

1 **Jason K. Singleton, State Bar #166170**  
lawgroup@sbcglobal.net  
2 **Richard E. Grabowski, State Bar #236207**  
rgrabowski@mckinleyville.net  
3 **SINGLETON LAW GROUP**  
4 **611 "L" Street, Suite A**  
Eureka, CA 95501  
5 **(707) 441-1177**  
**FAX 441-1533**

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 JCS**

**REPLY TO OPPOSITION TO MOTION FOR  
EXCLUSION OF DEFENDANT'S EXPERT  
WITNESS**

**DATE:  
TIME:  
CTRM:**

18 **1. Defendant's argument that Plaintiff's motion to exclude is premature where**  
19 **the expert's testimony has not been submitted in summary judgment**  
20 **papers or trial is in error.**

21 *FRCP* Rule 26(a)(2) requires a comprehensive disclosure of expert opinions. Where  
22 that disclosure reveals opinions that are patently inadmissible, there is no logical reason to  
23 preclude an exclusion motion until summary judgment or trial. Indeed, if the Court were to wait  
24 to rule on Plaintiff's motion, Plaintiff would then be put to the task of marshalling evidence for  
25 presentation at trial, to oppose Defendant's expert's spurious allegations of the disgruntled  
26 employee, the vindictive Azoogole competitor, etc. The authority to rule on Plaintiff's motion  
27 comes from the court's inherent powers, which, "*are governed not by rule or statute but by the*  
28 *control necessarily vested in courts to manage their own affairs so as to achieve the orderly*  
*and expeditious disposition of cases.*" **Chambers v. NASCO, Inc.** (1991) 501 US 32, 43, 111

1 S.Ct. 2123, 2132

2 **2. Defendant's contention that it was justified in making a late expert**  
3 **disclosure, on the grounds that Plaintiff's expert report was not included**  
4 **within Plaintiff's answers to Court mandated interrogatories, is without**  
5 **merit.**

6 Azoogle contends that it was unaware that Plaintiff would be disclosing an expert, and  
7 as a result, "*was left scrambling to locate an expert*", (Def Mot P2 L7). The implied premise is  
8 an excuse for Azoogle's late disclosure of expert opinions. Attached to the Declaration of  
9 Jason K. Singleton as Exhibit "A" submitted herewith, are emails (*from May and June 2007*)  
10 between counsel disclosing very clearly that Plaintiff's expert was Jeffery Posluns. Azoogle  
11 was *fully aware* that Plaintiff had retained an expert, months prior to the time designated for  
12 expert disclosure.

13 Azoogle states in support of its contention it was "sandbagged" by Plaintiff's expert  
14 disclosure, that Plaintiff's answers to Court mandated contention interrogatories, did not  
15 mention Plaintiff's expert, Mr. Posluns. First, Plaintiff did not understand the court's order of  
16 June 29, 2007 (Docket 242), to require Plaintiff to make a complete expert disclosure within  
17 the context of Plaintiff's answers to the Court imposed contention interrogatories. Plaintiff's  
18 answers to the contention interrogatories was exhaustive. Over 250 pages of answers,  
19 declarations, and exhibits. Azoogle has not, and cannot, point to any evidentiary material  
20 relied upon by Mr. Posluns in offering his opinions, that was not material already within the  
21 possession of Azoogle. Nor has Azoogle pointed to any specific contention raised by Mr.  
22 Posluns, that was not covered within Plaintiff's answers to interrogatories. Azoogle's  
23 contention it was sandbagged by Plaintiff's failure to make an **FRCP** Rule 26 expert disclosure  
24 within the context of answers to court imposed contention interrogatories, is without merit.

25 **3. Defendant's expert offers "opinions" which are clearly inadmissible.**

26 Dr. Cohen's report, page 7, opinion 3, states that Plaintiff "*caused the interception by*  
27 *Plaintiff of potentially personal or otherwise legally protected emails directed toward individuals*  
28 *not party to this legal action. Plaintiff did not notify these individuals that these emails were*  
*being intercepted.*" This statement does not rebut anything offered by Mr. Posluns. This

1 statement is not relevant to any claim or defense in this action, and is intended solely to  
2 disparage Plaintiff. At Dr. Cohen's deposition, he recanted, and stated he held no such  
3 opinion. Cohen Depo., P84, L 15-25. Exhibit "B" hereto, submitted herewith under seal  
4 pursuant to the confidentiality designation by Defendant. Dr. Cohen should not be allowed to  
5 testify that Plaintiff intercepted legally protected emails.

6 Dr. Cohen's report, Page 7, opinion 4, states that Plaintiff received the subject emails  
7 because Plaintiff disabled its spam filter. This opinion does not rebut anything in Mr. Posluns  
8 report. The failure to mitigate defense in CAN SPAM Act cases was dispensed with by Judge  
9 Conti. *Phillips v Netblue*, C-05-4401 SC (Docket 146-Exhibit D to Plaintiff's Motion) The  
10 CAN SPAM Act does not require Plaintiff to even have a spam filter. Dr. Cohen should not be  
11 allowed to testify that Plaintiff received the subject emails as a result of disabling its spam filter.

12 Dr. Cohen's report, P7, Opinion 5, states that Plaintiff invited the receipt of the  
13 information in the subject emails, by its affirmative acts. This statement rebuts nothing offered  
14 by Mr. Posluns. Further, Azoogole has stipulated in this action, it has no opt-in consent for any  
15 of the subject emails. (Docket 249). Moreover, Dr. Cohen recanted at his deposition, stating  
16 there was no causal connection between Nella at one time requesting mortgage information,  
17 and the sending of the subject emails. Depo Dr. Cohen, P82 L23 to P83 L7. (Exhibit "B"  
18 hereto) Dr. Cohen should not be allowed to testify that Plaintiff invited the subject emails to be  
19 sent.

20 Dr. Cohen's report, P7 Opinion 6, states that Plaintiff entered false information (the  
21 Bruce Wolf lead) into a "federal interest computer," which was a "deceptive act." This rebuts  
22 nothing offered by Mr. Posluns. The statement is not relevant to any claim or defense in this  
23 case, is intended to disparage Plaintiff, and must be excluded. Azoogole would like to infer to  
24 the jury that Plaintiff criminally violated 18 **U.S.C.** 1030. Plaintiff has not, but if it had, it would  
25 be a matter for the D.O.J, not Azoogole.

26 Dr. Cohen's report, P7-8, Opinion 7, offers, in sum, that the integrity of the subject data  
27 (emails) cannot be trusted due to a lack of adequate procedures for protecting data, etc., etc.  
28 Plaintiff concedes this would be rebuttal of Mr. Posluns report. Dr. Cohen's discussion of the

1 “chain of custody” must be excluded because it is a legal opinion, and because there is no  
2 such requirement in civil cases, only criminal matters.

3 Further, it is two entirely different opinions to say there may be factual basis to question  
4 the integrity of the data, and to state an affirmative opinion the data *is not what it purports to*  
5 *be*. It is one thing to point out there are more secure methods for handling electronic data, and  
6 entirely another to state the methodology failed. Because Dr. Cohen did not analyze the  
7 subject emails, and has no evidence whatsoever that any changes occurred to the data, Dr.  
8 Cohen’s opinion that the subject emails are not what they purport to be, fails to meet the  
9 requirements of **FRE** Rule 702. Dr. Cohen himself conceded this to be true at his deposition,  
10 P92 L18-L22: “*I don’t know whether of not any alteration other than changing the form and*  
11 *selecting a subset took place, and furthermore I don’t have the necessary information required*  
12 *to make any sort of a definitive determination;*”. Exhibit “B” hereto. Dr. Cohen should not be  
13 permitted to testify the subject emails are not what they are purported to be.

14 Dr. Cohen’s report, P8 Opinion 10, states that because Plaintiff did not contact each of  
15 the email account holders (1400 or so) from which the subject emails appear to be sent,  
16 (looking at the “sent from” field in the subject emails) to ask if they had consented to the use of  
17 their account, Plaintiff cannot thus contend that such account holders did not so consent to the  
18 use of their accounts to send the subject spam. Plaintiff concedes this would be rebuttal to Mr.  
19 Posluns report. However, this is not expert opinion, it is lay opinion. Such an analysis is not  
20 “scientific, technical, or other specialized knowledge” that would assist the jury. (**FRE** Rule  
21 702) The jury is fully capable of understanding the idea that since email account holders were  
22 not asked if they consented to the use of their account, that it might be possible that they did  
23 consent. There is no reason to allow an expert to lend the credibility of expert opinion upon a  
24 lay opinion.

25 Dr. Cohen’s report, P9 Opinion 11, offers two different opinions. One, that the evidence  
26 is insufficient to show a relationship between Defendant and the subject emails. Two, that  
27 Plaintiff has not shown the subject emails were not sent by parties maliciously trying to  
28 generate law suits against the Defendant. Whether the evidence is sufficient to establish that

1 Azoogole is legally responsible for inducing (as that term is defined by the CAN SPAM Act) the  
2 subject emails, is the ultimate issue of fact for the jury to decide. This is not a proper opinion  
3 because Cohen cannot provide any evidence that the emails were not sent on Azoogole's  
4 behalf – **FRE** Rule 705 requires opinions be based on some facts.

5 The other very important point is whether Mr. Cohen's opinion helps the jury? **FRE**  
6 Rules 702 and 703. Can't the jury make up its own mind of whether there is enough evidence  
7 to prove the Plaintiff's case, (or disprove) without Cohen's help? It is now proper to allow  
8 expert opinion on an ultimate issue of fact in a case, but, only where such expert opinion is  
9 helpful.

10 Dr. Cohen's opinion that the subject emails were sent in a malicious effort to generate  
11 lawsuits against Azoogole is not rebuttal of anything offered by Mr. Posluns. Moreover, same is  
12 pure speculation. An expert must have some factual basis for an opinion, and nothing has  
13 been offered by Dr. Cohen. **FRE** Rule 702. Dr. Cohen is an expert on digital forensics. If  
14 there is some IT technical information that would lead to this conclusion, he has not said it. If  
15 Dr. Cohen's opinion the emails were sent maliciously to generate lawsuits against Azoogole is  
16 based upon an analysis of garden variety human motivators, (like avarice, revenge etc) same  
17 is clearly not the province of any expert, much less the field of digital forensics. Where has  
18 any expert ever been allowed to testify, "I think the plaintiff is greedy and spiteful, therefore  
19 plaintiff likely did so and so." Dr. Cohen's Opinion 11 should be excluded.

20 Dr. Cohen's report, P9 Opinion 12 states that Plaintiff's proof of a directory harvest,  
21 (emails were sent to recipients alphabetically and emails were sent to closed and admin  
22 accounts) is "*no proof of how those addresses were collected.*" Plaintiff concedes this  
23 statement is rebuttal of Mr. Posluns report. The problem is, that Dr. Cohen goes on to state  
24 that Plaintiff itself may have sold the addresses to the person who sent the emails, or that  
25 ASIS' end user clients may have all signed up to receive the subject spam. There is no  
26 evidence whatsoever anywhere in the record this either of these events occurred. It is pure  
27 speculation. An expert must have some factual basis for their opinion, (**FRE** Rule 702) and  
28 here Dr. Cohen has none. Moreover, Azoogole has stipulated in this case that it has no opt-in

1 data for the subject emails. Consequently, Dr. Cohen's opinion that ASIS customers may have  
2 asked for the spam emails, is now irrelevant to this case. Plaintiff requests the Court exclude  
3 Dr. Cohen's pure speculation, and testimony on matters now clearly irrelevant.

4 Dr. Cohen's report, P9 Opinion 13, is that "white labeling" is "standard practice in all  
5 manners of business." Dr. Cohen has not been offered as an expert in marketing, business  
6 practices, nor internet marketing via bulk commercial email. It is also clear that Dr. Cohen  
7 lacks such experience as well. See pages 53 and 54, Cohen Depo. Exhibit "B" hereto. Dr.  
8 Cohen is unqualified to state the opinion that "white labeling" is standard practice in all  
9 manners of business, and as such, must be excluded.

10 Dr. Cohen's report, pages 9 and 10, Opinion 14, states that the materials he reviewed,  
11 do not demonstrate to Dr. Cohen that Azoogole induced the subject emails to be sent. Again,  
12 this is a conclusion of ultimate fact that should be left for the jury to decide.

13 Dr. Cohen's report, P10, Opinion 15, offers a litany of possible explanations for the  
14 subject emails, such as: 1. insider fraud on the part of Plaintiff's employees or contractors, 2.  
15 Plaintiff fabricated the emails, and 3. disgruntled ex-employee maliciously signed up all of the  
16 recipient email addresses. Again, an expert must have some factual basis to make such  
17 claims, **FRE** Rule 702. Dr. Cohen has none. Dr. Cohen testified at his deposition:

18 Q: Do you have any evidence as you sit here today that the  
19 emails at issue in this lawsuit were fabricated?  
(objection by Defense counsel excised)

20 A: I don't know whether I have any evidence or not, but I don't  
21 know of any evidence that I've been provided with that would  
22 in any way definitively show whether or not the information  
23 provided by Nella White was fabricated or how it was  
fabricated."

Page 89 Lines 1-10. (emphasis added) Exhibit "B" hereto

24 Unless Dr. Cohen can point to some specific, credible, logical evidence, on which to  
25 base his expert opinions, he should not be allowed to speculate to the jury on the mere  
26 possibility of insider fraud, disgruntled ex-employees, fabrication by Plaintiff, etc. **FRE** Rule  
27 702 Finally, on this point, none of these potential hypothetical possibilities, are rebuttal of Mr.  
28 Posluns report.

1 **4. Azoogle contends it is justified in filing its supplemental report of Dr.**  
2 **Cohen, on the grounds that Plaintiff did not timely respond to its request to**  
3 **disclose the depositions of Carl Scoles and Josh Mohland.**

4 Defendant offers that Plaintiff designated the depositions of Messer's Mohland and  
5 Scoles as AEO, and that as a result, it could not timely provide those transcripts to Dr. Cohen.

6 First, Defendant has not pointed to any such designation of those transcripts by Plaintiff  
7 as AEO, nor can Plaintiff find any such designation anywhere in the file. Defendant said it, but  
8 offered no proof or documentation of it.

9 Second, the timing problem is entirely one of Defendant's creation by waiting till the last  
10 possible days to take Mr. Mohland and Mr. Scoles depositions. Mr. Mohland and Mr. Scoles'  
11 declarations were provided to Defense counsel on August 9<sup>th</sup>. Dr. Cohen's rebuttal report was  
12 not due for some sixty days later, on October 10<sup>th</sup>. 60 days is plenty of time to take two  
13 depositions, order the transcripts, and provide same to an expert. Defendant simply cannot  
14 state it was Plaintiff's fault that Defendant did not timely take depositions, and provide same to  
15 its expert. Where does Defendant state Plaintiff did not produce Mr. Scoles or Mr. Mohland on  
16 the first date Defendant requested?

17 On a general note, Defendant's Opposition seeks to supplement the expert reports,  
18 essentially starting over, since if Dr. Cohen supplements his report, Plaintiff would then seek to  
19 supplement Mr. Posluns' report. The problem with that, is the parties have already deposed  
20 each other's expert. Expert depositions are particularly expensive. Mr. Posluns had to travel  
21 from Ontario, Canada to San Francisco to appear for his deposition. It would be unfair for  
22 these costs to be again incurred, simply because Azoogle failed to comply with the Court's  
23 scheduling order, and, as Defendant's Opposition reveals, did so without justification.

24 Defendant's Opposition, page 10, Lines 21-26, offer five legal theories which, Defendant  
25 contends, render relevant Dr. Cohen's opinion that Plaintiff disabled its spam filter. Plaintiff will  
26 list each such "theory" together with a discussion of same. Plaintiff seeks to dispense now with  
27 such spurious legal theories, so as to avoid the necessity of addressing them again at  
28 summary judgment or trial.

///

- 1 a. Whether ASIS was acting as a provider of Internet access services when it  
2 decided to remove its filters to initiate a lawsuit.

3 The definition of whether an entity is sufficiently an Internet access provider is set  
4 by the CAN SPAM Act. 47 **U.S.C.** Section 231 (e)(4). Defendant has not contended  
5 Plaintiff is not an IAP, and indeed, Dr. Cohen, Plaintiff's own expert, concedes as much  
6 in his report. (Exhibit "C") hereto. Consequently, Defendant would apparently like to  
7 argue that Plaintiff was acting as something other than an IAP, when it modified its  
8 spam filtering. Defendant has cited no authority for this proposition, nor can Plaintiff  
9 think of any. Defendant cannot divide off the activities of ASIS, without some legal  
10 basis for doing so.

- 11 b. Whether ASIS was adversely affected by the alleged emails.

12 Apparently Defendant is contending that Plaintiff was not adversely effected,  
13 since if the spam filters were properly configured, the subject spam would have been  
14 caught by the filter, and hence Plaintiff would not have suffered adverse effect. Plaintiff  
15 uses a filtering service, called "Postini." Part of this service, for which Plaintiff pays a  
16 fee, includes bandwidth and server storage space, to handle and store the filtered off  
17 spam. (The spam has to be stored so that ASIS clients can look in the bulk mail box to  
18 find legitimate emails that were incorrectly flagged as spam). Whether the subject spam  
19 were stored at Postini or stored on ASIS servers, is irrelevant, because either still  
20 constitutes adverse effect. ASIS still has to pay for that bandwidth and server space,  
21 regardless of where the spam is filtered and stored, as Plaintiff has to pay for it in either  
22 event.

23 The court in ***Hypertouch, Inc. v. Kennedy-Western University***, Slip Copy, 2006  
24 WL 648688 at 4 (N.D.Cal. 2006), stated:

25 "As for adverse affect, Hypertouch has submitted a  
26 declaration indicating that high spam loads have caused  
27 decreased server response and crashes, led to higher  
28 bandwidth utilization, and forced expensive hardware and  
software upgrades. Given the thousands of spam messages  
that plaintiff has shown were received by its servers, this is a  
reasonable statement creating an issue of material fact."

1 This definition is supported by the actual language of the **CAN SPAM Act**:

2 “The growth in unsolicited commercial electronic mail  
3 imposes significant monetary costs on providers of Internet  
4 access services, businesses, and educational and nonprofit  
5 institutions that carry and receive such mail, as there is a  
6 finite volume of mail that such providers, businesses, and  
7 institutions can handle without further investment in  
8 infrastructure.”

9 15 **USC** 7701(6)

10 So too here. Dr. Cohen said it best himself:

11 *“I believe that in the overall, plaintiff and everybody I know that uses the internet  
12 suffers adverse effects from getting large volumes of emails that they don’t wish to  
13 receive.”* Cohen Depo, P76 L3-6

14 c. Whether ASIS invited the alleged harm that it suffered.

15 It is unclear what legal doctrine Defendant is referring to. Plaintiff can think of no  
16 legal theory legal or equitable, that might remotely have any application. Plaintiff might  
17 suppose that Defendant means to say that Plaintiff consented to receiving the emails, in  
18 that it changed the settings for its spam filtering service. Consent is specifically  
19 addressed by the CAN SPAM Act, which is the “opt-in” procedure. Defendant has  
20 stipulated it has no opt-in data for any ASIS clients. Moreover, the CAN SPAM Act  
21 imposes liability for sending emails, and whether they are received by a spam filtering  
22 service, or Plaintiff’s first set of servers, or second or Plaintiff’s end user clients, is  
23 irrelevant.

24 d. Whether ASIS has unclean hands with respect to the actions at issue.

25 The unclean hands doctrine bars relief to a plaintiff who has violated conscience,  
26 good faith or other equitable principles in his prior conduct, as well as to a plaintiff who  
27 has dirtied his hands in acquiring the right presently asserted. Bad intent is the essence  
28 of the defense. ***Dollar Systems, Inc., v Avcar Leasing Systems, Inc.***, 890 F.2<sup>nd</sup> 165,  
173 (9<sup>th</sup> Cir. 1989) Even if it were shown that ASIS modified its spam filtering service  
for the sole purpose of being able to file suit against those entities sending spam to  
ASIS, such conduct cannot be said to violate conscience, good faith, or any other

1 equitable principle.

2 e. Whether ASIS has failed to mitigate the alleged harm it suffered.

3 This has been addressed above, Page 3, Lines 8-10. As noted, Judge Conti  
4 ruled the failure to mitigate doctrine is unavailable to Defendants in a CAN SPAM Act  
5 prosecution. Judge Conti wrote:

6 “The court further finds that the affirmative defense which  
7 Defendants propose to add to their answer runs contrary to  
8 the structure of the CAN SPAM Act as a whole, shifting from  
9 the spammer to the receipt of SPAM the responsibility to  
10 limit receipt of unwanted spam.” ....

11 “By requiring recipients, rather than spammers, to take  
12 actions necessary to limit their receipt of spam, Defendants’  
13 proposed affirmative defense would turn this section of the  
14 Act on its head.”

15 Likewise, each of Defendants “theories” as to why it is relevant that Plaintiff  
16 changed the configuration of its spam filtering service, would have the incongruous  
17 effect Judge Conti clearly stated would turn the CAN SPAM Act on its head. Plaintiff  
18 respectfully requests the Court dispose of such legal fallacies at this juncture, so as to  
19 save the resources of reviewing them again on Summary Judgment or trial.

20 Therefore Defendant’s expert opinions should be excluded.

21 **SINGLETON LAW GROUP**

22 Dated: November 29, 2007

23 /s/ Jason K. Singleton  
24 Jason K. Singleton,  
25 Richard E. Grabowski, Attorneys for Plaintiff,  
26 **ASIS INTERNET SERVICES**