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7
8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10 **ASIS INTERNET SERVICES, a California**)
11 **corporation,**)

Case No. C-05-5124 JCS

12 **Plaintiff,**)
13 **vs.**)

OPPOSITION TO DEFENDANT AZOOGLES
MOTION FOR RULE 11 SANCTIONS

14 **OPTIN GLOBAL, INC., a Delaware**)
15 **Corporation, also dba Vision Media Limited**)
16 **Corp., USA Lenders Network, USA**)
Lenders, and USA Debt Consolidation)
Service; et al.,)

DATE: November 2, 2007
TIME: 9:30 a.m.
CTRM: A, 15th Floor

17 **Defendants.**)
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1 **INTRODUCTION**

2 Plaintiff herein responds and presents its Opposition to Defendant Azoogle’s Motion for Rule 11
3 Sanctions.

4 Defendant has made a motion to the court for dismissal on the basis of *FRCP* Rule 11, on the
5 grounds that Plaintiff’s Second Amended Complaint (hereafter SAC) lacks evidentiary and legal
6 support. Defendant’s argument lacks merit and is supported by evidence that misrepresents the facts at
7 the time of the incident period of this suit.

8 This case is about one business trying to take advantage of another business because they are
9 sure the Plaintiff cannot do anything about it. Plaintiff is an Internet Service Provider (ISP) who has
10 suffered under the attacks of spammers for years. When a bulk marketer sends bulk email to the
11 customers of an ISP they are using the resources of the ISP to send their advertisements. The ISP must
12 upgrade their systems and software to handle the increased load. The ISP receives no compensation
13 from the bulk marketer for the use of its resources, and has to either eat the cost or recoup the cost from
14 its customers. Some bulk marketers think it is their right to misuse the ISP resources in this manner.
15 Both the federal and California legislatures disagree, at least in part, with this position. Both legislatures
16 provided a right to the ISP to bring an action for penalties and injunction against advertisers that violate
17 certain rules. Plaintiff intends to exercise its rights. Defendant has brought this motion in an attempt to
18 intimidate Plaintiff into going away.

19 Rule 11 clearly allows for allegations that are likely to have evidentiary support after further
20 investigation or discovery. Rule 11 does not contemplate that all of the evidence is available and
21 presented at the time of the complaint.

22 The Ninth Circuit has provided guidance of what is to be considered in a Rule 11 Motion. The
23 Court established the “reasonable man” standard as appropriate for judgment of Rule 11 motions. The
24 Court defined a reasonable man as a competent attorney licensed in the District. Also, the pleading must
25 not be for an improper purpose.

26 Plaintiff’s purpose is to stop persons and entities from misusing its resources by spamming its
27 email service. Plaintiff may benefit from the statutory penalties, and recovery of its expenses, provided
28 by the legislatures to punish those involved. Neither of these are improper purposes and Defendant’s

1 assertions are baseless and petty. Plaintiff wants to avoid a long and expensive trial if it can achieve its
2 objective through settlement, that would reduce the costs for everyone including the court. To say that
3 Plaintiff has an improper purpose because they have offered settlement is a ridiculous argument.

4 Defendant appears to apply a summary judgment or trial standard to a Rule 11 motion.
5 Defendant requires Plaintiff to prove beyond a shadow of doubt all of the elements of the causes of
6 action.

7 Plaintiff was apprised of sufficient facts to name Azoogole in the Second Amended Complaint.
8 Later adduced facts point to clear liability for Defendant Azoogole.

9 Next, Defendant has relied on a representation of evidence that misrepresents the facts in this
10 case. The evidence available at the time of filing does not show what Defendant has asserted in their
11 motion. Neither the 2006 or the 2005 affiliate terms and conditions are relevant to this case. These facts
12 were not discovered until later, the assertion by Defendant that these documents are relevant is
13 misleading and intended to confuse the issues. This is a serious misrepresentation of evidence.

14 Finally, Defendant has waited eleven months after the filing of the First Amended Complaint
15 (hereafter FAC) and eight months after the SAC. Defendant's Rule 11 Motion is untimely and should
16 be dismissed.

17 STATEMENT OF FACTS

18 1. History of the SPAM.

19 During the months of October of 2005 through January of 2006, Plaintiff received in excess of
20 10,000 emails to its servers that met the definition of SPAM under the *CAN SPAM Act of 2003* and the
21 *California Business and Professions Code* §17529.5. (Plaintiff has recently re-counted the emails
22 using a program specifically designed to count the multiple "To" and "CC" addresses contained in the
23 emails.) The count reached when recounting the emails is 12,756. See Declaration of Josh Mohland in
24 Support of Court Ordered Interrogatories [hereafter Dec. JM], ¶5), attached to the Declaration of
25 Richard Grabowski [hereafter RG] as **Exhibit A**. These emails were sent using obviously stolen email
26 identities. These emails were sent with false header information, so as to make tracing the source
27 impossible. These emails were sent with subject lines that contained consistently misspelled words.
28 (See ¶3 of the Declaration of Nella White in support of Plaintiff's Opposition to Defendant's First

1 Motion to Dismiss - Docket #50 [hereafter “Nella Doc. #50”]); also see Expert Disclosure of Jeffrey
2 Posluns ¶ IV-C and D attached to the Dec. of RG, **Exhibit B**.

3 On the evening of October 25, 2005, and extending into the early hours of October 26, 2005, the
4 ASIS.com mail service, received many messages regarding real estate financing. Nella became aware of
5 this because many of these messages were sent to email addresses that were no longer active. See ¶4 to
6 Nella Doc. #50. Plaintiff has provided a list of unassigned and never assigned email accounts in its
7 response to Defendant Azoogole’s First Request for Production. (See **Exhibit C** [filed under seal] to
8 Dec. of RG).

9 All of these emails asked the recipient to go to various specific Internet sites, such as
10 wwmort.com, bbmort.com, xxmort.com, etc., and contained a link to get there. However, once a party
11 went to any of those sites, the information and site information was exactly the same. See Exhibit “B”
12 to Nella Doc. #50. Exhibit B to Nella Doc. #50 is the email that was used by Nella to enter the
13 SPAMMER’s website at wumort.net on October 27, 2005.

14 On Thursday, October 27, 2005, Nella filled out a form on the wumort.net site. Nella chose
15 wumort.net because it clearly had been sent to a large percentage of her customer base, listed
16 alphabetically, leading her to suspect they had been gathered by means of a Directory Harvest Attack.
17 See ¶7 to Nella Doc. #50.

18 Of the 12,756 emails produced by Plaintiff, 1578 of those emails contain a link to wumort.net or
19 wumort.com. See Declaration of Carl Scoles RE Supplemental Disclosure Six Amended attached to
20 Dec. of RG as **Exhibit D** (hereafter Dec. Carl-#6) and Exhibit “A” Sheet 4 “*E-mail counts-per domain*”.
21 These URL links resolved to the exact same IP address and changed IP address throughout the history of
22 the domains on the exact same day. See Dec. Carl#6-Exhibit “A” Sheet 3 “*IP’s & related domains*”
23 (**Exhibit D**). There is an image of wumort.net on the Internet Wayback machine, there is not an image
24 for wumort.com. See Dec. Carl#6, Exhibit “A” Sheet 1 “*ASIS Data*” L. 137–141 and L. 247–251
25 (**Exhibit D**). See also Declaration of Carl Scoles (2) Exhibit “H” To Response To Court Ordered
26 Interrogatories (hereafter Dec. Carl-2) Exhibit D, attached to Dec. of RG as **Exhibit E**.

27 The wumort.net and wumort.com emails are exactly the same in appearance, even to the point of
28 the same misspellings, except for the different senders, recipients and URL link. See examples in

1 **Exhibit F** [filed under seal] to Dec. RG. This indicates that of the 12,756 emails at a minimum 1578
2 emails came from the same source and directed the recipient to the same web site. See Exhibit C to
3 Nella Doc. #50 for the image of the wumort.net website filled out with the “Bruce Wolf” information.

4 As has been described before, Bruce Wolf is a fictitious person created by Nella White to try and
5 discover who was sending spam emails to asis.com email accounts.

6 The telephone number provided by Nella White in filing the Bruce Wolf lead was attached to a
7 recording machine. The telephone number received a number of calls from mortgage brokers on
8 October 28, 2007, the day after Nella White entered the Bruce Wolf information into the wumort.net
9 website. The voice recordings were transcribed by Teresa Singleton, a clerk at Singleton Law Group.
10 See Exhibit A to Declaration of Teresa Singleton in Support of Opposition to Motion to Dismiss, Docket
11 #51.

12 From the calls received on October 28, 2005, Plaintiff’s attorney was able to identify nine
13 separate mortgage companies who were responding in less than 24 hours to the Bruce Wolf lead. The
14 Bruce Wolf information was not available from anywhere else; Nella White made it up on the night of
15 October 27, 2005. See ¶7 to Nella Doc. #50. Therefore, the only way for these nine mortgage brokers
16 to have gotten the information is to have received the information from the person who owned the web-
17 site wumort.net.

18 **2. Information Readily Available to Plaintiff Prior to the Filing of the SAC.**

19 On page 5:3-4 of Defendant’s Motion, Defendant states that Bishop’s declaration “Stated that
20 Azoogle had received the Bruce Wolf lead from a third party (identified as John Strothers).” Ms.
21 Bishop actually stated: “Quicken loans received the lead from its affiliate, Azoogle, and that Azoogle
22 had apparently received the lead from John Strothers...” Declaration of Amy Bishop, Docket #56,
23 3:19–21. The problem is that Amy Bishop did not identify John Strothers as a third party or as an
24 affiliate. Quicken Loans through Amy Bishop informed Plaintiff that Azoogle provided the lead from
25 Azoogle’s affiliate John Strothers.

26 Assertions by Azoogle were quickly shown to be wrong at the time of the FAC and the SAC.
27 Quicken Loans stated that Azoogle had signed contracts with Quicken Loans that warranted Azoogle
28 had: “obtained any and all requisite consent from consumers to pass their information to [Quicken

1 Loans] as a Qualified Submission.” Dec. of Amy Bishop, Docket 56, 2:21–23. Obviously this was not
2 a correct warranty by Azoogole. Azoogole has repeatedly argued that the emails were not sent on its
3 behalf. If that is so and Azoogole knew nothing about the site that Nella White visited on October 27,
4 2005, then how could Azoogole warrant that the leads Azoogole was providing to Quicken Loans had any
5 and all of the required consent from consumers. Either Azoogole was directly involved in acquiring the
6 leads or it was making flagrantly false claims in its warranties to Quicken Loans. It turns out Azoogole
7 was involved and they were making flagrantly false warranty claims.

8 Defendant discusses the terms and conditions displayed on its web site. Defendant relies on this
9 T&C as proof that there was an agreement in place and that agreement contained terms regarding the
10 prohibition of violations of the *CAN SPAM Act*. However, the agreement discussed in detail by
11 Defendant on page 5 of its motion, was not in place in 2005. The document that Defendant discusses as
12 Exhibit E has a date of “12/14/2006” at the bottom of the first page, this was three months after the SAC
13 was filed. Defendant’s Exhibit F to the Declaration of Hank Burgoyne (hereafter “Dec. of HB”) is dated
14 July 24, 2006. Therefore, neither Exhibit E or F of Dec. of HB is relevant to the SAC and the state of
15 Azoogole agreements in October of 2005 through January of 2006.

16 Exhibit G to Dec of HB was the affiliate agreement in place in October of 2005, and was
17 reviewed by Plaintiff’s counsel. Exhibit G to Dec of HB, contains only one reference to spam. Buried
18 in paragraph 6 “Representations and Warranties” is the statement: “You agree not to send Unsolicited
19 Commercial Email (i.e. SPAM).” Paragraph 5, *Termination*, makes no mention of consequences for
20 violating this representation. However as is discussed below, Defendant has claimed that its third party
21 vendor, Seamless Media, was responsible for the lead. Azoogole has also asserted that third party
22 vendors did not sign the affiliate agreement. Therefore, even Exhibit G to Dec. of HB has no relevance
23 in this action.

24 Defendant’s reference to SPAMHAUS and the fact that Azoogole was removed from the
25 SPAMHAUS ROKSO list is correct. However, what Defendant fails to mention is that Azoogole was not
26 removed from the SPAMHAUS ROKSO list until May of 2006, seven months after Nella White entered
27 the “Bruce Wolf” lead on October 27, 2005. Exhibit J to Dec. HB. Plaintiff knew that Azoogole’s
28 problems with SPAMHAUS were related to spamming by its affiliate network. Plaintiff knew that

1 Azoogle had a very bad reputation for spamming and working with spammers based on blogs and
2 reports available on the internet.

3 **3. The emails were clearly in violation of the CAN SPAM Act and California Business**
4 **and Professions Code.**

5 Plaintiff knew that the emails were clearly in violation of several sections of the *CAN SPAM*
6 *Act*, since they contained obviously false header information and seriously deceptive subject lines. See
7 the SAC. Plaintiff believed that a directory harvest had been used to collect the ASIS email accounts,
8 since they were sent in alphabetical order. See Docket #50 Dec of Nella White ¶7. Plaintiff knew the
9 emails were unsolicited, since many of the emails were sent to closed accounts and internal ASIS email
10 accounts.

11 Plaintiff had good reason to believe the emails originated from the same source based on the
12 characteristics of the emails, and the fact that they were received in alphabetical order of the receiving
13 email account. Further detailed studies of the emails demonstrate that there are three distinct identifiable
14 forms that were used to produce the emails and that these three forms sent the emails to the same
15 landing pages.

16 **4. Subsequent evidence supports the SAC.**

17 The email from Ragi Mahil of Azoogle to Chris Meerschaert of Quicken Loans dated November
18 4, 2005 (provided by Quicken Loans), Mr. Mahil states: “The affiliate that provided Azoogle the lead:
19 John Strothers”. **Exhibit G** to Dec RG, QL-0084. This email clearly identifies John Strothers as
20 Azoogle’s affiliate. This email established at an early stage of this case that Azoogle provided the
21 “Bruce Wolf” lead to Quicken Loans and that it acquired the lead through Azoogle’s affiliate John
22 Strothers.

23 Defendant Azoogle has since declared that it did not receive the lead form its affiliate John
24 Strothers. Rather Azoogle asserts that it received the lead from its third party vendor Seamless Media.
25 **Exhibit H** to Dec. of RG, Azoogle’s response to Interrogatories at 15:21–24. Azoogle has also asserted
26 that it does not use its affiliate policies and procedures with third party contractors. Azoogle has
27 provided a third party “advertising insertion order” with terms and conditions that covers its agreement
28 with Seamless Media. **Exhibit I** to Dec. of RG AZ-018-021 submitted under seal pursuant to

1 confidential designation by Defendant Azoogle. Note that the agreement allows for the use of email.
2 AZ-018 Also note that there is no reference to any prohibition of violation of the *CAN SPAM Act* other
3 than paragraph 12. Paragraph 12 only prohibits the use of Azoogle's suppression list in a manner that
4 violates the *CAN SPAM Act*. AZ-020–021. The terms and conditions do not contain a general
5 prohibition against violation of the *CAN SPAM Act*. Azoogle has admitted that it never provided the
6 suppression list to its third party contractors. **Exhibit J** to Dec. RG, Depo Mossanen (filed under seal)
7 30:17–20.

8 Mr. Mossanen was asked what the difference was between and affiliate and a third party vendor.
9 Mr. Mossanen initially stated he did not know the difference. **Exhibit J** to Dec. RG, Mossanen 56:6–
10 9(under Seal). After a break with his attorney Mr. Mossanen corrected himself and restated his answer.
11 See **Exhibit J** to Dec. RG, Mossanen (filed under seal) 60:23–61:11

12 Emails between Mr. Mossanen and Azoogle's third party vendor Lendance (identified in
13 Azoogle's Fourth Supplemental Disclosure), indicate that Lendance was provided with an affiliate id.
14 **Exhibit L** to Dec. RG, Plaintiff's Bate 1546. Azoogle also apparently provided Lendance with the URL
15 addresses of the lowrateadvisors.com site (See **Exhibit L** to Dec. RG, Plaintiff's Bate 1547), even
16 though Mr. Mossanen stated that none of Azoogle's creatives were provided to third party vendors.
17 **Exhibit J** to Dec. RG, 63:18–22. The web page identified by Lendance is the LowRateAdvisors.com
18 web site. Mr. Mossanen then goes on to describe how the web site would look like the third party
19 vendor's site but the data would be posted directly to Azoogle's site, without the consumer knowing, via
20 a form post. **Exhibit J** to Dec. RG, 112–118.

21 As the emails to Lendance from Mossenan demonstrate there was a much closer involvement
22 then just acting as a consumer of leads with third party vendors.

23 Quicken Loans also provided its agreement with Azoogle that includes a letter from Ragi Mahil,
24 "Campaign Manager – Azoogleads.com, Inc." The letter from Mr. Mahil states: "Mortgage leads are
25 generated by our own web properties allowing for greater quality control, submitted by nationwide
26 consumers, who are ready to buy". **Exhibit G** to Dec. RG QL-0023 submitted under seal as designated
27 Confidential by Defendant Quicken Loans. The documents attached identify www.lowrateadvisors.com
28 as one of Azoogle's mortgage sites. **Exhibit G** to Dec. RG QL-0024. The web page presented by

1 Azoogle to Quicken Loans representing www.lowrateadvisors.com contains the same image of a house
2 that appears on the web page where Nella White entered the “Bruce Wolf” lead. **Exhibit G** to Dec. RG
3 QL-0017 (submitted under seal); also **Exhibit K** to Dec. RG, Mathis 268:7-19, and Plaintiff’s exhibit 7
4 and 8 (under seal).

5 According to Azoogle the Bruce Wolf Lead was submitted to Azoogle at “10/28/05 12:50 PM
6 PST”. **Exhibit I** to Dec. of RG AZ-022 (under Seal). Since Nella White entered the information late on
7 the night of October 27, 2005, it is likely the information was transferred directly from the wumort.net
8 page to Azoogle via a real time form post.

9 The Bruce Wolf lead sheet (discovered after filing the SAC) provided by Azoogle to Quicken
10 Loans contained the Bruce Wolf information provided by Nella White and the title, at the top of the
11 page, of “LowRateAdvisors.com”. **Exhibit G** to Dec. RG, QL-0116. This creates the impression that
12 Azoogle was providing the lead as part of its web page, LowRateAdvisors.com. Especially since
13 Azoogle had provided Quicken with a copy of the LowRateAdvisors.com site and the statement that
14 leads are generated by its own web properties.

15 Azoogle has produced the contract with Seamless Media, whom Azoogle asserts provided the
16 leads under the agreement. This agreement is titled “AzoogleAds Insertion Order for Mortgage Lead
17 Test.” See **Exhibit I** to RG AZ-05 (under seal). This agreement states that “the sole obligation of
18 Azoogle is to conduct the Advertising Campaign described in this Insertion Order.” See **Exhibit I** to
19 RG AZ-06 (under seal). The agreement also states: “Neither Company nor Advertiser may assign this
20 Insertion Order without the other’s prior written consent. Neither Company nor Advertiser shall
21 unreasonable withhold their consent.” AZ-06. The terms of this agreement allow for placement of the
22 advertisement in various forms including emails. AZ-05. This agreement includes a requirements
23 document “Azoogle Refinance Lead Criteria Document 2005.” AZ-012. This requirements document
24 states that the lead will not be accepted if: “-Lead is non-exclusive to Azoogle for an unlimited period
25 of time.” AZ-012. (**Exhibit I** under seal)

26 The lead was accepted by Azoogle. Azoogle asserts that the lead came from Seamless Media
27 based on the Insertion Order provided in AZ-05 (**Exhibit I** under Seal). Azoogle has not provided any
28 proof that it agreed to allow Seamless Media to assign the insertion order to some other entity. The lead,

1 by the terms of the agreement was only acceptable to Azoogole if it was exclusive. Therefore,
2 Azoogole.com induced Seamless Media to place the ad in an email. That email advertisement was sent to
3 ASIS.COM, who responded with the Bruce Wolf lead. The Bruce Wolf lead was provided by Seamless
4 Media to Azoogole.com who provided it to the mortgage brokers.

5 Since 1,578 of the subject emails contained the wumort.net and wumort.com URL links, then it
6 is logical to assume they were all email advertisements induced by Azoogole and would have led directly
7 back to Azoogole.

8 **5. Consciously Avoids Knowing**

9 Did Azoogole know or consciously avoided knowing that its contractor would use SPAM to send
10 the advertisement and get the lead? Don Mathis stated at his deposition that Azoogole.com did not use
11 the same agreements with third parties that was used with affiliates. **Exhibit K** to Dec. RG, Mathis pgs.
12 193-194 (under seal). Affiliates are required to sign the terms and policies published by Azoogole.

13 However, there was no written policy used by Azoogole during the incident period to vet or
14 control third party vendors. It is up to the Azoogole business manager to do whatever is done to qualify
15 and manage third party vendors. **Exhibit K** to Dec. RG, Pgs. 306-307 (under seal). Julian Mossanen,
16 Director of Affiliate Management and the person directly responsible for third party contractors, stated
17 that he never received any instructions as to background research, vetting, etc., required for third party
18 vendors. **Exhibit J** to Dec. RG., Pg. 59. Mr. Mossanen stated that he took no action with the third party
19 vendors regarding policing spam beyond the signing of the insertion orders. **Exhibit J** to Dec. RG., Pg.
20 129.

21 The only reference to avoidance of violations of the *CAN SPAM Act* occurs in paragraph 12 of
22 the Insertion Agreement and only applies to use of Azoogole's suppression database by Seamless.
23 **Exhibit I** to Dec. RG, AZ 07 (under seal). Respondents to Plaintiff's subpoenas of Azoogole's third
24 party contractors, names provided by Azoogole, (**Exhibit I** to Dec. RG, AZ 131-133 under Seal), agreed
25 to the same form as Seamless. See **Exhibit M** to Dec. RG, Plaintiff's bate: Lead Flash, LLC 1532-1535,
26 Lendance 1539-1542, Respond.com 1747-1750, and eMarketsource 1789-1792. Note that these
27 agreements are for the incident period. For example, the agreement with Lendance opened on "Sept
28 8/05". See **Exhibit M** to Dec. RG, Bate 1539.

1 **6. The Same Entity Sent all of the Emails**

2 Plaintiff has conducted a study of the emails and the URL links contained in the emails. This
3 study was conducted by tracing the history of the IP addresses used to hold the actual images on the
4 landing pages of the URL links. Some 1578 emails of the 12,756 plus emails pointed to the wumort.net
5 or wumort.com websites. Another 3,397 of the emails pointed to web pages containing the exact same
6 images in the wumort.net web page. Another 1,352 emails pointed to web pages containing at least six
7 of the same images as the wumort.net web page. That is they contained the same house image, graph
8 image, etc. Therefore, 6,327 emails of the 12,756 pointed to web pages with the exact same, or almost
9 the same, images as the web page viewed by Nella White on October 27, 2005. See **Exhibit B**, Posluns,
10 ¶ IV-E. The actual source of those pages, which can be recovered using the Internet Wayback machine,
11 is the same or very similar.

12 This means that a direct connection can be shown between those 6,327 emails and the email that
13 was used to generate the Bruce Wolf lead.

14 In addition, by tracking the IP address history of the web pages pointed to by the remaining
15 emails, an additional 5,091 emails can be shown to have been on the same IP Address as those web
16 pages containing the images viewed by Nella White. Unfortunately the web images for these pages
17 were not archived in the Internet Wayback machine and cannot be recovered. However, their coincident
18 appearance on the same servers (IP Addresses) at the same time is excellent circumstantial proof that
19 they contained the same images and were related. The chances of two unrelated emails received during
20 a short time frame pointing to exactly the same IP Address is incredibly remote, given that there are over
21 4 trillion possible IP Addresses in the Internet system. See **Exhibit B**, Posluns, ¶ IV-E.

22 Therefore, 11,418 of the emails can be shown to point to the web pages with the same images
23 viewed by Nella White when she entered the Bruce Wolf Lead.

24 The subject emails can be shown to have come from identical sources during the entire period.
25 Plaintiff has discovered evidence that a botnet was used to transmit the emails. By comparing the time
26 the email was sent, the domain name advertised in the domain, the list of recipients, and the similarities
27 in both the headers and the message body, it can be determined that identical messages were being sent
28 using a botnet. See **Exhibit B**, Posluns ¶ IV-G.

1 Further, Plaintiff conducted a study of the email characteristics and discovered that over 93% of
2 the emails in the ASIS originals can be grouped into three distinct message body types:

3 6,393 emails contained the unique phrase "Keine";

4 4,099 emails contained the unique phrase "Or maybe"; and

5 1,498 emails contained the unique phrase "to be remov(ed)".

6 Each group of emails contains identical patterns that can be compared to a form letter or
7 template. In both the "Keine" and the "or maybe not" emails, the advertised domain is inserted into the
8 email template, along with a set of random nonsense words.

9 In the case of the "to be remov(ed)" group of emails, the advertised domain is inserted into the
10 email template, and a random name is added. See **Exhibit A**, Mohland, for detailed data regarding the
11 emails, ¶ 7 and 8 and Exhibits A, D, E, F, and G; also see **Exhibit B**, Posluns, ¶ IV-E.

12 All these characteristics taken together tend to clearly show that all of the emails are linked
13 together, and that they were sent by the same person or persons during the incident period. **Exhibit B**,
14 Posluns, ¶ IV-E.

15 **7. The Emails were Sent on Azoogle's Behalf**

16 The image on those web sites that were the same as wumort.net contain a picture of a house.
17 The exact same picture of the house also appears in the copyrighted materials provided by Quicken
18 Loans' response to Plaintiff's First Request for Production – **Exhibit G** QL 17 (under seal). This
19 picture, provided by Quicken Loans, is the advertisement materials provided by Azoogle.com to
20 Quicken Loans showing the Azoogle.com web site for Lowrateadvisors.com. This document purports to
21 be the copyrighted material of Azoogle.com. This copyright information was confirmed in the
22 deposition of Don Mathis in his testimony for Azoogle.com. **Exhibit K**, Mathis Pgs. 268-269 and
23 Exhibits 7 and 8 (under seal).

24 This same image of a house is on Azoogle.com's server at [http://www.lowrateadvisors](http://www.lowrateadvisors.com/long/images/ln_6.jpg)
25 [.com/long/images/ln_6.jpg](http://www.lowrateadvisors.com/long/images/ln_6.jpg). See **Exhibit E** (Carl 2-Ex, C). What is more, this image was on
26 Azoogle.com's server in May of 2005, when Alex Zhardanovsky, founder of Azoogle.com, was accused
27 of mortgage refinance spamming using the same house image on a blog linking to the Azoogle.com
28 image. **Exhibit N** to Dec. of RG. The archive of the blog can be found at

1 <http://www.webservertalk.com/archive154-2005-5-1074010.html>.

2 This ties at least 6,327 emails and likely 11,418 emails directly to an image that Azoogle.com
3 owns and was using in its mortgage refinance advertisements at the time of the incident in 2005.

4 Plaintiff has recently discovered another site with the same image and the same layout as the
5 wumort.net site. The new site is at www.Lowrateadvisors.net. See **Exhibit E**-Carl 2 Ex. B. In
6 addition, as discussed below, the same images were discovered on Azoogle's open server at
7 <http://www.lowrateadvisors.com/long/index.php?affil=1828#>. See **Exhibit E**-Carl 2 Ex. E. The
8 Azoogle web URL is contained in the www.LowRateAdvisors.net source code. See **Exhibit E**-Carl 2
9 Ex. E. An examination of the source code of the [Lowrateadvisors.net](http://www.Lowrateadvisors.net) web page indicates it is the same
10 as the source code for wumort.net with changes that relate to being on a different server.

11 Recently, images of each element of the Lowrateadvisors web page (and the page Nella White
12 went to) appearing in the wumort.net web page were discovered on an Azoogle server at:

13 http://www.lowrateadvisors.com/long/images/ln_1.jpg
14 http://www.lowrateadvisors.com/long/images/ln_2.gif
15 http://www.lowrateadvisors.com/long/images/ln_5.gif
16 http://www.lowrateadvisors.com/long/images/ln_6.jpg
17 <http://www.lowrateadvisors.com/long/images/graph.gif>
18 http://www.lowrateadvisors.com/long/images/ln_right.gif
19 <http://www.lowrateadvisors.com/long/images/spacer.gif>
20 http://www.lowrateadvisors.com/long/images/ln_left.gif

21 See **Exhibit E**-Carl 2 Exhibit E.

22 Domain name "[lowrateadvisors.com](http://www.lowrateadvisors.com)" is owned by Azoogle. [Lowrateadvisors.com](http://www.Lowrateadvisors.com) is located at
23 IP address 209.47.46.154, which is in the range of IP addresses owned exclusively by Azoogle per
24 Azoogle's disclosure of June 22, 2007, and the ARIN data provided with the WHOIS information. See
25 **Exhibit I** AZ-0125 (under seal).

26 These same images appear on the wumort.net webpage, with the exception of the
27 "lowrateadvisors" logo. See **Exhibit E**-Carl 2 Ex. D. The source code for the wumort.net, and the other
28 web pages all use the exact same file names for the images. That is the file name for the image of the
house is "ln_6.jpg." The file name for the Freddie Mac graph image is "graph.gif." As discussed above
these are the same file names used on the [Azoogle lowrateadvisors.com](http://www.Azoogle.com/lowrateadvisors.com) image server. See **Exhibit E**-
Carl 2 Exhibits B and C and D for printouts of the source code for the wumort.net and other landing

1 pages.

2 Plaintiff has also discovered that on site: [http://www.lowrateadvisors.com/long/](http://www.lowrateadvisors.com/long/index.php?affil=1828#)
3 [index.php?affil=1828#](http://www.lowrateadvisors.com/long/index.php?affil=1828#), owned by Defendant Azoogole, appears a web page that is virtually the same as
4 [the web page Nella White saw in October 2005](#). This web page contains the following: “©
5 AzoogoleAds.com Inc., All Rights Reserved.” See **Exhibit E**-Carl 2 Ex. C.

6 Plaintiff recently discovered that the image of the house and the same web page image that Nella
7 White viewed in October 2005, was also included as evidence in the case of *FTC v. Optin Global, et al.*,
8 CV-01502-SC, USDC, CA Northern Dist, 2005. See **Exhibit O** to Dec. of RG for extracts of
9 declarations, emails, and web pages presented by the FTC in evidence against Optin Global. These
10 pages show an image that advertises the refinance service of “LowRateAdvisors.” As discussed above
11 LowRateAdvisors is a copyrighted name owned by Azoogole.com. The image of the house is the same
12 image that appears in the web page seen by Nella White. These images, both from the *FTC v. Optin*
13 *Global* evidence and the page Nella viewed, also contain a quote from “Freddie Mac” for a 30 year fixed
14 rate mortgage of “4.63%” for “APRIL 2004.” The Freddie Mac quote stayed the same even though the
15 web pages range over a full year.

16 In September 2004, one month prior to the date on the emails produced by the FTC in the *FTC v.*
17 *Optin Global* case, Azoogole.com received a complaint from their Internet Service Provider, Savvis. This
18 complaint was routed from SpamCop and concerned Azoogole’s “Spamadvertised web site:
19 <http://www.lowrateadvisors.com....>” See **Exhibit P** to Dec. RG, Pg. 0864 of the Savvis Subpoena
20 Response.

21 **8. Azoogole caused their third party vendors not to display Azoogole’s name.**

22 Plaintiff has also discovered that Defendant Azoogole was encouraging its third party contractors
23 to use “white labeling.” See **Exhibit L** to Dec. RG, Lendance, Pg. 1547-1549. “White labeling” is the
24 process of using the third party contractor’s site to gather the data and then post it to Azoogole’s site with
25 no reference to the consumer about Azoogole. This is supposedly done to protect the relationship
26 between the third party contractor and the consumer, but it also has the effect of eliminating any ability
27 to track the advertisement back to Azoogole. See **Exhibit A** Posluns, ¶IV-F; also see **Exhibit J** to Dec.
28 RG, Mossanen Pgs. 125–126 and 95–106 under Seal). On pages 125-126 of his deposition Mr.

1 Mossanen stated that Azoogole was invisible to the consumer. SPAMHAUS complained of this process
2 to Azoogole in February of 2005, as a reason they could not determine if its affiliates were spamming.
3 See **Exhibit Q** to Dec. of RG, AZ-SP 46, submitted under seal under confidentiality claim by
4 Defendant.

5 White labeling, as described by Mr. Mossanen, is exactly what occurred when Nella White
6 entered the Bruce Wolf lead into the wumort.net site on October 27, 2005. The third party vendor used
7 a copy of Azoogole's web page on their site, and then form posted the lead to Azoogole's servers.

8 **9. Azoogole's Rule 11 Motion is untimely.**

9 Finally, Azoogole was named in the First Amended Complaint (hereafter "FAC") and in the SAC.
10 The FAC was filed July 14, 2006. The SAC was filed on October 4, 2006. Azoogole did not file a
11 Motion to Dismiss or Join the existing Motion to Dismiss filed after the FAC. Azoogole waited to file
12 this motion until June 1, 2007, eight months after the SAC and eleven months after the FAC.

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **1. Standard of review for a Rule 11 Motion.**

15 Defendant claims that Plaintiff had no evidentiary support for its claims. Defendant claims that
16 Plaintiff made all of its claims based on actual knowledge. Plaintiff clearly stated that its allegations
17 were based on information and belief. Plaintiff also had significant evidence that Defendant Azoogole
18 was complicit in the sending of mortgage spam to Plaintiff. Plaintiff stated very clearly that it did not
19 know the relative responsibilities of each defendant in causing the violations. SAC ¶18. Plaintiff did
20 not state that "Azoogole" performed specific elements of the complaint. Rather Plaintiff, in alleging each
21 element of the causes of action, alleged the "Defendants" performed the actions. See SAC. At the time
22 there were eighteen known Defendants.

23 "Whether a violation has occurred and what sanctions, if any, to impose for a violation are
24 matters committed to the discretion of the trial court; . . ." 146 *F.R.D.* 401, 590. Therefore judgment is
25 within the discretion of the trial court.

26 An *FRCP* Rule 11(b) motion requires that a complaint be brought after an inquiry, reasonable
27 under the circumstances, and the allegations have evidentiary support, or if identified are likely to have
28 evidentiary support after further inquiry.

1 The Court has stated its interpretation of this language:

2 Rule 11 imposes a duty on attorneys to certify that they have conducted a
3 reasonable inquiry and have determined that any papers filed with the
4 court are well grounded in fact, legally tenable, and “not interposed for
any improper purpose.”

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 at 393 (1990).

5 The Court defined a three step process in deciding a Rule 11 Motion: (1) the factual basis for the
6 pre-filing inquiry and the factual basis of the pleading; (2) whether the legal basis was sound; and (3)
7 discretion in tailoring appropriate sanctions. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 at 399
8 (1990).

9 The Court states in 146 *F.R.D.* 401, 590:

10 Rule 11 motions should not be made or threatened for minor, inconsequential
11 violations of the standards prescribed by subdivision (b). They should not be
12 employed as a discovery device or to test the legal sufficiency or efficacy of
13 allegations in the pleadings; other motions are available for those purposes. Nor
14 should Rule 11 motions be prepared to emphasize the merits of a party's position,
to exact an unjust settlement, to intimidate an adversary into withdrawing
contentions that are fairly debatable, to increase the costs of litigation, to create a
conflict of interest between attorney and client,

15 Plaintiff clearly stated in the SAC that it did not know the relative responsibilities of the
16 Defendants. SAC ¶18. Plaintiff clearly stated that the allegations were made on information and belief.

17 The Ninth Circuit has defined how to analyze a Rule 11 motion. First the standard for review is
18 reasonableness. “The ‘reasonable man’ against which conduct is tested is a competent attorney admitted
19 to practice before the district court.” *Zaldivar v. City of Los Angeles*, 780 F.2d 823 at C.A. 9
20 (Cal.),1986.

21 As to improper purpose, Plaintiff stated in its deposition what its purpose was: “What we've
22 been trying to do is get rid of spam, not become preoccupied with all the details of it.” **Exhibit R** to
23 Dec. RG, Deposition of Nella White 18:20–21.

24 **2. What are the elements of Plaintiff’s CAN SPAM Act cause of action, what did
25 Plaintiff know as facts and what investigations were undertaken?**

26 Plaintiff had substantial evidence for the elements of the violations of the *CAN SPAM Act* cited.

27 15 *USC* 7704(a)(1) provides that a violation occurs when any email is sent with false header
28 information. 15 *USC* 7704(a)(2) provides that a violation occurs when a commercial email is sent with

1 a false or misleading subject line. Plaintiff had in its possession the emails at issue in this case. Plaintiff
2 had analyzed those emails and demonstrated that the email header information had been tampered with
3 as the sent from IP addresses did not match the sent from domain names. This meets the definition of
4 false headers.

5 Plaintiff alleged that the subject lines were false and misleading and provided examples in the
6 SAC of email subject lines that stated they were rate approvals or mortgage approvals. These emails
7 subject lines are clearly misleading since the emails were not mortgage or rate approvals.

8 As cited by Defendant, the court has established the elements of a *CAN SPAM Act* claim in
9 *Hypertouch, Inc. v. Kennedy-Western University*, Not Reported in F.Supp.2d, 2006 WL 648688
10 (N.D.Cal.,2006), courtesy copy attached for the Court. It must be noted that this case does not represent
11 precedence since it is an unpublished district decision. The *Hypertouch* case also deals with a Summary
12 Judgment motion, not a Rule 11 motion. Therefore, only limited instruction can be gained from the
13 case.

14 *Hypertouch* defines a multi-step process in deciding at summary judgment whether a party has
15 violated the applicable CAN SPAM statute and whether an ISP can bring an action under 15 USC
16 7706(g). Did the emails violate the *CAN SPAM Act*? As discussed above, Plaintiff had significant
17 evidence that the emails violated both 15 USC 7704(a)(1) and (2). Next, the plaintiff must be a
18 “Provider of Internet Access” to qualify under 15 USC 7706(g). *Hypertouch, Inc. v. Kennedy-Western*
19 *University*, 2006 WL 648688 at 2 (N.D.Cal.,2006). Next, the plaintiff must suffer “adverse affect.”
20 Plaintiff has provided Defendant with evidence proving it is an Internet Access Provider. See **Exhibit A**
21 Posluns ¶ IV-A. The court decided that the declaration by the *Hypertouch* plaintiff was sufficient to
22 show “adverse affect.” *Id.* at 4.

23 Plaintiff has provided significant evidence that ASIS Internet Service is an Internet Access
24 Provider. Plaintiff has provided extensive evidence that it suffered similar adverse affect to that
25 accepted by the court in *Hypertouch*. This information was available to Plaintiff’s counsel at the time of
26 the complaint and has subsequently been provided to Defendant.

27 Next, did the defendant “initiate” the spam email? *Hypertouch, supra*, at 4. The *Hypertouch*
28 court defined initiate consistent with the applicable statutes as:

1 “originate or transmit such a message or to procure the origination or
2 transmission of such message.” 15 U.S.C. 7702(9). In this context,
3 “procure” means “intentionally to pay or provide other consideration to, or
4 induce, another person to initiate such a message on one's behalf with
5 actual knowledge, or by consciously avoiding knowing, whether such
6 person is engaging, or will engage, in a pattern or practice that violates
7 this Act.”

8 15 U.S.C. § 7706(g)(2). *Id.* at 4.

9 **a. Were the emails sent on behalf of Azoogle?**

10 Plaintiff had direct evidence from Defendants Quicken Loans and Aegis that Azoogle had
11 provided the “Bruce Wolf” lead. Plaintiff had evidence that the only way Azoogle could have acquired
12 the “Bruce Wolf” lead was through the spam and the wumort.net landing page that Nella White used on
13 October 27, 2005. Plaintiff had evidence that the emails were all from the same source, based on the
14 characteristics of the emails. Therefore, Plaintiff had facts that supported a reasonable belief that the
15 emails were sent on Azoogle’s behalf.

16 **b. Did Azoogle have actual knowledge or consciously avoid knowing of violation
17 of the CAN SPAM Act?**

18 Plaintiff had undertaken an investigation of similar cases that had a connection with the
19 Defendants in this case. For example, Plaintiff started investigating the relationship to the *FTC v.*
20 *OPTIN GLOBAL* case as early as November of 2005. Plaintiff had discovered various articles
21 concerning sting operations, almost exactly like Plaintiff’s, that were written as far back as 2003. See
22 Docket #49, Dec. of RG in Opposition to Defendants’ First Motion to Dismiss. Plaintiff provided these
23 articles prior to filing the complaint. Plaintiff had researched the Internet and discovered various
24 references to Azoogle and its founder Alex Zhardanovsky’s relationship to spamming operations.
25 Specifically a blog that Alex Zhardanovsky purportedly participated in on October 26, 2005, discussing
26 Azoogle’s policy on spamming and Azoogle’s affiliates. In this blog Alex Zhardanovsky purportedly
27 said: “As for who takes responsibility, that’s the age old question isn’t it? The link tracks through us, it’s
28 our fault, it’s plain and simple.” See **Exhibit S** to Dec. RG. Plaintiff has provided these reports to
29 Defendant.

30 Plaintiff discovered that Azoogle was on the SPAMHAUS ROKSO list during the incident
31 period. Plaintiff’s attorney and his consulting expert have done extensive research on spamming

1 operations and how they are set up and managed. Plaintiff submitted his Expert Disclosure on
2 September 10, 2007, as required by the case schedule.

3 These facts support the contention that Azoogole either knew that its agents were using SPAM or
4 consciously avoided knowing its agents were using SPAM. Defendant's arguments concerning
5 Plaintiff's knowledge are flawed because they assume that Plaintiff had to have proof beyond a doubt of
6 Azoogole's state of mind at the time of filing. Plaintiff does not even need this level of proof at trial,
7 since the burden of proof is a preponderance of evidence. Circumstantial evidence can be used to meet
8 that burden. Evidence subsequently obtained through depositions of Azoogole's managers indicates that
9 at the incident time Azoogole was doing nothing to monitor or prevent its third party vendors from using
10 SPAM.

11 Plaintiff did not actually allege that Azoogole knew or consciously avoided knowing that its
12 agents were violating the *CAN SPAM Act* in the SAC. Plaintiff was only required to allege facts
13 necessary to put the defendant on fair notice of Plaintiff's claim. *Leatherman v. Tarrant County*
14 *Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 at 47 (1993).

15 Plaintiff had evidence to support the fact that Azoogole knew or consciously avoided knowing its
16 agents were violating the *CAN SPAM Act*.

17 **c. Directory Harvest and Use of Automated email generation tools?**

18 Plaintiff's other allegations in the SAC allege use of a directory harvest and use of automated
19 scripts to generate email accounts.

20 The subject emails were received in alphabetical order over a short period of time and were sent
21 to email accounts that were open, closed, and internal administrative accounts. This indicates that the
22 email list that was used was stolen from an ASIS server via a directory harvest. It also shows that at
23 least a portion of the emails could not have been solicited. Either someone hacked into the ASIS servers
24 or emails were sent with various names looking for responses that would identify a real email account.
25 There is almost no other way for the sender to have acquired the closed and internal administrative email
26 accounts.

27 At the time Plaintiff believed that the email accounts used to send the emails were created using
28 automated tools, since most of the emails came from yahoo.com, msn.com, hotmail.com, etc. These are

1 sites where anyone can go to acquire email accounts at no cost. However, evidence since discovered by
 2 Plaintiff suggests that the sending email accounts were actually stolen or more likely were part of a
 3 botnet. It is likely that instead of generating new email accounts, the sender actually used a botnet that
 4 already had email accounts to send the emails. This does not change the fact that at the time the
 5 evidence appeared to point to the use of automated email account generation tools.

6 Therefore, based on the statutes and the only case law available at the time, Plaintiff had facts
 7 sufficient under the reasonable man standard to form its complaint.

8 Plaintiff made reasonable inquiries as to the connection of the emails to Azoogle given the time
 9 allowed by the court in filing the SAC. Plaintiff was only allowed one week to file the SAC after the
 10 second motion to dismiss failed. Docket #114, 14:3-4. Prior to that time, Plaintiff and its attorney had
 11 made all inquiries available to them prior to the opening of discovery. In a Rule 11 motion “[a] court
 12 must consider all of the circumstances of a case.” *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 at
 13 401 (1990). Plaintiff was also dealing with two motions to dismiss and eighteen separate defendants.
 14 During the period from the initial complaint, in which Azoogle was not named, to the filing of the SAC,
 15 Plaintiff garnered all of the information available not under the direct control of Defendant Azoogle.
 16 That information led to the reasonable conclusion that Defendant Azoogle was complicit in the
 17 spamming of Plaintiff ASIS.

18 **d. Defendant attempts to cherry pick words in poorly formed interrogatories.**

19 Defendant cites various responses by Plaintiff to Azoogle’s interrogatories. A close reading of
 20 these interrogatories and responses show that Plaintiff is responding to the question that Defendant
 21 Azoogle asked. For example in Exhibit O to Dec of HB, at Interrogatory No. 24 Defendant asks:

22 “INTERROGATORY NO. 24:

23 State all facts known to YOU, if any, indicating that the SPAMMERS transmitted
 each of the 10,000 plus SPAM messages, “for and in the hire” of AZOOGLE.”

24 Plaintiff Responds:

25 **“RESPONSE:**

26 Azoogle provides creative’s to its publisher affiliates to use in advertisements on
 its behalf. Azoogle placed an insertion order for financial mortgage offers related to
 27 refinancing, similar to the emails at issue, with Seamless Media Corp. just prior to the
 incident described in Plaintiff’s SAC. The “Bruce Wolf” lead was tied directly back to
 28 Azoogle through Quicken Loans. Azoogle has admitted that the lead came from their
 affiliate Seamless Media Corp. As discussed above there is a significant body of

evidence that indicates all of the emails can be linked to the same source.

Azoogle has a history of partnering with know spamming operations to advertise. Plaintiff has discovered through unverified sources the following information. Several blogs discuss 2005 SPAMHAUS ROKSO list entrants who were affiliated with Azoogle: Skylist, Dzenis Softic, Lloyd Lapidus, VendareGroup, and BlueRock Dove. As of 2007 Lloyd Lapidus and Revolution Media are still listed on the Rhyolite Software of Unwelcome Mail Domains list. Dzenis Softic, now renamed Softic, is still listed on the SPAMHAUS ROKSO list. VendareGroup is currently on the SPAMHAUS ROKSO list. BlueRock Dove was removed from the SPAMHAUS ROKSO list sometime after 2005. Following is an excerpt from a blog at <http://www.webservertalk.com/message883813.html> in 2005 where this information was derived:

- > http://www.spamhaus.org/rokso/evide...okso_id=ROK2852
 - > "Lloyd Lapidus - revolution media"
 - > ROK3637 Gregory Pippo - business partner
 - > ROK3635 PARTNER-IN-SPAM: BlueRock Dove
 - > ROK3937 PARTNER-IN-SPAM: Denisz Softic / volomp
 - > ROK4227 PARTNER-IN-SPAM: Dzenis Softic - teol.net
 - > ROK3646 Partner-In-Spam: Josh Baer
 - > ROK4160 PARTNER-IN-SPAM: Vendaregroup.com
 - > ROK4244 Partner-In-Spam: wotch.com
 - > ROK3712 Alex Zhardanovsky / Azoogle - Partners-In-Spam
 - > ROK3932 Alex Zhardanovsky / Azoogle - giftfox.com
 - > ROK4171 Alex Zhardanovsky / Azoogle - main info
- Copies of this information has already been produced to Defendant.

Azoogle founder and president discussed the issue of using affiliates and how Azoogle dealt with affiliates who violate the affiliate rules on October 26, 2005, wherein he stated: "Hard to know who made the placement without having the affiliate ID. If you can get me the ID, the question would be a lot easier to answer. As for who takes responsibility, thats the age old question isnt it? The link tracks through us, its our fault, its plain and simple."

<http://www.revenews.com/wayneporter/archives/001104.html>

There were various blogs and web sites produced to Defendant as part of Plaintiff's Supplements to Initial Disclosure that contained complaints by consumers and bloggers regarding Azoogle's network of affiliates sending spam.

This response names specific companies, activities, and actions of Azoogle that demonstrate the answer to the question posed by Defendant. It also demonstrates a pattern and practice of using spammers as affiliates and doing little or nothing to prevent the use of spam. The *CAN SPAM Act* in 15 *USC* 7706(g)(1)(2) specifically allow for the use of evidence of "pattern and practice" in an action.

Plaintiff demonstrated, in its answer to the question, that Defendant had a pattern and practice of dealing with spammers with conscious knowledge or consciously avoiding knowing it was dealing with

1 spammers.

2 Defendant has chosen to ignore the information provided, such as links to known spamming
3 operations, and concluded “None of Plaintiff’s responses stated any information, much less evidence, or
4 pointed to a single document...” Defendant’s Motion For Rule 11 Sanctions at 10:2-4.

5 **3. What are the elements of Plaintiff’s California Business and Professions Code §17529.5
6 cause of action, what did Plaintiff know as facts and what investigations were undertaken?**

7 Plaintiff had substantial evidence for the elements of the violations of the *California Business
8 and Professions Code* cited.

9 *California Business and Professions Code* §17529.5(a) states it is unlawful: “for any person or
10 entity to advertise in a commercial e-mail advertisement either sent from California or sent to a
11 California electronic mail address under any of the following circumstances:” Those circumstances
12 include: the use of a third party’s domain name without their permission to send the email; the email
13 contains false header information; and the email contains a misleading subject line. *Ibid.*

14 *California Business and Professions Code* §17529.5(b)(1)(ii) provides standing for an
15 “electronic mail service provider.”

16 Plaintiff has over a thousand active email customers. Therefore, Plaintiff is an email service
17 provider.

18 As discussed above the emails contained obviously false header information and misleading
19 subject lines. The emails were a solicitation to receive calls from a broker for mortgage quotes.
20 Defendant’s criticism of Plaintiff’s use of *People v. McKean*, (1925) 76 Cal.App. 114 at 131 [243 P.
21 898] for a definition of advertising is ridiculous. This case is still good law, as far as Plaintiff’s attorney
22 can determine, and has been widely cited in cases and appellate briefs as recently as 2007 in cases
23 before the California Supreme Court. See **Exhibit T** to Dec of RG.

24 **a. Did Azoogle Advertise in the spam emails received by ASIS?**

25 The only remaining question is if Azoogle was advertising in the spam emails. The track of the
26 “Bruce Wolf” lead through Azoogle indicates that Azoogle was acquiring leads for distribution to
27 Mortgage Brokers, knowing the leads would be obtained via email marketing. Defendant Azoogle has
28 admitted it was running a mortgage lead marketing program at the time.

As discussed above the emails were advertisements and were sent on Defendant Azoogle’s

1 behalf.

2 Azoogle was not named directly in the email. However, Azoogle was in the internet marketing
3 business, running advertising campaigns for mortgage brokers to acquire leads. The description of
4 Azoogle's advertising strategy can be found on its website, in its advertisements for "publishers" and
5 "advertisers."

6 This scenario was well documented as how a typical spamming network was set up. Books and
7 articles cited by Plaintiff in the earlier Oppositions to Dismiss papers describe the relationship between
8 the spammer, the middlemen (Internet Marketing companies like Azoogle), and the final purchaser (e.g.
9 Mortgage Companies).

10 Testimony before the Congress by FTC investigators indicate that the best way to identify the
11 spammer and the advertisers is to track the money. **S. REP. 108-102, S. Rep. No. 102, 108TH Cong.,**
12 **1ST Sess. 2003, 2004 U.S.C.C.A.N. 2348, July 16, 2003. See Exhibit U (page 4).**

13 Prior to filing the SAC, Plaintiff had tracked the money from the Mortgage Brokers to Azoogle
14 to John Strothers. It was logical, based on the facts known at the time, that Azoogle had hired John
15 Strothers to send advertisements on its behalf in order to generate mortgage leads to fulfill the existing
16 contracts with the Mortgage Brokers.

17 It turns out, based on the evidence discovered since the SAC was filed, that Azoogle actually
18 hired Seamless Media to send emails to acquire sales leads. The contract documents with Seamless
19 Media provided by Azoogle are titled "Azoogleads Advertising Insertion Order for Mortgage Lead
20 Test". **Exhibit I** to Dec. of RG AZ-018 (under seal). Therefore, Azoogle was actually hiring Seamless
21 Media to send email advertisements on its behalf, and the emails contained a solicitation intended to
22 induce a consumer into providing their personal information to Azoogle for a promise of mortgage
23 refinance quotes. Therefore, the emails did contain an advertisement for services provided by Azoogle.

24 Defendant's arguments concerning whether Plaintiff had sufficient facts and legal basis to make
25 the allegations in the SAC are to some degree based on incorrect interpretations of the statutes. The legal
26 issues and the facts as stated here were presented to the court over a ten month period and two major
27 motions to dismiss and Judge Wilken found nothing unreasonable or frivolous about the causes of
28 action. Judge Wilken also found that the *California Business & Professions Code* §17529.5 extended

1 liability to anyone advertising in a commercial email containing a false header or misleading subject line
2 based on the language of the statute. Docket #114, at 3:20–22. Therefore the legal analysis of
3 *California Business and Professions Code* §17529.5 by Plaintiff’s counsel is supported by the prior
4 findings of the court and the statutory language.

5 **4. What are the elements of Civil Conspiracy and what did Plaintiff know?**

6 Defendant makes a meritless argument regarding the conspiracy claim. Plaintiff pled this cause
7 of action with sufficiency to survive two motions to dismiss. The facts required to support the claim are
8 provided by the underlying causes of action.

9 California common law Civil Conspiracy is defined in *Saunders v. Superior Court* (2d
10 Dist.1994) 27 Cal.App.4th 832, 846 [33 Cal.Rptr.2d 438, 446] as: “the formation and operation of the
11 conspiracy and damage resulting to plaintiff from an act done in furtherance of the common design.”

12 The California Civil Jury Instructions add the requirement that one or more of the conspirators
13 commit the wrongful act “in furtherance of the conspiracy” causing another party to be injured.
14 (**California BAJI** 13.85). In this case the wrongful act was sending the SPAM to Plaintiff’s email
15 server as performed by the SPAMMERS. (Complaint. ¶40). Plaintiff alleged that “Defendants” sent the
16 emails. (Complaint ¶¶ 14–22). The conspiracy is shown by the advertising agreements.

17 Judge Wilkin ruled on a motion to dismiss the conspiracy claim and denied the motion to
18 dismiss. Docket #144, 11:20-12:2. Defendant argues that “[a] claim for conspiracy fails to comply with
19 prevailing standards where, for example it is unsupported by any act in furtherance of the alleged
20 conspiracy.” Inducing a party to send spam with knowledge or consciously avoiding knowledge is an
21 act in furtherance of the conspiracy. Contracting and paying that person is an act in furtherance of the
22 conspiracy. Azoogole has breached its duty to ASIS, as imposed by both the **CAN SPAM Act** and
23 *California Business and Professions Code*, not to induce spamming or advertise in spam emails. The
24 evidence available at the time the SAC was filed indicated that Azoogole had advertised in spam and
25 induced others to send the spam.

26 **5. Defendant’s Motion is untimely.**

27 Defendant filed its motion eight months after the SAC and eleven months after the FAC. On that
28 basis the motion was an untimely filing and the court should refuse to hear the motion on that basis.

1 “Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if
2 delayed too long, may be viewed as untimely.” 146 *F.R.D.* 401, 590; See also *Ridder v. City of*
3 *Springfield*, 109 F.3d 288, 295 (6th Cir., 1997) and *Barber v. Miller*, 146 F.3d 707, 710 (9th Cir., 1998).

4 Azoogole was named in the First Amended Complaint (herein “FAC”) and in the SAC. The FAC
5 was filed July 14, 2006. The SAC was filed on October 4, 2006. Azoogole did not file a Motion to
6 Dismiss or join the existing Motion to Dismiss filed after the FAC. Azoogole waited to file this motion
7 until June 1, 2007, eight months after the SAC and eleven months after the FAC. *F.R.C.P.* Rule 11(c) is
8 intended to provide a safe harbor against motions by limiting a filing until after a 21 day period. The
9 courts have also ruled that a motion that is too late also defeats the primary deterrence effect intended by
10 Rule 11 of preventing frivolous motions.

11 The Court stated that it would not rule on Defendant’s Rule 11 Motion until after summary
12 judgment. Plaintiff’s attorney asked Defendant’s attorney to take the motion off calendar until a ruling
13 on summary judgment was made, potentially reducing or eliminating the costs to the Court and Plaintiff.
14 Defendant’s attorney refused.

15 A party is not allowed to bring a Rule 11 Motion to intimidate its adversary or to increase
16 litigation costs. Defendant’s improper purpose in bringing this motion is to intimidate Plaintiff and
17 increase litigation costs. Defendant hoped that Plaintiff, faced with this Motion, would withdraw.

18 CONCLUSION

19 Defendant Azoogole has brought this motion in an untimely manner. Defendant has ignored the
20 actual facts that Plaintiff knew at the time of the SAC. Defendant is attempting to use minor
21 inconsequential statements to abuse the procedures defined in **Rule 11**. Defendant has attempted to
22 make totally non-relevant materials appear as dispositive. Defendant has made meritless arguments
23 concerning correspondence and negotiations between attorneys. Defendant simply does not understand
24 the statutes and case law regarding **CAN SPAM Act** and the *California Business and Professions*
25 *Code*, introducing interpretations that have no basis in the statutes or case law. Defendant has accused
26 Plaintiff of having improper purposes, but Plaintiff’s purpose is to enforce the statutes and protect itself
27 from greedy marketers who wish to take advantage of the internet at Plaintiff’s expense.

28 Defendant has brought this motion to intimidate Plaintiff into withdrawing contentions that are

1 fairly debatable and to increase the costs of litigation. 146 *F.R.D.* 401, 590. This is Defendant's
2 improper purpose in bringing this Motion.

3 Defendant has made a meritless motion and wasted both the Court's and Plaintiff's time and
4 money.

5 **SINGLETON LAW GROUP**

6 Dated: October 4, 2007

7 /s/ Jason K. Singleton
8 Jason K. Singleton,
9 Richard E. Grabowski, Attorneys for Plaintiff,
10 **ASIS INTERNET SERVICES**

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