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

ASIS INTERNET SERVICES, a California corporation,

Plaintiff,

vs.

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

Defendants.

Case No. C-05-5124 JCS

NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: May 4, 2007
Time: 9:30 a.m.
Courtroom A, 15th Floor
The Honorable Joseph C. Spero

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on May 4, 2007 at 9:30 a.m. or as soon thereafter as the matter may be heard in the above-titled court, located in Courtroom A on the 15th Floor of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA 94101, defendant, AzoogLeads.com Inc. ("AzoogLe"), pursuant to the stipulation filed with the Court on April 4, 2007 (the "Stipulation"), will move for summary adjudication.

Pursuant to the Stipulation, this Motion asks the Court to address the following

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1 issues:

- 2 • Whether the following types of evidence, or any of them, are admissible on
3 the question of whether a CAN-SPAM defendant that did not itself originate
4 or transmit a commercial electronic mail message *procured* the origination
5 or transmission of such commercial electronic mail message within the
6 meaning of 15 U.S.C. §§7702(12) and 7706(g)(2):
 - 7 ○ Evidence that the defendant has a reputation for initiating
8 commercial electronic mail messages in violation of CAN-SPAM (15
9 U.S.C. §7701 *et. seq.*);
 - 10 ○ Evidence that third parties in privity with the defendant in relation to
11 Internet marketing activities have a reputation for initiating
12 commercial electronic mail messages in violation of CAN-SPAM (15
13 U.S.C. §7701 *et. seq.*);
 - 14 ○ Evidence that third parties in privity with the defendant in relation to
15 Internet marketing activities have—in fact—initiated commercial
16 electronic mail messages, other than those at issue, in violation of
17 CAN-SPAM (15 U.S.C. §7701 *et. seq.*).
- 18 • Whether a defendant can be said to *advertise*, within the meaning of
19 California Business and Professions Code Section 17529.5(a), in a
20 commercial e-mail advertisement that neither mentions nor references the
21 defendant nor any third party in privity with the defendant, nor any
22 property, goods, services, or extensions of credit as specifically offered by
23 the defendant or any third party in privity with the defendant.

24 This Motion is based on Azoogle’s Memorandum of Points and Authorities in
25 Support set forth below, the Declaration of Henry M. Burgoyne, III In Support of the
26 Motion, all pleadings on file in this case, and such further evidence and arguments that
27 may be presented prior to or at the hearing on this Motion.
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1 Dated: April 11, 2007

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Henry M. Burgoyne, III
Karl S. Kronenberger
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By: _____ /s/
Henry M. Burgoyne, III

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The parties bring these Cross-Motions for Summary Adjudication in a quest for
4 Court guidance regarding a pair of discrete legal issues—one relating to CAN-SPAM,
5 the other to California Business & Professions Code Section 17529—the resolution of
6 which should vastly streamline the prosecution of this action.

7 As is no secret to the Court, the litigation of ASIS Internet Services, Inc.
8 (“Plaintiff”)’s CAN-SPAM claim has not gone smoothly. One source of difficulty has been
9 Plaintiff’s failure to identify any evidence suggesting that Azoogleads.com, Inc.
10 (“Azoogle”) participated in, or had reason to know of, the wrongdoing alleged in the
11 Second Amended Complaint (“SAC”). A second source of difficulty has been the
12 parties’ disagreement regarding a closely related legal question: Whether Plaintiff may
13 prevail even in the absence of such evidence by demonstrating that Azoogle has a
14 reputation as a “spammer,” or knows of or has associations with uninvolved third parties
15 supposed to “SPAM.” It is this legal question as to which the parties seek Court
16 guidance.

17 As Plaintiff must concede, Azoogle did not send the 11,000-plus emails alleged
18 by Plaintiff in its SAC. Azoogle’s purported liability under CAN-SPAM therefore hinges
19 on whether it “procured” those emails from some unnamed party. To prove that a
20 defendant procured unlawful emails, a plaintiff must prove both: (i) that the defendant
21 intentionally paid or induced another person to initiate the emails; and (ii) that the
22 defendant did so “with actual knowledge, or by consciously avoiding knowing, whether
23 such person is engaging, or will engage, in a pattern or practice that violates [CAN-
24 SPAM].” 15 U.S.C. §§7702(12), 7706(g)(2).

25 It is the second of those two prongs (the “Knowledge Prong”), which is a subject
26 of this Motion. Azoogle, following the only federal court decision to address the issue,
27 maintains that the Knowledge Prong means exactly what it says: That a defendant will
28 not be held liable absent proof the defendant was aware of a current or future violation

1 by the actual sender of the alleged emails. *Hypertouch, Inc. v. Kennedy-Western Univ.*,
 2 No. C 04-05203, 2006 WL 648688, at *5-6 (N.D. Cal., March 8, 2006) (attached as Exh.
 3 A to the Declaration of Henry M. Burgoyne, III In Support of Azoogles Motion for
 4 Summary Adjudication (“Burgoyne Decl.”)). Plaintiff, by contrast, takes the position—
 5 unsupported by any identifiable authority—that a plaintiff can satisfy the Knowledge
 6 Prong by proving a defendant’s supposed reputation as a “spammer,” or a defendant’s
 7 knowledge of, or association with, uninvolved third parties supposed to “SPAM.” (The
 8 basis of Plaintiff’s position is its belief that all Internet marketing companies are members
 9 of a secret conspiracy—the “SPAM Cartel”—and as such, may be charged with
 10 knowledge of every other defendant’s actions. (Burgoyne Decl., Exh. B at 2:26-5:24).
 11 The parties seek the Court’s opinion as to which of those interpretations is correct, as
 12 that opinion might help the parties tailor discovery and perhaps negotiate a resolution of
 13 Plaintiff’s CAN-SPAM claim.

14 The parties also seek Court guidance as to a second issue: Whether (as Plaintiff
 15 appears to contend) Plaintiff may establish liability under California Business &
 16 Professions Code Section 17529.5(a) by showing that Azoogles may somehow have
 17 benefited from the 11,000-plus alleged emails? Or whether (as Azoogles maintains)
 18 Plaintiff must prove, as per the language of the statute, that Azoogles “advertise[d]” in the
 19 alleged emails—for example, by showing that Azoogles sent those emails, or that those
 20 emails reference Azoogles or a related third party, or goods or services as specifically
 21 offered by Azoogles or a related third party? As in the case of their disagreement
 22 concerning CAN-SPAM’s Knowledge Prong, the parties’ believe that Court guidance
 23 regarding the meaning of “advertise,” as used in Section 17529.5(a), will help them
 24 streamline and focus the remainder of this litigation.

25 II. PROCEDURAL BACKGROUND

26 A. Plaintiff’s SPAM Cartel Conspiracy Theory.

27 On December 12, 2005, Plaintiff filed a complaint (the “Complaint”) alleging
 28 violations of CAN-SPAM and California Business and Professions Code Section

1 17529.5(a) against 17 defendants. In March 2006, a number of the initial defendants
 2 moved the Court to dismiss the Complaint. Defendant Quicken Loans Inc. (“Quicken”)—
 3 which, like Azoogole and most every other defendant, was alleged to have received a
 4 single tainted marketing lead from a single third party—also moved the Court for security
 5 for costs, including attorneys’ fees.

6 In its consolidated opposition, Plaintiff explained that it brought suit “after suffering
 7 egregious injury by a group of conspirators who intend to misuse its Internet service
 8 resources to gain information about its clients and sell mortgages to its clients.”
 9 (Burgoyne Decl. Exh., B, 1:26-28.) Plaintiff’s opposition detailed that conspiracy—the
 10 “SPAM Cartel”—the centerpiece of which is a secret agreement amongst all mortgage
 11 lenders and Internet marketing companies to launder marketing leads generated by
 12 means of mass CAN-SPAM violations. (*Id.* at 2:26-5:21.) As stated by Plaintiff:

13 The SPAM Cartel is now built around an industry adept in obfuscating and
 14 hiding the identities of advertisers sending SPAM. ... Just as the money
 15 man in a bank robbery does not know or care how the bank robbers
 16 actually carry out the theft, the money man in the SPAM industry is not
 17 interested in the details and depend [sic] on obfuscation and remoteness
 to pretend he is not responsible. (*Id.* at 4:13-5:3.)

18 Implicit in Plaintiff’s theory was the conclusion that as co-conspirators, SPAM
 19 Cartel members could be charged with actual knowledge of other members’
 20 wrongdoing. (*Id.* at 3:6-7 and 3:14-18.)¹

21 Plaintiff’s SPAM Cartel theory did not impress Judge Claudia Wilken, who
 22 granted defendants’ motion to dismiss. Judge Wilken denied the motion for
 23 security brought by Quicken, which, like Azoogole, unknowingly received a single
 24 marketing lead alleged by Plaintiff to have been generated in connection with a
 25 single one of Plaintiff’s 11,000-plus alleged emails. In doing so, however, Judge
 26 Wilken warned Plaintiff: “If you had included [Quicken] in your amended

27 ¹ As the source of its SPAM Cartel theory, Plaintiff cites “*Inside the SPAM Cartel – Trade Secrets*
 28 *from the Dark Side*,” a supposed tell-all book distributed by a small tech publisher and authored by a self-
 described former outlaw emailer named “Spammer-X.” (Burgoyne Decl. Exh. B, 3:28-4:3.)

1 complaint, you better give that some thought and discuss it with your clients
2 because I will not hesitate to award attorneys' fees for Quicken if it turns out that
3 they weren't properly included." (Burgoyne Decl., Exh. C at 16:17-21.)

4
5 **B. Plaintiff's Planned Proof by Reputation and Association.**

6 On July 14, 2006, Plaintiff filed a First Amended Complaint, which added Azoogle
7 as a defendant. Then, on October 4, 2006, Plaintiff filed the operative Second Amended
8 Complaint. The SAC echoed Plaintiff's SPAM-Cartel conspiracy theory, alleging that
9 Azoogle "conspired with and at all times supported the SPAMMERS in execution of the
10 allegations set forth in [the] complaint." (SAC at ¶10.) The SAC also alleged a variety of
11 additional grounds for Azoogle's vicarious liability—ranging from employment to
12 franchisee/franchisor to master/servant—none supported by any specific factual
13 allegation.

14 On January 4, 2007, Azoogle informed Plaintiff of its intention to seek sanctions in
15 connection with the filing of the SAC, based upon the utter absence of information
16 supporting Plaintiff's allegations as to Azoogle. In a January 8 email, Plaintiff replied
17 that "after discovery has concluded, Plaintiff will be able to prove that Azoogle knew or
18 consciously avoided knowing that its affiliates were spammers. Ask your client, as your
19 client is well aware it's [sic] Affiliates are spammers."² (Burgoyne Decl., Exh. D.)

20 On February 5, 2007, Plaintiff served its responses to Azoogle's basic written
21 contention discovery. In support of its allegations as to Azoogle, Plaintiff's responses
22 provided no information. Instead, the responses incorporated a slew of generalizations
23 regarding "Azoogleads history of SPAM abuse," including references to "news articles
24 and blogs" supposedly describing Azoogle and its founder "as active spammers," and
25 discussing "the messy affiliate business carried on between lead generation companies
26 and spammer affiliates." (Burgoyne Decl., Exh. D at Nos. 12 and 13.³) Two weeks

27 ² "Affiliate," as used by Plaintiff, refers not to an owned or controlled subsidiary, but to an
independent contractor providing marketing or similar services.

28 ³ Azoogle relies on Plaintiff's discovery responses not for their factual content—the Court and
parties have agreed these Cross-Motions will not address fact questions—but to demonstrate Plaintiff's
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1 earlier, Plaintiff served on Azoogole discovery apparently intended to flesh out those
2 generalizations and seeking, effectively, every document relating to Azoogole’s marketing
3 lead business.⁴

4 **III. PLAINTIFF’S REPUTATION AND ASSOCIATION EVIDENCE IS, AS A MATTER OF**
5 **LAW, INSUFFICIENT AND INADMISSIBLE TO PROVE AZOOGLE VIOLATED**
6 **CAN-SPAM**

7 Plaintiff has made clear its intention to prove that Azoogole “procured” the 11,000-
8 plus emails alleged in the SAC by demonstrating that Azoogole has a reputation as a
9 “spammer,” or has knowledge of or associations with uninvolved third parties supposed
10 to “SPAM.” As a matter of law, however, Azoogole’s reputation and associations are
11 irrelevant to its knowledge or conscious avoidance of knowledge of wrongdoing. What’s
12 more, any proof of Azoogole’s reputation and associations is inadmissible under the
13 Federal Rules of Evidence. If Azoogole is to be found liable, Plaintiff must instead proffer
14 evidence that Azoogole knew or had every reason to know that the sender of the emails
15 at issue had violated, or would violate, CAN-SPAM.

16 **A. CAN-SPAM’s Plain Language Requires Proof of Azoogole’s State of**
17 **Knowledge Concerning the Actual Sender of the Alleged Emails.**

18 For an Internet Access Service (“IAS”) to establish a violation of CAN-SPAM, it
19 must prove that the defendant originated or transmitted, or *procured* the origination or
20 transmission of, an unlawful electronic mail message. CAN-SPAM defines *procure* as:

21 intentionally to pay or provide other consideration to, or induce,
22 another person to initiate such a message on one’s behalf, with
23 actual knowledge, or by consciously avoiding knowing, whether
24 such person is engaging or will engage in a pattern or practice that
25 violates the Act. 15 U.S.C. §7706(g)(2) (emphasis added)

26 In the single decision known to Azoogole addressing that language, Judge Susan
27 Illston construed it as requiring admissible evidence establishing the defendant’s state of
28 intention to prove Azoogole’s liability through evidence of third-party wrongdoing or of Azoogole or others’
supposed reputations as “spammers.”

intention to prove Azoogole’s liability through evidence of third-party wrongdoing or of Azoogole or others’
supposed reputations as “spammers.”

⁴ See Azoogole’s Motion for Protective Order and for Leave to Amend Discovery Responses, and the
Declaration of Henry M. Burgoyne III in support thereof (detailing scope of Plaintiff’s first written
discovery to Azoogole).

1 knowledge regarding the actual sender of the emails at issue. *Hypertouch*, 2006 WL
2 648688 at *5-6. The *Hypertouch* plaintiff, also an IAS, alleged that the defendant had
3 contracted with third parties to engage in email advertising on the defendant's behalf.
4 The defendant moved for summary judgment, including on the basis that it did not know,
5 nor consciously avoided knowing, that such third parties had violated, or would violate,
6 CAN-SPAM. In opposition, the plaintiff made the SPAM-Cartel-like argument that the
7 defendant must have been "aware that these third parties use unlawful email advertising
8 as a means of increasing the exposure of [defendant] and the products it sells." *Id.* at
9 *5. In granting defendant's motion, Judge Illston confirmed that CAN-SPAM liability
10 could not be premised on anything less than admissible "evidence that [the defendant]
11 had actual knowledge or consciously avoided knowledge of a current or future violation
12 of the CAN-SPAM Act by anyone who sent the e-mails at issue." *Hypertouch* at *5-6
13 (emphasis added).

14 Plaintiff promises to prove Azoogole's CAN-SPAM liability by means of evidence
15 concerning Azoogole's reputation and associations with uninvolved third parties. That
16 evidence, however, would shed no light whatsoever on Azoogole's state of knowledge
17 concerning the actual sender of the emails at issue in this case. Accordingly, such
18 evidence would, as a matter of law, be irrelevant to, and therefore inadmissible to prove,
19 Azoogole's actual knowledge or conscious avoidance of knowledge, as is required by
20 CAN-SPAM's definition of "procure." On that basis alone, the Court should grant
21 Azoogole's Motion.

22 **B. The Conscious Avoidance Standard, Imported from the Law of**
23 **Conspiracy, Requires All But Actual Knowledge.**

24 As explained in the 2003 United States Senate Report, in crafting CAN-SPAM's
25 definition of "procure," Congress intended to impose liability on those who remained
26 willfully ignorant of the practices of third parties agreeing to act on their behalf. S. Rep.
27 No. 108-102, at 15 (2003), *reprinted in* 2003 U.S.C.C.A.N. 2348, 2360. Given that
28 purpose, it is not surprising that Congress ripped portions of that definition, in particular

1 the “consciously avoiding knowing” language, directly from a long line of conspiracy
 2 case law. That case law makes clear that a defendant may be charged with conscious
 3 avoidance of knowledge—otherwise known as “willful blindness”—only where the
 4 defendant “decided not to learn the key fact, not merely to have failed to learn it through
 5 negligence.” *Untied States v. Nektalov*, 461 F.3d 309, 315 (2d. Cir. 2006).

6 A finding of willful blindness is appropriate “only where it can almost be said that
 7 the defendant actually knew. He suspected the fact; he realised its probability; but he
 8 refrained from obtaining the final confirmation because he wanted in the event to be able
 9 to deny knowledge. This, and this alone, is willful blindness.” *Nektalov*, 461 F.3d at
 10 315. In this regard, conscious avoidance of knowledge is distinguishable from other
 11 standards, such as constructive knowledge or reckless disregard, which impose liability
 12 even where a defendant might not have formed a suspicion or belief regarding the
 13 existence of certain facts. *See Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt.*, No. 03
 14 CIV.2387, 2007 WL 926916 at *14 (S.D.N.Y., March 27, 2007) (distinguishing between
 15 conscious avoidance and constructive knowledge).⁵

16 Plaintiff posits the existence of a “SPAM Cartel,” as if that might justify a lowering
 17 of the burden of proof regarding Azoogle’s knowledge. No such lowering is justified. As
 18 Congress made clear when it incorporated the “consciously avoiding knowing” standard
 19 into the definition of “procure,” Azoogle cannot be found liable absent admissible
 20 evidence that it all but actually knew of ongoing or future wrongdoing by the sender of
 21 the 11,000-plus alleged emails. Evidence regarding Azoogle’s reputation and
 22 associations with third parties, even third parties supposed to commit email marketing
 23 violations, does not come close to satisfying that standard. For that additional reason,
 24

25 ⁵ See, e.g., *U.S. v. Draves*, 103 F.3d 1328 (7th Cir. 1997) (conscious avoidance of knowledge of credit card
 26 fraud premised on defendant’s having witnessed girlfriend repeatedly fail to enter correct ATM identification number,
 27 spend thousands of dollars in late night purchases, and forge victim’s signature on credit card receipts); *U.S. v.*
 28 *McAllister*, 747 F.2d 1273 (9th Cir. 1984) (conscious avoidance of knowledge of transportation of illegal immigrants
 where defendant agreed to sudden trip at 2:00 a.m. with no specific destination, defendant’s partner refused to
 accompany defendant in truck, and defendant refused to look in the back of the truck); *U.S. v. Aulicino*, 44 F.3d 1102
 (2d. Cir. 1995) (conscious avoidance charge justified as to kidnapping where defendant was present at meeting where
 kidnappings were planned and was outside proposed victim’s home at time of arrest).

1 the Court should hold that Plaintiff's promised reputation and association evidence is
2 insufficient and therefore inadmissible to prove that Azoogle knew or consciously
3 avoided knowing, as is required under CAN-SPAM.

4 **C. The Federal Rules Strongly Disfavor Reputation and Association**
5 **Evidence.**

6 Subject to a handful of inapplicable exceptions, "evidence of a person's character
7 or a trait of character is not admissible for the purpose of proving action in conformity
8 therewith on a particular occasion." Federal Rule of Evidence 404. The policy behind
9 Rule 404 is that reputation evidence is of such slight probative value, and so tends to
10 distract the trier of fact, that its admission risks the imposition of liability even where
11 remaining evidence demonstrates that a defendant did nothing wrong. See *Jones v.*
12 *Southern Pacific R.R.*, 962 F.2d 447 (5th Cir. 1992); Fed. R. Evid. 404 advisory
13 committee's note. For the same reason, under the Federal Rules "the conduct of a third
14 person offered to prove the character of the accused is barred as evidence of the
15 defendant's conduct." *United States v. Ellis*, 493 F. Supp. 1092 (Tenn. 1979); see
16 *United States v. Lucas*, 374 F.3d 599 (6th Cir. 2004); *United States v. Ngo*, 985 F.2d 576
17 (9th Cir. 1993).

18 Plaintiff's proposed proof—regarding Azoogle's supposed "history of SPAM
19 abuse," Azoogle's reputation as an "active spammer," Azoogle's "Affiliates'" reputations
20 as "spammers," and the general nature of relationships between lead generation
21 companies and spammer affiliates—is the picture of evidence that Rule 404 is designed
22 to exclude. Plaintiff's proposed proof would do nothing to establish whether Azoogle
23 knew or could have known of, or played any role in, the specific violations alleged in the
24 SAC. Furthermore, it would open the door to a finding of liability based not on actual,
25 admissible evidence, but on the trier of fact's conclusion that Azoogle is a bad actor and
26 so must have done something wrong. Thus, Plaintiff's proposed reputation and
27 association evidence is inadmissible—not just on the question of Azoogle's knowledge
28 or conscious avoidance of knowledge, but on the issue of Azoogle's liability generally.

1 On that further basis, the Court should grant Azoogole’s Motion.

2 **IV. AZOOGLE CANNOT BE HELD TO HAVE “ADVERTISED”**
3 **IN EMAILS THAT BEAR NO CONNECTION TO IT**

4 As Plaintiff must concede, Azoogole did not send any of the 11,000-plus alleged
5 emails. Nor do those emails reference Azoogole (or any other person or entity) or any
6 goods or services as specifically offered by Azoogole (or anyone else). Still, Plaintiff
7 promises to prove that Azoogole “advertise[d]” in those emails within the meaning of
8 California Business & Professions Code Section 17529.5(a)—presumably by
9 demonstrating that, as a member of the SPAM Cartel, Azoogole somehow benefited from
10 their having been sent. Azoogole believes liability under Section 17529.5(a) requires
11 proof of something more—for example, that Azoogole sent the alleged emails, or that
12 those emails reference Azoogole or a related third party, or goods or services as
13 specifically offered by Azoogole or a related third party. The question posed by this
14 section is: Which party is right?

15 Business and Professions Code Section 17529.5(a) makes it “unlawful for any
16 person or entity to advertise in a commercial e-mail advertisement” under certain
17 enumerated circumstances. The California legislature intended Section 17529 generally
18 “to regulate the advertisers who use spam, as well as the actual spammers,” including
19 because the “true beneficiaries of spam are the advertisers who benefit from the
20 marketing derived from the advertisements.” Cal. Bus. & Prof. Code §17529(j).
21 California Business and Professions Code Section 17529.1(a), somewhat circularly,
22 defines an “advertiser” as “a person or entity that advertises through the use of
23 commercial e-mail advertisements.”

24 Plaintiff has yet to make clear how it intends to establish Azoogole’s liability under
25 that framework, except by generally referring to “Azoogoleads history of SPAM abuse.”
26 (Burgoyne Decl., Exh. E at No. 4.) Presumably, that history would be relevant—at least
27 under Plaintiff’s “SPAM Cartel” conspiracy theory—to show that Azoogole (and countless
28 others) somehow benefited from the 11,000-plus alleged emails. Section 17529.5(a),

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1 however, requires not that Azoogole have benefited from the alleged emails, but that
 2 Azoogole have “advertise[d]” in them. Azoogole’s supposed history of “SPAM abuse” or its
 3 purported membership in Plaintiff’s SPAM Cartel is utterly irrelevant to, and therefore
 4 inadmissible to prove, that fact. (Nor can Plaintiff point to any other evidence that
 5 Azoogole “advertise[d]” in the alleged emails, since those emails weren’t sent by Azoogole,
 6 and since none references Azoogole or any related third party, or goods or services as
 7 specifically offered by Azoogole or any related third party.)

8 Plaintiff’s interpretation of Section 17529—that every arguable beneficiary of an
 9 unlawful email can be said to have “advertise[d]” in that email—would permit the
 10 imposition of unlimited vicarious liability, including for third-party acts a defendant
 11 couldn’t have known about. The injustice of Plaintiff’s interpretation is all the more
 12 apparent here, where the alleged emails make no reference to any particular person or
 13 entity—much less any defendant—or to goods or services as specifically offered by any
 14 person or entity. Under such circumstances, Plaintiff’s interpretation would create
 15 liability against any alleged member of Plaintiff’s alleged “SPAM Cartel,” regardless of
 16 any demonstrated connection to the alleged emails.

17 To say that advertisers are the “true beneficiaries of spam” is not to say that all
 18 arguable beneficiaries of “spam” are advertisers. Plaintiff’s construction of 17529 would
 19 turn it into a weapon. In recognition of that fact, the Court should grant Azoogole’s motion
 20 for summary adjudication as to California Business & Professions Code Section 17529.

21 V. CONCLUSION

22 Nothing in CAN-SPAM or California Business and Professions Code Section
 23 17529 suggests that Congress and the California legislature intended to impose
 24 unbounded vicarious liability for the activities of third parties. Plaintiff’s proposed
 25 construction of those statutes would open the gates to flood of litigation, accompanied
 26 by overwhelming and unfocused discovery of the sort that has characterized this case.
 27 These cross-motions for summary judgment represent what might be the Court and
 28 parties’ last, best opportunity to focus this litigation in a way that would permit a

1 resolution short of trial. For those reasons, and as further explained above, the Court
2 should grant summary adjudication in favor of Azoogie.

3 Dated: April 11, 2007

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