



April 26, 2007

The Hon. Joseph C. Spero
Magistrate Judge
U.S. District Court for Northern California
450 Golden Gate Ave., Courtroom A, 15th Floor
San Francisco, CA 94102

AS FILED

**RE: ASIS INTERNET SERVICES V. OPTIN GLOBAL, INC., ET. AL.,
USDC, NORTHERN DISTRICT OF CALIFORNIA, CV-05-5124**

Dear Judge Spero:

We are counsel to defendant Azoogleads.com, Inc. ("Azoogle"). We write in response to Plaintiff ASIS Internet Services, Inc. ("Plaintiff")'s April 23, 2007 letter, and to express Azoogle's growing concerns with Plaintiff's repeated improper *ex parte* communications with the Court and Plaintiff's increasingly aggressive and oppressive discovery conduct.

Plaintiff's April 23rd letter ostensibly sought to summarize the parties' meet-and-confer efforts. In reality, it was yet another thinly-veiled effort by Plaintiff to create an *ex parte* record of Azoogle's supposed misconduct, combined with yet another improper motion to compel. Azoogle requests that the Court remove Plaintiff's April 23rd letter and Plaintiff's improper *ex parte* April 16, 2007 letter from the file of this case. Azoogle also again requests that the Court admonish Plaintiff that neither the Federal Rules of Civil Procedure nor the Local Rules permit Plaintiff to seek Court intervention as to discovery disputes by way *ex parte* letter briefs.

As Your Honor may remember, on March 20, 2007, the parties conferred *in camera* about the state of discovery. The parties concluded that conference by agreeing to file cross motions for summary adjudication ("Cross-Motions"), which both parties stipulated to the Court would provide guidance regarding the majority of the pending discovery disputes. The parties agreed generally to postpone their discussions about the majority of unresolved discovery issues while the Cross-Motions were pending. Your Honor asked the parties to prepare and submit to the Court a joint letter briefly summarizing the March 20th conference. While this is what Plaintiff's April 23, 2007 letter purports to be, the letter is not joint nor brief nor even an accurate summary.

Plaintiff did not seek Azoogle's input in drafting its April 23 letter, and did not provide a copy of its draft until two-and-a-half weeks after the March 20

meeting. Rather than summarize the totality of the parties discussions, the letter purported to describe the status of various written discovery requests, and concluded by requesting a court hearing to address Plaintiff's demand that Azoogole produce for deposition its CEO. Azoogole voiced its objections to Plaintiff's letter (pointing out that it omitted any reference to, for example, the resolution of Plaintiff's motion to compel depositions, and the parties' agreement regarding the Cross-Motions) and submitted a proposed revised draft. Thereafter, without incorporating any of Azoogole's suggestions or making any attempt to compromise with Azoogole, Plaintiff announced that the parties were "unable to reach agreement on a joint letter," and filed its own. **(Exh. A.)**

Plaintiff's brazenness is exacerbated by its letter's inaccuracies, both with respect to Azoogole's discovery responses and Plaintiff's purported efforts to supplement its own responses. Plaintiff spends less than a page discussing the entire range of its written discovery responses (most all which Plaintiff agreed were in need of amendment). By contrast, Plaintiff spends three and one-half pages discussing the supposed inadequacies of Azoogole's responses to Plaintiff's document demands – despite the parties' agreement to postpone resolution of those issues until after the Court's rulings on the Cross-Motions. As another example, the final paragraph of Plaintiff's letter criticizes Azoogole for refusing to meet-and-confer in-person in Eureka, California over Plaintiff's demand that Azoogole permit a deposition of Alex Zhardanovsky. What Plaintiff conspicuously omits is that (at Plaintiff's invitation) the parties have conducted all other recent discovery meet-and-confers by telephone, and that Mr. Zhardanovsky is Azoogole's CEO, whose testimony is wholly irrelevant to Plaintiff's claims. **(Exh. B.)**

Plaintiff continues to use deposition scheduling as an out-and-out tool of harassment. As explained in Azoogole's summary adjudication opposition, during their March 20 *in camera* meeting, the parties agreed that depositions of Azoogole personnel would not begin until at least two weeks after the hearing on the parties' Cross-Motions. This schedule made sense, so that Plaintiff could tailor its questioning based on the Court's resolution of the Cross-Motions. During an April 12th telephone call, however, Plaintiff's counsel disavowed that agreement, on the grounds that it was not "official" and was not contained in a written stipulation. Plaintiff then began noticing depositions for the first week of May.

In an attempted compromise, Azoogole offered depositions of Don Mathis and Ryan McVey on May 23rd and 24th, respectively. **(Exh. C.)** Plaintiff accepted that offer **(Exh. D)**, only to again renege, on the basis that Plaintiff now wanted to depose just Mr. McVey, and only on May 23rd, rather than May 24th, the date on which Azoogole had confirmed Mr. McVey's availability. **(Exh. E.)** Again, in an attempt to compromise, Azoogole offered a deposition on May 23rd (Plaintiff's chosen date) of either Mr. McVey or, if he were unavailable (due to family reasons known to Plaintiff), Mr. Mathis. **(Exh. F.)** The very next day, Plaintiff changed its position again – criticizing Azoogole for not producing both deponents on May 23rd and May 24th (as Azoogole had offered to do just days before) and

threatened to bring Azoogle's supposed uncooperativeness to the Court's attention. (**Exh. G.**)

Plaintiff's strategy is apparent: Take every opportunity to create a record of Azoogle's supposed discovery malfeasance and repeatedly threaten motions to compel in the hopes of browbeating Azoogle into providing the very discovery that Plaintiff agreed *in camera* to defer. The obvious and inevitable results of Plaintiff's conduct have been extraordinary and unnecessary costs in the form of correspondence and what amounts to unauthorized discovery motions practice. Azoogle prays the Court will bear Plaintiff's tactics in mind when deciding whether the attorneys fees Azoogle will request at the end of this case are reasonable.

Based on the above, Azoogle respectfully requests that the Court: 1) remove Plaintiff's April 16th and April 23rd *ex parte* letters to the Court from the files of this case; 2) order Plaintiff to abide by its express agreements to push back depositions and discovery conferences until the Court's resolution of the Cross-Motions; and 3) instruct Plaintiff not to file any additional improper letters or to use discovery to harass, delay, or inconvenience the parties or the Court.

Sincerely,

KRONENBERGER BURGOYNE, LLP

A handwritten signature in black ink, appearing to read "H. M. Burgoyne, III". The signature is stylized and somewhat cursive, with a large initial "H" and "B".

Henry M. Burgoyne, III