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13
14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**

16 **ASIS INTERNET SERVICES, a California) Case No. C-05-5124 MHP**
corporation,)
17 **)**
18 **Plaintiff,) JOINT CASE MANAGEMENT**
vs.) STATEMENT
19 **)**
20 **OPTIN GLOBAL, INC., a Delaware) DATE: November 5, 2007**
Corporation, also dba Vision Media) TIME: 4:00 p.m.
21 **Limited Corp., USA Lenders) CTRM: 15, 18th Floor**
22 **Network, USA Lenders, and USA)**
Debt Consolidation Service; et al.,)
23 **Defendants.)**

1 The parties to the above-entitled action jointly submit this Case Management Statement
2 and request that the Court adopt it as its Case Management Order in this case.

3
4 **1. Jurisdiction and Service:** The basis for the Court's subject matter jurisdiction over
5 plaintiff's claims and defendant's counterclaims, whether any issues exist regarding personal
6 jurisdiction or venue, whether any parties remain to be served, and, if any parties remain to be
7 served, a proposed deadline for service.

8 **The parties do not dispute subject matter jurisdiction, personal jurisdiction,**
9 **or venue, except to the extent those issues were raised or preserved in the**
10 **parties' pleadings. All parties have been served.**

11
12 **2. Facts:** A brief chronology of the facts and a statement of the principal factual issues in
13 dispute.

14 **ASIS's Statement:**

15 **Plaintiff claims it is an Internet Access Provider and accuses of Defendants**
16 **of violating the CAN SPAM Act of 2003 and California Business and Professions**
17 **Code §17529.5 from October 25, 2005, through August 14, 2007. Plaintiff's**
18 **complaint is for injunctive relief and damages per the applicable statutes.**

19
20 **Azoogle's Statement:**

21 **AzoogleAds.com, Inc. ("Azoogle") acts as a conduit through which "lead**
22 **providers" channel qualified marketing leads to end merchants of goods and**
23 **services. Azoogle has never sent unsolicited commercial email, and its**
24 **agreements with its lead providers prohibit them from passing through Azoogle**
25 **leads solicited other than by lawful means. Azoogle routinely enforces these**
26 **agreements through a variety of aggressive methods. As a result of Azoogle's**
27 **vigilance, it is highly respected in the industry, including by some of the email**
28 **marketing industry's most vocal critics.**

1 On December 12, 2005 Plaintiff filed a complaint in the this case against 13
2 defendants, which at the time, did not include Azoogle. Plaintiff alleged that all of
3 the defendants had conspired to send in excess of 10,000 emails to Plaintiff's
4 servers in violation of the Federal CAN-SPAM Act and California Business and
5 Professions Code §17529.5. Plaintiff consented to have Magistrate Judge Joseph
6 C. Spero preside over the case for all purposes. On July 14, 2006, Plaintiff
7 amended its complaint to add Azoogle. Plaintiff alleged that Azoogle had
8 conspired with the other defendants to send the 10,000-plus alleged emails. By
9 early 2007, Plaintiff had settled with each defendant named in the 2005 Case
10 except for Azoogle—and those it could not locate.

11 Plaintiff has sought to link the 10,000-plus alleged emails to Azoogle by
12 virtue of the fact that Azoogle received one fictitious lead, the so called "Bruce
13 Wolf lead." The Bruce Wolf lead was created when Plaintiff purportedly
14 responded to one of the alleged emails, with the intent of initiating this litigation.
15 The Bruce Wolf lead traveled through at least three other entities before getting to
16 Azoogle, and then traveled to several additional entities. At some point prior to
17 arriving at Azoogle, the Bruce Wolf lead's path splintered, and the Bruce Wolf
18 lead traveled to several additional entities, wholly unrelated to Azoogle. Based
19 on this evidence, Plaintiff has sought to link Azoogle to the remaining 10,000 plus
20 alleged emails. However, Plaintiff has produced only exceedingly circumstantial
21 evidence that Azoogle was in any way tied to the remaining emails alleged in
22 Plaintiff's Second Amended Complaint.

23 In fact, even Plaintiff concedes that Azoogle did not send the 10,000-plus
24 emails. Instead, Azoogle's purported liability under CAN-SPAM hinges on
25 whether it "procured" those emails from some unnamed party. To prove that a
26 defendant procured unlawful emails, a plaintiff must prove both: (i) that the
27 defendant intentionally paid or induced another person to initiate the emails; and
28 (ii) that the defendant did so "with actual knowledge, or by consciously avoiding

1 knowing, whether such person is engaging, or will engage, in a pattern or
2 practice that violates [CAN-SPAM].” 15 U.S.C. §§7702(12), 7706(g)(2).

3 This case is distinct from the related case filed by Plaintiff, Case No. C-07-
4 04630. While both cases involve the same parties and are governed by the same
5 statutory scheme, this case involves an entirely different set of alleged emails,
6 containing entirely different content, purportedly sent by different entities over a
7 different time period. Fact discovery has been completed in this case, and expert
8 discovery is closing.

9 Azoogie is preparing a motion for summary judgment, and requests that
10 the Court sets an expeditious briefing and hearing schedule for the same.
11 Azoogie previously filed a Motion for Rule 11 Sanctions against Plaintiff, which
12 Judge Spero dismissed without prejudice with the expectation that Azoogie
13 would re-file the motion after the disposition of its motion for summary judgment.
14 Azoogie intends to re-file its Motion for Rule 11 Sanctions—along with a motion
15 for sanctions pursuant to 28 U.S.C. §1927 for vexatiously and unreasonably
16 maintaining multiplying this litigation.

17
18 3. Legal Issues: A brief statement, without extended legal argument, of the disputed points
19 of law, including reference to specific statutes and decisions.

20 **Azoogie’s Statement:**

- 21
- 22 • Whether Plaintiff has adequately pleaded—and can establish—that Azoogie
23 procured the origination or transmission of each of the alleged emails in
24 question, under 15 U.S.C. §7701, *et. seq.*
 - 25 • Whether Plaintiff has adequately pleaded—and can establish—that Azoogie
26 intentionally paid or provided other consideration to, or induced, another
27 person to initiate the alleged emails, under 15 U.S.C. §7701, *et. seq.*
 - 28 • Whether Plaintiff has adequately pleaded—and can establish—that Azoogie
procured the alleged emails with knowledge or consciously avoiding knowing

1 whether such person is engaging or will engage in a pattern or practice that
2 violates the CAN-SPAM Act, under 15 U.S.C. §7701, *et. seq.*

- 3 • Whether Plaintiff can establish that each of the alleged emails was unsolicited
4 by the intended email recipient.
- 5 • Whether Plaintiff has adequately pleaded—and can establish—that it has been
6 adversely affected by the alleged emails, under 15 U.S.C. §7701, *et. seq.*
- 7 • Whether an email sent from a domain name registered using a privacy service
8 contains false or materially misleading information by virtue of that fact alone,
9 under 15 U.S.C. §7701, *et. seq.*, and if so, whether such a determination
10 violates the First Amendment of the United States Constitution.
- 11 • Whether CAN-SPAM preempts California Business and Professions Code
12 §17529.5.
- 13 • Whether the alleged emails constitute commercial email advertisements under
14 California Business and Professions Code §17529.5.
- 15 • Whether Azoogie advertised in the alleged emails under California Business
16 and Professions Code §17529.5.
- 17 • Whether the alleged emails contained falsified, misrepresented, or forged
18 header information California Business and Professions Code §17529.5.
- 19 • Whether Plaintiff and Plaintiff’s counsel have violated Rule 11 of the Federal
20 Rules of Civil Procedure by signing and filing the Second Amended
21 Complaint, with the allegations contained therein.
- 22 • Whether Plaintiff and Plaintiff’s counsel have violated 28 U.S.C. §1927 for
23 maintaining this lawsuit for over two years without a legal or factual basis to
24 do so.

25 4. Motions: All prior and pending motions, their current status, and any anticipated
26 motions.

27 **ASIS’s Statement**

28 **Plaintiff has pending before the Court a Motion for Preliminary Injunction**

1 for return or destruction of sensitive material provided under subpoena to
2 Defendant by a third party. This motion was filed with a Motion for Order
3 Shortening Time to hear it on the same date as the within case management
4 conference.

5 Plaintiff is also in the process of filing a Motion to Exclude Defendant's
6 Expert Witness.

7
8 **Azoogole's Statement:**

9 Azoogole anticipates bringing the following motions:

- 10 • Motion for summary judgment;
- 11 • Motion to compel discovery responses/application for contempt for
12 failure of Plaintiff's expert to respond to third party subpoena;
- 13 • Motion for Rule 11 sanctions based on the unsubstantiated
14 allegations in Plaintiff's complaint.
- 15 • Motion for sanctions pursuant to 28 U.S.C. §1927 for unreasonably
16 and vexatiously multiplying this litigation.
- 17 • Motion for attorneys' fees pursuant to 15 U.S.C. §7706.

18
19 **5. Amendment of Pleadings:** The extent to which parties, claims, or defenses are expected
20 to be added or dismissed and a proposed deadline for amending the pleadings.

21 **ASIS's Statement**

22 Plaintiff does not anticipate amending its pleadings.

23 **Azoogole's Statement:**

24 Azoogole does not anticipate amending its pleading at this time.

25
26 **6. Evidence Preservation:** Steps taken to preserve evidence relevant to the issues
27 reasonably evident in this action, including interdiction of any document-destruction program
28 and any ongoing erasures of e-mails, voice mails, and other electronically-recorded material.

1 **ASIS's Statement**

2 To the best of their knowledge the parties hereto have fully complied with
3 the evidence preservation requirements

4
5 **Azoogole's Statement:**

6 Fact discovery has now closed in this case. Accordingly, this section is no
7 longer applicable.

8
9 7. Disclosures: Whether there has been full and timely compliance with the initial
10 disclosure requirements of Fed. R. Civ. P. 26 and a description of the disclosures made.

11 **Initial disclosures have been made by both parties.**

12
13 8. Discovery: Discovery taken to date, if any, the scope of anticipated discovery, any
14 proposed limitations or modifications of the discovery rules, and a proposed discovery plan
15 pursuant to Fed. R. Civ. P. 26(f).

16 **ASIS's Statement:**

17 **Fact discovery has closed in this case.**

18 **Azoogole asserts below that the parties have agreed that additional**
19 **documents are still pending from Plaintiff. Plaintiff disagrees with Azoogole's**
20 **interpretation of the final discovery order of the Judge Spero and states that no**
21 **additional documents are pending from Plaintiff. Judge Spero stated in his Order**
22 **of October 2, 2007 (Docket 255 – courtesy copy attached):**

23 **Subject to the agreements by counsel as reflected in the**
24 **Motion to Compel, the motion by Defendant Azoogole for an**
25 **order compelling ASIS to conduct a reasonable search for**
26 **responsive documents in the possession of ASIS's employees**
27 **and its agents is DENIED.**

28 **Pg. 1 L. 17 - 20**

Judge Spero further stated: "Except as expressly granted

1 above, the Motion to Compel is DENIED.” Docket 255 Pg. 2 L.

2 13.

3 Plaintiff believes it has provided all documents responsive to an agreed
4 upon in the Joint Letter of September 25, 2007 (Docket 254 – courtesy copy
5 attached). Plaintiff believes that Defendant is either not aware of what has been
6 produced or is using this tactic to prolong discovery after being told by the Court
7 that their requests were denied.

8 Azoogie also asserts below that:

9 “The parties have agreed that expert discovery will comply
10 with the Federal Rules of Civil Procedure and agree that there
11 should be no need at this time to impose additional limitations
12 on the subject matter or timing of discovery in the case.”

13 While Plaintiff normally always complies with the rules of Federal Civil
14 Procedure, in this case Azoogie’s statement is both misleading and wrong.
15 Expert disclosure in this case is governed by the Court’s Order of February 5,
16 2007 (Docket 167 – courtesy copy attached). The Court’s order establishes the
17 schedule and the process for Expert Discovery. For example, the order provides
18 the rules for supplemental disclosures on Pg. 8 L. 10 – 11. When a court makes
19 an order regarding expert disclosure the court’s order nullifies FRCP Rule 26(a)
20 and the court’s order takes precedent. (*International Business Machines Corp. v.*
21 *Fasco Industries, Inc.*, Not Reported in F.Supp., 1995 WL 115421 at 2
(N.D.Cal.,1995) – courtesy copy attached.)

22 ASIS requests that the current dates for expert discovery not be changed.
23 Defendant has been particularly willful in disregarding the Court’s order in this
24 case and should not be rewarded by a change of the scheduling for expert
25 discovery.

26 ASIS has produced all of the documents relating to Mr. Posluns’ disclosure
27 and all documents relating to Mr. Posluns’ deposition. Defendant is attempting to
28 create issues by expressing their “fears” below. Plaintiff knows of no other

1 documents in this matter.

2 In the Court's Order of October 2, 2007, the court did order that Defendant
3 produce Jan Evans an Azoogole employee for deposition. Defendant has
4 scheduled the deposition of Ms. Evans for October 31, 2007. Plaintiff has
5 scheduled the deposition of Mr. Cohen, Defendant's expert, for October 30, 2007.

6
7 **Azoogole's Statement:**

8 Fact discovery has closed in this case. While the deadline for filing
9 discovery motions for fact discovery has closed, on September 25, 2007 Judge
10 Spero issued an order excluding from the deadline: "agreements by counsel as
11 reflected in the Motion to Compel." Judge Spero was referring to the parties'
12 joint letter to the Court, in which Plaintiff represented that it would produce
13 several categories of documents. Azoogole has not received documents for many
14 of these categories and has serious concerns that Plaintiff has not engaged in a
15 good faith nor diligent collection effort. Specifically Azoogole has not received:

- 16
- 17 • Documents from Carl Scoles, Josh Mohland, Dave Marshall, and Nick Grabowski;
 - 18 • An amended privilege log, if applicable;
 - 19 • Amended responses to RFPs Nos. 28, 29, 31, and 32; and,
 - 20 • All drafts of documents referenced in produced correspondence between ASIS and Jay Williams, of Seamless Media Solutions, LLC.

21 Expert discovery has not closed in this case. The parties have agreed that
22 expert discovery will comply with the Federal Rules of Civil Procedure and agree
23 that there should be no need at this time to impose additional limitations on the
24 subject matter or timing of discovery in the case. The parties have further agreed
25 that the format of disclosure or discovery of electronic documents should comply
26 with the Federal Rules of Civil Procedure.

27 Azoogole request that the Court set a closing date for expert discovery as
28 well as a date for brining motions to compel/applications for contempt as to

1 expert discovery.

2 Azoogle has also serious concerns about Plaintiff's production of
3 documents in its expert's possession. Azoogle has now served Plaintiff's
4 counsel with two subpoenas for its expert, Jeffrey Posluns. Mr. Posluns testified
5 in his deposition that he had reviewed these subpoenas. Nonetheless, neither
6 Plaintiff nor Mr. Posluns has produced the subpoenaed documents. Specifically,
7 Azoogle has requested:

- 8 • Notes taken by Mr. Posluns, both before and during his deposition; while
9 Mr. Posluns had these notes in his possession at his deposition, he
10 refused to let Azoogle make a copy of them;
- 11 • All emails reviewed by Mr. Posluns, in their electronic format; and
- 12 • correspondence between Plaintiff's counsel and Mr. Posluns, including but
13 not limited to preparation materials sent by Mr. Grabowski to Mr. Posluns,
14 as referenced in an email between them on September 28, 2007 at 10:02
15 a.m.

16 Azoogle fears that Plaintiff is withholding additional relevant documents, of
17 which Azoogle is simply not aware.

18 9. Class Actions: If a class action, a proposal for how and when the class will be certified.

19 N/A

20 10. Related Cases: Any related cases or proceedings pending before another judge of this
21 court, or before another court or administrative body.

22 Case No. C-07-04630 MHP is related to C-05-5124 MHP and was filed after
23 the Court denied Plaintiff's request to supplement the Second Amended
24 Complaint in this case.

25 11. Relief: All relief sought through complaint or counterclaim, including the amount of any
26 damages sought and a description of the bases on which damages are calculated. In addition,
27 any party from whom damages are sought must describe the bases on which it contends
28 damages should be calculated if liability is established.

1 **Plaintiff is seeking statutory damages for violations of the Can Spam Act as**
2 **follows:**

- 3 1. **For statutory damages of up to \$100.00 for each violation of 15**
4 **U.S.C. §7704(a)(1) in the sum of \$1,275,600;**
- 5 2. **For statutory damages of \$25.00 for each violation of 15 U.S.C.**
6 **§7704(a)(2) in the sum of \$318,900;**
- 7 3. **For aggravated damages under 15 U.S.C. §7706(g)(1)(C) of up**
8 **to three times the amount above for these violations**
9 **committed by the defendants' violations of 15 U.S.C. §7704(b)**
10 **in the sum of \$4,783,500;**
- 11 4. **For a preliminary and permanent injunction preventing the**
12 **defendants and all persons acting in concert with them from**
13 **the violation of the Can-Spam Act of 2003;**
- 14 5. **For liquidated damages of \$1,000.00 for each violation of**
15 **California Business and Professions Code § 17529.5(a) in the**
16 **sum of \$12,756,000;**
- 17 6. **Plaintiff also seeks attorneys' fees and costs.**

18
19 **Azoogle seeks judgment in its favor and further that the Court order Plaintiff to**
20 **pay Azoogle's costs and attorneys' fees pursuant to 15 U.S.C. §7706.**

21
22 **12. Settlement and ADR: Prospects for settlement, ADR efforts to date, and a specific ADR**
23 **plan for the case, including compliance with ADR L.R. 3-5 and a description of key discovery**
24 **or motions necessary to position the parties to negotiate a resolution.**

25 **The parties have already participated in court-ordered mediation, which**
26 **failed to achieve a settlement of the case or any issues in the case. The**
27 **parties do not believe that additional ADR efforts will prove useful in settling**
28 **the case.**

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13. Consent to Magistrate Judge For All Purposes: Whether all parties will consent to have a magistrate judge conduct all further proceedings including trial and entry of judgment.

While the parties consented to have Magistrate Judge Joseph C. Spero conduct all proceedings in this case, Plaintiff declined to permit Judge Spero conduct all proceedings in the related case, Case No. 07-04630. Accordingly, both cases have been reassigned to the Honorable Marilyn H. Patel.

14. Other References: Whether the case is suitable for reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

No.

15. Narrowing of Issues: Issues that can be narrowed by agreement or by motion, suggestions to expedite the presentation of evidence at trial (e.g., through summaries or stipulated facts), and any request to bifurcate issues, claims, or defenses.

None.

16. Expedited Schedule: Whether this is the type of case that can be handled on an expedited basis with streamlined procedures.

No.

17. Scheduling: Proposed dates for designation of experts, discovery cutoff, hearing of dispositive motions, pretrial conference and trial.

Plaintiff propose the following dates:

Non-Expert Discovery Cut-off:	<u> N/A </u>
Dispositive Motions - Last Day for Hearing:	<u> 12/14/07 </u>
Designation of Experts:	<u> 09/10/07 </u>
Rebuttal:	<u> 10/10/07 </u>
Expert Discovery Cut-off:	<u> 11/12/07 </u>
Pretrial Conference:	<u> 04/04/08 </u>
Trial:	<u> 04/18/08 </u>

1 Azoogle notes that Plaintiff’s proposed dates would require Azoogle to file its
 2 motion for summary judgment four days after the case management conference. While
 3 Azoogle is prepared to file its motion for summary judgment on an expedited schedule,
 4 it request more than four days to file this critical document. Accordingly, Azoogle
 5 proposed the following dates:

6 Azoogle proposes the following dates:

7 Non-Expert Discovery Cut-off:	<u> N/A </u>
8 Dispositive Motions - Last Day for Hearing:	<u> 12/31/07 </u>
9 Designation of Experts:	<u> N/A </u>
10 Rebuttal:	<u> N/A </u>
11 Expert Discovery Cut-off:	<u> 12/01/07 </u>
12 Pretrial Conference:	<u> 02/15/07 </u>
13 Trial:	<u> 03/0107 </u>

14
 15
 16 **18.** Trial: Whether the case will be tried to a jury or to the court and the expected length of
 17 the trial.

18 **Plaintiff expects the trial will last for the following number of days: 10**

19 **Azoogle expects the trial will last for the following number of days: 5**

20 **19.** Disclosure of Non-party Interested Entities or Persons: Whether each party has filed the
 21 “Certification of Interested Entities or Persons” required by Civil Local Rule 3-16. **In addition,**
 22 each party must restate in the case management statement the contents of its certification by
 23 identifying any persons, firms, partnerships, corporations (including parent corporations) or
 24 other entities known by the party to have either: (i) a financial interest in the subject matter in
 25 controversy or in a party to the proceeding; or (ii) any other kind of interest that could be
 26 substantially affected by the outcome of the proceeding.

27 **Plaintiff is a corporation and has no parent or subsidiaries that have any**
 28 **kind of interest in its operation. Defendant AZOOGLE.COM, INC., filed an answer**

1 on behalf of itself but identifies the attorney as representing AZOOGLEADS.COM.
2 Defendant also filed a Certificate of Interested Parties but did not identify any
3 relationship between the two corporations.

4 Plaintiff took the default of Defendant Leads Limited in this case and
5 judgment on the default has been deferred by the court until the case is
6 concluded.

7
8 Azoogle certifies that the following listed persons, associations of persons,
9 firms, partnerships, corporations (including parent corporations) or other entities
10 (i) have a financial interest in the subject matter in controversy or in a party to the
11 proceeding, or (ii) have a non-financial interest in that subject matter or in a party
12 that could be substantially affected by the outcome of this proceeding:

13
14 As of this date, other than the named parties, there is no such interest to
15 report.

16
17 **20.** Such other matters as may facilitate the just, speedy and inexpensive disposition of this
18 matter.

19 **SINGLETON LAW GROUP**

20
21 Dated: October 26, 2007 /s/ Jason K. Singleton
22 Jason K. Singleton, Attorney for Plaintiff,
23 ASIS INTERNET SERVICES

24 **KRONENBERGER BURGOYNE, LLP**

25 Dated: October 26, 2007 /s/ Jeffrey M Rosenfeld
26 Jeffrey M. Rosenfeld, Attorneys for
27 Defendants, AZOOGLE.COM, INC., and
28 AZOOGLEADS US, INC., dba
AZOOGLEADS.COM