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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11

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

14 Plaintiff,

15 vs.

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

19 Defendants.
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Case No. C-05-5124 JCS

**MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR
SUMMARY ADJUDICATION**

Date: June 1, 2007
Time: 9:30 a.m.
Courtroom A, 15th Floor
The Honorable Joseph C. Spero

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I. INTRODUCTION

Plaintiff ASIS Internet Services, Inc. ("Plaintiff")'s summary adjudication memorandum does more than Defendant Azoogleads.com, Inc. ("Azoogle") ever could to illustrate why the Court must place some limits on this litigation.

Plaintiff's brief is a perfect metaphor for its prosecution of its case. Plaintiff misrepresents the law and its own allegations. Plaintiff willfully disregards the parties' agreement and the Court's order, and files yet another unauthorized discovery pleading. Plaintiff takes every opportunity to disparage Azoogle with a prejudicial, inaccurate and self-contradictory recital of "facts" ... all in furtherance of enterprise-wide discovery demands that the Court already characterized as needing to be "narrowed dramatically."

Plaintiff all but ignored the two legal issues that the parties agreed, and the Court ordered the parties, to brief:

1. Whether Plaintiff may prove that Azoogle "procured" the 11,000-plus alleged emails (as relevant to Plaintiff's CAN-SPAM claim) with evidence that Azoogle is a "spammer," or has associations with others supposed to "SPAM"; and
2. Whether Azoogle can be said to have "advertised" in those emails within the meaning of California Business & Professions Code Section 17529.5(a).

Instead, Plaintiff filed what amounts to a motion to compel, based on its increasingly hollow assertion that the overwhelming discovery it seeks is necessary to "answer key questions in this case." (Plaintiff's Memorandum ("Memo.") at 6:3.) The reason for Plaintiff's retreat is obvious: No matter how one twists CAN-SPAM and Business & Professions Code Section 17529.5(a) – and Plaintiff twists both – they simply cannot be read as supporting Plaintiff's proposed theories of proof.

Plaintiff repeats, as it has for months, that Azoogle refuses to provide necessary discovery. That's simply not true. Azoogle has produced, or is in the process of producing, all of its information concerning the "Bruce Wolf lead," Azoogle's agreements

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1 with those who provided or received that lead, Azoogole's related correspondence,
2 Azoogole's policies regarding email-related compliance, and other relevant information.
3 There's nothing more for Azoogole to provide, or for Plaintiff to demand or to admit as
4 evidence. Plaintiff's continued protests to the contrary strain Plaintiff's credibility,
5 especially in light of Plaintiff's concessions that: i) Azoogole's only connection to the
6 alleged emails is the parties that provided the Bruce Wolf lead (see Memo. at 5:10-16
7 and 14:15-19); and ii) the alleged emails don't contain sufficient information to permit the
8 identification of any wrongdoer not situated in that chain of distribution (see *id.* at 18:25-
9 26).

10 It's increasingly difficult to view this lawsuit as other than a shakedown. Of
11 eighteen defendants named in the SAC – none shown to be responsible for the alleged
12 wrongdoing, and all threatened with overwhelming discovery – all but one has been
13 dismissed or settled for an insignificant fraction of Plaintiff's supposed \$16 million in
14 damages. It's not now and never was possible for eighteen independent entities – all
15 either competitors or contractors bound by representations to abide by the law – to have
16 "conspired" to send the alleged unlawful emails. Plaintiff should be embarrassed for
17 having even suggested the existence of a "SPAM Cartel."

18 The point of these cross-motions – agreed to by Plaintiff, both during the parties'
19 *in camera* meet and confer and in the parties' Stipulation and Order – was to bring some
20 focus to this litigation. It doesn't matter what one labels this proceeding – summary
21 adjudication, an early rule 56(f) request, a motion to compel or a motion *in limine*. CAN-
22 SPAM provides no support for Plaintiff's threatened proof by defamatory reputation and
23 association evidence. And California Business & Professions Code provides no basis to
24 argue that Azoogole "advertised" in the alleged emails. Conclude as much, and the Court
25 is four months away from wrapping up this case with a hearing on Azoogole's motions for
26 sanctions, costs and fees.

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28 ///

1 10:11.) As is obvious from the Intent Prong's language, the actual burden is much,
2 much higher, requiring proof that a defendant "intentionally [paid] or provide[d] other
3 consideration to, or to induce[d], another person to initiate such a message on one's
4 behalf." 17 U.S.C. § 7702(12). Of course, the Court need not decide the appropriate
5 burden, since the sole question at issue is whether Plaintiff's threatened reputation and
6 association evidence is in any way relevant or admissible to prove whether Azoog
7 "procured" the alleged emails. And even under Plaintiff's careless reading of the Intent
8 Prong, the answer is "no."

9 Plaintiff's characterization of the "Knowledge Prong" is equally misleading.
10 Plaintiff states that an Internet access service plaintiff need only show a defendant's
11 knowledge "that the statute [CAN-SPAM] was being violated." (Op. at 15:17-18.) As this
12 Court has ruled, however, the Knowledge Prong requires proof not that a defendant
13 possessed knowledge of wrongdoing generally, but that the defendant knew, or avoided
14 knowing, of "a current or future violation of the CAN-SPAM Act by anyone who sent the
15 e-mails at issue." *Hypertouch, Inc. v. Kennedy-Western Univ.*, No. C 04-05203, 2006
16 WL 648688, at *5-6 (N.D. Cal., March 8, 2006) (emphasis added) (attached as Exh. A to
17 the Declaration of Henry M. Burgoyne, III In Support of Azoog's Motion for Summary
18 Adjudication ("Burgoyne Decl.")). Plaintiff makes no attempt to explain how Azoog's
19 supposed past bad acts, or its associations with others that Plaintiff considers to be bad
20 actors, could or would shed any light on Azoog's knowledge of a likely CAN-SPAM
21 violation by the sender of the alleged emails.

22 Plaintiff's proposed use of reputation and association evidence is all the more
23 unjustified because, as Plaintiff's knows, the words "spammers" and "SPAM" have
24 widely varying meanings. CAN-SPAM implicitly sanctions unsolicited commercial email,
25 so long as such email complies with the act's guidelines. Anti-email marketing activists,
26 by contrast, regard all unsolicited commercial email as "SPAM." An Internet posting
27 describing a company as a "spammer" or an email as "SPAM" thus sheds no light on
28 whether either violated the law.

1 The Federal Rules of Evidence bar all but all reputation and association evidence,
2 and for good reason. In recognition of that fact, the Court should clarify that Plaintiff's
3 may not prove that Azoogole "procured" the alleged emails by evidence that Azoogole is a
4 "spammer" or has associations with others supposed to "SPAM."

5 **B. Plaintiff's "Pattern-or-Practice" Arguments Misrepresent CAN-SPAM and**
6 **Plaintiff's Own Allegations.**

7 Plaintiff attempts to justify its threatened use of reputation and association
8 evidence (and its concomitant enterprise-wide discovery demands) by reference to
9 "pattern or practice" language contained in CAN-SPAM. Plaintiff's arguments, however,
10 depend on more patent misrepresentations, concerning both CAN-SPAM and Plaintiff's
11 own allegations.

12 Plaintiff states that an "Internet Access Provider" (the actual term is "Internet
13 access service") such as Plaintiff may bring a CAN-SPAM action "if he [sic] can show a
14 pattern or practice that violates those paragraphs [of CAN-SPAM]." (Memo. at 10:3-4.).
15 The CAN-SPAM section Plaintiff purports to paraphrase (but doesn't cite) is Section
16 7706(g)(1). What Section 7706(g)(1) actually states is that "an Internet access service
17 adversely affected by ... a pattern or practice that violates paragraphs (2), (3), (4), or (5)
18 of section 7704(a) of this title, may bring a civil action ..." (Emphasis added.) Patterns
19 or practices that haven't adversely affected an Internet access service (for example,
20 unalleged misconduct by uninvolved third-parties) simply aren't actionable. More
21 importantly, as Plaintiff attempts to gloss over, Section 7706(g)(1) isn't part of the
22 definition of "procure." It's a jurisdictional provision unrelated to any issue in this case.
23 Plaintiff knows that, as evidenced by Plaintiff's having cited Section 7706(g)(1) in the
24 SAC's "Jurisdiction and Venue" section. (SAC at ¶ 1.)

25 Plaintiff also purports to rely on "pattern or practice" language in Section
26 7706(g)(2)'s Knowledge Prong. As Plaintiff argues, "[e]vidence of a pattern or practice
27 can also be used to show that an affiliate that was induced to send emails had a pattern
28 or practice of sending spam emails." What Plaintiff ignores, of course, are the

1 Knowledge Prong's obvious requirements that the pattern or practice in question both: i)
2 belong to the actual sender of the emails and ii) essentially have been known to the
3 defendant. 17 U.S.C. 7706(g)(2). Patterns or practices of those who didn't send the
4 emails, or that weren't known to the defendant, aren't actionable or relevant.

5 Perhaps most misleading, Plaintiff's "pattern or practice" discussion repeatedly
6 implies that Plaintiff bases its CAN-SPAM claim on some pattern or practice of Azoogle.
7 It doesn't. The words "pattern or practice" appear in the SAC only once – as mentioned
8 above, in the Jurisdiction and Venue section, where Plaintiff inserted them in lip service
9 to Section 7706(g)(1)'s jurisdiction requirement. Plaintiff has alleged no facts, and has
10 proffered no discovery or other information, so much as suggesting that it suffered
11 adverse effects as a result of some Azoogle pattern or practice, much less a pattern or
12 practice apart from the 11,000-plus alleged emails.

13 The wrongdoing at issue is the 11,000-plus alleged emails. Azoogle has
14 produced, or is in the process of producing, all its information relevant, or potentially
15 relevant, to the 11,000-plus alleged emails, and to the Bruce Wolf lead, and to the
16 parties that supplied or received the Bruce Wolf lead. Plaintiff has no right to demand or
17 admit as evidence anything else. To conclude otherwise would be to turn every CAN-
18 SPAM trial into a mud-fight about the defendant's reputation, and "spammer affiliates,"
19 and the secretive "SPAM Cartel." No doubt the drafters of CAN-SPAM intended no such
20 thing.

21 **C. Plaintiff's Section 17529.5 Argument Defies the Language of That**
22 **Statute, Judge Wilken's Prior Ruling and Common Sense.**

23 As if California Business & Professions Code Section 17529.5 failed to provide its
24 own definition, Plaintiff reaches back to a concurring opinion in a 1925 California Court
25 of Appeal case for what Plaintiff touts as the "definition of advertising used in California."
26 That definition, according to Plaintiff, encompasses any "conveyance of information" that
27 "is an exploitation of the intended recipient" and that "benefit[s]" the supposed advertiser.
28 (Memo. at 19:8-14.) Based on that definition, and the fact that Azoogle received a

1 supposed “benefit” in the form of the Bruce Wolf lead, Plaintiff concludes that Azoogle
2 “advertised” in the alleged 11,000-plus emails.

3 The obvious problem with Plaintiff’s definition (and related reasoning) is that it
4 doesn’t require a supposed “advertiser” to have played any role in, or even to have
5 known of, the “advertisement.” It requires only that the supposed advertiser have
6 “benefited.” Plaintiff’s reasoning creates what amounts to strict vicarious liability. It’s
7 hard to believe the California Legislature intended 17529.5 to reach so far, given its
8 expressed statutory purpose of “regulating the advertisers who use spam, as well as
9 actual spammers.” Cal. Bus. & Prof. Code § 17529(j). Judge Claudia Wilken concluded
10 as much in granting an earlier motion to dismiss. (Burgoyne Decl., Exh. P at 14:13-16
11 (“Plaintiff may include a § 17529.5 claim ... if it can state, truthfully ... that Defendants
12 advertised their services in the allegedly fraudulent emails” (emphasis added)).)

13 It’s hard to construe the alleged emails as “advertisements” for the services of
14 Azoogle or anyone else. As Plaintiff points out, it’s impossible to tell from the alleged
15 emails who sent them, much less whose services they promote. (Memo. at 18:25-26).
16 Furthermore, Azoogle is an Internet marketing company, not a mortgage lender. The
17 SAC alleges that the Bruce Wolf lead ended up with, or passed through the systems of,
18 18 entities, one of which (Leads Limited, Inc.) Plaintiff alleged to be a competing “Lead
19 Generator.” It defies all sense to conclude that those emails nevertheless constitute all
20 those entities’ “advertising.”

21 It’s worth noting that Plaintiff’s Section 17529.5 claim fails even under Plaintiff’s
22 expansive definition of “advertise,” insofar as Azoogle received less than no benefit from
23 the alleged emails. Azoogle’s agreement with Quicken required Quicken to pay only for
24 *bona fide* marketing leads, and obligated Azoogle to indemnify Quicken in connection
25 with violations by Azoogle of the law or the parties’ agreement. (Declaration of Richard
26 E. Grabowski in Support of [Plaintiff’s] Motion for Summary Adjudication (“Grabowski
27 Decl.”), Exh. L at ¶ 8.)² It’s hard to characterize that potentially enormous obligation as a

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² Similarly, Azoogle’s agreement with Seamless required Seamless to replace, free of charge, any bogus
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1 “benefit.”

2 In the end, it matters little how the Court resolves the parties' arguments under
3 Section 17529. Once the Court has disposed of Plaintiff's CAN-SPAM claim, Azoogole
4 will request that the Court decline to exercise further jurisdiction over, and thereafter
5 dismiss, any remaining state law claims. See *Hypertouch* at *6 (declining to exercise
6 jurisdiction over Business & Professions Code claim after dismissing CAN-SPAM claim).

7
8 **III. THE MORASS OF “FACTS” DISGUISED AS PLAINTIFF’S BRIEF ILLUSTRATES**
9 **THE NEED FOR COURT GUIDANCE**

10 From the filing of its initial complaint until now, Plaintiff's strategy has been
11 apparent: Retreat behind a fog of supposed “fact questions” and argue that, absent
12 enterprise-wide discovery, it cannot see itself to a resolution of this case. The problems
13 with that strategy are two-fold. First, the more Plaintiff argues, the more obvious it
14 becomes that Plaintiff will say anything to keep its case alive, thus bankrupting Plaintiff
15 of credibility at the time Plaintiff needs it most. Second, the farther discovery
16 progresses, the thinner Plaintiff's cloud of fog, and the harder for Plaintiff to credibly
17 argue that more discovery will make a difference. Still, Plaintiff continues to push
18 discovery demands so sweeping as to suggest an ulterior motive.

19 **A. Plaintiff’s Memorandum Makes Clear That Plaintiff Will Say Anything**
20 **Necessary to Help Its Case Survive.**

21 As Plaintiff's memorandum richly illustrates, Plaintiff will say anything, at any time
22 and in any context, in the interest of moving its case one step closer to trial.

23 For example, Plaintiff's memorandum states that Plaintiff “contends that
24 Defendant Azoogoleads was the entity that was responsible for inducing the actual
25 spammers to send emails,” and that Azoogole “then benefited by selling the leads they
26 [sic] gained to a group of mortgage brokers.” (Memo. at 3:11-13 (emphasis added).)
27 The SAC, by contrast, alleges – not on information and belief, but on *actual knowledge* –

28 lead provided to Azoogole. (Grabowski Decl., Exh. J at numbered p. 2.)

1 that the "spammers" acted at the behest of all defendants and even that all defendants
 2 initiated the alleged unlawful emails themselves. (SAC at ¶¶ 21-22, 24-26, 30, 32, 34,
 3 36 and 49-52.) Before that, in its opposition to dismiss its initial complaint, Plaintiff
 4 argued that the "spammers" were acting on behalf of, and for the benefit of, all mortgage
 5 lending and Internet marketing companies (collectively, the "SPAM Cartel"). (Burgoyne
 6 Decl., Exh. B at 2:26-5:24.) And still separately, Plaintiff is seeking a default judgment
 7 for the entirety of its alleged \$16 million in damages against Leads Limited, Inc., another
 8 alleged "Lead Generator," also on account of Leads Limited having sent, or having
 9 induced others to send, the alleged emails. (Declaration of Henry M. Burgoyne, III In
 10 Opposition to Plaintiff's Motion for Summary Adjudication ("Burgoyne Op. Decl.") at Exh.
 11 A.) How could two "lead generators" – competitors in the marketplace – have played the
 12 same exclusive role as initiator of the alleged unlawful conduct?

13 Plaintiff even contradicts itself within its own memorandum. Plaintiff states that it
 14 bears the burden of proving "who sent the [alleged] emails," and that it demanded the
 15 identities of Azoogles lead providers so that it could match that information "against the
 16 data contained in the emails." (Memo. at 2:26-27, 6:14.) Elsewhere, however, Plaintiff
 17 concludes that the alleged emails likely were sent by one or both of Seamless Media
 18 Corp. ("Seamless") or John Strothers ("Strothers"). (*Id.* at 12:11-13.) And still
 19 elsewhere, Plaintiff represents, as it has in the past, that there is "no way to identify the
 20 identity [sic] of the sender through the information provided in the email." (Memo. at
 21 18:25-26; *see also* Memo. at 3:17-19, Burgoyne Op. Dec. at Exh. B, 6:6-9 (alleged
 22 emails were sent "so as to make tracing the source impossible").)

23 These are not the only, or even the most serious, examples of Plaintiff speaking
 24 out of both sides of its mouth:

- 25 • In early 2006, Plaintiff promised to settle with then-defendant Quicken in return for
 26 Quicken's provision of certain information. Quicken complied, and Plaintiff faxed
 27 Quicken a partial settlement agreement ... only to later claim that no agreement
 28 had been reached. (*Id.* at Exh. C, 3:1-6:4.) (Quicken settled with Plaintiff more
 than one year later for a pittance.)

- 1 • Earlier in this litigation (Plaintiff hasn't provided a date), Plaintiff's counsel, or a
2 representative of Plaintiff's counsel, engaged in one or more unrepresented
3 communications with Azoogole employees, including Lee Herrera. At first,
4 Plaintiff's counsel claimed he personally identified Mr. Herrera on the Internet.
5 (*Id.* at Exhs. D and E.) Subsequently, after Azoogole pointed out that Mr. Herrera's
6 contact information wasn't available on the Internet, Plaintiff conceded to the
7 Court that Plaintiff's investigator identified Mr. Herrera during telephone calls to
8 Azoogole. (*Id.* at Exh. F and G, p. 2-3.)
- 9 • During the parties' March 20 *in camera* meet-and-confer, the parties agreed that
10 depositions of Azoogole personnel, including Ryan McVey and Azoogole's
11 organizational representative as to email-related legal compliance, would not
12 begin until two weeks after the hearing on the parties' cross-motions for summary
13 adjudication. (*Id.* at Exhs. H and I.) During an April 12 telephone call, however,
14 Plaintiff counsel disavowed that agreement, on the grounds that it was not
15 "official" and was not contained in a written stipulation. (*Id.* at Exh. J.) Plaintiff
16 currently is noticing depositions of Azoogole personnel as early as the first week of
17 May, is planning a motion to compel a deposition of Azoogole's CEO. (*Id.* at Exhs.
18 K and L.)

19 Plaintiff's shifting theories of its case demonstrate that it doesn't believe any to be
20 correct. That's no surprise to Azoogole, which has for months requested discovery
21 concerning the facts supposed to underlie Plaintiff's basic contentions, and has received
22 nothing in return. The Court is not, per the terms of the Stipulation and Order, to decide
23 fact issues in the context of these cross-motions. To the extent the Court nevertheless
24 wades into the thicket of selective, contradictory and unsubstantiated allegations that is
25 Plaintiff's "Statement of Facts," it should bear in mind that Plaintiff is no stranger to
26 misrepresentation.

27 **B. Plaintiff's "Statement of Facts" and Supporting Documents Demonstrate**
28 **That Azoogole Already Is Providing All Necessary Discovery.**

The Court ordered that these cross-motions address only issues of law. Plaintiff
filed, and proceeded to argue from, an almost six-page statement of facts. Ironically,
that statement concedes everything necessary to conclude that the overwhelming

1 discovery demanded by Plaintiff will do nothing to help it prove its case.

2 Plaintiff's memorandum concedes or concludes that:

- 3 • All the alleged emails came from the same source (*Id.* at 14:15-19);
- 4 • The Bruce Wolf lead (solicited in connection with one of the alleged 11,000-plus
- 5 emails) passed through two parties – Seamless and Strothers – on its way to
- 6 Azoogle (*Id.* at 5:10-16); and
- 7 • It is more likely than not that Seamless or Strothers sent the alleged emails and
- 8 owned or operated the “USA Lenders Network” website to which those emails
- 9 directed recipients (*Id.* at 12:11-13).

10 Exactly. Azoogle's only connection to the Bruce Wolf lead is Seamless and Strothers.

11 No other party or parties stood in the chain, unless they were at least three steps

12 removed from Azoogle. So regardless of whether Seamless and/or Strothers sent the

13 alleged emails themselves or procured the Bruce Wolf lead from someone else,

14 Seamless and Strothers are the only third parties as to whom Azoogle should be

15 required to produce information. Discovery as to Azoogle's hundreds or thousands of

16 other lead providers would be pure fishing.

17 In tacit recognition that its avenues of discovery and proof are limited, Plaintiff

18 attempts to shift its burden to Azoogle. For example, Plaintiff complains of Azoogle's

19 failure to produce “evidence that [Seamless and Strothers] are not ‘USA Lenders

20 Network’...” (Memo. at 2:20-21.) Of course, it's not Azoogle's responsibility to disprove

21 Plaintiff's claims. The most Azoogle can do is to produce the relevant information in its

22 possession and wait for Plaintiff to come to its senses.

23 The truth is that nobody in this lawsuit knows who sent the alleged emails. As

24 Plaintiff knows from Azoogle's productions, Azoogle received the Bruce Wolf lead from

25 Seamless, which in turn received it from Strothers. As Plaintiff also knows, the Bruce

26 Wolf lead may have traveled a long and forked path before ever arriving to Seamless

27 and Strothers. (See Burgoyne Op. Decl., Exh. M (article attached as Exh. C to Plaintiff's

28 response to Azoogle Interrogatory No. 13) at p. 2.) Plaintiff's allegations, to the extent

1 any are true, demonstrate that the Bruce Wolf lead ended up in the hands of at least one
2 competing “lead generator” (Leads Limited). It thus is highly unlikely that the sender of
3 the related email was working “on behalf of,” much less under the control of, Azoogle.

4 Azoogle’s only connection to that chain is Seamless and Strothers. It is there that
5 Plaintiff should focus its inquiry.

6 **C. Plaintiff Has Forgotten the Court’s Observation That its Discovery**
7 **Demands Should Be “Narrowed Dramatically.”**

8 As explained by Azoogle in its motion for a protective order, Plaintiff’s discovery
9 demands – encompassing, as they do, practically every document relating to Azoogle’s
10 lead provider business – are wildly overbroad. The Court concluded as much during the
11 parties’ March 20 *in camera* meet-and-confer, when it observed that Plaintiff’s discovery
12 demands should be “narrowed dramatically.” Azoogle assumed those words would chill
13 Plaintiff’s zealotry.

14 They didn’t. Plaintiff has agreed to narrow certain of its demands.³ Even so
15 limited, however, those demands encompass an overwhelming volume of information
16 totally unrelated to Plaintiff’s claims or the SAC’s alleged wrongdoing. Furthermore, on
17 other fronts, Plaintiff has begun pushing even harder, demanding a deposition of
18 Azoogle’s CEO and threatening motions to compel ... including as to discovery issues
19 the parties agreed to hold over until the hearing on the cross-motions for summary
20 adjudication. (Burgoyne Op. Decl. at Exhs. L, N and O.) As Plaintiff’s memorandum
21 makes clear, Plaintiff hasn’t backed off its initial theory of discovery – entitling it all but
22 every document concerning Azoogle’s lead provider business – one bit. (Memo. at 17:5-
23 23.)

24 Plaintiff’s memorandum illustrates that the “key questions” as to which Plaintiff
25 demands answers bear little relation to what Plaintiff believes to be the elements of its

26 _____
27 ³ For example, Plaintiff now demands only those of Azoogle’s lead providers who solicit leads by means of
28 email, and only those Azoogle marketing materials and clients relating to Azoogle’s mortgage-lending
vertical, and only those documents created in the eight months (rather than the several years) surrounding
the alleged wrongdoing. (Memo. at 7:7-15.)

1 claims. (*Compare* Memo. at 6:3-12 (describing the “several key questions in this case”)
2 *and* Memo. at 6:13-17 (stating the supposed elements of Plaintiff’s CAN-SPAM claim).)
3 Plaintiff’s aggressive rhetoric does nothing to mask that disparity. It is increasingly
4 difficult to deny that Plaintiff’s discovery demands speak to some motive unrelated to
5 proof of its claims. As soon as judgment is entered, Azoogle will file sanctions motions
6 asking the Court to conclude as much.

7
8 **IV. CONCLUSION**

9 Plaintiff does not now have, and never has had, any cognizable legal basis for its
10 threats to prove Azoogle’s CAN-SPAM liability by means of evidence that Azoogle’s is a
11 “spammer” or associates with others supposed to “SPAM.” Nor does Plaintiff have any
12 hope of demonstrating that Azoogle “advertised” in the alleged 11,000-plus emails.
13 Plaintiff pounds its discovery bully pulpit because it has nowhere else to stand. Take
14 away that bully pulpit and this case is over. Not because denying Plaintiff’s
15 overwhelming discovery would divest Plaintiff of the opportunity to prove its claims, but
16 because Plaintiff’s claims never could have been proved. In recognition of that truth,
17 and as explicitly requested by the parties, the Court should enter an order clarifying
18 Plaintiff’s burdens of proof, thus permitting the parties to wrap up discovery, resolve this
19 case, and proceed to Azoogle’s motions for sanctions, fees and costs.

20
21 Dated: April 20, 2007

22 Henry M. Burgoyne, III
23 Karl S. Kronenberger
24 Jeffrey M. Rosenfeld
25 Kronenberger Burgoyne, LLP

26 By: _____ /s/
Henry M. Burgoyne, III

27 Attorneys for Defendant,
28 AZOOGLEADS.COM INC.