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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**

11
12 **ASIS INTERNET SERVICES**, a California
corporation,

13 Plaintiff,

14 vs.

15 **OPTIN GLOBAL, INC.**, a Delaware
16 Corporation, also dba Vision Media
Limited Corp., USA Lenders Network,
17 USA Lenders, and USA Debt
Consolidation Service; et al.,

18 Defendants.
19

Case No. C-05-5124 JCS

**DEFENDANT AZOOGLEADS.COM,
INC.'S MOTION FOR 1) PROTECTIVE
ORDER AND 2) LEAVE TO AMEND
DISCOVERY RESPONSES**

Date: April 20, 2007
Time: 9:30 A.M.
Courtroom A, 15th Floor
Honorable Joseph C. Spero

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. PLAINTIFF PROVIDES NO BASIS FOR ITS SWEEPING CLAIMS.....3

 A. Plaintiff’s Responses Demonstrate No Support for its CAN-SPAM Claim...3

 B. Plaintiff’s Responses Suggest No Basis for Liability Under CA Law.....4

III. PLAINTIFF’S DISCOVERY TACTICS NECESSITATE A PROTECTIVE ORDER.....5

 A. Standard for Granting a Protective Order.....5

 B. Plaintiff’s Discovery Demands Are Oppressively Broad.....5

IV. AZOOGLER DESERVES TO AMEND ITS SUPPOSED ADMISSIONS.....7

 A. Standard for Withdrawing Admissions.....7

 B. Denial of Azoogle’s Requests Would Preclude and Examination on the Merits.....8

 C. As a Matter of Law, Plaintiff Cannot Show Prejudice.....8

V. AZOOGLER’S EFFORTS TO MEET AND CONFER.....9

VI. CONCLUSION.....11

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TABLE OF AUTHORITIES

1
2
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21
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23
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28

Cases

Coleman v. American Red Cross (6th Cir. 1994)
23 F3d 1091, 1098.....1,5

Dickey v. Churray (E.D. Cal.)
2006 WL 1153796, at p. 3.....8

Dynasty Apparel Industries, Inc. v. Rentz (S.D. Ohio 2001)
206 F.R.D. 596, 601-02.....7

Fernandez v. City of San Francisco (N.D. Cal.)
1996 WL 162993, at p. 5.....8

Hadley v. U.S. (C.A.9 1995)
45 F.3d 1345, 1348.....1,7

Hypertouch, Inc. v. Kennedy-Western University (N.D. Cal.)
2006 WL 648688, at *5-63-4

Kerry Steel, Inc. v. Paragon Industries, Inc. (6th Cir. 1997)
106 F.3d 147, 154.....7

Novopharm Ltd. v. Torpharm, Inc. (E.D.N.C. 1998)
181 F.R.D. 308, 310.....8

Revlon Consumer Prods. Corp. v. L'Oreal, S.A. (D.Del. 1997)
170 F.R.D. 391, 404.....7

Sonoda v. Cabrera (9th Cir. 2001)
255 F.3d 1035, 1039.....2,7-8

U.S. v. Branella (D.N.J. 1997)
972 F.Supp. 294, 301.....8

Statutes and Treatises

15 U.S.C. §§ 7701 et. seq. ("CAN-SPAM").....*passim*

California Business and Professions Code § 17529.5(a)4

Rutter Group, Civil Procedure Before Trial § 11:515.....1,5

Rutter Group, Civil Procedure Before Trial §11:1072.....5

Rutter Group, Civil Procedure Before Trial § 11:1413.2.....6

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I. INTRODUCTION

Azoogles.com, Inc. ("**Azoogles**") brings this motion for a protective order barring Plaintiff ASIS Internet Services, Inc. ("**Plaintiff**") from conducting sweeping discovery unrelated to any demonstrable connection between Azoogles and the wrongdoing alleged in Plaintiff's Second Amended Complaint ("**SAC**"). Azoogles also seeks an order excusing its two-week delay in responding to Plaintiff's requests for admissions, such delay having been occasioned by Plaintiff's apparent withholding of material information.

Plaintiff claims \$16 million in damages based on more than 11,000 alleged violations of the CAN-SPAM Act and California law. At present, however, Plaintiff's information demonstrates at most that a single marketing lead generated in connection with a single one of those emails passed through Azoogles's systems while in transit from one third party to others. That's it. Plaintiff has failed to provide any information suggesting that Azoogles sent or knew of that single email, or even that such email violated the law. What's more, Plaintiff has proffered no cognizable theory by which it might extrapolate a violation relating to a single email into thousands and thousands of additional violations of the sort alleged in the SAC.

Still, Plaintiff has served written discovery seeking the majority of documents pertaining to Azoogles's marketing lead business going back two-and-a-half and, in one case, three years.¹ In what smacks of an attempt to avoid an examination on the merits, Plaintiff also has refused to permit Azoogles to amend admissions supposed to result from a fifteen-day delay in Azoogles's service of its responses to Plaintiff's requests for admissions.² Plaintiff's refusal is ironic – less because Azoogles overlooked Plaintiff's late service of its initial disclosures than because the deadline passed at a time Plaintiff apparently was withholding information material to its claims. In any event, Plaintiff

26 ¹ See Rutter, *Civil Procedure Before Trial* ("Rutter"), § 11:515 (quoting *Coleman v. American Red Cross*, 23 F3d 1091, 1098 (6th Cir. 1994) (protective order proper where discovery request would have required party "to search every file that exists" at its place of business)).

27 ² See *Hadley v. U.S.*, 45 F.3d 1345, 1348 (C.A.9 1995) (admissions may be withdrawn where failure to do so "would practically eliminate any presentation of the merits of the case").

1 cannot as a matter of law demonstrate prejudice.³ Accordingly, it would be grossly unfair
2 to reward Plaintiff for its gamesmanship.

3 Azoogle is not the first to be troubled by the disparity between Plaintiff's
4 grandiose demands on the one hand and its meager information on the other. Almost a
5 year ago, then-Defendant Quicken Loans, Inc. ("**Quicken**") – which, like Azoogle,
6 received a single marketing lead from a single third party – made a motion for Plaintiff to
7 post security. Judge Claudia Wilken denied that motion, but warned Plaintiff: "If you
8 had included [Quicken] in your amended complaint, you better give that some thought
9 and discuss it with your clients because I will not hesitate to award attorneys' fees for
10 Quicken if it turns out that they weren't properly included." (Declaration of Henry M.
11 Burgoyne, III ("**Burgoyne Decl.**"), Exh. A at 16:17-21.)

12 Azoogle is not asking the Court to bar discovery. It simply is asking the Court to
13 forestall discovery unrelated to the single, tenuous link between Azoogle and the mass
14 wrongdoing alleged in the SAC. If that initial discovery suggests some greater
15 connection, Azoogle will work with Plaintiff to expand the boundaries of Plaintiff's inquiry.
16 If not, the parties can prepare for summary judgment.

17 Plaintiff claims CAN-SPAM cases are inherently complex. If that's the case
18 generally, it's not so here. The issue here is simple: Do the Federal Rules entitle
19 Plaintiff to impose enterprise-wide discovery at a time it has failed to proffer any
20 information – not evidence, but information – suggesting Azoogle has done something
21 wrong? Azoogle believes they do not, and on that basis requests an order:

- 22 1. Protecting Azoogle from discovery unrelated to the single marketing lead that
23 transited Azoogle's systems and that Plaintiff alleges to have been generated
24 in connection with one of the alleged emails; and
- 25 2. Permitting Azoogle to amend any admissions occasioned by Azoogle's failure
26 to timely serve its responses to Plaintiff's written discovery.

27
28 ³ *Sonoda v. Cabrera*, 255 F.3d 1035, 1039 (9th Cir. 2001) ("[t]he prejudice contemplated by 36(b) is not simply that the party who obtained the admission will now have to convince the factfinder of the truth").

1 **II. PLAINTIFF PROVIDES NO BASIS FOR ITS SWEEPING CLAIMS**

2 **A. Plaintiff's Responses Demonstrate No Support for Its CAN-SPAM Claim**

3 For a plaintiff to succeed under CAN-SPAM, it must prove, with respect to each
4 alleged email, that the email embodies one or more CAN-SPAM violations and that the
5 defendant initiated (sent), or "procured" the initiation of, the email. 15 U.S.C. §§ 7702(9)
6 and (12), 7704. In the context of an action by an ISP, "procure" means:

- 7 i. intentionally to pay or provide other consideration to, or to induce, another
8 person to initiate such a message on one's behalf
9 ii. with actual knowledge, or by consciously avoiding knowing, whether such
10 person is engaging, or will engage, in a pattern or practice that violates [CAN-
11 SPAM].

12 15 U.S.C. §§ 7702 (12), 7706(g)(2). With respect to the second of those prongs, the
13 naked assertion that a defendant generally "is aware that these third parties use
14 unlawful email advertising" is insufficient, in particular where the defendant proffers
15 evidence – for example, a declaration stating that it did not know or consciously avoid
16 knowing of any wrongdoing – to the contrary. *Hypertouch, Inc. v. Kennedy-Western*
17 *University*, 2006 WL 648688, at *5-6 (N.D.Cal.) (Burgoyne Decl., Exh. S).

18 Plaintiff's discovery responses fail to disclose the email Plaintiff alleges to relate
19 to the lead that transited Azoogles systems.⁴ Nor do Plaintiff's responses specify the
20 nature of the CAN-SPAM violation (violations?) embodied therein or the supposed
21 connection between that email and the 11,000-plus other emails alleged in the SAC.
22 Perhaps more fundamentally, Plaintiff's discovery responses and disclosures foreclose
23 the possibility that Azoogles sent the alleged email, and provide no basis for believing
24 that Azoogles knew, or consciously avoided knowing, that the sender was engaged, or
25 would engage, in a pattern and practice of violating CAN-SPAM.

26 In prior filings, Plaintiff has attempted to fill that informational vacuum with what

27 _____
28 ⁴ Plaintiff's responses to Azoogles interrogatories and requests for documents, not including exhibits, are attached as Exhibits B and C, respectively, to the Burgoyne Decl.

1 amount to conspiracy theories – for example, that Internet marketing companies are part
2 of a “SPAM Cartel” organized for the purpose of laundering unlawful marketing leads.
3 (Burgoyne Decl., ¶ and Exh. D, 3:12-5:24.) While Plaintiff’s “SPAM Cartel” reasoning
4 may have helped Plaintiff past the pleading stage, it did not inspired confidence in
5 Plaintiff’s case generally. (See *id.* at Exh. A, at 16:17-21 (Judge Wilken: “I will not
6 hesitate to award attorneys’ fees for Quicken if it turns out that they weren’t properly
7 included”).) Nor can Plaintiff seriously purport to rely on such theories, since, as
8 explained in *Hypertouch*, unsubstantiated “six degrees of separation”-type arguments
9 are not a proper basis for a CAN-SPAM claim. More recently, Plaintiff also has invoked
10 what amounts to “reputation” evidence – in the form of Internet printouts – though it isn’t
11 clear what Azoogole’s reputation has to do with Plaintiff’s claims, given that the relevant
12 “pattern or practice” is that of the (as yet unidentified) sender of the alleged emails.

13 **B. Plaintiff’s Responses Suggest No Basis for Liability Under CA Law**

14 California Business and Professions Code § 17529.5(a) states that it is “unlawful
15 for any person or entity to advertise in a commercial e-mail advertisement” embodying
16 any of a defined list of infirmities. An “advertiser” is any person or entity that “advertises
17 through the use of commercial e-mail advertisements.” Cal. Bus. & Prof. Code. §
18 17529.1(a).

19 Plaintiff’s discovery responses fail to disclose the alleged email (emails?) in which
20 Azoogole allegedly “advertised.” It is probable that Azoogole did not advertise in any,
21 given that Azoogole is an Internet marketing company and that the SAC describes the
22 alleged emails as relating to mortgage lending services. In any event, if and when the
23 Court enters judgment as to Plaintiff’s CAN-SPAM claims, it will ask the Court to dismiss
24 Plaintiff’s California law claims for lack of subject matter jurisdiction, thereby obviating
25 Plaintiff’s lack of proof. See *Hypertouch*, 2006 WL 648688 at *6 (dismissing California
26 claims after judgment for defendant entered as to CAN-SPAM).

1 **III. PLAINTIFF'S DISCOVERY TACTICS NECESSITATE A PROTECTIVE ORDER**

2 **A. Standard for Granting a Protective Order**

3 For good cause shown, a court may "make any order which justice requires to
4 protect a party or person from annoyance, embarrassment, oppression, or undue burden
5 or expense" resulting from another party's discovery demands. FRCP 26(c). Good
6 cause includes a showing that the burden or expense of the requested discovery would
7 outweigh its likely benefit, as in the case of a request that would require a party "to
8 search every file that exists" at its place of business. Rutter, § 11:515 (*quoting Coleman*
9 *v. American Red Cross*, 23 F3d 1091, 1098 (6th Cir. 1994)). The first factor to be
10 considered in determining the appropriateness of a protective order: "[W]hether the
11 information is being sought for a legitimate purpose." Rutter, § 11:1072.

12 **B. Plaintiff's Discovery Demands Are Oppressively Broad**

13 Plaintiff has failed to provide any basis to suspect that Azoogole is liable for a
14 single violation of CAN-SPAM or California law. Still, Plaintiff has propounded discovery
15 – 20 interrogatories (22 counting compound ones), 43 requests for admissions, 39
16 document requests – requiring Azoogole to produce virtually every document relating to
17 its marketing lead business going back two-and-one-half years.⁵ One request seeks

18
19 ⁵ See Burgoyne Decl., Ex. E ("**Plain. Int.**"), Ex. F ("**Plain. RFAs**"), and Ex. G ("**Plain. Doc. Req.**").
Collectively, Plaintiff's written discovery demands that Azoogole produce or provide (among other things):

- 20
- 21 • Contact information for each of Azoogole's thousands of third party lead providers, along with
22 Azoogole's agreements with those entities, each demonstrating a "written or electronic signature ...
23 or proof of electronic signature"; a month-by-month, entity-by-entity accounting of every payment
24 by Azoogole to those entities; and all documents relating to those payments, in each case going
25 back to August 1, 2005. (Plain. Doc. Req. Nos. 4 and 7; Plain. Int. Nos. 9 and 12);
 - 26 • All communications between Azoogole and any of the identified lead providers, also since August
27 1, 2005. (Plain. Doc. Req. No. 8);
 - 28 • Contact information for every entity to which Azoogole had provided marketing leads, along with a
month-by-month, entity-by-entity accounting of every payment received by Azoogole from those
entities, in each case going back to August 1, 2005. (Plain. Int. Nos. 10 and 11);
 - Month-by-month accountings of marketing emails: i) sent by Azoogole's third-party lead providers
to asis.com; and ii) sent by Azoogole and its third party lead providers to any "Protected Computer,"
as defined by CAN-SPAM, accompanied by sample copies of all such emails, in each case since
August 15, 2005. (Plain. Doc. Req. Nos. 15 and 16; Plain's Int. Nos. 4 and 5);
 - All correspondence between Azoogole and any entity or person on the subject of unlawful email
advertising since August 1, 2005. (Plain. Doc. Req. No. 9);
 - All court complaints against Azoogole stating causes of action for false email advertising or other

1 documents from almost two years before the first alleged violation. (See Plain. Doc.
 2 Req. No. 22.) Much of the information sought by Plaintiff is stored in backup files, some
 3 kept offsite and some of which Azoogole could search only by means of custom search
 4 scripts. (Declaration of Don Mathis in Support of Defendant's Motion ("Mathis Decl.")
 5 ¶¶4-6.) The estimated cost of complying with Plaintiff's written discovery: Hundreds of
 6 person hours and potentially tens of thousands of dollars in costs. (*Id.* at ¶5.)

7 Additionally, Plaintiff has demanded the depositions of Azoogole employees Ryan
 8 McVey and Lee Herrera⁶ – the latter of whom, as repeatedly disclosed to Plaintiff, is a
 9 technical support representative in his early twenties whom Plaintiff's "expert" identified
 10 during phone calls to Azoogole. (Burgoyne Decl., Exh. H.) Plaintiff claims its expert
 11 made those calls before Azoogole was named as a defendant. (*Id.* at Exh. I at 2-3.)
 12 Plaintiff's credibility is strained, though, since Plaintiff previously represented – twice –
 13 that it identified Mr. Herrera on the Internet. (*Id.*, Exh. J.)⁷

14 The overwhelming bulk of information sought by Plaintiff is unlikely to assist
 15 Plaintiff in any way. Azoogole's contracts and correspondence with its thousands of lead
 16 providers will not reflect whether Azoogole knew, or consciously avoided knowing, that a
 17 single marketing lead was procured by unlawful means. Azoogole's communications
 18 regarding unlawful email marketing will not demonstrate whether the alleged emails
 19 embody violations of CAN-SPAM. And thousands of month-by-month accountings, each
 20 going back two-and-a-half years, will play no part in calculating damages, if for no other

21
 22 unlawful email marketing, breach of consumer privacy, false claims act demands, libel, defamation
 or fraud. (Plain. Doc. Req. No. 10); and

- 23 • All strategic or marketing plans for Azoogole going back to January 1, 2004. (Plain. Doc. Req. No.
 22.)

24 ⁶ Azoogole initially agreed to produce Mr. McVey but withdrew that offer after concluding that Plaintiff had
 25 withheld documents to be used at Mr. McVey's deposition. Azoogole did not agree to voluntarily produce
 26 Mr. Herrera, since Plaintiff wouldn't disclose how Plaintiff identified Mr. Herrera or why Plaintiff wanted to
 27 depose him, and since Mr. Herrera is not a managing agent of Azoogole. (Burgoyne Decl., Exh. 9 (*citing*
 28 Rutter, Federal Civil Procedure Before Trial ("Rutter"), § 11:1413.2 (parties are under no obligation to
 produce other than managing agents.))

⁷ Plaintiff also has demanded a deposition of Azoogole's spam "abuse manager," spam "abuse team"
 supervisor, or "PMK" on spam issues, but has refused invitations to specify a list of topics as would be
 required under FRCP 30(b)(6). (*Id.* at Exh. K.)

1 reason than Plaintiff's repeated assertion that it seeks only statutory damages. (*Id.* at
2 Exh. L, 3:1-6, and Plain. Int. Resp. No. 11.)

3 As stated, Azoogole is not asking the Court to halt discovery. Rather, it is asking
4 the Court to draw boundaries reflective of the single, tenuous link between Azoogole and
5 the mass wrongdoing alleged in the SAC. If Plaintiff develops a cogent theory based
6 upon that information, or otherwise discovers additional relevant information, it can
7 explain as much to Azoogole and the Court, and on that basis request additional
8 discovery. If not, the parties can begin preparing for summary judgment.

9 **IV. AZOOGLE DESERVES TO AMEND ITS SUPPOSED ADMISSIONS**

10 **A. Standard for Withdrawing Admissions**

11 "[T]wo requirements must be met before an admission may be withdrawn: (1)
12 presentation of the merits of the action must be subserved, and (2) the party who
13 obtained the admission must not be prejudiced by the withdrawal." *Sonoda v. Cabrera*,
14 255 F.3d 1035, 1039 (9th Cir. 2001).

15 The first prong of that test is satisfied where the court's refusal to allow withdraw
16 or amendment "would practically eliminate any presentation of the merits of the case."
17 *Hadley v. U.S.*, 45 F.3d 1345, 1348 (C.A.9 1995). The presentation of the merits is
18 practically eliminated where, for example, the party opposing amendment seeks to use
19 the other party's supposed admission as the basis for summary judgment. *Dynasty*
20 *Apparel Industries, Inc. v. Rentz*, 206 F.R.D. 596, 601-02 (S.D. Ohio 2001).

21 As for the second prong, "[t]he prejudice contemplated by 36(b) is not simply that
22 the party who obtained the admission will now have to convince the factfinder of the
23 truth; rather, it relates to the difficulty a party may face in proving its case, for example by
24 the unavailability of key witnesses in light of the delay." *Sonoda*, 255 F.3d at 1039.
25 Prejudice does not equal the need to obtain evidence; instead, it equals a handicap in
26 the form of "sudden" need to obtain evidence. *Kerry Steel, Inc. v. Paragon Industries,*
27 *Inc.*, 106 F.3d 147, 154 (6th Cir. 1997); see *Revlon Consumer Prods. Corp. v. L'Oreal,*
28 *S.A.*, 170 F.R.D. 391, 404 (D.Del. 1997) (prejudice resulted from fact that discovery

1 already had closed).⁸ The burden of proving prejudice is on the party opposing
2 amendment. *Sonoda*, 255 F.3d at 1039.

3 **B. Denial of Azoogle's Request Would Preclude An Examination of the Merits**

4 It cannot be questioned that denying Azoogle's motion to amend would subserve
5 the presentation of this action's merits. Plaintiff has stated its intention to use Azoogle's
6 supposed admissions as the basis for a motion for summary adjudication, likely to
7 include the issue of Azoogle's supposed knowledge of the SAC's alleged wrongdoing.
8 (Burgoyne Decl., ¶26.) Permitting Plaintiff to do so would foreclose any examination of
9 that and other fundamental issues, despite that Plaintiff's discovery responses provide
10 no basis to suspect that Azoogle did anything wrong. If Plaintiff believes Azoogle to be
11 connected to the 11,000-plus alleged violations, it should disclose the information
12 supporting that belief. Otherwise, it should cease erecting procedural roadblocks to a
13 full and fair adjudication of its claims.

14 **C. As a Matter of Law, Plaintiff Cannot Show Prejudice**

15 Plaintiff cannot, as a matter of law, demonstrate prejudice from Azoogle's failure
16 to sooner serve its responses to Plaintiff's requests for admissions. Azoogle, the last
17 named defendant, did not become an active participant in this litigation until the
18 December 15, 2006 status conference, which the Court reset in order to give Azoogle
19 time to answer the SAC. What's more, Azoogle served its responses just 15 days late,
20 and within hours of the March 9 mediation. At the time, summary judgment had been
21 indefinitely postponed and trial was not scheduled to begin for almost a year. Under
22 those circumstances, it strains Plaintiff's credibility to even suggest prejudice.

23 Plaintiff's refusal to waive Azoogle's untimeliness is especially ironic in light of
24 Plaintiff's own apparent withholding of information material to Azoogle's responses.

25 _____
26 ⁸ See also *Novopharm Ltd. v. Torpharm, Inc.*, 181 F.R.D. 308, 310 (E.D.N.C. 1998) (no prejudice from
27 responses served 14 days late); *U.S. v. Branella*, 972 F.Supp. 294, 301 (D.N.J. 1997) (no prejudice from
28 responses served two weeks late, where opposing party did not rely on responses when preparing for
trial); *Dickey v. Churray*, 2006 WL 1153796, at p. 3 (E.D. Cal.) (no prejudice from responses served 14
days late); *Fernandez v. City of San Francisco*, 1996 WL 162993, at p. 5 (N.D.Cal.) (no prejudice from
responses filed 48 days late, even when motion to amend not brought until a year later).

1 Beginning February 8, Plaintiff promised a full preview of its case at the parties' March 9
 2 mediation. (Plaintiff refused to disclose the planned basis of that presentation on the
 3 ground that it was "attorney work product.") (*Id.* at ¶¶ 17, Exh. I at p. 11 (Plaintiff letter
 4 brief, referring to Plaintiff's mediation statement, not received by Azoogole until March 2).)
 5 Plaintiff's responses to Azoogole's requests for documents repeatedly stated that
 6 responsive documents "will be produced," though none ever was. (*Id.* at Exh. B, Nos. 2,
 7 6-10, 16-17.) Then, during the parties' February 19 meet-and-confer, Plaintiff claimed to
 8 know of up to 800 documents establishing Azoogole's knowledge of the SAC's alleged
 9 wrongdoing. Those and other statements – combined with Plaintiff's vacuous discovery
 10 responses, deficient even in comparison to those served on Quicken – convinced
 11 Azoogole that Plaintiff was withholding material information. (*compare* Exh. B, Plain. Int.
 12 Resp. Nos. 1, 3-4 *with* Exh. M (Plaintiff's Response to Quicken's First Set of
 13 Interrogatories) Nos. 1, 3 and 4.) It would be grossly unfair for Plaintiff to benefit from
 14 that gamesmanship.

15 The only arguable prejudice is Plaintiff's burden in opposing portions of this
 16 motion. And Plaintiff invited that prejudice when it denied Azoogole's repeated requests
 17 for an extension. When Plaintiff served its initial disclosures on the day of the December
 18 15, 2006 status conference, no defendant cried foul. (Burgoyne Decl., ¶¶14.) Plaintiff
 19 should have followed that lead. Because Plaintiff cannot show prejudice, the Court
 20 should grant Azoogole's motion to amend its responses to Plaintiff's requests for
 21 admission.

22 **V. AZOOGLE'S EFFORTS TO MEET AND CONFER**

23 In early January, Azoogole and Plaintiff began an ongoing meet-and-confer
 24 process over their discovery requests and responses.⁹ On February 8, Azoogole initiated
 25 a meet and confer regarding Plaintiff's discovery responses, culminating in a February
 26 19 in-person meeting. (*Id.* at Exhs. N and O.) Plaintiff's counsel opened that meeting by
 27

28 ⁹ Azoogole was not the only party to encounter difficulty managing discovery with Plaintiff. (*See, e.g., Id.* at Exh. P (five emails and four letters from Quicken or Plaintiff concerning discovery and other disputes).)

1 stating that the parties were “unlikely to reach agreement” on any of the issues raised in
2 Azoogle’s letter. At points during the meeting, Plaintiff’s counsel:

- 3 • Responded, when asked whether Plaintiff could identify the particular Azoogle
4 lead providers alleged to be “spammers”: “I don’t know if I can or not”;
- 5 • Refused to place any potential limits – numerical or otherwise – on the scope of
6 Plaintiff’s planned third-party discovery from Azoogle’s lead providers; and
- 7 • Stated, “it’s not [Plaintiff’s] obligation to tell you” what Plaintiff considered to be
8 the violations embodied in the 11,000-plus alleged emails ... and instructed that if
9 Azoogle wanted that information it should examine those emails for itself.

8 (*Id.* at ¶20.)

9 Plaintiff and Azoogle met again after the parties’ March 9 mediation. In preceding
10 days, the parties had corresponded about two issues: i) Plaintiff’s designation of email
11 addresses as “Highly Confidential-Attorneys Eyes Only”; and ii) Plaintiff’s refusal to grant
12 Azoogle an extension to respond to Plaintiff’s requests for admission. (*Id.* at Exh. Q.)
13 Azoogle suggested the parties broaden the meeting to encompass all outstanding
14 discovery, although Plaintiff’s counsel refused to engage in a “quid pro quo” discussion.
15 Plaintiff refused to reconsider its stance on either issue. (*Id.* at ¶22.)

16 The week of March 12, the parties met-and-conferred at length concerning
17 Plaintiff’s refusal to allow Azoogle to amend its supposed admissions and regarding
18 Plaintiff’s discovery requests and Azoogle’s response thereto. (*See Id.* at Exh. R.)
19 Counsel for Plaintiff and Azoogle spoke on March 14 and March 15. During the March
20 15 call, which lasted for more than an hour, Plaintiff agreed to reconsider certain of its
21 positions, and to limit certain of its demands to exclude information regarding the
22 provision of marketing leads unrelated to email. Azoogle also agreed to reconsider
23 certain of its positions. Plaintiff refused, however, to permit Azoogle to amend its
24 supposed admissions, and stated its intention to use them in support of a motion for
25 summary adjudication, likely to include the issue of Azoogle’s alleged knowledge. (*Id.* at
26 ¶26.) Now certain that the issues raised herein would not be resolved short of Court
27 intervention, Azoogle filed this motion.

VI. CONCLUSION

Plaintiff's discovery responses and disclosures provide no basis to suspect that Plaintiff will be able to prove a single CAN-SPAM or California Business and Professions Code violation, much less 11,000 of them. In the face of that reality, it would be grossly unfair to permit Plaintiff to heap months and months of costly discovery on Azoogle, or to benefit from supposed admissions occasioned by Plaintiff's own apparent withholding information. When the merits phase of this litigation is over, and perhaps sooner, Azoogle, like Quicken before it, will ask the Court to shift to Plaintiff the growing financial burden of this litigation. In the meantime, and in the interest of sooner arriving at that point, Azoogle requests that the Court enter Azoogle's proposed order:

1. Protecting Azoogle from discovery unrelated to the single marketing lead that passed through Azoogle's systems and that Plaintiff alleges to have been generated in connection with one of the alleged emails; and
2. Permitting Azoogle to amend any admissions occasioned by Azoogle's failure to timely serve its responses to Plaintiff's written discovery.

KRONENBERGER BURGOYNE, LLP

Dated: March 16, 2007

 /s/
 Henry M. Burgoyne, III, Attorneys for
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