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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

HYPER TOUCH, INC, a California corporation,

Plaintiff,

vs.

AZOGLE.COM, INC., *et al.*,

Defendants.

Case No. CV-08-03739 GHK

**AZOGLE.COM, INC.'S
RESPONSE TO ORDER TO
SHOW CAUSE**

INTRODUCTION

1
2 Plaintiff, Hypertouch, Inc.’s (“Hypertouch”) initial complaint named two
3 sham defendants, *i.e.* Intuit, Inc. (“Intuit”) and Rock Holdings, Inc. (“Rock
4 Holdings”), for the dual purposes of attempting to destroy diversity
5 jurisdiction and providing an ostensible basis for venue in Southern
6 California. Defendants Azoogie.com, Inc. (“Azoogie”), Quicken Loans, Inc.
7 (“Quicken Loans”), and Intuit removed this action on the basis of fraudulent
8 joinder (Rock Holdings had not been properly served). Azoogie thereafter
9 informed Hypertouch of its intention to raise the venue issue in the context
10 of Azoogie’s motion to dismiss. Seeing the writing on the wall, Hypertouch
11 dismissed Intuit and agreed to cooperate in a change of venue, but not until
12 it was permitted to amend its complaint. That amendment, filed on July
13 3, 2008, also dropped defendant Rock Holdings, but added a third
14 defendant, SubscriberBase, Inc. (“SubscriberBase”), which has yet to
15 appear or even to be served.

16 On June 27, 2008, in the interim between when Hypertouch agreed to
17 cooperate in a change of venue and when Hypertouch filed its amended
18 complaint, the Court ordered the named defendants to show cause as to
19 why this action should not be remanded. The Court adopted a five-state,
20 three-part test to evaluate an entity’s citizenship for purposes of assessing
21 diversity. That test, however, required all named defendants to publicly file
22 with the Court a significant amount of confidential information, which
23 information—at least in the case of Azoogie—was not kept in the ordinary
24 course of business and would need to be manually compiled. The test
25 proffered by the Court also contained apparent ambiguities, in particular as
26 to the geographic origins of the defendants’ income, making it difficult for
27 Azoogie to provide a full and complete response. Nonetheless, in the nine
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1 days between the electronic service of the Court’s order and the filing of
2 this response, Azoogole researched the Court’s inquiries to the best of its
3 ability and responded.¹ As shown by Azoogole’s response, and the
4 concurrently filed response of Quicken Loans, the Court has diversity
5 jurisdiction over this matter under 28 U.S.C. §§1332 and 1441.

6 In the event the Court finds that it lacks subject matter jurisdiction
7 over this action, the proper remedy would be dismissal and not remand.
8 The operative First Amended Complaint (“FAC”) was initially filed with this
9 Court and wholly superseded any prior complaint filed in state court. The
10 Court cannot remand to a state court a complaint the state court has never
11 seen, and that has not been filed in accordance with that state’s
12 procedures. (Absent diversity jurisdiction, this Court cannot take any action
13 affecting the merits of this case). *See Libhart v. Santa Monica Dairy Co.*,
14 592 F.2d 1062, 1065 (9th Cir. 1979) (where complaint filed in state court
15 action that was later removed to federal court failed to state a federal
16 question, “no federal jurisdiction existed to entertain a later amendment to
17 the complaint”). Furthermore, and perhaps most importantly, venue as to
18 this action is improper in this or any court located in Southern California,
19 given that all witnesses, parties, and evidence relating to this action
20 (including Hypertouch and its servers and personnel) are located in
21 Northern California or elsewhere in this country or world. In fact, the FAC
22 does not even mention Hypertouch’s supposed bases for its choice of
23 venue. The simple truth is that this Court was selected in the course of
24 forum shopping. To the extent the Court doubts its jurisdiction to hear this
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26 ¹ In the event the Court would like Azoogole to provide a supplemental response
27 to its Order to Show Cause, Azoogole would be eager to cooperate in a
28 clarification of the Court’s test as relates to the geographic source of Azoogole’s
income, and in the execution of a protective order to safeguard the confidentiality
of Azoogole’s financial information.

1 case, the Court should simply dismiss the matter in its entirety for improper
2 venue and allow Hypertouch to re-file its case in an appropriate forum.

3 **BACKGROUND**

4 On April 15, 2008, Hypertouch filed its initial complaint in the above-
5 captioned action in California state court against four defendants: 1)
6 Azoogle; 2) Intuit; 3) Quicken Loans; and 4) Rock Holdings. Azoogle
7 recognized that Rock Holdings and Intuit were sham defendants named
8 solely to destroy diversity and provide Hypertouch with a basis for venue in
9 Southern California. Thus, on June 6, 2008, Azoogle filed a Notice of
10 Removal, joined by Quicken Loans and Intuit, based on diversity of
11 citizenship. Hypertouch quickly recognized that its ploy to destroy diversity
12 jurisdiction and fabricate a venue hook had failed. After the case had been
13 removed, on June 17, 2008 Hypertouch filed a notice of dismissal as to
14 Intuit. And on July 3, 2008, Hypertouch filed its First Amended Complaint
15 (“FAC”), which dropped Rock Holdings as a defendant and added
16 SubscriberBase.

17 Prior to filing the FAC, Hypertouch also agreed to cooperate in a
18 change of venue to the Northern District of California. However, before the
19 parties could file such a stipulation, the Court issued an Order to Show
20 Cause (the “OSC”). In the OSC, the Court asked each defendant to
21 provide: 1) the number of employees it has in each of the top five states in
22 which it conducts business, 2) the gross percentage of its sales originating
23 in each of these states, 3) the gross percentages of its assets held in each
24 of these states, and 4) the location of its headquarters.

25 **RESPONSE TO ORDER TO SHOW CAUSE**

26 Azoogle hereby demonstrates diversity of citizenship in this action by
27 providing the Court with the requested information to the best of Azoogle’s
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1 ability. Quicken Loans is concurrently filing a response to the OSC that
2 provides further support for a finding of diversity jurisdiction. Because Intuit
3 and Rock Holdings are no longer defendants in this action, the requested
4 information as to these entities is no longer necessary to maintain diversity
5 of citizenship.

6 **I. The Issue of Remand Is Now Moot.**

7 The Court's OSC has been mooted by Hypertouch's FAC, which was
8 filed on July 3, 2008, thereby becoming the operative pleading. The FAC,
9 unlike the initial complaint, alleges complete diversity among the
10 defendants. To wit, Hypertouch has dropped its efforts to include sham
11 defendants in order to destroy diversity and provide a venue hook. As
12 such, any supposed basis for venue in this Court has disappeared. If at
13 this point the Court decides that it does not have diversity jurisdiction over
14 the FAC, the proper remedy would be dismissal for lack of jurisdiction and
15 not remand. Alternatively, the Court may, and should, dismiss the matter
16 for improper venue, given that none of the parties, witnesses, or evidence
17 is located within the forum, a fact well known to Hypertouch at the time it
18 chose that forum.

19 **II. If the Court Finds that It Lacks Subject Matter Jurisdiction, It**
20 **Should Dismiss the FAC for Improper Venue.**

21 As a result of Hypertouch's decision to drop Rock Holdings, there no
22 longer appears in the FAC any basis for venue in this District. As Azoog
23 indicated in its notice of removal, Rock Holdings appeared to be
24 fraudulently joined for the sole purpose of creating a venue hook in
25 Southern California. Hypertouch has already agreed to cooperate in a
26 change of venue to Northern California, where Hypertouch and its servers
27 and personnel are located, where Azoog has a satellite office, and where
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1 Azoogole and Quicken Loans have counsel. Accordingly, in the event the
2 Court decides that it lacks subject matter jurisdiction, it should dismiss the
3 FAC for improper venue such that Hypertouch may re-file its pleading in
4 Northern California.

5 It bears mentioning that it isn't clear that the Court could remand this
6 action, at least in this action's current form. The operative pleading is the
7 FAC, which was filed in this Court, per this Court's procedures, and not in
8 state court. If this Court has no jurisdiction over this action, then any and
9 all acts performed by this Court must be reversed and this case sent back
10 in its initial form. See *Libhart* 592 F.2d at 1065. A much more appropriate
11 course would be dismissal such that this action might be brought in a
12 proper forum.

13 **III. There Was No Need for Sham Defendants To Sign Removal**
14 **Papers.**

15 In the OSC, the Court states that the notice of removal may have
16 been procedurally deficient because it was not signed by Rock Holdings.
17 However, those named as defendants but not yet served in a state court
18 action need not join the notice of removal. See *Salveson v. Western States*
19 *Bankcard Ass'n*, 731 F.2d 1423, 1429 (9th Cir. 1984). Moreover, joinder is
20 not required by entities named as defendants fraudulently joined for the
21 sole purpose of preventing removal. See *Farias v. Bexar County Bd. Of*
22 *Trustees for Mental Health*, 925 F.2d 866, 871 (5th Cir. 1991). "Although
23 the usual rule is that all defendants in an action in a state court must join in
24 a petition for removal, the 'rule of unanimity' does not apply to 'nominal,
25 unknown, or fraudulently joined parties.'" *United Computer Systems, Inc. v.*
26 *AT&T Corp.*, 298 F.3d 756, 762 (9th Cir. 2002) (internal citations omitted).

27 As evidenced by Hypertouch's quick dismissal of both Rock Holdings
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1 and Intuit, these entities were sham defendants fraudulently joined by
2 Hypertouch solely to defeat diversity and to provide a venue hook.
3 Furthermore, initially named defendant Rock Holdings was never even
4 served, insofar as the office to which Hypertouch delivered a copy of its
5 initial complaint pertained to a wholly separate entity apparently also
6 named Rock Holdings. In its FAC, Hypertouch continues to distort the
7 venue issue. The FAC does not even mention why this Court is
8 supposedly an appropriate venue.

9
10 **IV. Azoogle Responds to the Court’s Requests to the Best of**
11 **Azoogle’s Ability, in Light of the Press of Time and Lack of a**
12 **Protective Order.**

13 While the Court ostensibly entered its OSC on June 27, 2008, the
14 parties did not receive email notification of the OSC until June 30, 2008—
15 the Monday before a holiday weekend. Even if Azoogle had the full 12
16 days to respond to the OSC, it would have been an insufficient amount of
17 time to compile the data requested by the Court. In essence the Court
18 asked the defendants to track the geographic origin, on a state-by-state
19 basis, of all of the defendants’ revenues. Azoogle does not maintain such
20 data in the ordinary course of business. Nor would such figures be easily
21 determined, since Azoogle—an Internet-based advertising company—
22 earns revenues from clients, and in relation to individual consumers,
23 located across the country. (Azoogle was unsure which of those, if either,
24 was to be considered in determining the “originating” source of Azoogle’s
25 income.) Furthermore, the financial information sought by the Court is
26 highly confidential, and cannot be filed with the Court absent a protective
27 order sufficient to ensure that information’s protection.

28 In light of the compressed timeframe and the sensitive nature of the
information requested by the Court, Azoogle made its best efforts to

1 compile the requested information, and below provides that data. To the
2 extent the Court would like Azoogle to furnish additional information,
3 Azoogle hereby requests an extension of time to do so. Azoogle also
4 requests clarification regarding the Court's request as to revenue data, and
5 further seeks leave to move for a protective order sufficient to ensure the
6 confidentiality of any additionally furnished information.

7 **V. Requested Information as to Azoogle**

8 **A. Number of Employees in each State**

9 Azoogle has the following number of employees and independent
10 agents in the following three states/provinces:

- 11 • 56 employees and independent agents and 4 interns in New York;
- 12 • 32 employees and independent agents in Ontario, Canada;
- 13 • 3 employees in California. (Declaration of Anwesa Paul in Support
14 of Azoogle.com, Inc.'s Response to Order to Show Cause ("Paul Decl.")

15 ¶2.)

16 **B. Percentage of Sales in each State**

17 Azoogle is a marketing company, which serves clients throughout the
18 country. (Paul Decl. ¶3.) A state-by-state analysis of the origination of
19 Azoogle's revenues is difficult if not impossible to provide as any given
20 dollar of revenue may arguably originate from multiple locations.² (*Id.*) As
21 a simplified example, lead-based revenue may theoretically arise from the
22 location of the client, from the location of the lead affiliate, from the location
23 of the person who is the subject of the lead, or from the location of the
24 Azoogle employee who managed that lead-generation project. All of these
25 would be valid interpretations of the Court's request. Moreover, the
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27 ² Even if the calculation of the originating geographic source of revenue were
28 unambiguous, Azoogle does not keep this information in the ordinary course of
its business.

1 disclosure of Azoogles actual revenue numbers would result in the
2 disclosure of information that Azoogles has purposely sought to keep
3 confidential. (*Id.*) Accordingly, Azoogles could not, and does not here,
4 provide information concerning its revenues. To the extent the Court would
5 like Azoogles to submit revenue-related information, Azoogles hereby
6 requests an extension of time to do so, and further requests clarification
7 regarding the specific method of calculating such data, as well as a
8 protective order sufficient to protect any such data.

9 **C. Percentage of Assets Held in each State**

10 Generally speaking, the quantity or value of tangible assets held by
11 Azoogles in a given location is proportional to the number of employees
12 working in that location. Accordingly, the gross percentage of a) Azoogles
13 assets held in each of the top three states/provinces in which it conducts
14 business of b) Azoogles assets held in these top three states/provinces is
15 as follows:

- 16 • Approximately 62% of Azoogles assets are held in New York;
- 17 • Approximately 35% of Azoogles assets are held in Ontario,
18 Canada;
- 19 • A negligible percentage of Azoogles assets are held in California.

20 (Paul Decl. ¶4.)

21 **D. Azoogles Headquarters**

22 Azoogles headquarters are located in New York, New York. (*Id.* ¶5.)

23 **VI. Requested Information as to Quicken Loans**

24 Based on representations by Quicken Loans set forth in its
25 concurrently filed documents, Quicken Loans also appears to satisfy the
26 Courts five-state, three-prong test for diversity jurisdiction, as well as the
27 nerve center test.
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CONCLUSION

For all of the reasons set forth above, Azoogole has demonstrated cause as to why the Court has diversity jurisdiction over this action. Azoogole further has demonstrated that, in the event the Court finds it has no subject matter jurisdiction over this action, the correct course would be to dismiss this case for lack of proper venue.

DATED: July 9, 2008

KRONENBERGER BURGOYNE, LLP

By: /s/ - Henry M. Burgoyne, III

Henry M. Burgoyne, III
Attorney for Defendant
AzoogoleAds.com, Inc.