

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

KRONENBERGER BURGOYNE, LLP
Henry M. Burgoyne, III (CA Bar No. 203748)
Karl S. Kronenberger (CA Bar No. 226112)
Jeffrey M. Rosenfeld (CA Bar No. 222187)
Deepa Krishnan (CA Bar No. 228664)
150 Post Street, Suite 520
San Francisco, CA 94108
Telephone: (415) 955-1155
Facsimile: (415) 955-1158

Attorneys for Defendant, AZOOGLEADS.COM, INC.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ASIS INTERNET SERVICES, a California corporation,

Plaintiff,

vs.

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

Defendants.

Case No. C-05-5124 JCS

**AZOOGLEADS.COM'S INC.'S
OPPOSITION TO PLAINTIFF'S
MOTION FOR EVIDENTIARY
SANCTIONS FOR FAILURE TO
PRODUCE WITNESS AT DEPOSITION**

Date: December 7, 2007

Time: 9:30 A.M.

Ctrm: A, 15th Floor

The Honorable Joseph C. Spero

INTRODUCTION

Plaintiff ASIS Internet Services ("ASIS")'s Motion for Evidentiary Sanctions for Failure to Produce Witness at Deposition ("Motion") is ironic – not so much because ASIS deposed Jennifer Evans before filing it or because Ms. Evans couldn't have known relevant facts, but because the only party to postpone the deposition of Ms. Evans was ASIS. And unlike Ms. Evans, who postponed her deposition at the direction of her doctor and then upon the death of her spouse's brother, ASIS's only excuse for twice postponing Ms. Evans's deposition was the supposed unavailability of ASIS's lead

1 counsel, who didn't ultimately participate in the deposition anyway. ASIS's decision to
2 bring these circumstances to the Court's attention suggests that more than 1 year and
3 almost \$1 million in joint fees and costs after Azoogleads.com, Inc. ("Azoogle") was
4 added as a party, ASIS has yet to comprehend either the seriousness of this action or
5 the magnitude of its burden of proof.

6 ASIS's Motion, as other of its filings, brims with inaccuracies and misstatements.
7 Except as directly relevant to these issues, Azoogle does not attempt to correct them.
8 Azoogle simply notes that, as the transcript of Ms. Evans's deposition makes clear, and
9 as Azoogle explained to ASIS months earlier, Ms. Evans's position as Affiliate Manager
10 afforded her no opportunity to learn information concerning Seamless Media Corp. or
11 any other Azoogle lead vendor, or concerning any of the events, actors or issues raised
12 by ASIS's claims. To suggest that a delay in deposing Ms. Evans translates into
13 sanctions tantamount to a judgment for ASIS is ludicrous, and is not supported by any of
14 the multiple authorities ignored by ASIS.

15 ASIS's recent trio of (to be kind) unconventional discovery motions are perhaps
16 the best examples of tactics that, taken as a whole, leave little doubt about ASIS's
17 intention to impose additional costs on Azoogle while deferring any adjudication on the
18 merits. If ASIS were as cocksure as it has always represented itself to be, it would be
19 eschewing these and other of its current tactics (e.g., proposing that summary judgment
20 motions be heard one week after the case management conference) in favor of a
21 process calculated to resolve this case at the earliest reasonable time. For those and
22 other reasons, the Court should deny ASIS's Motion and permit the parties to turn to
23 summary judgment.

24 25 **STATEMENT OF FACTS**

26 Jennifer Evans is a former Affiliate Manager for Azoogle who resides in Toronto,
27 Canada. (Declaration of Stephen Fox in Opposition to Motion for Evidentiary Sanctions
28 for Failure to Produce Witness at Deposition ("Fox Decl.") ¶¶5 & Ex. B at 11:14-22.) As

1 an Affiliate Manager, Ms. Evans had no involvement in Azoogle’s work with vendors—
2 the third parties whose lead provision activities ASIS claims to be at issue in this case.
3 (*Id.* ¶5 & Ex. B at 23:9-24:8.) Whether it was contract negotiations, lead generation, or
4 addressing spam complaints, the operations of third party vendors were outside the
5 scope of Ms. Evans’s responsibility as an Affiliate Manager. (*Id.* ¶5 & Ex. B at 23:9-24:8,
6 77:18-78:10.)

7 Despite Ms. Evans’s demonstrated lack of knowledge relating to ASIS’s claims,
8 ASIS noticed the deposition of Ms. Evans for July 18, 2007 in New York. (Fox Decl. ¶7.)
9 A week before the scheduled deposition, Ms. Evans suffered complications with her
10 pregnancy. (*Id.*) As a result, Ms. Evans was unable to travel to New York, and was thus
11 forced to postpone her deposition. (*Id.*) The parties agreed to reschedule Ms. Evans’s
12 deposition for August 27, 2007. (Fox Decl. ¶8.) However, days before the deposition
13 was to go forward, Ms. Evans’s brother-in-law passed away. (*Id.*) Ms. Evans was
14 naturally unable to go forward with the deposition, and ASIS’s counsel was immediately
15 informed of this situation. (*Id.*) Mr. Singleton, skeptical of Mr. Evans’s motives,
16 demanded a death certificate—which Ms. Evans produced. (*Id.* ¶8 & Ex. C.)

17 Because the first two depositions were postponed on account of Ms. Evans’s
18 unavailability, Azoogle agreed to pay the costs for a video-conference hookup that would
19 permit ASIS’s counsel to depose Ms. Evans from the West Coast. (*Id.* ¶9.) On August
20 31, 2007, Mr. Singleton requested that such video-conference deposition be conducted
21 on September 7, 2007, on which date Mr. Singleton planned to be in San Francisco.
22 (Declaration of Henry M. Burgoyne, III in Opposition to Motion for Evidentiary Sanctions
23 for Failure to Produce Witness at Deposition (“Burgoyne Decl.”) ¶2 & Ex. A.) Azoogle’s
24 counsel agreed, and began making preparations to conduct Ms. Evans’s deposition on
25 that date. (*Id.* ¶¶2-3 & Exs. A-B.) However, three days before the scheduled deposition,
26 Mr. Singleton cancelled the deposition on account of personal child-care issues. (*Id.* ¶4
27 & Ex. C.) The parties rescheduled Ms. Evans’s video-conference deposition again for
28 September 17, 2007, with Mr. Singleton’s associate, Richard Grabowski, to take the

1 deposition while Mr. Singleton participated in the deposition of third party Seamless
2 Media Corp. (Fox Decl. ¶12.) Again, three days before the scheduled deposition, Mr.
3 Singleton reneged on that agreement, claiming that he personally was entitled to
4 participate in Ms. Evans's deposition. (Burgoyne Decl. ¶5 & Ex. D.) Azoogle held the
5 deposition anyway, so as to create a record of its attempts to provide for Ms. Evans's
6 deposition prior to the September 18, 2007 close of discovery. (Fox. Decl. ¶13 & Ex. D.)

7 Also in September, Azoogle attempted to arrange a three-way video conference
8 that would have permitted Mr. Singleton to take Ms. Evans's deposition from his
9 hometown of Eureka, California. (*Id.* ¶9.) However, Eureka's sole video conference
10 facility did not support the state-of-the art, Internet-based conferencing technology used
11 by Azoogle; thus, no connection could be established. (*Id.* ¶¶9-10.)

12 By the end of September, Ms. Evans and others in her department had been let
13 go by Azoogle in a company reorganization. (Fox Decl. ¶15.) Even so, Azoogle
14 continued to work with Ms. Evans to arrange her deposition, which took place by video
15 conference on November 16, 2007. (*Id.* ¶¶15, 22.) ASIS's counsel took the deposition
16 of Jennifer Evans on November, 16, 2007. (*Id.* ¶5 & Ex. B.) Despite Mr. Singleton's
17 having twice canceled Ms. Evans deposition on the grounds that he was not personally
18 available to attend, it was Mr. Singleton's associate, Richard Grabowski, and not Mr.
19 Singleton who participated in the deposition.

20 21 DISCUSSION

22 **A. Sanctions Are Inappropriate Because Azoogle Made a Good Faith Effort to** 23 **Produce Jennifer Evans—And in Fact Produced Ms. Evans for Deposition.**

24 While it is true that Mr. Evans twice postponed her deposition, those
25 postponements resulted from unforeseen and extenuating personal circumstances
26 (complications of Ms. Evans's pregnancy and the death of Ms. Evans's brother-in-law)
27 completely beyond the control of Azoogle. (*Id.* ¶¶8-9, & Ex. C.) In the face of Ms.
28 Evans's medical exigencies and a death in Ms. Evans's family, Azoogle worked with Ms.

1 Evans and ASIS to arrange Ms. Evans’s deposition. (*Id.* ¶¶9-22 & Exs. D-F; Burgoyne
2 Decl. ¶¶2-5 & Exs. A-D.) That deposition was completed before ASIS filed this Motion—
3 which motion ASIS promised not to pursue if the Evans deposition went forward. (Fox
4 Decl. ¶¶ 17, 22 & Ex. F.) As the record (including the transcript of Ms. Evans’s
5 deposition) demonstrates, Azoogle undertook significant efforts to secure the production
6 of Ms. Evans, even though she couldn’t have had any relevant knowledge and even
7 though at the time of her deposition she no longer worked for Azoogle.

8 Ironically, the only party to cancel the deposition of Ms. Evans was ASIS. And
9 ASIS did so twice—once because of ASIS’s lead counsel’s child care issues, and a
10 second time because ASIS’s lead counsel insisted that he, rather than his associate Mr.
11 Grabowski, be available to participate. (Burgoyne Decl. ¶¶2-5 & Exs. A-D; Fox Decl.
12 ¶¶12-13 & Ex. D.) In retrospect, both those reasons appear disingenuous, since it was
13 the associate Mr. Grabowski and not Mr. Singleton who ultimately conducted Ms.
14 Evans’s deposition. The only other postponement of Ms. Evans’s deposition resulted
15 from technical difficulties in establishing a video-conference connection—paid for by
16 Azoogle—that would have permitted ASIS’s lead counsel Mr. Singleton to depose Ms.
17 Evans from his hometown of Eureka, California. (Fox Decl. ¶¶9-10.)

18 The Federal Rules of Civil Procedure do not come close to imposing sanctions for
19 circumstances such as these. Rule 37 sanctions “are intended to punish evasion of pre-
20 trial discovery,” *Shervin v Perez*, No. 87-2171, 1991 WL 12776, *1 (9th Cir. Feb. 6,
21 1991), not to mandate strict compliance with a schedule in the face of family deaths and
22 medical exigencies. Circumstances beyond the control of the producing party simply do
23 not justify the imposition of sanctions. See *Falstaff Brewing Corporation v. Miller*
24 *Brewing Company*, 702 F.2d 770, 783-84 (9th Cir. 1983); see also *United States v.*
25 *Sumitomo Marine & Fire Insurance Co.*, 617 F.2d 1365, 1369 (9th Cir.1980) (recognizing
26 that is improper to dismiss a claim or to exclude evidence if the failure to comply with a
27
28

1 discovery order was due to circumstances beyond the party's control); accord *Emerick v.*
2 *Fenick Industries, Inc.*, 539 F.2d 1379, 1381 (5th Cir.1976) (same).¹

3 The case law cited by ASIS is readily distinguishable from the facts of the instant
4 matter. For example, *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101 (9th
5 Cir. 2001) addressed a situation where there was no justification for why the defendant
6 serves his expert report two years after the close of discovery and 28 days before trial.
7 *Yeti* is a far different situation from the case at hand, where Azoogle was prevented from
8 producing a witness, first because of medical emergencies, and later, because of a
9 death in the family. Similarly, ASIS's reliance on *Henry v. Gill Industries, Inc.*, 983 F.2d
10 943 (9th Cir. 1993) is misplaced. In *Henry*, the court addressed a pattern of intentionally
11 ignoring discovery obligations, including two occasions where a party witness refused to
12 appear for deposition based upon what the court termed "factually implausible" excuses.
13 *Henry*, 983 F.2d at 948-49. ASIS's remaining case law is similarly inapposite.² In the
14 instant matter, the reasons for the scheduling problems are verifiable and real.

15 Factors beyond the control of a party and its counsel do not warrant sanctions.
16 See *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A v.*
17 *Rogers*, 357 U.S. 197, 211-212 (1958); *Falstaff Brewing Corporation v. Miller Brewing*
18 *Company*, 702 F.2d 770 (9th Cir. 1983). The only party to cancel Ms. Evans's
19 deposition, and without any legitimate cause, was ASIS. Combine those cancelations
20 with ASIS's other conduct—e.g., demanding a death certificate for Ms. Evans's brother

21 _____
22 ¹ Accord *General Houses, Inc. v. Marloch Manufacturing Corp.*, 239 F.2d 510, 513
23 (2d Cir.1956) (dismissing for willful failure to appear pursuant to Rule 37 reversed
24 because no officers or former officers of corporation were within plaintiff's control, and
25 that under such circumstances, it would be impossible to comply with order and
26 therefore a fortiori improper to dismiss the action).

27 ² See *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, *passim* (9th Cir.
28 1985), (stating that circumstances outside the control of a party are not a basis for
sanctions and finding no justification for sanctions); *North American Watch Corp. v.*
Princess Ermine Jewels, 786 F.2d 1447, 1450-51 (9th Cir. 1986) (finding that sanctions
were warranted where a party misrepresented to the court that it did not have control
over certain documents); *G-K Properties v. Redevelopment Agency of San Jose*, 577
F.2d 645, 647-48 (9th Cir. 1978) (upholding dismissal where a party refused to turn over
financial records until shortly before trial and purposely disobeyed the orders of the
court).

1 in law—and one wonders why ASIS would even bring these events to the Court’s
2 attention.

3

4 **B. ASIS Has Suffered No Prejudice.**

5 Even if Azoogole had obstructed the deposition of Ms. Evans, ASIS suffered no
6 prejudice as a result. As an initial matter, on November 16, 2007 Azoogole produced
7 Jennifer Evans for deposition. Moreover, as the deposition of Ms. Evans reveals—and
8 as Azoogole has maintained throughout this lawsuit—Ms. Evans has no knowledge of
9 facts relevant to this lawsuit. Because Ms. Evans served as an Affiliate Manager for
10 Azoogole, and ASIS’s claims allegedly relate to third party vendors, Ms. Evans could not
11 have known relevant information.

12 ASIS tries to skirt this issue by stating that “there is no difference between
13 affiliates and third party vendors.” As is known to ASIS—which has countless times
14 foregone discovery as to affiliates and instead focused on vendors—that simply isn’t
15 true. For example, as Mr. Mossanen previously testified, and as Ms. Evans testified at
16 her deposition:

17 Q: What is your definition of an affiliate.

18 A: An affiliate is an individual or a company who owns either websites or is
19 engaged in search engine marketing or e-mail marketing that would drive
20 traffic through to our advertiser’s site.

21 Q: Were you familiar with third party vendors—third party contractors of
22 Azoogole?

23 A: Familiar with?

24 Q: Are you familiar with the term of first of first of all third party contractors?

25 A: Yes.

26 Q: What’s the definition of a third party contractor then?

27 A: Well, the difference between third party is that they would not be on the
28 network as an affiliate. They would be a company who was Azoogole
would be on contract with for generating leads.

...

Q: What is the difference I’m I don’t understand the difference.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A: Third party vendors would not be signed up on the network the network being Azoogle Ads. To track the leads and revenue that they generated [t]hey would be on contract and use—bear with me while I try to remember the name of the technology that we used leads agents—leads agents to track traffic and leads coming in.

Q: So the difference [Objections omitted]

A: Lead agents is what third party vendors would use. Affiliates would use Azoogle Ads.com. (Fox Decl. ¶15 & Ex. B at 21:4-20, 22:10-24.)

Ms. Evans went on to testify that she never worked with Azoogle’s third party vendors during the relevant time period:

Q: What you worked on you worked with affiliates in 2005?

A: Yes.

Q: Did you work with third party contractors in 2005?

A: No.

...

Q: How About in 2006?

A: No.

Q: In 2007?

A: No. (Fox Decl. ¶15 & Ex. B at 23:9-14, 24:5-8.)

Nor did Ms. Evans have knowledge of the actors purportedly at issue in this lawsuit:

Q: Do you know who John Strothers is? [Objections omitted]

A: No.

Q: Has anyone ever mentioned that name to you at Azoogle?

A: Not that I can recall.

Q: Have you heard of the Bruce Wolfe lead? [Objections omitted]

A: No.

Q: So you haven’t had any discussions with anyone Azoogle concerning that lead?

A: No. Not that I recall.

. . .

Q: Even though as the director of affiliate management if this type of incident occurred [Complaints about the Bruce Wolf lead] wouldn’t you have been asked at least for information. [Objections omitted]

A: No.

Q: As the director of affiliate management.

A: Yes.

1 Q: Would you have been asked?

2 A: No.

3 Q: So you're not familiar with Seamless Media? [Objections omitted]

4 A: No.

5 . . .

6 Q: Did you hear of or do you know or do you know of how a SPAM complaint
7 concerning a third party would be handed by Julian? [Objections omitted]

8 A: No. I don't know how Julian would have conducted his business. (Fox Decl.
9 ¶5 & Ex. B at 75:14-76:6, 77:7-25, 89:4-11.)

10 Ms. Evans's testimony was never going to advance ASIS's case. How a delay in
11 receiving such testimony could prejudice ASIS is hard to imagine. For that reason
12 alone, ASIS's Motion should be denied.

13 **C. The Relief ASIS Seeks Does Not Relate to the Discovery Sought—Namely, the
14 Testimony of a Former Azoogle Employee with No Knowledge of the Relevant
15 Facts.**

16 Even if Azoogle somehow engaged in obstructionist conduct, and even if
17 that conduct somehow prejudiced ASIS, the evidentiary sanction sought by ASIS
18 is far outside the scope of sanctions countenanced by the Federal Rules of Civil
19 Procedure. An evidentiary sanction designating certain facts be taken as true and
20 established for the purposes of the action must relate to the discovery that was
21 sought. W. Schwarzer et al., *California Practaice Guide: Federal Procedure Before
22 Trial* ¶11:2411, citing Fed. R. Civ. Pro. 37(b)(2)(A), *Insurance Corp. of Ireland, Ltd. v.
23 Compagnie des Bauxites de Guinee*, 456 U.S. 694, 695 (1982); *General Ins. Co. of
24 America v. Eastern Consolidated Utilities, Inc.*, 126 F.3d 215, 220-21 (3d Cir. 1997)
25 (dictum). ASIS has failed to make any such showing.

26 Ms. Evans's deposition testimony reveals that she does not have knowledge of
27 the facts relevant to this lawsuit: While employed with Azoogle, Ms. Evans never
28 handled contract negotiations, lead generation, or spam complaints with third party
vendors, and she has no knowledge of the facts, actors, leads, or emails at issue in this
case. It is impossible to imagine any connection between that informational void and a

1 compelled finding that Azoogle induced the sending of the alleged emails. ASIS's
2 request that the Court nevertheless impose that sanction smacks of an attempt to avoid
3 a serious examination of ASIS's allegations. Because ASIS provides the Court with no
4 authority supporting such a leap, ASIS's Motion must be denied in its entirety.

5
6 **CONCLUSION**

7 ASIS's current Motion makes clear that it misunderstands the severity of the
8 proceeding it has initiated. More than a year and almost \$1 million in joint fees and
9 costs after Azoogle was added to this litigation, can ASIS seriously believe that the
10 record regarding Ms. Evans's deposition might entitle it to *de facto* summary judgment?
11 Does it not perceive the difference between postponing a deposition at the direction of a
12 deponent's physician and postponing a deposition on account of child care issues
13 relating to an attorney who isn't even going to participate? For the foregoing reasons
14 and others too numerous to mention, the Court should deny ASIS's Motion in its entirety.

15
16
17 Dated: November 30, 2007

Henry M. Burgoyne
Karl S. Kronenberger
Jeffrey M. Rosenfeld
Kronenberger Burgoyne, LLP

18
19
20 By: _____ /s/
Henry M. Burgoyne, III

21
22 Attorneys for Defendant,
AZOOGLEADS.COM INC.