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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 JCS

**NOTICE OF MOTION AND MOTION FOR
EVIDENTIARY SANCTIONS FOR FAILURE
TO PRODUCE WITNESS AT DEPOSITION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION**

DATE: December 21, 2007
TIME: 9:30 A.M.
CTRM: A, 15TH FLOOR

18 **I. NOTICE OF MOTION AND MOTION:**

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

20 Please take notice that on Friday, December 21, 2007, at 9:30 am, or as soon thereafter
21 as counsel may be heard by the above entitled Court, located in Courtroom A, 15th Floor, 450
22 Golden Gate Ave., San Francisco, California. Plaintiff will and hereby does move the Court for
23 an order for sanctions for Defendant's failure to produce Jen Evans at deposition as ordered by
24 the Court. Plaintiff requests that an order issue that: refuses to allow Defendant to support or
25 oppose designated claims or defenses that may be related to Ms. Evans, and prohibiting
26 Defendant from introducing evidence that may have been discovered through deposition of Ms.
27 Evans. This motion is brought on the grounds that: Defendant has failed to produce Jen Evans
28 on five separate occasions, including two agreed to dates after the Court ordered Ms. Evans to

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

4 II. STATEMENT OF FACTS

5 Jen Evans was identified by Ryan McVey, Azoogole Director of Mortgage Vertical, as the
6 Director of Affiliate Management during the incident period of this case, October 2005 – January
7 2006. See **Exhibit A** to Declaration of Jason Singleton (hereafter “JKS”), Deposition of Ryan
8 McVey P. 123 L. 17–P. 124 L. 4. Julian Mossanen’s testimony made clear there is no
9 difference between affiliates and third party vendors. Mr. Mossanen replaced Jen Evans as
10 Director of Affiliate Management. Mr. Mossanen was asked what the difference was between
11 and affiliate and a third party vendor. Mr. Mossanen initially stated he did not know the
12 difference. **Exhibit B** to Dec. JKS, Mossanen 56:6–9 (under Seal).

13 In addition, Plaintiff discovered several emails between *Jen Evans* and Azoogole’s third
14 party contractor *Consorte Media*, Inc, wherein the parties discuss the details for setting up
15 mortgage leads for the “Latin LowRateAdvisors”. **Exhibit C** to Dec. JKS, Subpoena response of
16 Consorte Media, Inc. Bate 042-071. Emails between Mr. Mossanen and Azoogole’s third party
17 vendor *Lendance*, indicate that Lendance was provided with an affiliate id. **Exhibit D** to Dec.
18 JKS, Plaintiff’s Bate 1546.

19 It is clear from the documents identified above that Ms. Evans was directly involved
20 during the incident with the details of acquiring mortgage leads and the management of third
21 party contractors, as well as affiliates. Ms. Evans is a clearly relevant witness.

22 Plaintiff first requested available dates to take Ms. Evans deposition on May 14th, 2007.
23 (**Exhibit E**) Defendant responded they, “would look into the deposition of Jen Evans and get
24 back to you soon.” **Exhibit E**. Then on May 21st, Defendant sent an email asking “please
25 inform as to your purpose in requesting her deposition, other than that you saw her name on a
26 document.” (**Exhibit F**) Plaintiff sent several emails trying to get Defendant to confirm a date for
27 her deposition, to no avail. Finally Plaintiff simply noticed her deposition. (**Exhibit G**)
28 Defendant then confirmed her deposition for July 18, 2007, in NYC. (**Exhibit H**) Then, on July

1 13, 2007, Defendant cancelled Ms. Evans deposition, five days before her deposition, and after
2 Plaintiff's counsel had already made flight and hotel reservations to travel to NYC. Defendant
3 cancelled her deposition on the grounds she could not travel from Toronto to NYC due to
4 medical complications. **Exhibit I.**

5 Since Ms. Evans could apparently not travel to NYC, Plaintiff noticed her deposition in
6 Toronto. Ms. Evans' deposition was re-set for August 27, 2007, in Toronto. See **Exhibit J** to
7 JKS, Amended Notice of Deposition. On August 24, 2007, Defendant's Counsel informed
8 Plaintiff's counsel that Ms. Evans would not appear on August 27, 2007, because the deposition
9 conflicted with the funeral of her brother-in-law. See **Exhibit K** to JKS, email from Defendant's
10 Counsel. The funeral occurred August 31, 2007, four days after the date selected for the
11 deposition.

12 During September, Plaintiff's Counsel and Defendant's counsel attempted to set up a
13 remote deposition of Ms. Evans. Defendant contended the equipment available at the local
14 Eureka, California court reporters' office and the equipment preferred by Defendant was
15 incompatible, hence, Defendant again cancelled the deposition. **Exhibit L**

16 Unable to reach an agreement on the deposition, a joint letter was submitted to the court
17 regarding the matter on September 25, 2007. See **Exhibit M** to JKS, Docket 254, P. 7, 8 and 9.
18 The Court issued an order stating that a video conference deposition of Ms. Evans was to take
19 place the next time Plaintiff's counsel was in San Francisco on business. See **Exhibit N** to JKS,
20 Docket 255.

21 The parties then exchanged several emails regarding the date of the deposition. As Mr.
22 Singleton, for Plaintiff, had to travel to San Francisco on October 30, 2007, to take the
23 deposition of Defendant's expert, Mr. Cohen, the deposition of Ms. Evans was set for October
24 31, 2007. See **Exhibit O**, Mr. Burgoyne stating October 31 was "fine for him." On, October 29,
25 2007, Defendant's counsel informed Plaintiff's counsel they were canceling the October 31,
26 2007 deposition. **Exhibit P.** Ms. Evans was apparently fired by Azoogole, had consulted her
27 own attorney, and was not willing to appear. **Exhibit P.** This was the first time Defendant gave
28 any indication that Ms. Evans was no longer an employee of Defendant Azoogole. During the

1 efforts to confirm the deposition would go off on October 31, 2007, Plaintiff's counsel inquired of
2 Mr. Burgoyne whether Ms. Evans would appear. Mr. Burgoyne wrote back on October 16th:

3 "You should deal directly with Steve. I haven't read your message,
4 and won't read or respond to any additional emails on the subject."

5 **Exhibit Q**

6 On November 1st, Defendant stated that there was no need to move the court and that
7 Defendant would make Ms. Evans available on November 13–16, 2007, at Plaintiff's
8 convenience. **Exhibit R.** Defendant also stated they would facilitate an ISDN link from New
9 York and Toronto to Eureka for the deposition to eliminate the need for travel. The parties
10 settled on November 16, 2007, as the date of the deposition.

11 On November 15, 2007, Defendant's attorney, Stephen Fox, emailed Plaintiff's attorney
12 that the deposition would not take place on the agreed date of November 16th because: "I
13 believe that Jen Evans is in the hospital..." See **Exhibit S** to JKS, email on the subject from
14 Stephen Fox.

15 Defendant's counsel, Stephen Fox, then again emailed Plaintiff's counsel, stating he was
16 incorrect that Ms. Evans was in the hospital, that in fact, "*It was merely a communication*
17 *unavailability issue, and everyone jumped to the worst case scenario conclusion*". **Exhibit T**

18 On November 15, 2007, during a telephone call, Plaintiff notified Defendant that it would
19 move the court for evidentiary sanctions on the matter. After being advised of such, Steve Fox,
20 counsel for Defendant, later called back and stated the deposition would proceed as noticed for
21 November 16, 2007. Given the history of Defendant's gamesmanship, the Court's order to
22 produce Mr. Evans, Defendant's agreement to produce her only after the threat of sanctions, will
23 not, under the law, preclude the imposition of sanctions.

24 **III. ARGUMENT**

25 **1. Defendant has failed to produce Ms. Evans for deposition and its excuses**
26 **are well within the control of Defendant to correct.**

27 Defendant has failed to produce Ms. Evans after successive deposition notices and an
28 order by the Court. Defendant has failed to show that sanctions are not justified because its
failure was substantially justified or that other circumstances were not in its control. Plaintiff has

1 made several concessions of time and expense to try and accommodate Defendant's needs in
2 taking Ms. Evans' deposition. Even so, repeatedly engaged in gamesmanship. Since Ms.
3 Evans has been fired and is a foreign citizen, it is extremely unlikely that Plaintiff will be able to
4 compel this witness to appear at trial. Ms. Evans was identified by Defendant as the Director of
5 Affiliate Management at the time of the spamming incident. Ms. Evans was working for
6 Defendant Azoogole with affiliates and third party contractors on the subject matter of this case –
7 consumer leads for mortgage refinance.

8 **FRCP Rule 37(b)** provides sanctions for failing to comply with a court order regarding
9 discovery. **FRCP Rule 37(b)(2)(B)** allows sanctions for failure consisting of:

10 (B) An order refusing to allow the disobedient party to support or
11 oppose designated claims or defenses, or prohibiting that party
12 from introducing designated matters in evidence;

13 **FRCP Rule 37(b)(2)** also allows additional monetary sanctions of:

14 "the reasonable expenses, including attorney's fees, caused by the
15 failure, unless the court finds that the failure was substantially
16 justified or that other circumstances make an award of expenses
17 unjust."

18 The Court in its order of October 2, 2007, Docket 255, stated that the video conference
19 deposition of Ms. Evans was to take place at a facility in San Francisco the next time Plaintiff's
20 counsel was in San Francisco on other business. That did not occur. The parties arranged the
21 deposition for October 31, 2007, to coincide with the Cohen deposition taking place on October
22 30, 2007. On October 29, Defendant's counsel informed Plaintiff that Ms. Evans would not
23 appear, and Ms. Evans did not appear as scheduled. Defendant has informed Plaintiff that Ms.
24 Evans no longer is employed by Azoogole. Ms. Evans is a Canadian citizen living in Toronto,
25 Canada, and cannot be subpoenaed as a third party, without a Letter Rogatory and the support
26 of the Canadian Court. Defendant confirmed, then cancelled, the deposition of Jen Evans, five
27 times. The reasons given by Defendant for doing so, taken together, are inherently incredible.

28 The court in **Yeti by Molly, Ltd. v. Deckers Outdoor Corp.**, 259 F.3d 1101 at 1106 (9th
Cir.,2001) established that a sanction less than dismissal does not require a showing of
"willfulness, fault, or bad faith". The court has stated: "disobedient conduct not shown to be

1 outside the control of the litigant is all that is required to demonstrate willfulness, bad faith, or
2 fault.” *Henry v. Gill Industries, Inc.*, 983 F.2d 943 at 948 (9th Cir.,1993); citing *Fjelstad v.*
3 *American Honda Motor Co.*, 762 F.2d 1334, 1341 (9th Cir.,1985).

4 The Defendant, late on November 15, recanted and stated it could arrange the deposition
5 of Jen Evans on November 16, 2007. This is a belated compliance with the court’s discovery
6 order and does not preclude proper sanctions. “Belated compliance with discovery orders does
7 not preclude the imposition of sanctions.” *North American Watch Corp. v. Princess Ermine*
8 *Jewels*, 786 F.2d 1447, 1451 (9th Cir.,1986). A “last minute tender of discovery does not cure
9 effects of discovery misconduct.” *Henry v. Gill Industries, Inc.*, 983 F.2d 943 at 947 (9th
10 Cir.,1993); citing *G-K Properties v. Redevelopment Agency of San Jose*, 577 F.2d 645, 647-
11 48 (9th Cir., 1978).

12 Here Defendant has failed to follow the Court’s order and has offered no basis that the
13 requested evidentiary sanctions are unjust. **FRCP Rule 37(b)(2)** requires that a showing that
14 the failure was substantially justified or the sanction unjust. Defendant has not demonstrated
15 that the failure was outside of their control. Defendant had from April to September to produce
16 Ms. Evans when she was in their employ. Plaintiff was met repeatedly with delay, excuses and
17 last minute cancellations of Ms. Evans deposition.

18 This is not the first time Defendant has ignored the court’s order and the **FRCP**.
19 Defendant has willfully ignored the court’s previous scheduling orders and deadlines set by the
20 relevant **FRCP** Rules throughout this entire case. For example, Defendant requested and
21 Plaintiff stipulated to an extension of 45 days to respond to Plaintiff’s Second Amended
22 Complaint on November 24, 2006. See Docket 118 to C-05-5124 CW–courtesy copy attached
23 hereto as **Exhibit U** to JKS. Defendant then filed its Answer late on November 27, 2006. See
24 Docket 134 to C-05-5124 CW–courtesy copy of first page attached hereto as **Exhibit V** to JKS.
25 Plaintiff served Requests for Admission, Interrogatories, and a Request for Production on
26 Defendant on January 23, 2007. See **Exhibit W** to JKS - Proofs of Service. These requests
27 were made by first class mail. Therefore given the extension of time for delivery the due date
28 for these discovery requests was February 27, 2007. **FRCP Rules 33, 34, and 36**. Defendant

1 served its response to the Requests for Admissions on March 9, 2007 (10 days late), and
2 Plaintiff received it on March 12, 2007. Defendant served its responses to Plaintiff's
3 Interrogatories and Requests For Production on March 14, 2007, 15 days late. (See **Exhibit X**
4 to JKS - face, signature, and proof of service pages of Defendant's discovery responses).
5 Defendant did not request an extension of time to answer the requests until after the late
6 response to Admissions on March 12, 2007. The court ordered expert disclosures by
7 September 10, 2007 and expert rebuttal by October 10, 2007. Defendant produced its expert
8 report on October 11, 2007, and then in defiance of the court's standing order produced a
9 supplemental on October 25, 2007. See Docket 272 Plaintiff's Motion to Exclude Defendant's
10 Expert Witness.

11 Defendant has willfully and continuously disregarded the court's orders and the
12 applicable *FRCP* rules.

13 Unless a tangible penalty is imposed for such conduct, attorneys will continue to believe
14 that such gamesmanship is an appropriate method to advocate for their clients. Plaintiff
15 respectfully requests the Court impose an evidentiary sanction, establishing that Defendant
16 Azoogole induced the subject emails in this lawsuit to be sent.

17
18 **SINGLETON LAW GROUP**

19 Dated: November 15, 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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