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6 **Attorneys for Plaintiff, ASIS Internet Services**

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

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

11 **Plaintiff,**)
12 **vs.**)

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

17 **Defendants.**)

Case No. C-05-5124 MPH

**RE-NOTICE OF MOTION AND MOTION FOR
A PRELIMINARY INJUNCTION ORDERING
THE RETURN OR DESTRUCTION OF
SENSITIVE MATERIALS; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT OF
MOTION**

DATE: December 3, 2007
TIME: 2:00 PM
CTRM: 15, 18th Floor, San Francisco

18 **NOTICE OF MOTION AND MOTION:**

19 To Defendant, **Azoogleads.com, Inc.**, and its attorney of record:

20 Please take notice that on December 3, 2007, at 2:00 am, or as soon thereafter as
21 counsel may be heard by the above entitled Court, located in Courtroom 15, 18th Floor, 450
22 Golden Gate Ave., San Francisco, California. Plaintiff will and hereby does move the Court for
23 a Preliminary Injunction ordering Defendant to return or destroy with verification certain highly
24 sensitive materials belonging to Plaintiff, **ASIS Internet Services**, designated by Defendant
25 Azooglead as AZ000787. Plaintiff also requests that materials designated as AZ000784 – 786
26 be designated as "Highly Confidential Attorney's Eyes Only". Plaintiff submits this RE-Notice
27 of Motion and Motion with a Motion For Order Shortening Time to be heard at the time of the
28 presently set Case Management Conference, (Docket No. 269).

1 This motion is brought on the grounds that: the configuration files for Plaintiff's protected
2 computers and complete lists of Plaintiff's customers email accounts were delivered by
3 Plaintiff's third party contractor, without Plaintiff's knowledge or approval, in response to
4 Defendant's subpoena. The existence outside of Plaintiff's direct control could result in both a
5 disruption of Plaintiff's service and the security of the private consumer information contained
6 in Plaintiff's servers.

7 This motion is based on this Notice of Motion and Motion, the Memorandum of Points
8 and Authorities filed herewith, and upon such other matters as may be presented to the Court
9 at the time of the hearing.

10 Because of the sensitivity of this information Plaintiff has not provided copies of the
11 information as part of this motion. Plaintiff will provide copies to the court if required.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 Plaintiff's counsel informed Defendant's counsel on October 17, 2007, that document
14 AZ000787 was a critical and sensitive file to Plaintiff's business and that there could be very
15 serious liabilities for exposure of this file. Plaintiff's counsel requested that the document either
16 be returned or destroyed with verification. Plaintiff's counsel also requested that documents,
17 also received from contractor, AZ000784 – 786 be designated "Highly Confidential Attorney's
18 Eyes Only", as they contain consumer email accounts. Counsels discussed via email whether
19 it was proper to send a joint letter to Judge Spero regarding the matter, since the parties had
20 received preliminary notice of the change in courts. Once final notice of the court
21 reassignment was received, Defendant refused to return or destroy the document and refused
22 to accept Plaintiff's designation of the documents under the Protective Order. Plaintiff
23 therefore has no choice but to bring this motion before the court to protect itself and its
24 customers.

25 On September 14, 2007, Defendant's counsel deposed SHAWN O'CONNOR an
26 employee of Perceptyx, Inc., dba Falcon Knight Enterprises. Mr. O'Connor and Perceptyx is
27 the third party contractor providing systems administration for ASIS Internet Services. As the
28 systems administrator Perceptyx has access to not only all of ASIS's data but also to ASIS's

1 system programs and server configuration files. Plaintiff did not object to the deposition of Mr.
2 O'Connor as a third party deponent. However, Plaintiff did object at the deposition to exposure
3 of sensitive information concerning the configuration of Plaintiff's network and servers. Plaintiff
4 pointed out that this information has no relevance to this case, Defendant has made no
5 showing of how this information is relevant to this case.

6 Unknown to Plaintiff, Mr. O'Connor and Perceptyx provided to Defendant's counsel, as
7 part of the subpoena response, the entire configuration files for ASIS's servers and the entire
8 list of email accounts for live ASIS email accounts. Defendant provided copies of this
9 information in its disclosure and said disclosure was received by Plaintiff's counsel on October
10 11, 2007.

11 This information is extremely sensitive and jeopardizes not only ASIS Internet's
12 operations but also sensitive consumer information for all of ASIS's customers. This
13 information taken together could be used as a road map by unscrupulous persons to all of the
14 consumer account information on ASIS's servers. The configuration files provide detailed
15 information about how ASIS's service works and where account and other type files can be
16 located. This information in the hands of a hacker could be used to either destroy ASIS's
17 service or discover all of the account information held by ASIS for its customers.

18 This information was provided without ASIS's or its counsel's knowledge or consent.
19 This information should not have been provided under any circumstances, because of the
20 extreme danger of exposure of consumer information and jeopardy to ASIS's operations.

21 Upon discovering what was included in the subject data, Plaintiff's counsel notified
22 Defendant's counsel on October 12, 2007, of the extremely sensitive nature of the data and
23 requested its immediate designation as attorney's eyes only and return and or verified
24 destruction of the system configuration files designated AZ-000787.

25 Defendant's counsel has chosen to ignore Plaintiff counsel's warning and instead treat
26 the information as some sort of negotiating tool.

27 Plaintiff therefore submits this request to the court for the return of this information
28 immediately, designated as AZ-000787 so as to avoid the extreme consequences that could

1 result if this data is exposed to the wrong persons. Plaintiff also requests that AZ-000784, AZ-
2 000785, and AZ-000786 be designated as “Highly Confidential - Attorneys Eyes Only” under
3 the protective agreement as highly sensitive consumer and corporate information.

4 Because of the damage that the configuration files could do in the wrong hands, Plaintiff
5 does not feel that the protective order is sufficient to protect the interests of ASIS or the 1,000
6 plus customers who could be put in jeopardy.

7 ARGUMENT

8 1. The Court can issue a Preliminary Injunction mandating the return or 9 destruction of the sensitive materials.

10 The court has the authority to protect the rights of the Plaintiff and Plaintiff’s customers
11 from the irreparable harm that can be caused by exposure of Plaintiff’s configuration files and
12 the consumer email accounts.

13 A preliminary injunction is a provisional remedy enacted by the court prior to final
14 adjudication of the issues in a case. The purpose of the preliminary injunction is to preserve
15 the status quo or prevent irreparable loss prior to judgment. ***Sierra On-Line, Inc. v. Phoenix***
16 ***Software, Inc.***, 739 F2d 1415, 1422 (9th Cir. 1984).

17 To obtain injunctive relief, the movant must demonstrate either: (1) a
18 combination of probable success on the merits and the possibility of
19 irreparable harm, or (2) that serious questions are raised as to the merits
and that the balance of hardships tips in its favor.

20 ***Department of Parks and Recreation for State of California v. Bazaar***
21 ***Del Mundo Inc.***, 448 F.3d 1118 at 1123 (9th Cir.,2006); citing ***Arcamuzi***
v. Cont'l Air Lines, Inc., 819 F.2d 935, 937 (9th Cir.1987).

22 As to the merits of this request, Plaintiff owns the configuration files (designated as AZ-
23 000787) that were in the custody of their agent Shawn O'Connor and employee of Perceptyx,
24 Inc., dba Falcon Knight Enterprises. See Para. 2 of Declaration of Nella White. These files
25 are critical to Plaintiff’s business operations and describe in detail how Plaintiff’s computer
26 servers are configured. These files contain both information about the security systems in
27 place at ASIS Internet Service and descriptions of Plaintiff’s file services. These configuration
28 files are integral to ASIS Internet Services’ Operation. See Declaration of Nella White, Para. 3.

1 Therefore, Plaintiff has both a right and a duty to protect this information.

2 The other three files AZ000784 – AZ00785 contain both open and closed customer
3 email accounts and other information about those customers. See Para. 4 of Declaration of
4 Nella White. These files are the property of ASIS Internet Services and were in the custody of
5 ASIS's agent Shawn O'Connor and employee of Perceptyx, Inc., dba Falcon Knight
6 Enterprises. See Para. 5 of Declaration of Nella White. Therefore, Plaintiff has a right and a
7 duty to protect the information in these files.

8 The configuration files contain no information that can lead to any admissible
9 information in this case. These files contain information about how Plaintiff's servers are
10 configured. A violation of the **CAN SPAM Act** or the **California Business & Professions**
11 **Code** §17529.5 occurs when the emails are sent. Nothing about the configuration of the
12 computers receiving the emails provide Defendant with a defense to the sending of the emails.
13 Defendant has provided no facts or argument that would make the configuration of the ASIS
14 computers relevant in this case.

15 Therefore, Plaintiff has demonstrated probable success on the merits of this discovery
16 issue. Even though the merits of the overall case against Defendants is still being contested,
17 Plaintiff has both a duty and right to protect these highly sensitive materials and Defendant has
18 failed to demonstrate the relevance of the materials.

19 As to the issue of irreparable harm, the court has stated the issue of public interest must
20 be considered as a factor. ***Department of Parks and Recreation for State of California v.***
21 ***Bazaar Del Mundo Inc.***, 448 F.3d 1118 at 1124 (9th Cir.,2006).

22 Here, Plaintiff may suffer impairment or destruction of its service if the configuration files
23 are exposed to the wrong parties. See Para. 6 of Declaration of Nella White. A hacker could
24 use these files to locate and dismantle Plaintiff's security systems and Plaintiff's file system.
25 The exposure of the consumer email accounts could result in additional hacking into consumer
26 accounts, or distribution of those files to spammers or unscrupulous persons. This could result
27 in additional spamming and fraud.

28 The consumers whose email accounts identified in AZ000784 – 786 have a right to

1 protect their information under both Article 1 of the California Constitution and under the
2 Fourth Amendment to the U.S. Constitution where there is an expectation of privacy.
3 **California v. Greenwood**, 486 U.S. 35 at 39 (1988). The Plaintiff has a duty and right to
4 protect the consumer's information. Both ASIS and its customers did not expose their private
5 information voluntarily. The exposure of information was done without their knowledge or
6 permission. ASIS has a very strong expectation that this type of information will be held in
7 absolute secrecy without exposure. ASIS's success and survival as a business entity depends
8 on secrecy of this information.

9 Therefore Plaintiff has demonstrated that it will suffer irreparable harm and that there is
10 a critical public interest in protection and non-disclosure of the information at issue.

11 Therefore, Plaintiff has met the dual requirements of success on the merits and
12 irreparable harm required for imposition of a preliminary injunction. Plaintiff has demonstrated
13 that there is a critical public interest in keeping this information secret.

14 **CONCLUSION**

15 Plaintiff has demonstrated the necessary elements required for a court order to return
16 its configuration files and protect consumer information as "Highly Confidential, Attorney's
17 Eyes Only." Therefore, Plaintiff asks the court to issue a preliminary injunction in this matter.

18 **SINGLETON LAW GROUP**

19 Dated: October 26, 2007

20 /s/ Jason K. Singleton
21 Jason K. Singleton,
22 Richard E. Grabowski, Attorneys for Plaintiff,
23 **ASIS INTERNET SERVICES**
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