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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

**DEFENDANT AZOOGLEADS.COM  
INC.'S OPPOSITION TO PLAINTIFF'S  
MOTION TO SUPPLEMENT SECOND  
AMENDED COMPLAINT**

**INTRODUCTION AND BACKGROUND**

Plaintiff ASIS Internet Services, Inc. ("Plaintiff") now seeks to do what Azoogles.Com, Inc. ("Azoogles") has warned the Court about for months: leverage the third-party discovery conducted under the auspices of its Second Amended Complaint ("SAC") to state additional claims relating to wholly unrelated emails sent as many as 15 months after this case was filed. To permit Plaintiff to bootstrap its initial speculative claims into additional speculative claims would create the worst kinds of pleading and discovery incentives. What's more, it would make it almost impossible for

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1 these or any other parties to ever resolve CAN-SPAM or related cases under any  
2 traditional timetable.

3 Over the past year-and-a-half, Plaintiff, working in tandem with its counsel, has  
4 created what amounts to a CAN-SPAM litigation mill. On or about the very day Plaintiff  
5 filed its initial complaint in this action, Plaintiff began directing emails sent to the  
6 addresses of former customers to a single directory (Plaintiff's "SPAM Database").<sup>1</sup>  
7 Plaintiff then essentially turned off Plaintiff's email filtering software—which normally  
8 prevents the bulk of unlawful and lawful commercial email from reaching Plaintiff's email  
9 server—so that all email sent to those addresses flowed freely.<sup>2</sup> Periodically, Plaintiff  
10 supplied the contents of its SPAM Database to Plaintiff's counsel, which, using the third-  
11 party discovery obtained in this lawsuit, searched those emails for any domain name, IP  
12 addresses or other information relating to Azoogole.<sup>3</sup> It is the emails resulting from that  
13 search (the "Supplemental Emails") as to which Plaintiff now seeks to supplement the  
14 SAC. The scope of Plaintiff's litigation mill reaches well beyond Azoogole, as  
15 demonstrated by the entirely new CAN-SPAM action that Plaintiff filed yesterday (also in  
16 the Northern District of California) against entirely new entities.<sup>4</sup>

17 The Supplemental Emails have nothing to do with the emails alleged in the SAC.  
18 Plaintiff appears not to contend that the sender or senders of the Supplemental Emails  
19 sent any of the SAC's 10,000-plus alleged emails. Nor does Plaintiff appear to contend  
20 that the SAC's almost 20 other defendants, including current defendant Leads Limited,  
21 Inc., had anything to do with the Supplemental Emails. As is apparent from Plaintiff's  
22 counsel's declaration, the Supplemental Emails don't even relate to mortgage lending—  
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26 <sup>1</sup> See Declaration of Henry M. Burgoyne in Opposition to Plaintiff's Motion to  
Supplement Second Amended Complaint ("Rosenfeld Decl.") at ¶7.

27 <sup>2</sup> See Burgoyne Decl. at ¶7.

28 <sup>3</sup> See Burgoyne Decl. at ¶7.

<sup>4</sup> *ASIS Internet Services v. Valueclick Inc, et al.*, Case No. 3:07-cv-03261.

1 mortgage lending being the one-and-only common characteristic of the 10,000-plus  
2 alleged emails alleged in the SAC.<sup>5</sup>

3 Plaintiff waited until May 25 of this year to inform Azoogole counsel of its intention  
4 to supplement the SAC, and until June 1 to file its Motion, despite that the Supplemental  
5 Emails date back to December 2005.<sup>6</sup> Prior to filing its Motion, Plaintiff provided no  
6 discovery or other information relating to the Supplemental Emails.<sup>7</sup> Plaintiff didn't even  
7 bother to lodge a proposed supplemental pleading, as is required by Civil Local Rule  
8 10-1, despite that the currently-operative SAC provides no notice of the substance of  
9 Plaintiff's new theories. The parties have all but finished meeting-and-conferring  
10 regarding written discovery. To permit Plaintiff to supplement its allegations would be to  
11 require the parties to revisit fundamental issues of relevance—in particular because  
12 Plaintiff believes that its additional allegations entitle it to new discovery as to an entirely  
13 different range of Azoogole lead provider.<sup>8</sup> Azoogole also has conducted its deposition of  
14 Plaintiff's organizational representative, who conceded complete ignorance as to the  
15 Supplemental Emails or the substance of Plaintiff's new claims.<sup>9</sup> Azoogole would thus be  
16 fundamentally handicapped in responding to any supplemental pleading.

17 Most telling of all, Plaintiff didn't examine the three sample Supplemental Emails  
18 submitted to the Court well enough to realize that one actually contains a bona fide  
19 Azoogole "Affiliate Link" (meaning a link facilitating the routing of marketing leads back to  
20 Azoogole).<sup>10</sup> Had Plaintiff done so, and brought that fact to Azoogole's attention, Azoogole  
21 might have explained that the former user of the related email account  
22 (Anthony@asis.com) actually consented to receive commercial email advertising on the  
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24 <sup>5</sup> See Declaration of Jason K. Singleton in Support of Plaintiff's Motion to  
Supplement Complaint ("Singleton Decl.") at Ex. A, pp. 1, 7, 14.

25 <sup>6</sup> See Burgoyne Decl. at ¶¶2-3.

26 <sup>7</sup> See Burgoyne Decl. at ¶5.

27 <sup>8</sup> See Burgoyne Decl. at ¶8.

28 <sup>9</sup> See Burgoyne Decl. at ¶¶4, 6-7.

<sup>10</sup> See Singleton Decl. at Ex. A, pp. 1, 7, 14.

1 subject of that email.<sup>11</sup> Azoogole might also have explained that the other links cited by  
2 Plaintiff as supposed evidence of Azoogole's involvement are to a publicly-accessible  
3 imaging server that will pour the images in those emails into any Internet document  
4 incorporating those links.<sup>12</sup> It is common practice for shady Internet publishers of all  
5 sorts to "steal" images from the unsuspecting operators of imaging and other web  
6 servers.<sup>13</sup> (Azoogole organizational deponent Don Mathis explained as much to  
7 Plaintiff's counsel during Mr. Mathis' deposition, which occurred the week prior to the  
8 filing of Plaintiff's motion.)

9 Plaintiff's third-party discovery has amounted to the essence of "fishing."  
10 Permitting Plaintiff to supplement the SAC will encourage CAN-SPAM (and perhaps  
11 other) plaintiffs to file speculative (or worse) pleadings on the theory that, if they do  
12 enough third-party discovery, they will find some reason to string the litigation along.  
13 On that and the other grounds explained below, the Court should deny Plaintiff's motion.  
14

## 15 ARGUMENT

### 16 1. Plaintiff Has Not Served or Filed Its Proposed Supplemented Pleading.

17 Local Rule 10-1 states that "any party filing or moving to file an amended  
18 pleading must reproduce the entire proposed pleading and may not incorporate any part  
19 of a prior pleading by reference." The Court may deny a request to amend or  
20 supplement a complaint if the movant fails to provide the proposed amended complaint.  
21 *Cureton v. National Collegiate Athletic Ass'n*, 252 F.3d 267, 273 (3d Cir. 2001). In  
22 deciding whether to grant or deny a motion to supplement, the Court may consider the  
23 merits of the proposed new pleading. *See Weekes v. Atlantic Nat'l. Ins. Co.*, 370 F.2d  
24 264, 272 (9th Cir. 1966).

25  
26 <sup>11</sup> See Declaration of Don Mathis in Opposition to Plaintiff's Motion to Supplement  
27 Second Amended Complaint ("Mathis Decl.").

28 <sup>12</sup> See Mathis Decl.

<sup>13</sup> See Mathis Decl.

1 Plaintiff has failed to provide a proposed supplemented pleading. Plaintiff's  
2 motion standing alone is far from clear as to what Plaintiff contends in relation to the  
3 Supplemental Emails, proffering only that:

- 4 • Plaintiff discovered in its "SPAM Database" 6944 emails that contain one or more  
5 links to servers at domain names owned by Azoogle;
- 6 • Plaintiff cannot identify the sender of these emails.
- 7 • The Supplemental Emails "are in violation of the CAN SPAM Act of 2003 and the  
8 California Business and Professions Code §17529.5 in that they are unsolicited  
9 and contain false header information."

10 Plaintiff's motion does not specify what about the content of the Supplemental Emails  
11 violates CAN-SPAM or California law. Nor does Plaintiff's motion state whether or how  
12 Azoogle initiated the Supplemental Emails; whether or how Azoogle intentionally paid or  
13 provided consideration to send the Supplemental Emails; whether or how Azoogle  
14 induced another person to initiate the Supplemental Emails; or whether or how Azoogle  
15 had actual knowledge, or consciously avoided knowing, that the sender had violated or  
16 would violate CAN-SPAM. Without any clue as to Plaintiff's allegations, Azoogle would  
17 be completely unable to conduct discovery or otherwise defend itself.

18 The lack of a proposed supplemental pleading also bars the Court from  
19 evaluating the merits of Plaintiff's proposed new claims. And those merits appear to be  
20 slim. As explained above, the former user of the [Anthony@asis.com](mailto:Anthony@asis.com) email account, to  
21 which one of Plaintiff's sample Supplemental Emails was sent, affirmatively consented  
22 to receive email advertising on the subject of that email.<sup>14</sup> The only other links in the  
23 emails attached to Plaintiff's counsel's declaration are to a publicly-accessible Azoogle  
24 imaging server from which anyone could have stolen the images referenced in those  
25 emails.<sup>15</sup> If anything, Plaintiff's hand-picked sample Supplemental Emails demonstrate  
26 Azoogle's commitment to work with "email affiliates" that honor Azoogle's opt-in policies.

27 <sup>14</sup> See Mathis Decl.

28 <sup>15</sup> See Mathis Decl.

1 Plaintiff's failure to lodge a proposed supplemental pleading is, in-and-of-itself,  
2 sufficient basis to deny Plaintiff's motion.

3  
4 **2. Plaintiff Delayed as Long as a Year-and-a-Half in Bringing Claims as to the**  
5 **Supplemental Emails.**

6 The decision whether to permit a supplemental pleading is within the discretion of  
7 the court. See *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir.1988). The Court should  
8 grant leave to file a supplemental pleading only when doing so will promote the  
9 economic and speedy disposition of the entire controversy between the parties, will not  
10 cause undue delay or trial inconvenience, and will not prejudice the rights of any of the  
11 other parties to the action. See *Hall v. Central Intelligence Agency*, 437 F.3d 94, 101  
12 (D.C. Cir. 2006). Additionally, the district court may consider the moving party's undue  
13 delay in determining whether to grant leave to file a supplemental pleading. See  
14 *Bowles v. Reade*, 198 F.3d 752, 757-58 (9th Cir. 1999).

15 Certain of the Supplemental Emails were sent as early as December 12, 2005.  
16 Still, Plaintiff waited until May 25 of this year—just three months before the discovery  
17 cut-off—to inform Azoogole's trial counsel that it was considering filing a supplemental  
18 complaint incorporating those emails.<sup>16</sup> At the time Plaintiff filed its motion, Plaintiff was  
19 aware that its motion would not be heard until after Azoogole deposed Plaintiff's  
20 organizational representative, who, during her deposition, conceded complete  
21 ignorance as to the Supplemental Emails or the substance of Plaintiff's new claims.<sup>17</sup>  
22 Azoogole already has conducted the bulk of its written discovery, and has received no  
23 information whatsoever on Plaintiff's intended supplemental claims, except for the  
24 Supplemental Emails themselves.<sup>18</sup> Given the schedule of this action, if Plaintiff's  
25 motion were granted, Azoogole would have only a month to complete the discovery  
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27 <sup>16</sup> See Burgoyne Decl. at ¶2.

28 <sup>17</sup> See Burgoyne Decl. at ¶7.

<sup>18</sup> See Burgoyne Decl. at ¶5.

1 process as to Plaintiff's 6,944 alleged new emails. Still, Plaintiff acknowledges that  
2 supplementation of the sort it now requests would require the parties to revisit nearly all  
3 of their discovery requests.<sup>19</sup> It would be the height of unfairness to permit Plaintiff to  
4 benefit from a delay resulting from its own inattention.

5 Furthermore, even if the Court were to extend this case's deadlines to permit  
6 Azoogle to conduct additional discovery, what would prevent Plaintiff from later filing  
7 another motion to supplement, based upon the further fruits of Plaintiff's CAN-SPAM  
8 litigation mill? Plaintiff's proposed supplemental pleading will defeat an economic and  
9 speedy disposition of this action, not promote it. As discovery has demonstrated,  
10 Plaintiff is having more than enough trouble proving the claims already stated in the  
11 SAC. The Court should permit the parties to conclude the adjudication of those claims  
12 before permitting Plaintiff to introduce so many more.

13  
14 **3. Plaintiff's Supplemental Claims Are Separate, Distinct, and New Causes of**  
15 **Action.**

16 While leave to permit supplemental pleading is favored, it cannot be used to  
17 introduce a separate, distinct, and new cause of action. *Planned Parenthood of*  
18 *Southern Arizona v. Neely*, 130 F.3d 400, 402 (9th Cir. 1997); *see Matsushita Elec.*  
19 *Indus. Co. Ltd. v. CMC Magnetics Corp.*, No. C 06-04538 WHA, slip op. at \*2 (N.D. Cal.  
20 Jan. 12, 2007).

21 Because Plaintiff has failed to attach a proposed supplemental pleading or  
22 otherwise provide substantive information concerning its proposed new claims, it is  
23 impossible to determine the relatedness of Plaintiff's proposed new claims to the SAC.  
24 What is clear is that the differences between the Supplemental Emails and the 10,000-  
25 plus emails alleged in the SAC appear to outweigh any potential similarities. Each  
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27 <sup>19</sup> The parties already stipulated to extend the fact discovery cutoff by a month, to  
28 accommodate Plaintiff's extensive discovery. The Court should not countenance yet  
another extension of fact discovery.

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alleged email is a new transaction as to which Plaintiff must demonstrate each and every element of every alleged cause of action. If Plaintiff truly believes the Supplemental Emails are actionable, it should file a new action stating new causes of action relating to them.

**CONCLUSION**

Third party and other discovery is intended to flesh out the facts of existent pleadings, not to troll for unrelated wrongs. Plaintiff should not be permitted to drag this litigation out and increase Azoogles costs by continuing to add claims that bear no relationship to, or greater chance of success than, those stated in its speculative SAC. For those and all the other reasons set forth above, the Court should deny Plaintiff's motion.

DATED: June 22, 2007.

**KRONENBERGER BURGOYNE, LLP**

By: \_\_\_\_\_ /s/  
Jeffrey M. Rosenfeld

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AZOOGLEADS.COM, INC.