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September 25, 2007

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

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

Dear Judge Spero:

Counsel for defendant Azoogles.com, Inc. ("Azoogles") and counsel for plaintiff ASIS Internet Services ("ASIS"), hereby submit this joint letter to the Court regarding each party's requests for leave to file Motions to Compel.

Plaintiff's responses to Azoogles's contentions, and Plaintiff's discovery issues, appear herein in Courier New font.

The Court should be aware that Plaintiff did not review this final version of the joint letter. In the days leading up to today's deadline for filing motions to compel (the discovery cut-off was last Tuesday), the parties had collaborated on a joint letter. Both parties understood that the joint letter was to be filed today. Yesterday, Plaintiff provided a draft, and was informed that Azoogles would amend some parts and respond to others, and would then provide that updated draft to Plaintiff. However, despite several emails and attempted telephone calls, Azoogles has been unable to reach Plaintiff's counsel today. Accordingly, Plaintiff has not had the opportunity to respond to certain changes made by Azoogles. Azoogles did not want to forfeit the opportunity to compel additional discovery, and so filed this letter in its current form. Azoogles requests that the Court entertain a later filed version of this letter – hopefully to be filed tomorrow – reflecting Plaintiff's final comments, changes and additions.

### **Azoogles's Statement**

Over the course of the last few months, Azoogles has deposed ASIS's designated organizational representative ("PMK"), Ms. Nella White, and has conducted depositions of percipient witnesses. Azoogles has also propounded additional written discovery, to which ASIS responded last week.

Based on the deposition testimony and the written responses received from ASIS, it is apparent that ASIS has, among other deficiencies, selectively

responded to discovery requests and failed to conduct a diligent search for all responsive documents. Azoogole therefore requests leave to file Motions to Compel.

1. ASIS Has Failed to Conduct a Diligent Search and Reasonable Inquiry for Responsive Documents in its Possession, Custody, or Control.

(a) ASIS identified Carl Scoles, Josh Mohland, Dave Marshall, and Nick Grabowski – each an employee or agent of ASIS’s counsel – as percipient witnesses<sup>1</sup>. Each witness testified that he likely possessed responsive documents, including correspondence, but that ASIS counsel had not asked him to produce them.

(b) In her deposition, ASIS’s PMK stated that she had not bothered looking for documents in the possession, custody, or control of other ASIS employees, even though the employees admittedly could have responsive documents. ASIS’s PMK further testified that she simply looked for documents that her attorneys specifically asked for, and that she did not undertake any additional search. (Exhibit A.)<sup>2</sup>

(c) ASIS agent Falcon Knight, which administers ASIS’s servers, provided correspondence with ASIS, which correspondence is responsive to Azoogole’s document requests. ASIS never produced that correspondence, and appears to have made no attempt to produce documents in Falcon Knight’s possession.

(d) ASIS’s written responses confirm that ASIS is in possession of responsive documents that ASIS has not yet produced. For example, ASIS states that it has no documents responsive to Azoogole RFP No. 31, although ASIS counsel conceded that ASIS’s unproduced spam database is responsive. Likewise, in response to RFP No. 28, ASIS produced email correspondence between its attorney and Jay Williams of Seamless Media Solutions, LLC. The emails, however, describe *additional* documents exchanged by ASIS and Mr. Williams, all relevant to this litigation, none produced.

(e) Plaintiff’s Expert Witness Disclosure describes bandwidth graphs and server configuration files provided by Ms. White to Plaintiff’s expert, all of which are relevant to Plaintiff’s claim of adverse affects, none of which was produced during discovery.

During counsels’ meet and confer, ASIS’s counsel stated that he would follow up with Carl Scoles, Josh Mohland, Dave Marshall, and Nick Grabowski and then produce responsive documents by September 25, 2007. (None has been received.) Counsel also represented that he would provide a privilege log, if applicable; amend ASIS’s response to RFPs Nos. 28, 29, 31, and 32; and produce all drafts of the documents referenced in the ASIS’s correspondence with Mr. Williams. (Again, none has been received.) ASIS counsel also

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<sup>1</sup> Azoogole has not yet received transcripts from these depositions.

<sup>2</sup> Similarly, Ms. White testified that she never searched for relevant documents, or sought information in the possession of any other ASIS employee, in connection with ASIS’s responses to Azoogole’s interrogatories and requests for admission. Relevant excerpts from Ms. White’s deposition are attached hereto as **Exhibit A**.

expressed a willingness to produce additional documents individually identified by Azoogle. ASIS counsel refused, however, to conduct the reasonably diligent search that, as every deposition has made clear, never was done.

Accordingly, Azoogle seeks leave to move for an order compelling ASIS to conduct a reasonable search for responsive documents in the possession of ASIS's employees and its agents, i.e., within ASIS's possession, custody, or control.

Carl Scoles is employed as Singleton Law Group office staff, as is Josh Mahlund. Each performed studies to answer the questions posed by the Court Ordered Responses to Interrogatories. Plaintiff would have preferred to wait until Plaintiff's designated expert could answer these questions, but could not due to the deadline. Consequently, Josh and Carl submitted declarations. Defendant then wished to depose them, and did. Defendant misrepresents what the witnesses stated regarding having documents responsive to discovery requests. Plaintiff requested of defense counsel to please identify what document request was pertinent, and what each witness stated they had, because, it is disputed that there are any documents that had not been produced. Defendant declined. Nonetheless, Plaintiff has agreed to query Josh, Carl, Dave and Nick, and see what documents they have, and if not privileged, to produce them. Nick is Plaintiff's counsel's son, and performed no work whatsoever on any part of Plaintiff's claim against Azoogle. Dave Marshall simply provided some consulting regarding office computer's generally, and again, did absolutely no work whatsoever in relation to Plaintiff's claim against Azoogle. Plaintiff has made it clear that neither Nick, Dave, Carl or Josh will be designated as experts in the within action.

Azoogle contends that Nella White did not ask her employees for any documents that might be responsive to discovery requests. That again is a misstatement. Any documents ASIS's employee's might have, are, and were, available to Nella. There are only three ASIS employees. As usual, Defendant requests discovery, without identifying what it is they want, much less identifying what it is they contend has not been produced. Nella White searched for and found any documents requested by Azoogle, that existed.

It is not ASIS's obligation to produce every scrap of paper and electronic document that ASIS has ever sent or received. Azoogle has not pointed to a discovery request that demanded any documents regarding Falcon Knight, much less explained the relevance they may have.

Any and all documents responsive to Azoogole's RFP, were searched for by Nella White already. Nella had and has access to everything at ASIS. What Azoogole seeks, is to impose a "make work" exercise on Plaintiff's counsel and Plaintiff, to require Plaintiff's counsel to go through (again) each and every of Azoogole's RFP and specifically question each ASIS employee regarding same. Now, Azoogole deposed ASIS employees. One would think that if they disclosed some non produced documents during their deposition, that Azoogole could at least point to same to justify their demand. They can't. This is a fishing expedition, without even telling Plaintiff or the Court, what it is we are fishing for. The FRCP requires that a party seeking production of documents, at least identify with some specificity what it is they seek. FRCP 34(b) See also *Richland Wholesale Liquors, Inc., v Joseph E. Seagram & Sons, Inc.*, 40 F.R.D. 480 (1966)

Plaintiff responds that it has agreed to amend RFP responses 26, 28, 29, and 30 to state that all responsive documents known to exist have been produced. Plaintiff will supplement RFP 28 to provide a release agreement, and any drafts of such agreement as may exist. As to RFP 29, which referred to documents previously attached in response to Court Ordered interrogatories, will be identified by bate stamp, in response to RFP 29.

Defendant's RFP 31 requested production of documents that show how many unsolicited commercial emails were directed to Plaintiff's server during 2005 and 2006. There are no such documents. Defendant's RFP 32 seeks documents reflecting the amount of unsolicited commercial email identified or filtered during 2005 and 2006 by any technology, service or software. Plaintiff uses a spam service called Postini. Postini does not keep or provide such records. We do know however how many spam emails have been collected in ASIS's spam database, and that number was included in response to RFP 32. Defendant now contends that the entire spam database is a document responsive to RFP 30 and 31, and requested during our discovery conference that it be produced. There is over 8.5 million emails within that database. Production of that database requires considerable effort. Moreover, those emails contain ASIS's end user's clients email addresses. Redacting those email addresses, from 8 million emails, is for all practical purposes, impossible. Defendant has not explained how production of this entire database is relevant to any claim or defense in this action.

Defendant originally sought to know, via RFP 31 and 32, how much spam Plaintiff received during a given period. The spam database, as was testified to by several witnesses, did not start collecting ASIS's spam until October 2005. Defendant also knows the current total. Witnesses testified about how fast the spam collects on a weekly basis, within the database. Hence, Defendant already has the information it seeks. Plaintiff suspects demanding production of the entire database is not intended to obtain relevant material, as much as an attempt to create a burden on Plaintiff and Plaintiff's counsel.

Plaintiff likewise objects to attempting to produce some portion of the database that accrued during the incident period. This is still no small task. It will require something like 15 to 25 man hours to run the searches, download the emails to a media large enough to contain it, write a script program to redact thousands of end user email addresses, and produce same to Defendant. All, mind you, without any showing of relevance to any claim or defense in this action. Azoogole has discovered from Plaintiff a reasonable approximation of how much spam is directed toward Plaintiff's servers. Azoogole has not explained how production of the actual spam is relevant, particularly where production is a considerable burden on Plaintiff.

## 2. Certain of ASIS's Interrogatory Responses are Incomplete.

ASIS has failed to produce three verifications (to ASIS's Supplemental Response to Azoogole's First Set of Interrogatories, its Supplemental Response to Interrogatories Nos. 1 and 2, and its response to Azoogole's Fifth Set of Interrogatories). Similarly, ASIS incorporated by reference external documents into its responses to Azoogole Interrogatories Nos. 51 and 52 (regarding Plaintiff's allegations concerning botnets, zombies, and Dark Mailers). ASIS's current responses don't even state which portions of those documents are relevant, or whether additional facts exist. During the parties' meet and confer, ASIS's counsel represented that he would amend ASIS's responses Nos. 51 and 52 to state all responsive facts, but did not agree to provide additional verifications. Azoogole requests leave to compel further and complete responses and verifications to all of its interrogatories.

Plaintiff has verified, and provided to Defendant, verifications for all outstanding interrogatory responses. Defendant fails to identify which verifications it contends are missing.

Defendant's interrogatories # 51 and 52 are almost identical to the Court Ordered Interrogatories. Plaintiff incorporated by reference the responses to Court Ordered Interrogatories, in response to #'s 51 and 52. It is unclear what material advantage there is to Defendant by requiring Plaintiff to engage in the exercise of cutting and pasting the previous responses into the responses to Interrogatories 51 and 52, but Plaintiff will do so.

3. ASIS Failed to Identify or Produce Documents Relating to Material Witness and ASIS Agent RND Computers.

On September 6, 2007, Mr. Grabowski testified that RND Computers ("RND") had administrative level access to Plaintiff's SPAM database, suggesting that RND would have relevant documents to this litigation, not to mention information regarding Plaintiff's investigatory methods. In her deposition on June 20, 2007, however, Ms. White, when asked to list all third parties with knowledge of Plaintiff's claims, failed to disclose RND. ASIS also failed to disclose RND in its response to Azoog's Interrogatories Nos. 1 and 2 (seeking persons with knowledge relating to ASIS's claims), and did not produce documents in RND's custody or control. Because ASIS did not timely identify RND, Azoog was unable to subpoena information before the discovery cutoff.

During the meet and confer, ASIS's counsel represented that he would produce all responsive documents in ASIS's possession and regarding RND. In the event ASIS fails to comply with its representation, by producing only a limited number of documents or none at all, Azoog seeks leave to compel production of such documents from ASIS, or, in the alternative, from Plaintiff agent RND.

R&D Computers is the Internet Access provider that hosts the server on which Plaintiff's spam database is located, (as well as other clients of SLG). The server itself is owned by Singleton Law Group. R&D Computers had provided no services whatsoever in relation to this case, other than to host the server. As the server host, R&D has administrative level access. As Defendant knows, that level of access does not allow R&D access to any of the spam data on the server, but only access to the operating system. Plaintiff did not list R&D in response to interrogatories requesting persons with knowledge, because it could not be fathomed what R&D could possibly know regarding this case. Defendant states Nella White in her deposition did not list R&D. Plaintiff could not find in Nella's transcript what Defendant is referring to. Plaintiff has nonetheless offered to produce for Defendant the invoices from R&D to Singleton Law Group. Again, Defendant has not pointed to any RFP that demanded correspondence between Singleton Law Group and R&D

Computers, nor explained what relevance the material might have.

**4. Third Parties, Including One ASIS Contractor, Did Not Comply With Subpoenas.**

Azoogle subpoenaed testimony and documents from third party witnesses Falcon Knight and Seamless Media Solutions, LLC ("Seamless"), the latter being the entity that supplied the single "Bruce Wolf" lead. Thus far, only Falcon Knight has provided documents, which documents Falcon Knight concedes to be less than those in its possession and control. Seamless – whose principal Jay Williams executed for Plaintiff a declaration in return for the release that Plaintiff has yet to produce – did not even appear for its deposition. Azoogle is working to resolve these matters informally; however, it is not confident that it will be successful prior to the Court's deadline for filing Motions to Compel. Therefore, Azoogle requests leave of Court to file Motions to Compel the subpoenaed documents from Falcon Knight and Seamless, and the attendance of Seamless at a deposition, in the event the matters are not informally resolved.

Azoogle has known its contention that Seamless Media was allegedly responsible for the subject spam emails, since Azoogle was named in the SAC. It is unclear why Azoogle waited till the close of discovery to subpoena Seamless Media.

**ASIS's Outstanding Discovery issues:**

**Deposition of Jen Evans**

Plaintiff's counsel has made three trips to the east coast to conduct depositions in this matter. The deposition of Jen Evans was scheduled to occur during the second such trip. A few days prior to the date set for Ms. Evans deposition, Counsel for Azoogle, Steve Fox stated Ms. Evans would not be produced as she was pregnant and thus could not fly from Toronto to NYC for the deposition as planned.

As a result, Plaintiff's counsel rescheduled Ms. Evans deposition to occur in Toronto. Several weeks later, Plaintiff's counsel flew to Toronto to take Ms. Evans and some other witnesses depositions. Azoogle, a day before Plaintiff's counsel left for Toronto, stated it could again not produce Ms. Evans, as apparently her brother-in-law had passed away.

Azoogle's counsel, Steve Fox then agreed to allow Ms. Evans deposition to be conducted via video conference, Plaintiff's counsel appearing in Eureka California. Mr. Fox stated Azoogle would cover the cost of the video conferencing.

Mr. Fox then changed his position, stating the Eureka court reporter, KCR reporter's video conferencing system was not compatible with Azoogles, and demanded that Plaintiff's counsel travel to San Francisco to conduct the deposition via video. Azoogles did offer to cover Plaintiff's travel costs, but not lost time for traveling to San Francisco. Plaintiff does not wish to lose a day of productivity traveling to and from San Francisco, (particularly after traveling twice to the east coast, to no avail) and requested that Azoogles produce Ms. Evans at a reporter's office that uses ISDN video conferencing, thereby allowing Plaintiff's counsel to appear in Eureka as agreed. ISDN video conferencing is common, is much better quality than internet conferencing, and it should not be difficult to find a location for Ms. Evans to appear at a ISDN facility. Plaintiff so requests.

Plaintiff offered to hold Ms. Evans deposition, via video, in San Francisco at a time when Plaintiff's counsel is already there. Plaintiff's counsel also offered to hold the video conference deposition, in Eureka, while Mr. Burgoyne was already in Eureka for other depositions, so as to save the cost of an additional video hook up. Defendant has now yet again changed its position, and is now contending that Ms. Evans is not a relevant witness, and need not be produced at all.

### *Azoogles's Response*

Ms. Evans could not appear for deposition in Toronto due to the death of her brother in law (the certificate for which, at Mr. Singleton's demand, was sent to Plaintiff), and because of pregnancy complications. Azoogles agreed to produce Ms. Evans by video conference – a deal that Plaintiff accepted.

Azoogles tried repeatedly to arrange such a conference. However, because the older video conference equipment available in Plaintiff's counsel's home of Eureka, California was incompatible with Azoogles's equipment, Azoogles's attempts failed. To facilitate a deposition prior to the discovery cut-off date, Azoogles therefore offered:

- to provide Ms. Evans for telephonic deposition (Plaintiff refused);
- at Mr. Singleton's request, to produce Ms. Evans for a September 7, 2007 video-conference deposition to be attended by Mr. Singleton while he was in San Francisco. (Mr. Singleton reneged on that agreement for personal reasons). (Exhibits B and C.); and
- to pay Mr. Singleton's \$450.00 travel costs from Eureka to San Francisco to attend a second scheduled video conference deposition on Monday, September 17, 2007.

Mr. Singleton did not respond to Azoogles offer of a September 17 video deposition, made just after 2 pm on Friday, September 14, and did not appear at the September 17 videoconference. After waiting thirty (30) minutes, Azoogles deposited Ms. Evans regarding her knowledge of Plaintiffs claims.

As the Court will remember, Plaintiffs sole basis for demanding a deposition of Ms. Evans was the supposed appearance of her name on certain documents connected with Azoogles affiliate program. Ms. Evans testified, however, that the deposition exhibits provided by Plaintiff (none of which Ms. Evans had ever seen) nowhere mentioned Ms. Evans. As Ms. Evans further testified – and as Azoogles counsel has in the past represented – Ms. Evans never worked in Azoogles mortgage lending vertical, had no dealings with any third party lead vendors, had no knowledge of the Bruce Wolf lead, and had no communications with any other defendant. Furthermore, as Plaintiff has conceded with respect to all of its other discovery requests, affiliate discovery isn't relevant since the Bruce Wolf lead was provided to Azoogles by a lead vendor and not one of Azoogles affiliates.

Azoogles has diligently attempted to accommodate Mr. Singleton's schedule, despite that Ms. Evans has absolutely no knowledge relevant to this case. If the Evans video deposition were that important to Plaintiff, then Plaintiff should have taken it on September 7, as the parties agreed, or then on September 17, as offered and held.

### **Third party vendor contracts**

During several discovery conference sessions, Azoogles counsel agreed to produce all contracts (Insertion Orders) between Azoogles and its third party vendors of mortgage leads. There was only about seventy such third party vendors. Azoogles witnesses stated such contracts were in fact saved at Azoogles. Plaintiff can produce emails from Mr. Burgoyne's office stating the production was "forthcoming". This has never occurred. During Counsel's meet and confer held the morning of September 21<sup>st</sup>, 2007, Plaintiff offered to accept what contracts Azoogles could produce, together with a statement under oath from Azoogles that it could produce no other contracts. Steve Fox stated he was still looking into whether Azoogles could locate the contracts. This request for contracts issue has been pending since last June 1<sup>st</sup>. At the June 1<sup>st</sup> hearing before this Court, on page 18, line 11, the Court ordered Azoogles to produce its affiliate contracts.

### ***Azoogles Response***

Azoogles has agreed to produce its vendor contracts from the months surrounding the incident period, or to state that (as appears the case) after a diligent search it

is unable to locate any. Azoogole also has agreed to state in a declaration that the Seamless Media vendor agreement employed the same form terms as Azoogole's other vendor agreements. As Azoogole has elsewhere explained, Azoogole's searches have been hampered by the fact that most and in some cases all responsive documents are no longer stored on Azoogole's systems. Plaintiff's complaint appears to be not that Azoogole has failed to comport with its discovery obligations, but that the information sought by Plaintiff – which already knows the identities of Azoogole's lead vendors and which was in any event barred from further third-party discovery – cannot reasonably be found.

**Identification of Azoogole's top ten producers of mortgage leads.**

During several discovery conference sessions, Azoogole's counsel agreed to identify the top ten third party vendors of mortgage leads. This has never occurred. Azoogole's counsel has repeatedly stated the information would be forthcoming, however, months have passed, and the information has not been produced. Mr. Fox, during the discovery conference of September 21<sup>st</sup>, again stated the information was "forthcoming".

***Azoogole's Response***

In compromise of certain of Plaintiff's far broader discovery demands, Azoogole has agreed to compile a list of what it believes to have been its "top ten third party lead vendors." Of necessity, Azoogole has had to work at the list, since "top ten third party lead vendors" is not a category of analysis ever maintained by Azoogole. Azoogole agreed to provide the list despite that Plaintiff's admitted use will be to gather dirt on the listed entities, and then to use that dirt to show that Azoogole consorted with bad actors. As Azoogole has explained, the information needed to compile the "top ten" list has had to be culled from backup information. As Plaintiff is aware, Azoogole expects to provide a responsive answer this week.

**Correspondence between Azoogole, and its third party vendors of mortgage leads, regarding termination.**

Plaintiff requested in discovery that Azoogole produce any correspondence between its third party vendors, and Azoogole regarding termination of the third party vendors contract with Azoogole. Mr. Burgoyne sent an email to Plaintiff's counsel stating that no such letters could be located. Plaintiff requested that Azoogole simply put in a formal discovery response, that after a diligent search, no such letters could be located. Mr. Burgoyne stated during the discovery conference of September 21<sup>st</sup>, 2007 that a formal statement would be provided as requested.

***Azoogole's Response***

During the parties' meet and confer, Azoogole agreed to amend its discovery response as described above.

**Discreet designations of Deposition Transcripts:**

The Protective Order in this case automatically identifies all deposition transcripts as confidential Attorney's Eyes Only for 30 days after receipt of the transcript by Counsel. Plaintiff has repeatedly requested that Azoogole make discreet designations of portions of the transcripts. Azoogole, after considerable delay, finally designated portions of the Don Mathis Transcript as "attorney's eyes only", but then designation the remaining entirety of Mr. Mathis' transcript as "confidential". Azoogole has not made any discreet designations of the remaining transcripts, with the exception of Mr. Zhardanovsky and Rick Olkin, which again, also have blanket designations as "confidential". Plaintiff requests the blanket designations of the transcripts be removed, and that discreet designations be made for the remaining transcripts. Eventually, Defendant will be filing a motion for summary judgment, and Plaintiff an Opposition. Plaintiff simply does not want to burden itself, or the Court, with filing nearly every bit of evidence in this action under seal, when opposing Defendant's motion for Summary Judgment.

***Azoogole's Response***

Azoogole has designated portions of the Mathis, Okin, and Zhardanovsky depositions as "Highly Confidential-Attorneys' Eyes Only," and has reduced the other portions to "Confidential," pending a final review by Azoogole. Azoogole is in the process designations discrete portions of the remaining transcripts. Plaintiff has deposed almost ten witnesses, some for the entirety of (and in the case of Mr. Mathis exceeding) Plaintiff's allotted time. Plaintiff's questions sought Azoogole's most sensitive technical, marketing, product, customer and risk management information, rendering the designation process delicate and time-consuming. It goes without saying that Azoogole is moving as quickly as possible to remove unnecessary designations, since Azoogole also wants to use those depositions' exculpatory content in its public filings.

**Production of emails received from seeded email addresses.**

Defendant's witnesses have testified Azoogole seeded its email suppression lists with email addresses that were never published and kept confidential. The idea being if an affiliate (or third party vendor) sent an email to such an address, then Azoogole could determine whether the

affiliate or contractor was spamming to Azoogles' suppression lists. Plaintiff requested that Azoogles produce all emails received to email addresses seeded into suppression lists, (known as Spam traps in the industry and by Azoogles' witnesses) with the actual email address redacted. Azoogles objected and refused to produce any such emails, on the grounds of relevance. If Azoogles will stipulate it will not be attempt to bring into evidence at trial its seeding strategy in defense of this action, then fine, Plaintiff will not seek production of the emails. However, in the absence of such stipulation, Plaintiff seeks production.

During Counsel's meet and confer of September 21<sup>st</sup>, Mr. Burgoyne stated the problem with producing the emails was the burden on Azoogles to do so. Plaintiff's RFP limited the request to the relevant time period. Nor could Mr. Burgoyne state what that burden was, or how many emails were responsive. Mr. Burgoyne also refused to respond to this RFP because he concluded Plaintiff's use of the term "Spam traps" was unclear. I made it clear to Mr. Burgoyne during our meet and confer exactly what it was that Plaintiff sought. Defendant's formal written objections to this RFP make no objection on the grounds the RFP is unintelligible. Mr. Burgoyne was still unwilling to provide the data, or a stipulation.

### *Azoogles' Response*

Plaintiff served on Azoogles a document request seeking all emails captured by Azoogles' "spam trap" between July 1, 2005 and April 1, 2006. Azoogles understood that request to seek all emails captured by Azoogles' own spam filter. During the parties September 21 meet and confer, Plaintiff clarified that it actually wanted the raw contents of a series of mailboxes containing emails sent by affiliates – not lead vendors, but affiliates – who violated Azoogles' terms and conditions by sending emails to addresses on Azoogles' "suppression lists."

The information sought by Plaintiff is, as Plaintiff has conceded with respect to all its past discovery responses, irrelevant, since it relates to affiliates and not lead vendors like Seamless, the entity from which Plaintiff received the Bruce Wolf lead. Plaintiff's request also is wildly overbroad, covering an almost year-long period extending for months on either side of the alleged incident period. Furthermore, Plaintiff's request would overburden Azoogles, which would have to search backup files for information of a sort that almost certainly wouldn't be kept, and which wouldn't in any event reflect on any element of any claim.

There are far less burdensome ways for Plaintiff to have gauged whether Azoogles actually used a spam trap – for example, interrogatories or deposition questions asking Azoogles to describe its use. If Plaintiff is entitled to the raw contents of Azoogles' spam traps, then Azoogles is entitled to the contents of

Plaintiff's spam database, which Plaintiff has steadfastly refused to produce, despite conceding its responsiveness to Azoogole's document demands.

Respectfully submitted,

**KRONENBERGER BURGOYNE, LLP**

**SINGLETON LAW GROUP**

*/s/*

Hank Burgoyne

Jason K. Singleton