discretion to manage its docket. *See*  
8 *Southern California Edison Co. v. Lynch*, 307 F.3d 794, 807 (9<sup>th</sup> Cir. 2002)  
9 (“District courts have inherent power to control their dockets. . . . Our review  
10 of such decisions is deferential; we will reverse a district court’s litigation  
11 management decisions only if it abused its discretion ....”) Accordingly, this  
12 Court is authorized to grant the requested extension.

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14 **IV.**

15 **GROUND FOR SEEKING RELIEF**

16 RMP seeks the aforementioned brief continuance of the trial on the  
17 following grounds:

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19 (1) On February 25, 2009, the Court continued trial in this action to  
20 September 15, 2009. (Docket Entry No. 233.)

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22 (2) The next day, on February 26, 2009, RMP’s counsel sent a letter to  
23 RMP’s trademark expert, Ms. Jill Pietrini, Esq., advising that trial in this action  
24 had been continued to September 15, 2009. (Sandelands Decl. Exh. ¶2, Exh. A.)  
25 Ms. Pietrini received this letter and made a note to advise RMP’s counsel that the  
26 new trial date conflicted with a previously planned vacation, but due to the press  
27 of business, inadvertently forgot to notify RMP’s counsel of the conflict. (Pietrini  
28 Decl. ¶2.)

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2 (3) On July 20, 2009, Ms. Pietrini sent RMP's counsel an email advising  
3 that she would be out of the country from September 11, 2009 through October 4,  
4 2009. (Sandelands Decl. ¶3, Exh. B; Pietrini Decl. ¶3.) Ms. Pietrini's email of  
5 July 20, 2009, was the first time RMP and its counsel learned of Ms. Pietrini's  
6 unavailability for trial during the period of September 11<sup>th</sup> through October 4<sup>th</sup>,  
7 2009. (Sandelands Decl. ¶3.)

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9 (4) Well before the Court's continuing the start of trial on February 25,  
10 2009, Ms. Pietrini had scheduled a vacation for the weeks of September 11<sup>th</sup>  
11 through October 4<sup>th</sup>, 2009. (Pietrini Decl. ¶¶2, 4.) This trip is of particular  
12 importance to Ms. Pietrini because she and her husband will be visiting their  
13 respective families in Italy. Some of their family members are of advanced age,  
14 i.e. are in their mid-80s, and some they will be meeting for the first time.  
15 (Pietrini Decl. ¶4.)

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17 (5) At this time, the majority of the costs of Ms. Pietrini's trip have been  
18 prepaid. (Pietrini Decl. ¶4.) Ms. Pietrini cannot now cancel her vacation without  
19 losing the majority of the expenses she has paid in advance. (Pietrini Decl. ¶4.)

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21 (6) Ms. Pietrini's live witness testimony is required at trial to explain  
22 complex concepts of trademark law including at least the following: What is  
23 secondary meaning and how does a mark acquire it? What is likelihood of  
24 confusion and how is it determined? What is a trademark registration? How are  
25 trademark registrations acquired and what rights are afforded to a registrant?  
26 How do the rights change over time (i.e. contestable versus incontestable marks)?  
27 Etc.

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1 (7) Ms. Pietrini's live witness testimony is also required at trial to rebut  
2 the opinions as to the ultimate issue of likelihood of consumer confusion which  
3 are expected to be nakedly proffered by Plaintiff's trademark expert, Ms. Lisa  
4 Kaufman. In particular, Ms. Kaufman is expected to opine that: (1) RMP's (now  
5 long abandoned) former trade name caused a likelihood of consumer confusion  
6 with Plaintiff's mark and thus infringed that mark; and, (2) had RMP sought to  
7 register the name RE/MAX All Cities Realty, the mark would have been rejected  
8 by the Trademark Office for likelihood of consumer confusion with Plaintiff's  
9 mark.<sup>1</sup> (Sandelands Decl. ¶9, Exh. H, (Kaufman Expert Declaration), ¶¶23 and  
10 24.)

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12 (8) As demonstrated by her expert report, Ms. Kaufman's opinions are  
13 unsupported by the application of any methodology to the facts of the case, which  
14 Ms. Kaufman failed to investigate. Ms. Kaufman's opinions are based upon  
15 nothing more than her experience as a trademark attorney and early experience as  
16 an examiner in the trademark office, and therein lies the danger. In view of her  
17 perceived status as an "expert," and in the absence of live rebuttal testimony, a  
18 jury is likely to substitute their judgment on the ultimate issue of likelihood of  
19 consumer confusion for Ms. Kaufman's supposed "expert" opinion on this  
20 ultimate issue. To avoid such undue prejudice to RMP, Ms. Pietrini's live  
21 witness testimony is required to rebut Ms. Kaufman's unsupported opinions. (For  
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23 <sup>1</sup> As explained in detail in RMP's Motion in Limine No. 4 (Docket Entry  
24 No. 100), Ms. Kaufman's testimony does not comport with either *Daubert* or  
25 Rule of Evidence 702 and hence should be excluded as unreliable testimony and  
26 unduly prejudicial. RMP's Motion in Limine No. 4 is presently awaiting decision  
27 by the Court. To the extent, the Court allows Ms. Kaufman to proffer these  
28 naked opinions (which RMP respectfully asserts the Court should not), Ms.  
Pietrini's testimony is crucial to explaining to the jury why Ms. Kaufman's  
opinions are unreliable and should not be credited.

1 the Court's reference, Ms. Pietrini's rebuttal expert report which discusses the  
2 serious flaws of Ms. Kaufman's expected testimony is attached to the Sandelands  
3 Declaration as Exhibit I.)

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5 **V.**

6 **RMP HAS SHOWN GOOD CAUSE FOR GRANTING THE REQUESTED**  
7 **RELIEF**

8 Good cause exists to grant the requested relief because the unavailability of  
9 Ms. Pietrini to testify at trial is not within RMP's ability to control and moreover  
10 is not the result of any action or lack of action on the part of RMP. (See Pietrini  
11 Decl. ¶¶2-3.) Thus, good cause exists to move the trial date by four weeks to  
12 allow RMP's trademark expert, Ms. Pietrini, to testify.

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14 **VI.**

15 **PLAINTIFF WILL INCUR NO PREJUDICE**  
16 **BY A BRIEF CONTINUANCE**

17 Plaintiff will incur no prejudice by a four week delay of the start of trial  
18 because RMP abandoned all commercial use of the allegedly infringing trade  
19 name in November of 2007. Therefore, there is no possibility of ongoing injury  
20 due to the alleged infringement. (Defendant notes that Plaintiff may assert that  
21 commercial usage of the now defunct allegedly infringing trade name continued  
22 after November of 2007 because in early 2008, nonparty to this lawsuit  
23 Commbroker, Inc., then on the verge of bankruptcy, had a website that bore in  
24 small print at the bottom of its web pages the line "Copyright Re/Max All Cities  
25 Realty." Upon being notified by Plaintiff of this remnant, noncommercial, usage,  
26 nonparty Commbroker, Inc. promptly took down the website. Plaintiff has not  
27 brought to RMP's attention any other instances of alleged continued use,  
28 commercial or otherwise, of RMP's former trade name.

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**VII.**  
**CONCLUSION**

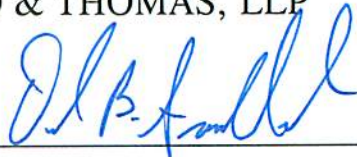
For the foregoing reasons, RMP respectfully requests that the Court continue the start of trial to October 13, 2009, or as soon thereafter as may be convenient for the Court. In the alternative, RMP requests that the Court grant RMP leave to conduct a deposition of Ms. Pietrini for the purpose of having Ms. Pietrini's expected testimony read into the record at trial.

DATED: July 31, 2009

Respectfully submitted,

CISLO & THOMAS, LLP

By: \_\_\_\_\_



David B. Sandelands  
Peter S. Veregge  
Attorneys for Defendant RE/MAX Marquee  
Partners, Inc. (formerly CF Real Estate  
Loans, Inc.)