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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 RULE 11 SANCTIONS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

DATE: November 2, 2007

TIME: 9:30 a.m.

PLACE: Courtroom A, 15th Floor
The Honorable Joseph C. Spero

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on November 2, 2007 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") will move the Court to impose sanctions on Plaintiff ASIS Internet Services ("Plaintiff") and Plaintiff's attorney of record, the Singleton Law Group, in connection with Plaintiff's filing of its Second Amended Complaint ("SAC"). In particular, AzoogLe will

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NOTICE OF MOTION AND MOTION FOR SANCTIONS; MPA

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1 move the Court to grant Azoogle an award of its costs and attorneys' fees reasonably
2 incurred in Azoogle's defense of this action, as well as to strike the Second Amended
3 Complaint and to grant such further sanctions as the Court deems proper.

4 As further described below, Azoogle's brings this Motion on the grounds that the
5 SAC utterly lacks evidentiary and legal support, and that it was filed and prosecuted
6 under circumstances demonstrating a wholly improper purpose.

7 This Motion is based on Federal Rule of Civil Procedure 11; the below
8 memorandum and any memorandum in reply; the declarations, exhibits, proposed order
9 and other documents filed in support thereof, and in support of any other sanctions
10 motions filed by Azoogle; all pleadings on file in this case; and such further evidence and
11 arguments that may be presented prior to or at the hearing on this Motion.

12
13 Dated: June 1, 2007

14 Henry M. Burgoyne, III
15 Karl S. Kronenberger
16 Jeffrey M. Rosenfeld
17 Kronenberger Burgoyne, LLP

18 By: _____ /s/
19 Henry M. Burgoyne, III

20 Attorneys for Defendant,
21 AZOOGLEADS.COM INC.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 As this lawsuit has moved from the pleading stage to discovery and then to
4 summary adjudication, it has become harder and harder for Plaintiff ASIS Internet
5 Services, Inc. (“Plaintiff”) to conceal that it filed its Second Amended Complaint (“SAC”)
6 without any information so much as suggesting Defendant Azoogleads.com, Inc.
7 (“Azoogle”) did anything wrong. By this Motion, Azoogle seeks sanctions under Federal
8 Rule of Civil Procedure 11 in connection with that filing, including an award of Azoogle’s
9 reasonable costs and fees and an order striking the SAC.

10 The SAC alleges that Azoogle sent, or participated in the sending of, more than
11 11,000 supposedly unlawful emails. The SAC further states a litany of vicarious liability
12 allegations – ranging from employer/employee and agency to franchisor/franchisee and
13 joint venturer – calculated to impose liability on Azoogle for the acts of unnamed third
14 parties. Plaintiff stated the vast majority of those allegations not on information and
15 belief, but on actual knowledge.

16 After two rounds of written discovery and just shy of 20 third-party subpoenas,
17 however, Plaintiff has failed to discover or disclose any information – much less
18 evidence – so much as suggesting a connection between Azoogle on the one hand and
19 the alleged “SPAMMERS” on the other. As to many of its allegations, Plaintiff now
20 concedes an utter lack of information, or offers discovery responses so confusing and
21 contradictory as to suggest Plaintiff isn’t sure what it believes. Now, as before the SAC
22 was filed, the only circumstance tying Azoogle to the SAC’s alleged mass wrongdoing is
23 that Azoogle unknowingly received a single corrupt marketing lead.

24 Most troubling about the SAC is that at the time Plaintiff filed it, Plaintiff was
25 aware of, or was in possession of, information absolutely negating the bulk of its
26 allegations. Nevertheless, Plaintiff forged ahead with its claims, with the ostensible
27 purpose of conducting enterprise-wide discovery designed to uncover relevant evidence.
28 It is impossible to imagine a clearer-cut example of a “fishing expedition.” Plaintiff’s

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1 counsel, an experienced CAN-SPAM litigator, must have known better.

2 Plaintiff's tactics in this litigation – a broad-brush, cumulative pleading, followed by
3 threats of multi-million-dollar judgments and crushing discovery – evidence Plaintiff's
4 intention to coerce settlements. To a frightening extent, that tactic has worked, in that all
5 but two of Plaintiff's almost 20 named defendants have settled, either for nothing or for
6 nominal sums. Plaintiff's other conduct in this litigation has done nothing to dispel the
7 appearance of an improper motive. It is no surprise that the Court concluded more than
8 a year ago, in the context of a motion for security by a defendant in the same posture as
9 Azoogle: "If you had included [Quicken] in your amended complaint, you better give that
10 some thought and discuss it with your clients because I will not hesitate to award
11 attorneys' fees for Quicken if it turns out that they weren't properly included."
12 Declaration of Henry M. Burgoyne in Support of Motion for Sanctions ("Burgoyne Decl.")
13 at Ex. A, 16:17-21.

14 Litigation isn't a game. Plaintiff and Plaintiff's counsel need to understand that
15 their actions in this case have caused real harm to real parties. It would be patently
16 unfair to require Azoogle to swallow the costs of defending this action. And it would
17 invite a repeat performance to permit Plaintiff and/or Plaintiff's counsel to stroll away
18 from this debacle no worse for the wear. For those reasons, and as further set forth
19 below, Azoogle moves the Court for Rule 11 sanctions in the form of an award of its
20 costs and attorneys' fees reasonably incurred in its defense of this action, as well as an
21 order striking the SAC and granting such further sanctions as the Court deems proper.

22 II. BACKGROUND

23 A. Information Readily Available to Plaintiff Prior to the Filing of the SAC

24 Plaintiff's counsel, the Singleton Law Group, is an experienced CAN-SPAM
25 litigator, having prosecuted three CAN-SPAM actions in the Northern District of
26 California. *Id.* at Exs. B and C, No. 16. As stated by Plaintiff's counsel's website,
27 Plaintiff's counsel "brings a partnership of business expertise, legal expertise, and
28 technical expertise that can help ISP's stop SPAM ..." *Id.* at Ex. B.

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1 In March 2006, Defendant Quicken Loans, Inc. (“Quicken”) associate corporate
2 counsel Amy Bishop filed a sworn declaration stating that Quicken received the “Bruce
3 Wolf lead” from Azoogle. *Id.* at Ex. D, ¶¶10. Bishop’s declaration further stated that
4 Azoogle had received the Bruce Wolf lead from a third party (identified as John
5 Strothers); that Azoogle had attempted to gather additional information about the Bruce
6 Wolf lead from that third party; and that Azoogle had severed any relationship with that
7 third party based on that third party’s refusal to cooperate in Azoogle’s investigation.
8 *Ibid.*¹

9 Prior to the filing of the SAC, Azoogle displayed (and still displays) on its website
10 a copy of the terms and conditions governing Azoogle’s lead providers (“Terms and
11 Conditions”). *Id.* at Ex. E. Paragraphs 2.23, 2.24, 8.5 and 8.9 of the Terms and
12 Conditions prohibit lead providers from providing leads generated in connection with
13 unlawful acts, including without limitation violations of CAN-SPAM. Paragraphs 5 and
14 8.3 of the Terms and Conditions incorporate Azoogle’s Acceptable Use Policy for Email
15 Marketing (“Email Policy”), which in turn prohibits lead providers from:

- 16 • sending emails to individuals who have not affirmatively opted to receive them;
- 17 • sending emails other than from a valid sender domain name and/or responsive IP
18 address;
- 19 • inserting a recipient address anywhere other than the “to” line;
- 20 • incorporating untruthful or misleading content or information into such emails;
- 21 • sending emails lacking valid return contact information;
- 22 • sending emails to addresses on Azoogle’s master “Suppression List,” which lead
23 providers are required to consult at least once a day; and
- 24 • failing to clearly identify such emails as advertisements. (*Id.* at Ex. F, ¶¶2-4, 6-7,
25 12-13, 15 and 20.)

26 The Terms and Conditions state that each party thereto “is an independent contractor

27 ¹ On January 9, 2007, Plaintiff also received from Quicken a document production including
28 correspondence between Quicken and Azoogle, which correspondence confirmed that the Bruce Wolf
lead had been provided to Azoogle by a third party.

1 and not a partner, joint venturer or employee of the other.” *Id.* at Ex. E, ¶16. They
2 further state that lead providers must indemnify Azoogle in relation to any violation by
3 the lead provider of the Terms and Conditions. *Ibid.*, ¶7. Past versions of Azoogle’s
4 Terms and Conditions, while not posted on Azoogle’s current website, contain similar
5 terms, and are publicly available through archive.org, a historical Internet archive well
6 known to and frequented by Plaintiff’s counsel. *Id.* at ¶ 8 and Ex. G.

7 Also available to Plaintiff prior to the filing of the SAC was the publicly-accessible
8 Registry of Known Spam Operations (“ROKSO”), operated by Spamhaus, a private
9 European organization. *Id.* at Ex. H. As explained on Spamhaus’ website, Spamhaus
10 regards all un-solicited commercial email as spam. *Id.* at Ex. I. That definition is
11 significantly broader than the definition employed by CAN-SPAM, which explicitly
12 permits a wide range of unsolicited commercial email. *Ibid.* Still, at the time Plaintiff filed
13 the SAC, Spamhaus did not regard Azoogle as a “spammer”; in fact, Azoogle had been
14 removed from ROKSO months earlier. *Id.* at Ex. J.

15 **B. The SAC’s Allegations as to Azoogle**

16 On October 4, 2006, Plaintiff filed its SAC, naming Azoogle as a defendant.
17 Notwithstanding the above-described readily available information, Plaintiff made the
18 following allegations, most geared toward Azoogle’s supposed vicarious liability and all
19 asserted based on Plaintiff’s alleged actual knowledge:

- 20 • **Paragraphs 9 & 11:** Azoogle hired and managed the activities of the alleged
21 “SPAMMERS”;
- 22 • **Paragraphs 11, 21, 30, 49:** The SPAMMERS were at all times acting as
23 Azoogle’s “employees or agents”;
- 24 • **Paragraph 14:** Azoogle used its employee/agent SPAMMERS to “advertise” the
25 “MORTGAGE BROKERS’ financial services”;
- 26 • **Paragraph 18:** Azoogle and other defendants were engaged in a “joint venture
27 and common enterprise” to violate CAN-SPAM;

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- 1 • **Paragraphs 21-22, 24-26, 31-32, 34-36, 51-52:** Azoogole sent or transmitted, or
2 caused or initiated the sending or transmission of, the alleged unlawful email
3 messages;
- 4 • **Paragraphs 21, 30, 49:** The SPAMMERS transmitted “for and in the hire of”
5 Azoogole the alleged unlawful email messages;
- 6 • **Paragraph 27:** Azoogole used a “harvest and directory attack or used an
7 automated creation of multiple email accounts” in connection with its alleged
8 wrongdoing; and
- 9 • **Paragraph 31:** Azoogole stole or “hijacked” the “email identities” to which the
10 alleged emails were sent.

11 Also notwithstanding the above-described readily available information, Plaintiff
12 made several additional allegations, these on information and belief:

- 13 • **Paragraph 10:** Azoogole, at all times, “conspired with” and “supported” the
14 SPAMMERS in the alleged misconduct;
- 15 • **Paragraph 13 & 16:** Azoogole, at all times, “conspired with” the “MORTGAGE
16 BROKERS” in the alleged misconduct;
- 17 • **Paragraph 18:** Azoogole and the SPAMMERS enjoyed a “master, servant ...
18 representative, franchiser, franchisee” relationship; and
- 19 • **Paragraph 19:** Azoogole “aided and abetted” all of the other defendants in the
20 alleged misconduct.

21 The SAC alleged no discrete facts in support of any of Plaintiff’s allegations.

22 **C. Plaintiff’s Litigation Conduct Demonstrates a Failure to Investigate and an
23 Improper Purpose**

24 Two months after it filed the SAC, Plaintiff asked Azoogole for a copy of Azoogole’s
25 “affiliate agreement with its email affiliates,” suggesting Plaintiff hadn’t bothered to look
26 for the document, including on Azoogole’s public website. *Id.* at Ex. K. In the same
27 email, Plaintiff asked Azoogole to “informally disclose” the third party that had provided
28 Azoogole with the Bruce Wolf lead, making clear that Plaintiff knew Azoogole didn’t send
the alleged emails. *Ibid.*² Then, in a January 8 email responding to a request that

² In a January 4, 2007 letter, Azoogole pointed out that Azoogole had attached the Terms and Conditions to Azoogole’s initial disclosures. *Id.* at Ex. L.

1 Plaintiff withdraw the SAC as to Azoogle, counsel for Plaintiff suggested that Azoogle
2 “ask [its] client how many Spamhaus and Rokso listings it, and its affiliates, have.” *Id.* at
3 Ex. M. As explained above, the answer as to Azoogle, readily ascertainable from
4 Spamhaus’s public website, was none. Furthermore, as Plaintiff conceded months later,
5 it was unable to identify a single Azoogle “affiliate” supposed to be listed on ROKSO. *Id.*
6 at Ex. P, No. 27.

7 During a January 8 telephone call with Azoogle counsel, Plaintiff counsel
8 explained that Plaintiff filed suit against what Plaintiff characterized as two types of
9 defendants: those from whom Plaintiff wanted information and, in some cases, small
10 cash payments; and those that Plaintiff believed to be the actual “spammers” or “one
11 step removed from the spammers,” and from whom Plaintiff intended to collect the full
12 measure of its damages. *Id.* at ¶13. Plaintiff described Azoogle as belonging in the
13 latter category. Plaintiff conceded, though, that it “d[id]n’t know enough information” to
14 determine Azoogle’s supposed role in the alleged wrongdoing. *Ibid.*

15 Similarly, during a March 20 *in camera* meet-and-confer, when pressed about the
16 absence of information suggesting Azoogle’s connection to the SAC’s alleged
17 wrongdoing, Plaintiff’s counsel admitted, “there is a link missing ... We don’t actually
18 know what the relationship is.” Declaration of Jeffrey Rosenfeld in Support of Motion for
19 Sanctions at ¶4.

20 **D. Plaintiff’s Discovery Responses Demonstrate an Utter Lack of Information**
21 **Supporting the SAC’s Allegations**

22 On February 5, Plaintiff served its initial responses to Azoogle’s first round of
23 written contention discovery. Plaintiff supplemented those responses, and provided
24 additional responses to later served contention discovery, in early May. In response
25 after response, Plaintiff ducked Azoogle’s questions, reiterated unresponsive boilerplate,
26 fabricated evidence and contradicted its own then-current discovery responses. In many
27 cases, Plaintiff simply and finally conceded an utter lack of information, including in
28 relation to allegations Plaintiff had stated on actual knowledge.

1 By way of example only, Plaintiff:

- 2
- 3 • In response after response concerning Plaintiff's vicarious liability allegations, including Azoogole's supposed knowledge, avoidance of knowledge, sponsorship and participation in the alleged wrongdoing, repeated unresponsive boilerplate concerning Azoogole's supposed "history" of spam abuse, associations with "spammers," imagined ROKSO listings, and "general reputation" as a "spammer." See, e.g., *Id.* at Ex. C, Nos. 5 and 12-13; Ex. N, Nos. 6-10; Ex. O, 20-24;
- 4
- 5
- 6
- 7 • Claimed to be unable to admit or deny whether Azoogole or its "affiliates" appeared on Spamhaus' ROKSO, despite Plaintiff's repeated responses (as discussed in the prior bullet point) referring to ROKSO and incorporating by reference ROKSO records and other documents, and despite Plaintiff's prior representations that certain of Azoogole's "affiliates" were listed on ROKSO. Compare Ex. M and the Plaintiff discover responses cited in the prior bullet point with Ex. P, Nos. 26-27;
- 8
- 9
- 10
- 11
- 12 • Cited in support of Plaintiff's employment and agency allegations Azoogole's agreements with Seamless Media Corp. and John Strothers – the first of which explicitly negates an employment or agency relationship and the latter of which doesn't exist. *Id.* at Ex. O, Nos. 34-35; Declaration of Richard E. Grabowski in Support of Plaintiff's Motion for Summary Adjudication, Ex. J (Azoogole's Insertion Order with Seamless Media Corp., filed under seal), ¶ 11;
- 13
- 14
- 15
- 16
- 17 • In complete contradiction of the discovery responses cited in the prior bullet point, admitted that Plaintiff lacked any evidence in support of its employment allegations. *Id.* at Ex. P, Nos. 5-6.
- 18
- 19 • Represented Plaintiff to have been aware of the Terms and Conditions (even though Plaintiff didn't bother to procure a copy) at the time Plaintiff filed the SAC, without suggesting how Plaintiff planned to explain away those of the Terms and Conditions foreclosing the majority of Plaintiff's vicarious liability allegations. *Id.* at Ex. P, No. 25;
- 20
- 21
- 22
- 23 • Conceded that the SAC, Plaintiff's initial disclosures and Plaintiff's filings in opposition to earlier motions to dismiss – none of which stated a single discrete fact relevant to the SAC's claims as to Azoogole – stated all the information known to Plaintiff at the time Plaintiff filed the SAC. *Id.* at Ex. P, No. 29; and
- 24
- 25
- 26 • Flatly admitted that Plaintiff lacked any evidence in support of its allegations concerning Azoogole's supposed use of automated means to obtain email addresses or to register for email accounts, and concerning Azoogole's supposed furnishing of the email addresses to which the alleged emails were sent. *Id.* at
- 27
- 28

1 Ex. O, Nos. 26-29 and 33.

2 None of Plaintiff's responses stated any information, much less evidence, or
3 pointed to a single document, so much as suggesting Azoogole's liability for the mass
4 wrongdoing alleged in the SAC.

5 **E. Azoogole's Notice to Plaintiff of Azoogole's Intent to Seek Sanctions**

6 On December 15, 2006, during Azoogole's first status conference, Azoogole
7 informed the Court and Plaintiff of Azoogole's intention to seek sanctions in connection
8 with the filing of the SAC and Plaintiff's prosecution of its claims. *Id.* at Ex. Q, 14:2-14.
9 On January 4, 2007, Azoogole provided written notice of that intention by means of a
10 letter to Plaintiff. *Id.* at Ex. R. Azoogole has repeated its intention to seek sanctions at
11 every stage of this litigation, including in multiple papers filed with the Court. *See, e.g.,*
12 *id.* at Exs. S, 11:7-9 and T, 13:16-19. On May 11, Azoogole served its draft of this motion
13 for Rule 11 sanctions on counsel for Plaintiff. *Id.* at ¶23. Three weeks later, on June 1,
14 Azoogole filed this motion with the Court.

15 **III. PLAINTIFF'S FILING OF THE SAC MERITS FRCP RULE 11 SANCTIONS**

16 **A. Rule 11 Generally**

17 Federal Rule of Civil Procedure 11 is intended to deter dilatory and abusive
18 pretrial tactics and to streamline litigation by excluding baseless filings. *Cooter & Gell v.*
19 *Hartmarx Corp.*, 496 U.S. 384, 393 (1990). The baseless filings targeted by Rule 11
20 include "expeditionary pleadings" and complaints "filed in a speculative effort to find
21 someone financially liable for plaintiffs' injuries ..." *Southern Leasing Partners, Ltd. v.*
22 *McMullan*, 801 F.2d 783, 788 (5th Cir. 1986); *Cabell v. Petty*, 810 F.2d 463, 466 (4th
23 Cir. 1987).³ While Rule 11 is not intended to chill creative advocacy, it requires creativity
24 to be tempered with a good faith application of the law and a reasonable investigation of
25 the facts. *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 484 (3d Cir. 1987); *Truesdell v.*

26 _____
27 ³ The "shotgun approach" to pleadings [citation omitted], where the pleader heedlessly throws a little bit of
28 everything into his complaint in the hopes that something will stick, is to be discouraged." *Rodgers v.*
Lincoln Towing Service, Inc., 596 F. Supp. 13, 27 (D.C. IL 1984), quoting *Whiten v. Ryder Truck Lines,*
Inc., 520 F. Supp. 1174, 1176 (M.D. LA 1981).

1 *Southern Cal. Permanente Med. Group*, 293 F.3d 1146, 1153-54 (9th Cir. 2002).

2 Rule 11 imposes sanctions even where only certain portions of a pleading violate
3 the rule's requirements. *Gurary v. Nu-Tech Bio-Med, Inc.*, 303 F.3d 212, 220-21 (2d Cir.
4 2002).⁴ Thus, unsubstantiated allegations or claims may be sanctioned despite other
5 meritorious claims in the pleading. *Cross & Cross Properties, Ltd. v. Everett Allied Co.*,
6 886 F.2d 497, 504 (2d Cir. 1989). Similarly, the fact that a pleading states a meritorious
7 claim against one defendant does not justify adding other defendants against whom the
8 claim is frivolous. *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir.
9 1990).

10 Whether a party has violated Rule 11 is tested objectively: if a paper is frivolous,
11 legally unreasonable, or lacks factual foundation, it is sanctionable, even though not filed
12 in subjective bad faith. *Zuniga v. United Can Co.*, 812 F.2d 443, 452 (9th Cir. 1987).

13 **B. The SAC Utterly Lacks, and Always Has Lacked, Evidentiary Support**

14 **1. Rule 11 Requires Both an Evidentiary Basis and a Reasonable** 15 **Investigation**

16 The presentation of a pleading or other paper certifies that, to the best of the
17 filer's knowledge and belief, formed after an inquiry reasonable under the
18 circumstances, the factual contentions in the paper have evidentiary support, *or if*
19 *specifically so identified*, are likely to have evidentiary support after a reasonable
20 opportunity for further investigation or discovery. Fed. R. Civ. P. 11(b)(3); *Christian v.*
21 *Mattel, Inc.*, 286 F.3d 1118, 1127 (9th 2002). It is not acceptable for a party to file suit
22 first and find out later whether or not it has a case. *Hale v. Harney*, 786 F.2d 688, 692
23 (5th Cir. 1986).

24 A reasonable inquiry requires attorneys to seek credible information rather than to
25 proceed on mere suspicion or supposition. *Cooter & Gell*, 496 U.S. at 393. Absent
26 unusual time pressure, a reasonable inquiry requires interviewing available witnesses
27

28 ⁴ See also *Senese v. Chicago Area I.B. of T. Pension Fund*, 237 F.3d 819, 826, fn. 3 (7th Cir. 2001);
Patterson v. Aiken, 841 F.2d 386, 387 (11th Cir. 1988).

1 and reviewing relevant documents. *King v. Idaho Funeral Services Ass'n*, 862 F.2d 744,
 2 747-48 (9th Cir. 1988); *Wold v. Minerals Engineering Co.*, 575 F. Supp. 166, 167 (D. CO
 3 1983). The fact that others have made similar claims against a defendant does not
 4 excuse a plaintiff from its duty to investigate whether that defendant is responsible for
 5 the plaintiff's injury. *Albright v. Upjohn Co.*, 788 F.2d 1217, 1221 (6th Cir. 1986).

6 Contentions based on information and belief do not relieve a plaintiff from its
 7 obligation to conduct an appropriate investigation. Fed. R. Civ. P. 11(b). Furthermore, if
 8 "evidentiary support is not obtained after a reasonable opportunity for further
 9 investigation or discovery," a plaintiff has a "duty under the rule not to persist with that
 10 contention." Committee Notes on Amendments to Federal Rules of Civil Procedure
 11 (1993) 146 FRD 401, 585-86.

12 **2. Plaintiff Made No Effort to Verify the SAC's Allegations as to Azoogle,**
 13 **None of which Are True**

14 The record of this case makes clear that prior to filing the SAC, Plaintiff conducted
 15 no investigation as to Azoogle's alleged wrongdoing. Plaintiff, an Internet access
 16 service represented by experienced CAN-SPAM counsel, didn't pause to procure or
 17 examine Azoogle's publicly available lead provider Terms and Conditions, which
 18 explicitly forbid violations of CAN-SPAM and which designate lead providers as
 19 independent contractors. Nor did Plaintiff bother to verify whether Azoogle – or even
 20 any of Azoogle's "affiliates" – appeared on Spamhaus's ROKSO, despite Plaintiff's
 21 heavy reliance on ROKSO as evidence of Azoogle's "reputation" as a "spammer." Had
 22 Plaintiff taken those steps, it could not in good faith have alleged that Azoogle employed
 23 the "SPAMMERS," that Azoogle and the SPAMMERS were engaged in a joint venture,
 24 or that Azoogle was a member of a "SPAM Cartel" conspiracy.

25 To the extent Plaintiff did have information concerning Azoogle's supposed
 26 involvement in the alleged wrongdoing, that information foreclosed the possibility that
 27 Azoogle sent the alleged emails. Seven months before Plaintiff filed the SAC, it
 28 received the Bishop declaration, stating that Azoogle received the Bruce Wolf lead from

1 a third party. Plaintiff's knowledge that the Bruce Wolf lead originated other than with
2 Azoogle is evident even from the SAC, which states claims against a second "Lead
3 Generator" defendant (Leads Limited) for allegedly also sending, or procuring the
4 sending of, the alleged emails. It was never possible for two competing "Lead
5 Generators" – much less 19 separate defendants – to have played the same exclusive
6 role as sender or procurer. Nevertheless, Plaintiff repeatedly alleged in the SAC – in
7 fact, still maintains – that Azoogle sent the alleged unlawful emails.

8 It has been six months since Azoogle first appeared at a status conference.
9 Plaintiff has conducted two rounds of written discovery and has issued more than a
10 dozen third-party subpoenas. Still, Plaintiff still has proffered no information – much less
11 evidence – establishing a single element of any of its claims. In particular, Plaintiff has
12 no information so much as suggesting that Azoogle knew, or could have known, of the
13 alleged emails, much less of the as-yet unidentified sender's propensity to commit a
14 CAN-SPAM or other violation. Plaintiff's utter lack of information admittedly extends to
15 numerous allegations that Plaintiff made not on information and belief, but on actual
16 knowledge. Judging from Plaintiff's confusing and contradictory discovery responses,
17 Plaintiff isn't now sure what it knows.

18 Plaintiff was under no deadline to file claims against Azoogle. Dispositive
19 information was readily available, if not already in Plaintiff's hands. As the record makes
20 clear, Plaintiff nevertheless filed suit against Azoogle and began asking questions later.
21 It is no defense that Plaintiff or others believe that Azoogle is a "spammer," or that
22 Azoogle has relations with lead providers supposed to "spam." Nor is it a defense that
23 Plaintiff drafted its sweeping allegations to insulate the SAC from a motion to dismiss, or
24 that Plaintiff had hoped to unearth some factual basis by means of its enterprise-wide
25 discovery demands. Any reasonable litigant would have dropped this case months ago.
26 Plaintiff chose to press ahead, and cannot now claim the benefit of hindsight in asking to
27 be excused for its overzealousness.
28

1 **C. Plaintiff's Legal Arguments Find No Support in Existing Law or Any Good Faith**
 2 **Extension Thereof**

3 **1. Rule 11 Does Not Permit a Litigant to Ignore Binding Precedent**

4 A complaint violates Rule 11 where it is "patently clear" that its claims have
 5 "absolutely no chance of success under the existing precedents, and where no
 6 reasonable argument can be advanced to extend, modify or reverse the law as it
 7 stands." *Eastway Const. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985).

8 In assessing a Rule 11 violation premised on allegedly frivolous legal arguments,
 9 a court should consider the extent to which a litigant has researched the issues and
 10 found some support for them. Committee Notes on Amendments to Federal Rules of
 11 Civil Procedure (1993) 146 FRD 401, 587. The "ostrich-like tactic of pretending that
 12 potentially dispositive authority against a litigant's contention does not exist" is
 13 sanctionable. *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1081 (7th Cir.
 14 1987), *quoting Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1198 (7th Cir. 1987).

15 A claim for conspiracy fails to comply with prevailing standards where, for
 16 example, it is unsupported by any supposed act in furtherance of the alleged conspiracy.
 17 *Holgate v. Baldwin*, 425 F.3d 671, 676 (9th Cir. 2005) (upholding Rule 11 sanctions
 18 where conspiracy plaintiff failed to plead act in furtherance).

19 **2. Plaintiff's Claims Rely on a Frivolous Interpretation of CAN-SPAM and**
 20 **California Business & Professions Code Section 17529.5**

21 Plaintiff knew seven months before if filed the SAC that Azoogole did not send the
 22 alleged emails. Accordingly, and as Azoogole informed Plaintiff in January 2006,
 23 Azoogole's CAN-SPAM liability hinges on whether Azoogole "procured" those emails.
 24 CAN-SPAM defines "procure" as "intentionally to pay or provide other consideration to,
 25 or induce, another person to initiate such a message on one's behalf, with actual
 26 knowledge, or by consciously avoiding knowing, whether such person is engaging or will
 27 engage in a patter or practice that violates the Act." 15 U.S.C. §§7702(12) and
 28 7706(g)(2) (emphasis added).

1 Also seven months before Plaintiff filed the SAC, this Court issued an opinion –
2 *Hypertouch, Inc. v. Kennedy-Western Univ.*, No. C 04-05203, 2006 WL 648688, at *5-6
3 (N.D. Cal., March 8, 2006) – clarifying that a CAN-SPAM plaintiff could satisfy the
4 “Knowledge Prong” of that statute only by proffering admissible “evidence that [the
5 defendant] had actual knowledge or consciously avoided knowledge of a current or
6 future violation of the CAN-SPAM Act by anyone who sent the emails at issue.”
7 (Emphasis added.) The Court’s ruling was hardly surprising, since the language of
8 CAN-SPAM, as quoted above, plainly speaks to a defendant’s knowledge of a pattern
9 and practice of the sender of the alleged emails. Furthermore, Plaintiff’s counsel, an
10 experienced CAN-SPAM litigator, must have known of the *Hypertouch* ruling.

11 Still, Plaintiff forged ahead with this case. At times, Plaintiff has attempted to
12 obfuscate *Hypertouch* and the language of CAN-SPAM. (See, for example, Plaintiff’s
13 motion for summary adjudication, which misleadingly argued that a CAN-SPAM Plaintiff
14 need only show that alleged emails were sent “on behalf of” a defendant, and that the
15 defendant have engaged in some unlawful “pattern and practice.”) At other times,
16 Plaintiff has attempted to circumnavigate those authorities, in particular by alleging the
17 existence of a “SPAM Cartel” (unsupported by any specific allegations of an actual
18 agreement or any act in furtherance thereof). For the most part, though, Plaintiff has
19 simply ignored *Hypertouch* and CAN-SPAM by couching its discovery responses in
20 terms of Azoogole’s supposed “history” of spam abuse, associations with “spammers” and
21 imagined ROKSO listings. It is patently clear that such “evidence” cannot now
22 demonstrate, and never could have demonstrated, Azoogole’s liability, regardless of how
23 creatively one construes CAN-SPAM.

24 Plaintiff’s legal arguments in support of its California Business & Professions
25 Code Section 17529.5 claim fare no better. As explained in Azoogole’s opposition to
26 Plaintiff’s motion for summary adjudication, Plaintiff’s definition of “advertising” – culled
27 from a concurrence in a 1925 California Court of Appeal case – would impose liability on
28 any defendant who arguably benefited from alleged unlawful emails, regardless of

1 whether the defendant knew about or had anything to do with them. The Court already
 2 dismissed Plaintiff's theory when it concluded that Plaintiff's Section 17529.5 claim
 3 would stand only if defendant could "truthfully" assert that Azoogle "advertised [its]
 4 services in the allegedly fraudulent emails." Burgoyne Decl., Ex. U, 14:13-17. The
 5 emails alleged in the SAC were sent by an unknown party, do not name any particular
 6 vendor, and relate to generic mortgage lending services. It's patently frivolous to argue
 7 that Azoogle somehow "advertised [its] services" in them.

8 Plaintiff is fond of repeating that CAN-SPAM and related statutes are complex,
 9 and that the law governing the SAC's claims is evolving. That's simply not true. At the
 10 time Plaintiff filed the SAC, Plaintiff had no arguable basis for impleading Azoogle. At no
 11 stage of this proceeding has Plaintiff proffered a single authority demonstrating the
 12 contrary. In recognition of that fact, the Court should impose Rule 11 sanctions.

13 **D. Circumstances Compel the Conclusion that Plaintiff Filed the SAC for the**
 14 **Purpose of Coercing a Settlement from Azoogle**

15 **1. Rule 11 Forbids the Presentation of Papers for an Improper Purpose**

16 By signing a pleading, an attorney certifies that it "is not being presented for any
 17 improper purpose, such as to harass or to cause unnecessary delay or needless
 18 increase in the cost of litigation." FED. R. CIV. P. 11(b)(1). As with the certification of
 19 factual and legal merits, the signer's "purpose" is to be tested by objective standards.
 20 *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831, n.9 (9th Cir. 1986); *Sussman v. Bank*
 21 *of Israel*, 56 F.3d 450, 458 (2d Cir. 1995).

22 While it is usually difficult to prove a plaintiff's intent to harass or delay, a lack of
 23 factual and legal merit to a pleading suggests that it was filed for an improper purpose,
 24 particularly where it has caused unnecessary delay and expense to other parties.
 25 Rutter, *Federal Civil Procedure Before Trial*, §17: 349. In this sense, Rule 11's
 26 frivolousness and improper purpose standards overlap, since a pleading's frivolousness
 27 will often be highly probative of the its purpose. *Townsend*, 914 F.2d at 140. An
 28 improper purpose may also be inferred from an attorney's expertise. When an

1 experienced attorney asserts a meritless claims, a “strong inference arises” that an
 2 action was brought for an improper purpose. *Huettig & Schromm, Inc. v. Landscape*
 3 *Contractors Council of Northern California*, 790 F.2d 1421, 1427 (9th Cir. 1986).

4 The “frivolous as a whole” standard is inapplicable to the determination of a
 5 proper purpose. Thus, incorporating into a complaint meritless claims for the purpose of
 6 harassment is sanctionable, even if the entire pleading is not for an improper purpose.
 7 *See Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1163 (9th Cir. 1987).
 8 Furthermore, even where a substantive claim is colorable, nothing in Rule 11 prohibits a
 9 court to “from making an independent analysis of the prayer for relief to determine
 10 whether it is frivolous and brought for an improper purpose.” *Id.*

11 **2. The SAC, in Conjunction with Plaintiff’s Litigation Tactics, Evidence**
 12 **an Intent to Coerce a Settlement**

13 Plaintiff’s filing and prosecution of the SAC has been the picture of oppressive,
 14 bad-faith litigation. As described above, Plaintiff alleged sweeping vicarious liability and
 15 other claims against Azoogole, for the most part on actual knowledge, despite an utter
 16 lack of supporting information. Plaintiff pressed a reading of CAN-SPAM that flew in the
 17 face of the statute’s language and the Court’s own precedent, and argued a construction
 18 of California Business & Professions Code Section 17529.5 that the Court disposed of
 19 before the SAC was filed. And Plaintiff concocted discovery responses so divorced from
 20 fact that even it couldn’t keep its own story straight. Plaintiff – represented by counsel
 21 experienced in CAN-SPAM litigation – must have known its positions in this litigation to
 22 be untenable.

23 Plaintiff’s discovery conduct has shed even more light on Plaintiff’s motivations.
 24 As explained in Azoogole’s motion for protective order and opposition to Plaintiff’s
 25 summary adjudication motion, and in numerous letters to the Court, Plaintiff:

- 26 • Served written discovery so sweeping as to require the production of virtually
 27 every document concerning Azoogole’s lead provider business. Burgoyne Decl.,
 28 Ex. S, 5:12 – 6:6;

- 1 • Engaged in unrepresented contacts with Azoogole personnel, and then lied about
2 that fact to Azoogole counsel. *Id.* at Ex. T, 10:1-6;
- 3 • Repeatedly broke agreements concerning the scheduling of depositions,
4 including those reached *in camera*, all the while threatening to bring Azoogole
5 before the Court if Azoogole didn't comply with its revised demands. *Id.* at Ex. T,
6 10:7-14;
- 7 • Continued to demand discovery concerning the identities of Azoogole's lead
8 providers, despite representations to the Court in other contexts that it has no
9 means of linking that information to the alleged emails. *Id.* at Ex. T, 9:18-22;
- 10 • Withheld documents produced by third parties and served more than a dozen
11 third-party subpoenas without providing Azoogole advanced notice, in one case
12 affirmatively misrepresenting the number of third-party subpoenas it had issued.
13 *Id.* at Ex. V; and
- 14 • Refused to permit Azoogole to amend discovery responses, despite Plaintiff's
15 representations that at the time such responses were due, Plaintiff was
16 withholding requested discovery. *Id.* at Ex. S, 8:23 – 9:14.

17 As described above, Plaintiff's counsel conceded early in this litigation that
18 Plaintiff named certain defendants for the sole purposes of extracting information and, in
19 certain cases, small settlements. Plaintiff accomplished those purposes, in that all but
20 two of almost 20 other defendants – none shown to have done anything more than
21 Azoogole – have settled, either for no money or for peanuts. During the parties' *in*
22 *camera* meet and confer, Plaintiff's counsel actually conceded that Plaintiff didn't
23 actually know the relationship between Azoogole and the alleged "SPAMMERS." In light
24 of that fact, there can be no legitimate motivation for Plaintiff to so aggressively press its
25 claims.

26 Plaintiff named Azoogole as a defendant not because Plaintiff had information
27 suggesting Azoogole did anything wrong, but because it knew Azoogole to be a deep
28 pocket with a reputation to protect. Taking into account the groundless nature of the
SAC and Plaintiff's litigation conduct, one cannot help but conclude that Plaintiff
prosecuted this action for the purpose of imposing financial and reputational costs
sufficient to compel Azoogole to settle. Whether Plaintiff actually expected Azoogole to

1 stand and fight is now beside the point. The Court should objectively assess the SAC's
2 allegations and Plaintiff's litigation conduct, and should conclude that Plaintiff's conduct
3 is explained by no legitimate purpose.

4 **IV. AN AWARD OF AZOOGLE'S FEES AND COSTS IS APPROPRIATE**

5 Rule 11 expressly authorizes a court to award both non-monetary and monetary
6 sanctions. Monetary sanctions can include both a fine payable to the court and an
7 award of attorney fees and other expenses incurred as a direct result of the Rule 11
8 violation if warranted for effective deterrence. *See also In re Yagman*, 796 F.2d 1165,
9 1183-85 (9th Cir. 1986).

10 Monetary sanctions in this case are wholly appropriate. By the time this action
11 concludes, Azoogle will have spent hundreds of thousands of dollars defending itself
12 and its reputation. A large portion, if not the majority, of those costs will have been
13 incurred in motions practice occasioned by Plaintiff's overwhelming and abusive
14 discovery demands and incessant resort to discovery motions practice. Azoogle was
15 itself a victim of the alleged wrongdoing, in that Azoogle had bargained to receive only
16 lawful leads, and had entered agreements potentially requiring Azoogle to indemnify
17 other recipients of Bruce Wolf lead. It would be grossly unfair to require Azoogle to pay
18 hundreds of thousands of additional dollars, especially when the increasingly
19 uncontested facts demonstrate Azoogle to have done absolutely nothing wrong.

20 Sanctions also would serve to deter Plaintiff and Plaintiff's counsel from bringing
21 similarly frivolous claims against other unsuspecting Internet marketing companies. This
22 is not the first case that Plaintiff's attorney has brought under his SPAM Cartel theory.
23 Because Plaintiff's counsel holds itself out as expert CAN-SPAM litigators, it is
24 reasonable to expect that it will not be the last. Plaintiff's chain-reaction litigation method
25 – characterized by shotgun pleadings against entities Plaintiff knows to have done
26 nothing wrong, followed by sweeping discovery calculated to provide a pretext for
27 impleading additional parties – is a patently impermissible means of discovering
28 information. Plaintiff had every opportunity to withdraw the SAC before this case

1 reached this stage. The Court should take this opportunity to send the message that
2 Plaintiff and Plaintiff's counsel's brand of vexatious and unfounded litigation will not be
3 tolerated.

4 **V. CONCLUSION**

5 For the reasons set forth above, the Court should impose on Plaintiff Rule 11
6 sanctions, including without limitation an award to Azoogle of Azoogle's reasonable
7 costs and fees incurred in defending this action, an order striking the SAC, and such
8 further sanctions as the Court deems proper.

9 Dated: June 1, 2007

10 Henry M. Burgoyne, III
11 Karl S. Kronenberger
12 Jeffrey M. Rosenfeld
13 Kronenberger Burgoyne, LLP

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

15 Attorneys for Defendant,
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