

1 Bingham McCutchen LLP
 JAMES G. SNELL (SBN 173070)
 2 CHRISTOPHER M. O'CONNOR (SBN 229576)
 ANDREW B. ELLSWORTH (SBN 240176)
 3 1900 University Avenue
 East Palo Alto, CA 94303-2223
 4 Telephone: (650) 849-4400
 Facsimile: (650) 849-4800
 5
 Attorneys for Defendant
 6 Quicken Loans Inc.

7
 8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 OAKLAND DIVISION

11
 12 ASIS INTERNET SERVICES, a California
 Corporation,

13 Plaintiff,

14 v.

15 OPTIN GLOBAL, INC., et al.,

16 Defendants.

No. 3:05-CV-05124-CW

DEFENDANT QUICKEN LOANS
 INC.'S NOTICE OF MOTION AND
 MOTION FOR SECURITY FOR
 COSTS INCLUDING ATTORNEYS'
 FEES

Date: April 21, 2006
 Time: 10:00 a.m.
 Place: Courtroom 2 -- 4th Floor
 Judge: Honorable Claudia Wilken

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 19 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

20 PLEASE TAKE NOTICE that on April 21, 2006 at 10:00 a.m., or as soon
 21 thereafter as this matter may be heard, in Courtroom 2 of the above-entitled Court, located on the
 22 fourth floor of United States District Court for the Northern District of California, located at
 23 1301 Clay Street, Suite 400 S, Oakland, California 94612-5212, Defendant Quicken Loans, Inc.
 24 ("Quicken Loans"), will and hereby does move this Court for an order that Plaintiff ASIS
 25 Internet Services ("Plaintiff") post security for costs and attorneys' fees Quicken Loans expects
 26 to incur in defending this action in the amount of Fifty Thousand Dollars (\$50,000.00).

27 This motion is made pursuant to section 7706(g)(4) of The Controlling The
 28 Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act"), Local

1 Rule 65.1-1, and the Court's inherent power, all of which allow the Court to exercise its
2 discretion to require Plaintiff to post security for the payment of Quicken Loans' costs including
3 attorneys fees. Such security should be required here, where Quicken Loans is likely to prevail
4 on the merits and where Plaintiff has already released any claim it might have had against
5 Quicken Loans.

6 This motion is based on this Notice, the attached Memorandum of Points and
7 Authorities, the attached declarations of Amy Bishop and James G. Snell, the attached Exhibits,
8 and any additional evidence and argument that the Court may receive at or before the hearing on
9 this Motion.

10 DATED: March 17, 2006

BINGHAM McCUTCHEN LLP

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13 By: _____ /s/
14 James G. Snell
15 ATTORNEYS FOR DEFENDANT
16 QUICKEN LOANS INC.
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 I. **INTRODUCTION**

3 In any action like this one, filed by an alleged internet access service under the
4 CAN-SPAM Act, “the court may, in its discretion, require an undertaking for the payment of the
5 costs of such action, and assess reasonable costs, including reasonable attorneys’ fees, against
6 any party.” 15 U.S.C. § 7706(g)(4). In addition, the Court has inherent power to award costs
7 and Local Rule 65.1-1 authorizes the Court, “[u]pon demand of any party, where authorized by
8 law and for good cause shown,” to “require any party to furnish security for costs which can be
9 awarded against such party in an amount and on such terms as the Court deems appropriate.”

10 The Court should exercise its discretion here and require Plaintiff to post security
11 in the amount of \$50,000 for costs and attorneys’ fees of Quicken Loans for the following
12 reasons:

- 13 • Plaintiff released its claim against Quicken Loans in exchange for information
14 Quicken Loans provided to Plaintiff.
- 15 • Plaintiff’s only theory of liability is for “conspiracy” among the defendants, yet
16 Quicken Loans, to its knowledge, has never had a business relationship with any
17 other named defendant.
- 18 • Quicken Loans did not send email to Plaintiff that violates the junk email laws.
19 According to its records, Quicken Loans has sent email to only nine addresses at
20 Plaintiff’s domain over the past six years and all of those emails resulted in closed
21 loans with Quicken Loans and/or predated the statutes at issue in this lawsuit and/or
22 complied with the statutes at issue in this lawsuit.
- 23 • No one from Plaintiff’s domain has opted out of receiving emails from Quicken
24 Loans.¹

25 Under these circumstances, where Plaintiff has released meritless claims but
26 refuses to dismiss the complaint, the Court should require the Plaintiff to post security for
27 Quicken Loans’ defense costs.

28 ¹ In addition to the specific facts cited above, Quicken Loans also joined defendant Aegis Lending Corporation’s Motion to Dismiss on February 21, 2006 because Plaintiff’s complaint fails to allege facts that would establish any violation of law by Quicken Loans.

1 II. STATEMENT OF FACTS

2 A. Quicken Loans Is Not Engaged In Any “Conspiracy” With
3 Defendants To Violate The Junk Email Laws

4 Quicken Loans is America’s top online mortgage lender, with a 94% client
5 satisfaction score.² Quicken Loans is the preferred mortgage company for many of America’s
6 top companies, including AT&T, Google, Yahoo!, Compuware, EDS, and Penske.³ Quicken
7 Loans has been ranked as one of the top place to work by Fortune, Computerworld Magazine,
8 and the Michigan Business and Professional Association.⁴

9 Quicken Loans has not achieved these accolades by spamming potential
10 customers. Instead, Quicken Loans has policies and contractual provisions in place that require
11 that the companies it does business with comply with the CAN-SPAM Act and related laws.⁵
12 Quicken Loans requires that the companies with whom it works comply with these policies and
13 contractual provisions.⁶

14 To its knowledge, Quicken Loans has never done business with any other named
15 defendant.⁷ Moreover, internal records reflect that Quicken Loans has sent email to nine email
16 addresses with Plaintiff’s domain “asis.com” over the previous six years (including the phony
17 “Bruce Wolf” name plaintiff used to request mortgage information, as described in more detail
18 below) and that each email either resulted in closed loans with Quicken Loans and/or predated
19 the statutes at issue in this lawsuit and/or was sent in response to what Quicken Loans believed
20 was an affirmative request for information but that also allowed the recipient to decline further
21 information.⁸ No one with an asis.com email address has asked to opt-out from receiving
22 information from Quicken Loans.⁹

23 _____
24 ² See Declaration of Amy Bishop (“Bishop Decl.”), ¶ 2.

25 ³ Bishop Decl., ¶ 2.

26 ⁴ *Id.*

27 ⁵ *Id.*, ¶ 3.

28 ⁶ *Id.*

⁷ *Id.*, ¶ 8.

⁸ *Id.*, ¶ 14.

⁹ *Id.*, ¶ 14.

1 **B. Plaintiff Released Quicken Loans From Any Liability**

2 On November 1, 2005, Plaintiff’s counsel Jason Singleton sent Quicken Loans a
3 letter following up on an initial telephone call to Quicken Loans.¹⁰ The letter claimed Quicken
4 Loans had received a referral for a “Bruce Wolf” that was generated by a junk email message
5 sent by an unnamed third party.¹¹ The letter stated that Plaintiff did not intend to file suit against
6 Quicken Loans, but that Plaintiff “wishes to provide Quicken Loans a complete release
7 agreement in exchange for assistance by Quicken Loans in tracking down the flow of data from
8 the spammer to the online form web page and finally to Quicken Loans.”¹² Plaintiff specifically
9 acknowledged in the letter that Quicken Loans might not wish to provide such information
10 without some contractual assurance it would not be used against Quicken Loans.¹³

11 On November 2, 2005, Quicken Loans corporate counsel Amy Bishop, sent an
12 inquiry to its partner Azoogole.com (“Azoogole”) who provided the “Bruce Wolf” lead.¹⁴ Azoogole
13 is one of the third-party companies with whom Quicken Loans contracts to provide qualified opt-
14 in leads for mortgage loans.¹⁵ Quicken Loans requires that Azoogole comply with junk email
15 laws.¹⁶ The Azoogole contract reads in relevant part:

16 [Azoogole] represents and warrants that it has obtained any and all
17 requisite consent from consumers to pass their information to
18 [Quicken Loans] as a Qualified Submission under this
19 Agreement.¹⁷

20 Quicken Loans also requires Azoogole to abide by the terms of Quicken Loans’
21 Privacy Policy for Partners and that policy requires compliance with junk email and other
22 applicable laws.¹⁸

23 ¹⁰ *Id.*, ¶ 4, Ex. A.

24 ¹¹ *Id.*

25 ¹² *Id.*

26 ¹³ *Id.*

27 ¹⁴ Bishop Decl., ¶ 7.

28 ¹⁵ *Id.*, ¶ 6.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *See Id.* Quicken Loans has not provided this contract because it contains proprietary and confidential information and there is no existing protective order in this case. Quicken Loans is prepared to provide the agreement to the Court at the Court’s request.

1 Ms. Bishop called Mr. Singleton on November 3, 2005, and explained that
 2 Quicken Loans was investigating the source of the “Bruce Wolf” lead.¹⁹ Ms. Bishop spoke again
 3 with Mr. Singleton on November 17 and November 21, 2005, and learned that the “Bruce Wolf”
 4 lead had apparently been submitted by Plaintiff to USA Lenders Network.²⁰ Ms. Bishop told Mr.
 5 Singleton that to her knowledge Quicken Loans had never done business with USA Lenders.²¹
 6 She later confirmed this and that Quicken Loans does not have a business relationship with any
 7 named defendant.²²

8 On or about December 14, 2005, Ms. Bishop informed Mr. Singleton that
 9 Quicken Loans had received as much information as it expected to get regarding the source of
 10 the lead.²³ Echoing Plaintiff’s counsel’s earlier observation that Quicken Loans might not wish
 11 to provide the requested information without some contractual assurance it will not be used
 12 against Quicken Loans, Ms. Bishop stated that the disclosure of the information was conditioned
 13 upon Plaintiff releasing Quicken Loans.²⁴ Mr. Singleton agreed to release Quicken Loans in
 14 exchange for the information regarding the source of the lead.²⁵ (Mr. Singleton did not,
 15 however, tell Ms. Bishop that he had already filed Plaintiff’s lawsuit against Quicken Loans two
 16 days earlier.)²⁶

17 Relying on the release, Ms. Bishop explained that Quicken Loans received the
 18 lead from Azoogole and that Quicken Loans understood that Azoogole had received the lead from
 19 someone named John Strothers (with whom Quicken Loans has no relationship).²⁷ Quicken
 20 Loans also told Mr. Singleton that it understood Azoogole had terminated its relationship with Mr.
 21 Strothers after Mr. Strothers failed to respond to Azoogole’s requests for information about the
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 24 ¹⁹ Bishop Decl., ¶ 7.

25 ²⁰ *Id.*, ¶ 8.

26 ²¹ *Id.*

27 ²² *Id.*

28 ²³ *Id.*, ¶ 9.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*, ¶ 10.

1 source of the Bruce Wolf lead.²⁸

2 Mr. Singleton thanked Ms. Bishop and promised to send Ms. Bishop a written
3 release agreement.²⁹ Mr. Singleton then did fax a release agreement to Quicken Loans on
4 December 20, 2005, but the release was missing the last pages.³⁰ Nevertheless, the sent portion
5 of the fax addressed the consideration exchanged and required no further performance from
6 Quicken Loans: The cover page thanks Quicken Loans for its “attention and assistance in this
7 matter” and states that “[u]pon execution of the Release, we will also file a Dismissal with the
8 Court dismissing Quicken Loans from the action.”³¹ The draft agreement confirms release of
9 Quicken Loans for “good and sufficient consideration, the receipt of which is hereby
10 acknowledged.”³²

11 After Quicken Loans requested a full copy of the release, Plaintiff’s counsel on
12 December 22, 2005 sent a different version that purportedly modified the oral release by
13 requiring additional performance by Quicken Loans.³³ While this was not what Quicken Loans
14 had agreed to, Quicken Loans was willing to modify the prior oral agreement and sent proposed
15 changes to Plaintiff’s counsel on December 23, 2005.³⁴

16 Plaintiff’s counsel never responded to this proposal. Instead, after repeated
17 attempts to contact Plaintiff’s counsel, Ms. Bishop finally spoke with Mr. Singleton on January
18 12, 2006.³⁵ Mr. Singleton refused to honor the oral release or negotiate a modified release,
19 telling her that he had received “better information” from another source, was “tired” of dealing
20 with Quicken Loans, and that Quicken Loans’ revisions to the agreement were “unacceptable.”³⁶
21 When Ms. Bishop reminded Mr. Singleton that he verbally agreed to the release, he replied “Try
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23
24 ²⁸ *Id.*, ¶ 10.

²⁹ *Id.*, ¶ 10.

³⁰ *Id.*, ¶ 11, Ex. B.

³¹ Bishop Decl., ¶ 11, Ex. B.

³² Bishop Decl., ¶ 11, Ex. B.

³³ Bishop Decl., ¶ 12, Ex. C.

³⁴ Bishop Decl., ¶ 12, Ex. D.

³⁵ Bishop Decl., ¶ 13.

³⁶ *Id.*

1 to enforce a verbal agreement.”³⁷

2 Quicken Loans sent a letter to Plaintiff on February 16, 2006 reiterating the
3 foregoing facts and asking that Plaintiff dismiss the Complaint against Quicken Loans with
4 prejudice.³⁸ Plaintiff refused.³⁹

5 **III. THE COURT SHOULD ORDER PLAINTIFF TO POST SECURITY**
6 **OF \$50,000 TO COVER QUICKEN LOANS’ ESTIMATED COSTS**
7 **AND ATTORNEYS’ FEES**

8 **A. The Court May Exercise Discretion To Award Security For**
9 **Costs Including Attorneys’ Fees**

10 In any action like this one, filed by an alleged internet access service under the
11 CAN-SPAM Act, “the court may, in its discretion, require an undertaking for the payment of the
12 costs of such action, and assess reasonable costs, including reasonable attorneys’ fees, against
13 any party.” 15 U.S.C. § 7706(g)(4). In addition, Local Rule 65.1-1 authorizes the Court,
14 “[u]pon demand of any party, where authorized by law and for good cause shown,” to “require
15 any party to furnish security for costs which can be awarded against such party in an amount and
16 on such terms as the Court deems appropriate.” Courts also have inherent power to require
17 plaintiffs to post security for costs. *In re Merrill Lynch Relocation Management, Inc.*, 812 F.2d
18 1116, 1121 (9th Cir. 1987).

19 **B. The Court Should Require Plaintiff To Post Security For Costs**
20 **And Attorney’s Fees**

21 Here, the Court should order plaintiff to post security for costs including
22 attorneys’ fees because Plaintiff released its claims against Quicken Loans, Quicken Loans is
23 likely to prevail on the merits of its claims, and Quicken Loans should not have to defend itself
24 without adequate security in the likely event it will prevail in this case.

25 **1. Plaintiff’s Lawsuit Is Frivolous Because Plaintiff**
26 **Released Quicken Loans**

27 Quicken Loans accepted Plaintiff’s offer for a release of claims in exchange for
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³⁷ *Id.*

³⁸ *See* Declaration of James G. Snell (“Snell Decl.”), ¶ 3, Ex. A .

³⁹ Snell Decl., ¶ 4.

1 information about the source of the lead received by Quicken Loans. Quicken Loans performed
2 its obligation by providing Plaintiff with the information requested, thereby making the release
3 binding, and Plaintiff acknowledged such performance. Plaintiff cannot now unilaterally rescind
4 the bargain. *See Nicholson v. Barab*, 233 Cal.App.3d 1671, 1681 (1991) (oral settlement
5 agreements are generally enforceable in the same manner as other oral contracts). Accordingly,
6 Plaintiff is prosecuting this action in bad faith and should be required to post security before
7 being allowed to continue to prosecute the action.

8 2. Quicken Loans Is Likely To Prevail On The Merits

9 Quicken Loans is likely to prevail on the merits. Plaintiff's Complaint alleges
10 violations of the CAN-SPAM Act (15 USC § 7701 *et seq.*), section 17539.5 of the California
11 Business and Professions Code ("California anti-spam law"), and common law civil conspiracy.
12 All of these claims relate to the same nexus of facts--that Quicken Loans was purportedly
13 conspiring with the other defendants to receive leads procured through violation of the junk
14 email laws. All of the claims will fail.

15 Quicken Loans does not have a business relationship with any other named
16 defendant. Instead, Quicken Loans received the lead through a third-party company, Azoogle,
17 who represents to Quicken Loans that its leads were procured in compliance with the junk email
18 laws. Quicken Loans investigated the sole lead raised by Plaintiff and understands that Azoogle
19 severed its relationship with the source of the lead. (Even if Plaintiff could somehow overcome
20 these facts, Plaintiff cannot explain how Quicken Loans should somehow be liable when
21 Quicken Loans' attempts to contact "Bruce Wolf" were based on Plaintiff apparently having
22 filled out an affirmative consent for further information about home loans.)

23 Moreover, records reflect that Quicken Loans has sent email to nine asis.com
24 addresses over the past six years and each contact either resulted in closed loans with Quicken
25 Loans and/or predated the statutes at issue in this lawsuit and/or were sent in response to what
26 Quicken Loans believed were affirmative requests for information and offered a means to
27 decline receipt of further information. No asis.com address has opted out of receiving
28 information from Quicken Loans. Accordingly, Plaintiff is not likely to be able to show Quicken

1 Loans is somehow liable for any commercial electronic messages allegedly sent to Plaintiff's
2 service, let alone in excess of 10,000 such messages.

3 Further, in cases brought under the CAN-SPAM Act by an internet access
4 provider, the provider must show that an advertiser "procured" the transmission of non-
5 compliant emails "with actual knowledge, or by consciously avoiding knowing" whether the
6 person sending the messages "is engaging, or will engage, in a pattern or practice that violates"
7 the CAN-SPAM Act.⁴⁰ There is no such evidence here. And the CAN-SPAM Act preempts
8 California's anti-spam law "except to the extent than any such statute, regulation, or rule
9 prohibits falsity or deception in any portion of a commercial electronic mail message."⁴¹ There
10 is no evidence Quicken Loans sent false or deceptive emails. Nor is there any evidence of any
11 civil conspiracy, which requires two or more persons who have agreed to a common plan or
12 design to commit a wrongful act. *Kidron v. Movie Acquisition Corp.*, 40 Cal. App. 4th 1571,
13 1582 (1995) (holding that movie distributor could not have conspired with other defendants
14 because there was no evidence that it agreed to commit a wrongful act).

15 Finally, even if Plaintiff could somehow establish liability, both the CAN-SPAM
16 Act and California's anti-spam law allow the Court to reduce or eliminate damages where, as
17 here, Quicken Loans has adopted commercially reasonable practices to comply with junk email
18 laws.⁴²

19 **3. The Court Should Provide Security For Quicken Loans'**
20 **Costs Including Reasonable Attorneys' Fees**

21 Under these circumstances, the Court should require Plaintiff to post \$50,000 as
22 security for Quicken Loans' costs, including reasonable attorneys' fees, as authorized by the
23 CAN-SPAM Act. This will ensure that Quicken Loans can recover costs necessary to defend the
24 frivolous claims that plaintiff released. Moreover, the interest Quicken Loans has in recovering
25 its costs far outweighs any prejudice Plaintiff might assert as a result of such security especially

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27 ⁴⁰ See 15 U.S.C. § 7704(a)(1).

28 ⁴¹ See 15 U.S.C. § 7707(b)(1).

⁴² See 15 U.S.C. § 7706(g)(3)(d); Cal. Bus. & Prof. Code § 17529.5(b)(2).

1 given that Plaintiff released its claims against Quicken Loans.⁴³

2 **IV. CONCLUSION**

3 For the forgoing reasons, the Court should order Plaintiff to post security for costs
4 and attorney fees in the amount of \$50,000, without prejudice to seeking a reapplication for
5 additional costs should such costs and attorneys' fees prove to exceed those anticipated at this
6 early stage of the litigation.

7 DATED: March 17, 2006.

BINGHAM McCUTCHEN LLP

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10 By: _____ /s/

11 James G. Snell
12 ATTORNEYS FOR DEFENDANT
13 QUICKEN LOANS INC.

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⁴³ The requirement of security, of course, is not an award of costs or fees and if and when Quicken Loans prevails in this action it would provide evidence to the Court of the costs and fees incurred.