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June 27, 2007

Magistrate Judge Joseph C. Spero  
United States District Court, Northern District  
450 Golden Gate Avenue  
San Francisco, CA 94102

RE: ASIS Internet Services v Optin Global, Inc., et al  
USDC, Northern District of California, CV-05-5124 JCS

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Dear Judge Spero:

This letter is a joint meet and confer letter following the meeting of Plaintiff's counsel and counsel for Azoogole, Hank Burgoyne, in San Francisco on June 22, 2007. The remaining issues are as follows:

**Azoogole's Outstanding Discovery Issues**

Azoogole's Arguments

*1. Plaintiff's Refusal to Disclose Basis of Fundamental Contentions*

Through written and deposition discovery, Azoogole has sought the basis for Plaintiff's contentions that:<sup>1</sup>

1. Each of the 10,000-plus alleged emails violates CAN-SPAM and the CA B&P Code;
2. Each of the alleged emails originated with the same sender; and
3. The sender of the alleged emails used unlawful means to procure the IP addresses and/or email addresses from which those emails were sent.

Plaintiff has yet to provide such information, except for occasional broad-brush summaries of ongoing "studies" and "analyses."<sup>2</sup> Plaintiff's refusal has left Azoogole in

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<sup>1</sup> See, e.g., Azoogole Interrogatories Nos. 3 and 4 (facts underlying CAN-SPAM and CA law claims), Nos. 5-10 (facts that Azoogole responsible for acts of "SPAMMERS"), No. 17 (facts that "SPAMMERS" initiated the "SPAM"), No. 28 (facts that Azoogole knew sender email accounts were registered by automated means), Nos. 30 and 32 (facts that Azoogole advertised or caused an advertisement to be transmitted in the "SPAM"); No. 33 (facts that Azoogole participated in transmitting "SPAM" by providing sender email addresses); and No. 40 (for description of studies or analyses of alleged emails). During the parties' March 20 meet and confer, Azoogole agreed to withdraw its Interrogatories Nos. 3 and 4 on the condition that Plaintiff provide the requested information in response to additional discreet interrogatories, although Plaintiff later refused to do so.

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all but complete ignorance of, for example, which of 10,000-plus subject lines Plaintiff believes to be misleading, or why; which portions of 10,000-plus headers Plaintiff believes to be falsified or forged, or how; which sender IP or email addresses Plaintiff believes to have been procured unlawfully, or by what means; or which elements of the alleged emails Plaintiff believes to suggest a common sender.

Plaintiff has justified its refusal to disclose its information on the ground that any “study” or “analysis” of the alleged emails is either attorney work product or expert material. Not even Plaintiff appears to believe that argument, since Plaintiff has failed to produce a privilege log, has selectively leaked certain of the requested information, and even has begun providing Azoogole certain results of its “studies.”<sup>3</sup> In any event, the information sought by Azoogole – the supposed violations embodied in the alleged emails, Plaintiff’s evidence of a single sender, Plaintiff’s basis for alleging the emails were sent by unlawful means – are facts, not attorney or expert work product. As such, they are discoverable, and should be provided to Azoogole, both in the form of documents and interrogatory responses stating the basis for Plaintiff’s contentions.

During the parties’ June 22 meet-and-confer, Plaintiff offered to explain the supposed infirmities of 5 or 10 of the alleged emails. (Plaintiff made the same offer during the parties’ March 20 meet-and-confer, but never did so, despite having provided Quicken Loans similar information months earlier, as demonstrated by Exhibit A.) Azoogole appreciates Plaintiff’s offer. Still, the SAC alleges claims based on 10,000-plus emails. An explanation regarding 5 or 10 would in no way inform Azoogole as to Plaintiff’s claims regarding all the others. This is not a case such as Phillips v. NetBlue, in which (as Plaintiff recently admitted) the defendant stood accused of actually sending emails. As Plaintiff concedes, Azoogole had no knowledge concerning the sending of the alleged emails. Accordingly, it would be fundamentally unjust to assume any information on the part of Azoogole, whether about the emails, the sender or the means by which they were sent.

Each alleged email is a separate transaction in relation to which Plaintiff must prove every element of every one of its claims. Plaintiff should, as requested, provide discovery demonstrating its proposed basis for doing so.

## *2. Plaintiff’s Improper Designation of Addresses to Which Alleged Emails Sent*

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<sup>2</sup> See, e.g., Declaration of Michelle Burdock Support [sic.] of Plaintiff’s Motion for Summary Adjudication (providing overview of similarities between emails, as would suggest a common sender); Plaintiff’s Response to Azoogole’s First Set of Requests for Interrogatories, Nos. 15-18 (describing ongoing “detailed study” concerning means used to send the alleged emails); Plaintiff’s Response to Fourth Set of Interrogatories, No. 40 (describing studies, including one concerning common links in alleged emails).

<sup>3</sup> The results of one of Plaintiff’s analyses arrived as Azoogole counsel was drafting this letter; Azoogole counsel has not yet had the opportunity to examine those results, but will do so before any telephone hearing.

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At the outset of this litigation, Plaintiff designated as “Highly Confidential-Attorneys’ Eyes Only” the email addresses to which the alleged emails were sent. In support of that designation, Plaintiff has argued that those addresses are the protected personal information of Plaintiff’s customers or, in a gloss added during Plaintiff’s deposition, the confidential corporate property of Plaintiff.

Circumstances strongly suggest that not even Plaintiff believes its designation to be proper. Plaintiff testified that many or most of the email addresses pertain to closed customer accounts, in relation to which no consumer privacy objection could be made. Plaintiff has never attempted, however, to determine which email addresses fall into that category, and appears not to have secured the permission of any current customers to disclose their email addresses to Azoogole counsel. Plaintiff has testified it has no means of determining which of its customers have made their email addresses public; a Yahoo! search reveals that the email address pertaining to the Bruce Wolf lead appears on no less than 20 Internet pages. Most telling of all, Plaintiff repeatedly – in its mediation presentation to party representatives, at Ms. White’s deposition, in its filed declaration in support of its motion to supplement its complaint – has selectively disclosed certain of the alleged email addresses in violation of the Stipulated Protective Order’s rules governing “Highly Confidential-Attorneys’ Eyes Only” material.

Azoogole repeatedly has requested that Plaintiff redesignate the email addresses so as to permit Azoogole to research, for example, whether any appeared on email suppression lists, or whether any was publicly available on the Internet. Plaintiff repeatedly has refused, stating that if Azoogole wishes to attempt such research, it must do so through counsel or through a paid third-party consultant. It is hard to imagine a better example of a party using a privilege as both a shield and a sword. The Court should order a redesignation of the email addresses so as to permit Azoogole to attempt internal research necessary to its defense.

### *3. Plaintiff’s Failure to Provide a Proper Organizational Deponent*

On June 20, Azoogole took the deposition of Nella White, both individually and as Plaintiff’s organizational representative on a list of topics provided by Azoogole. At the outset of her deposition, Ms. White admitted to being unprepared to testify as to, and to having failed to make any effort to inquire as to Plaintiff’s knowledge regarding, 12 of those topics.<sup>4</sup> As the deposition progressed, it became apparent that Ms. White also had no information regarding at least 11 more of those topics, including the supposed

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<sup>4</sup> No. 5 (customer complaints, including regarding email advertising); No. 18 (studies or evaluations concerning the alleged emails); No. 19 (volume and nature of email advertising received by Plaintiff over the past five years); No. 20 (ASIS volume of Internet traffic over the past five years); No. 21 (ASIS employees and contractors knowledgeable about email advertising and the alleged emails); No. 28 (the conspiracy alleged in the SAC); No. 29 (the “SPAM Cartel”); No. 32 (Azoogole, including its policies and procedures); No. 34 (Azoogole’s Spamhaus/ROKSO listings); No. 38 (the sources of Plaintiff’s information supporting the SAC’s allegations); No. 40 (those of Plaintiff’s allegations made on knowledge vs. information and belief); and No. 43 (documents supporting the SAC’s allegations as to Azoogole).

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violations embodied in the alleged emails, Azoogle's supposed role as a conspirator, and Azoogle's "history of spam abuse" and supposed Spamhaus/ROKSO listings.<sup>5</sup> In fact, as Ms. White conceded later in the deposition, she hadn't seen the list of topics in relation to which she was to testify until she arrived at her deposition.

When pressed about her lack of knowledge, Ms. White conceded that she had little involvement in the litigation since turning the matter over to her lawyers. With regards to Azoogle's document requests, Ms. White admitted to searching her files only for those documents that her lawyers asked her to look for. Ms. White further admitted that Plaintiff's lawyers drafted Plaintiff's responses to Azoogle's other written discovery, and that Ms. White didn't consult any of Plaintiff's other personnel or review any of Plaintiff's records before certifying those drafts as complete and accurate.

The situation of Plaintiff's deposition was made worse by Plaintiff's refusal to answer, based on the instruction of her counsel, numerous questions other than on the grounds of a legal privilege or order of the Court. The combination of Ms. White's ignorance and her counsel's instructions prevented Azoogle from gathering substantive information on a range of fundamental issues.

Azoogle still is in the process of reviewing the transcript of Plaintiff's deposition, and has yet to decide whether to seek sanctions or an additional deposition of Ms. White or Plaintiff's proper organizational representative. In the interim, Azoogle requests that the Court grant it leave to bring the issue of Ms. White's deposition before the Court by formal letter brief.

### Plaintiff's Response

*Azoogle first contends that Plaintiff has failed to explain:*

1. Each of the alleged emails violates CAN-SPAM and the CA B&P Code;
2. The alleged emails originated with the same sender; and
3. The sender of the alleged emails used unlawful electronic, automated or fraudulent means to procure the IP addresses, domain names and/or email addresses from which those emails were sent.

Plaintiff has in fact taken a representative sample of the subject emails, and explained in responses to interrogatories, how each of the representative emails violates the

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<sup>5</sup> No. 1 (Plaintiff's form of business and governance); No. 8 (the alleged emails and related customer complaints); No. 12 (public availability of email addresses to which alleged emails sent); No. 17 (supposed violations embodied in alleged emails); No. 24 (Plaintiff's knowledge that Azoogle participated in sending of alleged emails); No. 27 (Azoogle's legal or other relationships with other named defendants); No. 33 (Azoogle's alleged "history of spam abuse"); No. 36 (Plaintiff's pre-filing investigation of the SAC's allegations); No. 45 (Plaintiff's allegations as to defendant Leads Limited); No. 47 (Plaintiff's settlements with other defendants); and No. 49 (Plaintiff's discovery responses and document productions).

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various elements of the CAN SPAM Act and California B&P Code. Please see Exhibit "A" hereto, which is the relevant pages of the discovery response. This was served on Azoogole at the time it was served on Quicken Loans. What Azoogole actually seeks, is for Plaintiff to provide such an explanation as to all ten thousand of the subject emails. That same issue was before Judge LaPorte in **Phillips v Netblue** (C05-4401 SC), and Judge Laporte ruled that explanations as to a sample of the emails is sufficient. Defendant's representation of what was at issue in the Netblue matter is inaccurate.

Plaintiff has also agreed to provide to Azoogole, any and all trial exhibits, statistical breakdowns etc. on how groups of the subject emails violate the discreet elements California and federal law. In other words, whatever it is that Plaintiff is going to use to explain to the jury how the emails violate the law, will be provided to Azoogole as soon as it is created. It isn't entirely clear what more it is that Azoogole seeks, other than a five hundred page analysis of all ten thousand emails. Nor can Azoogole identify a single discovery demand that requests the information it contends is not provided.

Mixed in with this issue, are Plaintiff's analyses of the subject emails. For example, a comparison of the IP ranges to which the end user was directed by clicking on a link in the subject emails, to each other, and identifying which of the subject emails directed the end user to a site which had a picture of a house which was the same house depicted on Azoogole's "lowrateadvisor.com" web site. Plaintiff initially objected to producing this information, on the grounds it was Plaintiff's counsel's work product. Azoogole is entirely capable of performing the same comparisons as Plaintiff. Nonetheless, in an effort to end discovery disputes, Plaintiff has produced the results of all such analysis to Azoogole. This was a rather thick stack of paper. Azoogole has not articulated, nor identified, any additional analysis in Plaintiff's possession, that was not produced to Azoogole. Azoogole cannot state what it is they want, that they do not have, other than to say they want an explanation of how each and every ten thousand emails violate the law.

*Deposition of Nella White:*

Nella White's deposition was noticed both as the officer most knowledgeable and in her personal capacity. Azoogole's deposition notice for the PMK identified **49** topics on which it wanted the designated agent to be able to testify. See Exhibit "B" hereto. The notice designated topics such as "*The spam cartel*", "*Azoogole's or other defendants knowledge of the wrongdoing alleged in the SAC*", "*Azoogole's legal or other relationships with the alleged SPAMMERS*", "*Azoogole's legal or other relationships with the other named defendants*", and, "*Public availability of the email addresses pertaining to the email accounts at which the alleged SPAM was received.*" The latter, Plaintiff testified, no one but the email account holders themselves would know.

In sum, Nella White did her best to answer each of the questions posed. It was unreasonable, however, for Azoogole to expect Ms. White to have definitive answers on every question, on 49 different topics. FRCP 30 (b) (6) only requires a PMK deponent

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to be able to testify as to matters known or "reasonably" available to the organization.

Without going into lengthy details, and without the benefit of Ms. White's transcript, Plaintiff simply states that Azoogole's description of Ms. White's unpreparedness is vastly overstated. Ms. White managed an ISP for 12 years, and has been intimately involved in the subject litigation since its inception.

Now, at counsel's seven hour discovery conference on June 22, 2007, there was not more than four minutes spent discussing whether Azoogole needed additional deposition of Ms. White. It cannot be said the parties have met and conferred on this issue, and indeed, this is borne out by Azoogole's admission it has not decided itself whether it even seeks additional deposition time. Yet, Azoogole asks the Court to grant Azoogole leave to file a motion to compel. Plaintiff respectfully submits, leave to file a motion to compel should not occur until after the parties have properly conferred on the issue, and until Azoogole itself decides whether same is even needed.

*Redesignation of Plaintiff's client's email addresses:*

Plaintiff has a right to protect the identity of its customers and to prevent other persons from using its ISP service to harass his customers. Plaintiff has provided all the subject emails to Defendant's attorney un-redacted. The Defendant in this suit have been accused of violations of the **CAN SPAM Act** and of hiring individuals as affiliates who are in violation of the **CAN SPAM Act**. Defendant, including Mr. Zardanovsky and Azoogole's business contacts, have been identified as having been on the SPAMHAUS Register of Known SPAM Operations. Plaintiff cannot allow its customers to be exposed to the potential harm that the Defendant and its affiliates could inflict. Indeed, it was a directory harvest attack that allowed the subject emails to be sent. Moreover, not long after this suit was filed, a denial of service attack was made on Plaintiff.

Defendant has or will have an expert witness. That person is covered under the persons to whom disclosure can be made under the Protective Order. Defendants' expert can do any analysis that need be done. Moreover, since it will be Defendant's expert that will be providing testimony at trial on such issues, it should be Defendant's expert conducting any analysis of the subject e-mails that needs to be done.

Plaintiff has offered to redesignate the email addresses which are closed accounts at Plaintiff's ISP, to confidential. Azoogole does not just want the email addresses redesignated, but the entirety of the emails at issue in this suit. The emails at issue, were sent to closed accounts, however, within the "cc" field of the subject emails, it is clear that the subject emails were also sent to active accounts. It is those active accounts that Plaintiff does not wish to be disclosed to a likely spammer, or their business associates.

This exact same issue was before Judge Laporte in **Phillips v Netblue**. Judge Laporte was requested by Netblue to lift the Attorney's Eyes Only designation on the subject

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emails. Judge Laporte denied Netblue's request. See Judge Laporte's order attached hereto as Exhibit "C".

## **Plaintiff's Outstanding Discovery Issues**

### Plaintiff's Arguments

Plaintiff's Request for Production No. 9 requested correspondence regarding SPAM abuse management.

Plaintiff has offered to limit the scope of the request to the correspondence between Mr. Mathis, Chris Lafarro, Charles Noviczech, and any Azoogole staff on spam issues\compliance. Mr. Lafarro and Mr. Noviczech direct the spam abuse department at Azoogole, and report to Mr. Mathis.

This correspondence should be easy to locate, as it will be in the inbox\outbox of the individuals, and can be reviewed for content with a simple context search. A company can have a stated policy regarding CAN SPAM compliance, and not follow the policy. Such correspondence is where the rubber meets the road in the actual management of Azoogole's affiliates. Whether a company followed its own policy, in practice, is necessarily, and maybe only, demonstrated by what occurs in actual practice. Plaintiff understand the court's concern that Azoogole not need to produce every email in the company that references the word SPAM, or every complaint regarding spam. However, a sample of how such complaints were handled is clearly necessary. This is the most reasonable means to obtain it.

Plaintiff's RFP #40 requested a broad range of documents. Plaintiff offered to limit the request to correspondence referring to Azoogole's termination of its "third party vendors", if any. (such third party vendors sold raw leads to Azoogole). There are only 64 "third party vendors".

### Azoogole's Response

During the past weeks, Azoogole has produced lists of its marketing lead vendors, its IP addresses and its domain names. It also has produced, or agreed to produce (without limitation):

- Documents reflecting Azoogole's corporate approach to email legal compliance;
- Azoogole's correspondence with Spamhaus;
- Correspondence involving Don Mathis (Azoogole's chief operating officer and chief compliance officer) or any of his direct reports and concerning Azoogole's approach to email legal compliance at the time of the incident period;<sup>6</sup>

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<sup>6</sup> Plaintiff misleads the Court by requesting correspondence involving Charlie Noviczech and Chris Lafarro, since (as Don Mathis testified during his deposition) Charlie Noviczech wasn't hired by Azoogole

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- Azoogles marketing lead vendor contracts and contact information (to the extent such can reasonably be found<sup>7</sup>);
- Lists of Azoogles top earning marketing lead vendors and those of Azoogles vendors terminated for reasons relating to email legal compliance (both to the extent they reasonably can be determined);
- A spreadsheet maintained by Don Mathis and tracking vendor terminations; and
- The electronic file that constituted the lowrateadvisors.com website operated by Azoogle during the incident period (if such can reasonably be found).

Azoogle has drawn the line, however, at two of Plaintiffs demands: 1) correspondence to or from Azoogles lower level compliance personnel; and 2) correspondence concerning the terminations of individual marketing lead vendors. Both types of documents would shed little light on Azoogles overall approach to unlawful commercial email advertising, especially compared to the policy-level correspondence and materials that Azoogle already has agreed to produce. Most or all, in fact, would relate to individual complaints – a subject in relation to which Azoogle already has agreed to provide information (e.g., the identities of terminated marketing lead vendors and the spreadsheet maintained by Mr. Mathis). Perhaps most important, the additional documents demanded by Plaintiff would be burdensome to gather, existing in the electronic and other files of numerous employees and former employees.

Azoogle has agreed to compromise on dozens of Plaintiffs discovery demands; its productions have gone above and beyond the Courts instructions. Plaintiffs remaining two demands represent a step too far, and Azoogle should not be required to comply with them.

Respectfully submitted,

**SINGLETON LAW GROUP**

**KRONENBERGER BURGOYNE, LLP**

/s/

/s/

Jason K. Singleton

Hank Burgoyne

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until four months after the incident period alleged in the SAC, and Chris Lafarro (whom Azoogle counsel believes was hired after Mr. Noviczech) reported to Mr. Noviczech and not Mr. Mathis.

<sup>7</sup> During the parties' June 1 hearing, Plaintiffs counsel represented to the Court that Azoogle organizational deponent Don Mathis testified that Azoogle once provided an outside consultant with all its "affiliate contracts." In fact, as Plaintiff conceded during the meet and confer held minutes after that hearing, Mr. Mathis never so testified.