SINGLETON LAW GROUP

Jason K. Singleton, Esq.
lawgroup@sbcglobal.net

Richard E. Grabowski, Esq.
rgrabows@pacbell.net

611 "L" Street, Suite A
Eureka, California 95501

707-441-1177
707-441-1533 fax

March 8, 2007

Magistrate Judge Joseph C. Spero
United States District Court, Northern District
450 Golden Gate Avenue
San Francisco, CA 94102

RE: ASIS Internet Services v Optin Global, Inc., et al
USDC, Northern District of California, CV-05-5124 JCS
Joint letter re Request for Discovery Referee by Plaintiff and
Opposition by Defendant Azoogle

Dear Judge Spero:

This letter is a joint meet and confer letter following the meeting of Plaintiff's counsel and counsel for Azoogle, Hank Burgoyne, in San Francisco on February 19, 2007. This was the first date proposed by Mr. Burgoyne for a meeting, following the recent advice from Mr. Burgoyne that he would not be producing Mr. McVey for deposition. Mr. Burgoyne suggested that Plaintiff was attempting to use Mr. Burgoyne's travel to Eureka, California as leverage, consequently, Plaintiff's counsel agreed to meet in San Francisco, at the location requested by Mr. Burgoyne.

After the parties had conferred at length in writing in an effort to resolve the pending issues, Plaintiff requested a personal meet and a joint letter, to resolve three issues:

1. Defendant's refusal to produce their Chief Marketing Officer, Ryan McVey, for deposition.
2. Defendant's refusal to produce a technical employee, Lee Herrera, for Deposition.
3. To discuss the appointment of a discovery referee.

On the Saturday before the meet and confer, Mr. Burgoyne emailed a 10 page letter to Plaintiff' counsel adding a plethora of new issues to the proposed meet and confer.

Plaintiff's portion of the within meet and confer letter will be in 12 pt Arial font, and Defendant's Azoogle's will be in 12 pt Times New Roman.

Deposition of Ryan McVey

Mr. McVey is Azoogle's Chief Marketing Officer, or CMO. His name appears on

the contract between Defendant Quicken Loans and Defendant Azoogle, for Quicken Loans' purchase of leads from Azoogle. Plaintiff suspects Azoogle's CMO would have some knowledge of how leads are acquired via sending out bulk emails, who those individuals are, who in the Azoogle organization is Azoogle's affiliate manager, and spam complaint abuse desk. In sum, Mr. McVey is a relevant witness.

Plaintiff requested a date to take Mr. McVey's deposition last December 20th, 2006. Please see highlighted portions of Exhibit "A" hereto. On January 31st, 41 days later, Defendant finally got around to proposing a date for the deposition. (proposing a date 26 days later yet) Exhibit "B" hereto. The deposition was then promptly set for the date proposed by Defendant Azoogle, February 26th.

Plaintiff initially requested that Defendant allow the deposition to proceed remotely via video teleconference, as Mr. McVey is in New York. Bringing four attorneys from California to New York City for a deposition did not seem as efficient as bringing one witness to California. Defendant was unwilling to allow for deposition by video conference. After considerable gyrations, and half dozen meet and confer emails, Plaintiff was going to put the matter in the last CMC Statement to address at the last CMC conference, however Defendant Azoogle relented, on the last day to file the CMC Statement, and agreed to allow the deposition via video conference. (But only Mr. McVey and Azoogle's PMK, all other witnesses would have to be deposed in New York).

After Azoogle received Plaintiff's responses to Azoogle's written discovery, Mr. Burgoyne advised Plaintiff's counsel that Azoogle was refusing to produce Mr. McVey for deposition. Defendant's reasoning is set forth in Defendant's section below, but Plaintiff understands Defendant's position to be that Defendant is unable to properly prepare Mr. McVey for deposition because Plaintiff's written discovery responses are deficient, and because Plaintiff has not identified Mr. McVey as a person with knowledge of the case in Plaintiffs initial and supplemental disclosures. Plaintiff is unaware of any authority whatsoever that a party to litigation may refuse to produce a witness for deposition simply because the party is dissatisfied with the other parties responses to interrogatories. Likewise, the idea that Plaintiff must know whether Defendant's witnesses have specific knowledge about the case and disclose such witnesses, before being allowed to depose them, is patently absurd. Plaintiff requests an order from the Court directing Azoogle to produce Mr. McVey for deposition at the next opportunity. Defendant Azoogle has stated it will categorically not be producing Mr. McVey for deposition on February 26th.

Deposition of Lee Herrera

Subsequent to filing suit, and prior to naming and serving Azoogle, Plaintiff directed one of Plaintiff's experts to determine who in the Azoogle organization was responsible for handling spam complaints. Plaintiff's expert came back and stated that person is Lee Herrera. The expert called Azoogle's number, stated he had a spam

complaint, and asked who he should speak with. The Azoogle receptionist stated spam complaints are directed to Mr. Lee Herrera.

After a fair amount of gyrations with Mr. Burgoyne over noticing Azoogle's PMK deposition, (Plaintiff wanted the managing director for the staff handling spam complaints, which Mr. Burgoyne would not disclose this persons name, or produce him or her based on this description), Plaintiff then requested a date for deposing Mr. Herrera.

Mr. Burgoyne refuses to produce Mr. Herrera for deposition. Defendant contends that Mr. Herrera is a low level employee, and must be located, and personally served with a subpoena, in Canada. Defendant relies upon *Rutter Group*, *Fed. Civ. Proc. before Trial*, §11:1413.2. Mr. Burgoyne has indicated he would file a motion to quash such a subpoena, in Canada.

Meeting and conferring requires a meaningful exchange of ideas. Plaintiff explained to Mr. Burgoyne that Mr. Herrera is likely to be a relevant witness since he handles their spam complaints. Mr. Burgoyne won't disclose Mr. Herrera's title or job duties, but yet still states Mr. Herrera is a ministerial employee and therefore refuse to produce him. Clearly, that is not a meaningful exchange of ideas.

Plaintiff contends ministerial employees are secretaries and stenographers. ***Colonial Capital Co. v. General Motors Corp.*** (D CT 1961) 29 FRD 514, 515. Even assuming Mr. Herrera is a "low level" technical employee, if Mr. Herrera's "low level" technical duties are to track down and resolve spam complaints coming from Azoogle's affiliate contractors that send bulk email, his knowledge is highly relevant. The day-to-day processes actually used by Mr. Herrera to determine which of Azoogle's affiliates are spamming, and what is done about it, is directly at issue in this case. In any event, it does not appear that Mr. Herrera is a secretary or stenographer, but rather someone with technical skills.

Judge Brazil's enlightened instruction is useful here. In ***In Re Convergent Technologies***, 108 F.R.D 328 (N.D. Cal. 1985) Judge Brazil clearly laid out the responsibilities of counsel in federal civil litigation, that attempting to use discovery as a bludgeon, or making inefficient use of discovery, is contrary to the federal rules. Azoogle's demand that Plaintiff personally serve its employee with a subpoena, in Canada, to obtain discovery, is in direct conflict with Judge Brazil's learned instruction. Plaintiff is willing to take Mr. Herrera’s deposition in New York, or in Canada, as Azoogle might prefer.

Appointment of a discovery referee

Plaintiff requests the Court appoint a discovery referee. There are several different dynamics at work here that make appointment of a discovery referee appropriate. First, CAN SPAM Act cases are legally and factually complex. The

technology and tactics used by spammers, and those who benefit from spam, internet marketing companies like Azoogle, is quite involved. Obtaining production of Azoogle's "opt-in" list, spam complaints regarding its affiliates, and many other issues, inherently bring up legitimate discovery issues. Particularly where, as here, the law is new and frequently, not yet interpreted by the courts. Plaintiff's counsel's experience in another matter, *Phillips v Netblue* (No. C-05-4401 North Dist) proved this to be true.

Second, Plaintiff posits that Defendant Azoogle has nothing to lose by not producing discovery. The metaphysical truth is that Azoogle uses contractors that spam, and Azoogle knows it. If Azoogle produced all the relevant discovery requested by Plaintiff, it would establish liability in the millions of dollars. Until the ramifications of not producing discovery begin to approach the exposure from producing discovery, Azoogle is better off not producing the evidence.

Third, Defendant Azoogle has proved to be extremely obstreperous. Defendant insisted on personal service of the Complaint, even after a copy was received by corporate counsel. Plaintiff's counsel has received some 50 emails from Hank Burgoyne, several letters, multiple phone calls, and yet we can't even seem to get a couple of depositions set. Plaintiff's deposition as been set by Defendants twice, and ***twice cancelled*** by Mr. Burgoyne. Mr. Burgoyne indicated he wanted to cancel the mediation, or hold the mediation without appearance by anyone from Azoogle, on the ground he was unprepared, during the initial telephone conference with the mediator. The meritless refusal of Azoogle to produce its employees for deposition, the ten page meet and confer letter sent the Saturday before the in-person meet and confer on Monday morning, and a host of other petty artifices used by Azoogle to make Plaintiff's prosecution of this matter as difficult as possible, all clearly support the appointment of a discovery referee.

DEFENDANT AZOOGLE'S RESPONSE:

Introduction

Plaintiff's letter brief contains inaccuracies too numerous to document. In a concession to economy over accuracy, Azoogleads.com, Inc. ("Azoogle") will ignore the bulk of them, and will instead focus on the substance of Plaintiff's arguments.

The thrust of Azoogle's opposition is simple: It is fundamentally unfair for Plaintiff to on the one hand deny Azoogle discovery as to Plaintiff's basic contentions, and on the other hand to demand that Azoogle produce deponents – in particular deponents whom the Federal Rules do not require Azoogle to produce at all. Save a collection of Internet hearsay concerning Azoogle's "reputation," Plaintiff has refused to share its basis for believing, among other things, that Azoogle is responsible for the thousands of alleged emails. Unless and until Plaintiff discloses that information, Azoogle cannot effectively prepare for or participate in depositions, much less to mount a

full defense.

With no deadlines pending, the only reason to rush a deposition would be to take advantage of Azoogle's ignorance. Plaintiff asserts as fact that Azoogle is a "spammer." As soon as Plaintiff discloses the foundation for that assertion, Azoogle – which would like nothing better than to move toward summary judgment – will produce employees as required by the Federal Rules. Until then, if not longer, Azoogle requests that the Court keep a watchful eye over this case.

Background

Azoogle

Azoogle serves as a conduit through which "lead providers" channel marketing leads to end merchants of goods and services. Azoogle's agreements with its lead providers prohibit them from channeling through Azoogle leads procured other than by lawful means. Azoogle routinely enforces those agreements. As a result of Azoogle's vigilance, it is highly respected, including by some of the email marketing industry's most vocal critics.

Plaintiff's Claims

The Second Amended Complaint ("SAC") states CAN-SPAM and related claims arising out of Plaintiff's alleged receipt of thousands of mortgage-lending related emails during three weeks in October and November 2005. The SAC names fourteen defendants – all but two have settled – and seeks millions of dollars in damages. To prevail on its CAN-SPAM Act claims, Plaintiff must prove, among other things, that: 1) each of the thousands of alleged emails embodies one or more CAN-SPAM violations (e.g., a false or misleading email header, a misleading subject line, a non-functioning opt-out mechanism, etc.); and 2) Azoogle initiated, or "procured," each of those emails.

To date, Plaintiff has failed to proffer its information in relation to either of those prongs. As to the first prong, Plaintiff has offered isolated examples of what it believes to be unlawful email language, but has not attempted to relate those examples to the thousands of alleged emails.[1] With respect to the second prong, with a single exception, Plaintiff has declined to explain why it believes Azoogle to be related to (much less responsible for) the thousands of alleged emails, or even why it believes those emails to be in any way related to each other. Subsequent to the parties' in-person meet-and-confer, Plaintiff produced several dozen Internet printouts concerning Azoogle's alleged

[1] During the parties' in-person meet-and-confer, counsel for Plaintiff suggested that if Azoogle wanted to know what was wrong with the alleged emails, it should examine them for itself.

"reputation" as a "spammer." So far as Azoogle can tell, though, none of those printouts relates to the alleged emails.

The "single exception" mentioned in the previous paragraph concerns what has become known as the "Bruce Wolf" lead. Plaintiff, in an attempt to discover the initiator of one alleged email, sent a reply incorporating personal information for a fictitious individual, Bruce Wolf. That information became a marketing lead that a third-party lead provider channeled through Azoogle and to several mortgage broker defendants, which contacted Plaintiff. As Plaintiff is aware, although the Bruce Wolf lead passed through Azoogle's systems, Azoogle did not initiate the related email, and could not have known of any alleged violation. As Plaintiff is further aware, upon learning of Plaintiff's complaint, Azoogle took immediate steps to prevent the responsible lead provider from passing further unlawful leads through Azoogle's systems.

McVey Deposition and Azoogle's Discovery

Five days after Azoogle's first status conference, Plaintiff requested a deposition of Azoogle employee Ryan McVey. Azoogle, which at the time hoped for early summary judgment, agreed, provided that the deposition take place after Plaintiff had responded in good faith to Azoogle's first round of written discovery (document requests and interrogatories).

On February 5, three weeks before the date of Mr. McVey's deposition, Plaintiff served its responses. While timely, Plaintiff's responses contained far more objections than facts. For example, Plaintiff:

- Refused to state the facts known to Plaintiff's identified witnesses – two ASIS owners and six employees of Plaintiff's counsel – on the ground that a response would require Plaintiff "to depose separately each [such] individual … tak[ing] several days and cost[ing] thousands of dollars";
- Declined to state facts supporting Plaintiff's CAN-SPAM and California law claims, since a response would require "Plaintiff to exert mental gymnastics in order to decide what [information] Defendant might consider relevant";
- Failed to identify a single contractual provision creating an employment, joint venturer, franchisee, partner or similar relationship between Azoogle and other defendant, despite repeated general references to incriminating agreements;
- Repeatedly stated that responsive documents "will be produced," without subsequently producing or setting a deadline for such production; and
- Refused to provide documents concerning Plaintiff's pre-filing investigation, on the grounds that the request "fail[ed] to demand a discreet

category of documents" and "[did not] appear to be relevant to the subject matter of the action."[2]

Along with its responses, Plaintiff produced just one document: an email roster apparently created for this litigation. In a supplemental disclosure arriving several weeks later, Plaintiff also provided several dozen Internet printouts regarding Azoogle's "reputation." Azoogle assumed those printouts to constitute a small portion of the documents – as many as 800, according to Plaintiff – that Plaintiff claimed to establish Azoogle's liability for the thousands of alleged emails.

Azoogle initiated a meet and confer regarding Plaintiff's discovery responses. When Plaintiff refused to amend or supplement those responses, Azoogle requested that the McVey deposition be postponed. Plaintiff refused, and Azoogle informed Plaintiff that Mr. McVey would not appear.

Herrera Deposition

On February 5, the same day it provided its discovery responses, Plaintiff asked Azoogle to produce employee Lee Herrera. Azoogle counsel, who had not heard of Mr. Herrera, asked Plaintiff's counsel to identify him and to explain his relevance. Plaintiff's counsel refused, explaining that he wanted Azoogle to be the first to "tip its hand."[3]

Azoogle counsel subsequently identified Mr. Herrera, including at the parties' in-person meet-and-confer and in a February 19 email, as an Azoogle Technical Support Representative in his early 20's. As Azoogle informed Plaintiff, Mr. Herrera, who receives and routes technical complaints and related information, has no discretionary authority or ability to speak on behalf of Azoogle. Furthermore, Mr. Herrera didn't begin working at Azoogle until May 2006, six months after the relevant period as identified in the SAC.

Because Mr. Herrera was not a managing agent and could not know facts relevant to Plaintiff's claims, Azoogle informed Plaintiff that, if Plaintiff wanted to depose him, it would have to compel his attendance by subpoena, as required by the Federal Rules, subject to Mr. Herrera and/or Azoogle's rights to move to quash or for a protective order.

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[2] Azoogle continues to meet and confer with Plaintiff regarding Plaintiff's responses. If no resolution is reached, Azoogle will initiate a separate letter brief to the Court.

[3] At about the same time, Plaintiff requested a deposition of Azoogle's "spam abuse manager." Azoogle, which has no employee by that or any similar title, suggested that if Plaintiff wanted an organizational representative on that or other issues, it should properly notice a 30(b)(6) deposition. Plaintiff has yet to do so.

Plaintiff's Discovery

Even as Plaintiff has objected to discovery of its contentions, it has demanded that Azoogle produce a wide range of information, including:

- All of Azoogle's contracts with, and all documents reflecting Azoogle's payments to, all of Azoogle's providers of marketing leads, back to August 1, 2005 – a period that exceeds the relevant three-week timeframe by more than 17 months;
- Samples of every commercial email sent by Azoogle or any of Azoogle's lead providers, also since August 1, 2005; and
- Azoogle's marketing and business plans going back to January 1, 2004 – almost two years before the relevant time period.

Plaintiff's requests, taken literally, would require Azoogle to produce thousands, perhaps tens of thousands, of documents at a cost of hundreds and hundreds of person-hours of research time.

<u>Argument</u>

McVey Deposition

At this stage of the litigation, and in light of Plaintiff's discovery responses, it would be fundamentally unfair to expedite a deposition of Ryan McVey. Plaintiff claims to have reviewed as many as 800 documents tying Azoogle to the thousands of alleged emails. Yet none has been produced, save a handful of Internet chat room printouts, none of which reference the alleged emails. Nor has Plaintiff identified the supposed problems with the thousands of alleged emails, the basis of Plaintiff's belief that Azoogle sent or procured those emails, or even the foundation for Plaintiff's assertion that those thousands of emails are related. Under those circumstances, how is Azoogle to prepare a defense, much less a witness?

During the parties' meet-and-confer, Plaintiff sidestepped its evasion by repeating, as if it were a mantra, "It is a metaphysical truth that Azoogle's affiliates are spammers." But even if that were true – it's not – it wouldn't excuse Plaintiff's obligation to share its information regarding the emails alleged to be at issue.

Plaintiff would suffer no harm from a postponement of the McVey deposition. By stipulation of all parties, the early summary judgment schedule in this case has been vacated. Even before that stipulation had been drafted, Plaintiff agreed to a month-long postponement of depositions relating to Quicken Loans, which has been a defendant for

months longer than Azoogle. Furthermore, none of Plaintiff's discovery responses or disclosures have identified Mr. McVey as a potential witness, and Plaintiff's counsel conceded at the in-person meet-and-confer that he wasn't sure Mr. McVey possessed relevant information.

Azoogle would like nothing more than to complete bilateral discovery sufficient to permit a motion for summary judgment, since it is certain that Plaintiff cannot, and will never be able to, prove that Azoogle initiated or procured the thousands of unconnected emails alleged to be at issue. Azoogle continues to meet and confer with Plaintiff, and will if necessary file a motion to compel further responses. In the meantime, Azoogle requests that the Court decline Plaintiff's invitation to force Azoogle to produce Mr. McVey.

Herrera Deposition

If Azoogle is unsure of Plaintiff's reason for rushing the deposition of Mr. McVey, then it is baffled at Plaintiff's insistence that Azoogle immediately produce Lee Herrera. As Azoogle has explained, Mr. Herrera is a low-level technical employee in his early 20's with no discretionary authority and no ability to speak on behalf of Azoogle. Accordingly, Azoogle is under no obligation to voluntarily produce him, and his attendance at a deposition must be compelled by means of a subpoena. (See *Rutter, Fed Civ. Pro. Before Trial*, § 11:1413.2 (explaining that parties are under no obligation to produce other than managing agents).)

Furthermore, as Azoogle also has explained to Plaintiff, it is unlikely that Mr. Herrera – who hasn't been named in Plaintiff's discovery responses and disclosures – has relevant knowledge, since he began working at Azoogle six months after Plaintiff claims to have received the alleged emails.

Important to remember is that Azoogle has not threatened to withhold Mr. Herrera. Rather, it has refused to voluntarily produce him. If Plaintiff wants to force a deposition of Mr. Herrera, it should do so pursuant to established rules. If Plaintiff believes itself to have a good faith basis for Mr. Herrera's deposition, then Azoogle's reservation of its and Mr. Herrera's rights to move to quash or for a protective order should be no disincentive.

Discovery Referee

Azoogle has no wish to burden the Court with discovery disputes. (Azoogle invited Plaintiff to submit all outstanding discovery issues in a single, consolidated letter brief; Plaintiff insisted that these three issues be raised first.) Azoogle is concerned, however, that a lack of strict Court oversight will lead to discovery run amok. Plaintiff's discovery requests, described above, have done nothing to allay Azoogle's fears.

Azoogle also believes that the Magistrate's involvement in discovery will facilitate a more just and efficient resolution of this case. While Azoogle must proceed as if Plaintiff has some good-faith basis, its doubts grow ever stronger. If Plaintiff really believed the thousands of alleged emails to be unlawful, or really had information tying those emails to each other and to Azoogle, wouldn't it produce it? As Azoogle has previously stated, if Plaintiff can't connect this case's scattered dots, Azoogle will seek its costs and fees, both under the CAN-SPAM Act and Federal Rule 11. In denying an earlier motion by Quicken Loans' for security, Judge Wilken remarked that if Plaintiff were unable to prove its case against Quicken Loans, it may end up paying Quicken Loans' attorneys' fees. Azoogle, which stands in essentially the same position as Quicken Loans, expects any request for its own costs and fees to be as well received.

CAN-SPAM Act cases are not complex, especially when compared to patent, licensing and other disputes routinely handled by the Court. A greater concern in this case is control of the litigation. The only information Plaintiff has disclosed is the Bruce Wolf lead and a collection of Internet hearsay regarding Azoogle's "reputation" as a "spammer." Under those circumstances, Plaintiff's demand that Azoogle permit discovery regarding all of its lead providers and related financial records amounts to a fishing expedition at best and bullying at worst. In recognition of that fact, Azoogle requests that the Court maintain control over all facets of this litigation.

PLAINTIFF'S RESPONSE:

Defendant Azoogle begins by alleging Plaintiff has not properly responded to Defendants' request for documents or interrogatories, failed to provide a privilege log, has not copied Azoogle's counsel will all emails to and from other Defendants regarding scheduling of depositions, and made an inappropriate designation of Plaintiff's end user clients contact information as "confidential" under the protective order. There is no merit to these contentions. Mr. Burgoyne and I met and conferred on these issues in person, and Azoogle chose not to make them part of the joint letter.

Deposition of Ryan McVey

Defendant's primary argument is that Plaintiff has not produced documents requested by Azoogle, therefore Defendant cannot prepare their witness. *Azoogle has not identified a single document, or category of documents, it has requested, that Plaintiff has not produced.* Plaintiff has in fact produced *many hundreds* of documents to Azoogle, via initial and supplemental disclosures, in response to Defendant Quicken Loans discovery requests, attached to Plaintiff's Responses to Azoogle's Interrogatories and in response to Azoogle's document demand. Azoogle's contention that only one document was attached to its Response to Azoogle's demand for inspection, is misleading. Plaintiff's Response to Azoogle's inspection demand referred Azoogle to all

the other documents already produced. Plaintiff saw no need to copy all the materials already produced, and produce them again attached to the Response to Inspection Demand. The substance of Plaintiff's claims is laid out in some detail in the Complaint, in Plaintiff's discovery responses and in the Oppositions to the Motions to Dismiss.

Azoogle states that Plaintiff has access to other documents that it did not produce. What was actually said was that Plaintiff ran a Google search of the terms "Azoogle" with "Spam Complaint" and that several hundred hits appeared. Further, that not all these hits were printed out, and that Mr. Burgoyne could perform the same search. A random assortment of these hits were printed out and produced for Azoogle.

Azoogle's contention that it is justified in refusing to produce Mr. McVey for deposition, on the ground Plaintiff has stonewalled, is simply without merit. Moreover, Defendant has not cited, nor is Plaintiff aware, of any authority that allows a party to refuse to provide a deponent for deposition on the grounds it is dissatisfied with the other party's discovery responses. If Defendant Azoogle were truly dissatisfied with Plaintiff's disclosures, it would have brought those issues before the court.

Azoogle contends it is fair to refuse to produce Mr. McVey on the grounds Plaintiff has not "previewed" its case for Defendant. Plaintiff has served an 18-page mediation brief on Defendants, with several hundred documents attached. The contention is without merit.

Defendant contends that since the early summary judgment schedule has been vacated, there is no need to produce Mr. McVey for deposition. Plaintiff does not see the relevance to Defendant's contention. Plaintiff is entitled to conduct discovery. This matter has been pending for many months, and Plaintiff has been attempting to take Mr. Mcvey's deposition since December 20th, 2006.

Defendant contends it is justified in refusing to produce Mr. McVey for deposition on the grounds that Plaintiff agreed to a month long continuance of a deposition set for Quicken's PMK. Quicken refused to produce their witness on the date previously agreed, and proposed a date three weeks later. It did not seem necessary to litigate the issue. Plaintiff would have preferred to take the deposition on the date originally proposed. Plaintiff does not see the relevance of this to Defendant's refusal to produce Mr. McVey for deposition.

Defendant contends Plaintiff is not entitled to take Mr. McVey's deposition, in that Plaintiff has not explained to Defendant Mr. McVey's relevance to this case. As was repeatedly explained to Azoogle's counsel, Mr. Mcvey is Azoogle's CMO (Chief Marketing Officer) and he executed the contract between Azoogle and Quicken Loans for the sale of leads from Azoogle to Quicken. Azoogle does not deny this fact. Mr. McVey is a relevant witness.

Plaintiff is not trying to "take advantage of Azoogle's ignorance" as Mr. Burgoyne

states. Plaintiff is simply beginning the discovery process.

Deposition of Lee Herrera

Mr. Herrera is the person who fields Azoogle's spam complaints. This has been stated by Plaintiff to Mr. Burgoyne. Azoogle does not deny this fact, nor does Defendant disclose Mr. Herrera's job duties, to support its contention that Mr. Herrera is not a relevant witness. Defendant's allegation that Mr. Herrera is a "low level technical employee" does not reveal whether or not he has relevant information. Defendant contends that Plaintiff may only take the deposition of managerial employees. That is simply incorrect. Plaintiff may conduct discovery into any matter relevant to the subject matter of the action. Azoogle simply has not provided sufficient information for the Court to conclude that Mr. Herrera is a ministerial employee, (e.g. secretary or court reporter) such that Plaintiff must serve him with a subpoena.

Azoogle contends that Mr. Herrera started his employment with Azoogle six months after the subject emails were sent. So what. As Mr. Herrera fields Azoogle's spam complaints, he has relevant knowledge of the problem affiliates, the processes used by Azoogle to track such complaints, how that information is stored etc.

Taken as a whole, the Court should begin to see that Azoogle has not taken to heart the insight provided by Judge Brazil in ***In Re Convergent Technologies***, 108 F.R.D 328 (N.D. Cal. 1985). Defendant has refused, after several months of effort, to produce Mr. McVey for deposition; Refused to produce Mr. Herrera for deposition; and Twice cancelled Plaintiff's deposition. Azoogle has not responded in any fashion whatsoever to Plaintiff's Demand for Inspection of Documents, Plaintiff's Interrogatories etc, and such responses are now a week overdue. It is worth noting, that when Azoogle cancelled Plaintiff's deposition, and Mr. Mcvey's deposition (for Feb. 26th and 27th) Plaintiff's counsel had to eat $180.00 worth of hotel reservations (non-refundable). Azoogle was requested to reimburse these costs, and has not done so.

Discovery referee

Defendant's objection to the appointment of a discovery referee is not entirely clear. Azoogle seems to be of the opinion that discovery will be less efficient with a referee appointed, apparently on the grounds the referee will not have the authority to impose sanctions. ***FRCP*** Rule 53(c) provides that a special master may in fact impose sanctions.

Defendant offers that Plaintiff's written discovery demands are over burdensome, and therefore court oversight is needed. Plaintiff has demanded in discovery little more than Judge Laporte ordered Netblue to produce in *Phillips v Netblue* (No. C-05-4401 North Dist).

Contrary to Azoogle's assertions, the appointment of a referee will expedite the

resolution of discovery disputes. An eventuality Azoogle does not want. At this point, Plaintiff is willing to pay the entire cost of the appointment of a referee, as it is clear to Plaintiff that Azoogle has no intention of producing any discovery whatsoever without being directed to do so.

Respectfully submitted,

SINGLETON LAW GROUP

/s/ Jason K. Singleton

Jason K. Singleton

KRONENBERGER BURGOYNE, LLP

/s/ Hank Burgoyne

Hank Burgoyne

From: Jason Singleton [mailto:lawgroup@sbcglobal.net]
Sent: Wednesday, December 20, 2006 1:40 PM
To: hank@kronenbergerlaw.com
Subject: Asis v Azoogle

Dear Hank,

Several of the Defendant's that have settled, and also Quicken Loans, have stated the "Bruce Wolf" lead came from Azoogle. Could you please informally disclose which of Azoogle's affiliates produced the "Bruce Wolf" lead?

Also, we would like to have a copy of Azoogle's affiliate agreement with its email affiliates.

Finally, I would like to take the deposition of Ryan McVey, Azoogle's Business Development Manager. I am available to take this deposition most any weekday in January except the 25th. If recollection serves, the FRCP requires litigants to bring their witnesses within 75 miles of the court where the action is filed. So, I would propose to take this deposition in the conference room at Kaiser Air, in Oakland California. Please advise which date is available for your office.

I look forward to hearing from you. Take care,

Jason.

From: "Hank Burgoyne" <hank@kronenbergerlaw.com>
To: "'Jason Singleton'" <lawgroup@sbcglobal.net>; "'Roberta Alliston'" <r_alliston@sbcglobal.net>
Sent: Wednesday, January 31, 2007 10:09 AM
Subject: RE: Deposition of Nella White

We still are waiting final confirmation, but it appears that McVey will be available for deposition on Monday, February 26. Scheduling has been complicated by the fact that McVey resides not in New York but in Canada. As a courtesy, Azoogle nevertheless has agreed to make McVey available in the U.S. for deposition under the federal rules. I will attempt final confirmation of the date by week's end.

Hank Burgoyne
KRONENBERGER BURGOYNE, LLP
150 Post Street, Suite 520
San Francisco, CA 94108-4707
(415) 955-1155, x-116
(415) 955-1158 Fax
(415) 531-8125 Cell
hank@kronenbergerlaw.com
www.kronenbergerlaw.com