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**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 INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF ITS
MOTION FOR SUMMARY
JUDGMENT OR IN THE
ALTERNATIVE SUMMARY
ADJUDICATION**

Date: March 14, 2008
Time: 1:30 p.m.
Ctrm: A, 15th Floor

The Honorable Joseph C. Spero

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INTRODUCTION

1
2 More than two years after it was filed, this case has finally reached the merits stage.
3 Defendant Azoogles.com, Inc. (“Azoogles”) couldn’t be happier. Since the fall of 2006,
4 Azoogles has been saying that it had nothing to do with—in fact, couldn’t possibly have known
5 of—the vast conspiracy alleged in Plaintiff ASIS Internet Services, Inc. (“ASIS”)’s Second
6 Amended Complaint. Now, for the first time, Azoogles has an opportunity to prove its case.

7 The SAC alleged no facts regarding Azoogles, except that a single sales lead connected to
8 a single alleged unlawful email had once transited Azoogles’s systems. The SAC alleged that the
9 same sales lead had ended up in the hands of Azoogles competitor Leads Limited, Inc., the only
10 remaining defendant. Since the SAC was filed, Azoogles has wondered how ASIS planned to
11 prove that Azoogles and Leads Limited both played the same exclusive role of “lead generator.”
12 The answer, it now seems, is that ASIS didn’t have a plan, or at least a good one.

13 ASIS’s problems of proof occur on a variety of levels, and are too numerous to document
14 in 25 pages. The most obvious problem is ASIS’s failure to discover any evidence whatsoever
15 that Azoogles procured the initiation of the alleged 12,756 emails (the “Emails”). Other of ASIS’s
16 problems include the absence of evidence that ASIS suffered adverse effects, as are required for
17 ASIS’s standing; the absence of *bona fide* forensic evidence tying the emails to each other, much
18 less to a single (unidentified) sender; and ASIS’s unwillingness or inability to prove, on an email-
19 by-email basis, that the Emails violated CAN-SPAM. ASIS provides no authority for its belief
20 that it can prove Azoogles’s liability for what amounts to 12,756 separate transactions by reference
21 to hand-picked examples. Certainly, Azoogles is aware of none.

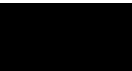
22 This case is not unique. Internet marketing companies across the country are standing up
23 to plaintiffs who file lawsuits based on nothing more than an in-box of spam and a hunch.
24 Increasingly, those Internet marketing companies are winning, for the simple reason that if
25 Congress had intended to ban email and other Internet-based marketing, it would plainly have
26 said so. Instead, it incorporated into CAN-SPAM standing requirements and an attorneys’ fees
27 clause intended to deter just this type of case. CAN-SPAM is on Azoogles’s side. And as this
28 motion demonstrates, so are the facts. For those reasons, and others stated herein, the Court

1 should grant Azoogles motion for summary judgment or, in the alternative, summary
2 adjudication.

3 **BACKGROUND**

4 **I. ASIS's CAN-SPAM Litigation Plan.**

5 Nella White ("White"), President of ASIS Internet Services, is no friend of mortgage
6 lenders, having once been deluged with "nuisance phone calls" after she requested mortgage
7 information over the Internet. Azoogles.com, Inc's Separate Statement of Undisputed Facts in
8 Support of Motion for Summary Judgment or in the Alternative Summary Adjudication ("Sep.
9 State.") No. 35. Nor is White a fan of "spam," which she believes is "ruin[ing] the Internet."
10 Sep. State. No. 36.

11 In late summer 2005, ASIS retained counsel (the Singleton Law Group, hereafter
12 "Singleton") for the purpose of pursuing spam-related lawsuits. Sep. State. No. 1. 

13 
14  Sep. State. Nos. 5, 11.

15 Soon, ASIS was providing those emails to Singleton on a nightly basis, so that Singleton could
16 incorporate them into its "Spam Database." Sep. State. Nos. 6, 14.

17 To collect emails, ASIS "aliases" the addresses of former users to a single account
18 pertaining to a user identified as "ng."¹ Sep. State. Nos. 7-8. As a result, no emails directed to
19 former users' addresses can be sent or delivered to, or received in, those users' mailboxes.² Sep.
20 State. No. 9. Because ASIS does not deactivate former users' email addresses, emails directed to
21 those addresses do not "bounce back," creating the deception that former users' accounts remain
22 active and valid. Sep. State. Nos. 82-83. ASIS also disables all spam filtering for former users'
23 addresses, such that all emails directed to them pass straight through Postini. Sep. State. Nos. 77-
24 78. Some of the emails collected by ASIS list as recipients ASIS's current users; others list third
25

26 ¹ Defendant Azoogles.com, Inc. ("Azoogles") cannot confirm, but believes that "ng" refers to
27 Nick Grabowski. Whoever "ng" may be, he or she does not use his or her account in the same
28 manner as other ASIS users. Sep. State. No. 10.

² Curiously, ASIS has aliased 1507 email addresses to the "ng" account, despite that its user base
is less than 1000. Sep. State. Nos. 8, 135.

1 parties unrelated to ASIS. Sep. State. Nos. 17-18. ASIS has no way of determining whether its
2 users make their email addresses publicly available, and therefore, neither ASIS nor its counsel
3 can determine whether any of ASIS’s former users opted to receive the emails collected for the
4 Spam Database. Sep. State. Nos. 22-23. ASIS’s CAN-SPAM litigation initiative is off to a fast
5 start, in that ASIS has filed six CAN-SPAM cases in just over two years.³

6 **II. Singleton’s Spam Database.**

7 Primarily on account of ASIS, Singleton’s Spam Database has grown quickly. By late
8 summer 2007, it incorporated approximately 10 million emails—6 or 7 million from ASIS, the
9 rest from two other Singleton clients—and was growing at a rate of 20,000 to 200,000 emails per
10 day. Sep. State. Nos. 15-16. Designed by Nick Grabowski, son of Singleton associate Richard
11 Grabowski, the Spam Database contains emails that do not violate CAN-SPAM, and that do not
12 even constitute “commercial electronic mail messages.” Sep. State. Nos. 6, 20-21.

13 In the interest of generating lawsuits on behalf of its clients, Singleton employees and
14 contractors search, sort, and visually review emails in the Spam Database. Sep. State. No. 19. In
15 at least one case (this one), Singleton used its discovery, in combination with the Spam Database,
16 to generate a whole new lawsuit based on emails ASIS already had received. Sep. State. No. 33.
17 Singleton does not require its employees and contractors to execute written employment or
18 contractor agreements, including any as would relate to confidentiality. Sep. State. Nos. 24-26.
19 At least one Singleton contractor, Dave Marshall, was provided a CD of the emails at issue in this
20 case (the “Emails”) without any instruction to keep them confidential and, to his recollection,
21 without signing the Court-ordered confidentiality agreement.⁴ Sep. State. No. 27. (ASIS lead
22 counsel Jason Singleton instructed Singleton investigators Josh Mohland and Carl Scoles not to
23

24 ³ *ASIS Internet Services v. Valueclick Inc.*, Case No. 07cv03261; *ASIS Internet Services v.*
25 *Azoogole.com, Inc.*, Case No. 07cv04360; *ASIS Internet Services v. Imarketing Consultants Inc.*,
26 *Case No. 07cv5357*; *ASIS Internet Services v. All In, LLC*, Case No. 07cv5717; *ASIS Internet*
27 *Services v. Active Response Group, Inc.*, Case No. 07cv6211. The second of those cases is
separate from this action. All ASIS’s lawsuits still are ongoing, except the one filed against
Valueclick, Inc.

28 ⁴ ASIS has designated the email addresses in the Emails, including those that do not pertain to
ASIS’s users or former users, as “Highly Confidential-Attorneys’ Eyes Only.”

1 respond to deposition questions about the Court-ordered confidentiality agreement, on the basis
2 that such questions invaded the “internal process[es]” of his office.) Sep. State. No. 28.

3 **III. “Bruce Wolf” Leads ASIS to Azoogle.**

4 AzoogleAds.com, Inc. is an Internet marketing company that assists its clients, by means
5 of arms-length contracts with independent entities, in the marketing of goods and services. Sep.
6 State. No. 44. Azoogle has never sent unsolicited email to generate potential sales contacts (also
7 known as “leads”) or for any other reason. Sep. State. No. 45.

8 On October 28, 2005, White clicked on a link appearing in one of the Emails. Sep. State.
9 No. 41. That link led White to a website, located at www.wumort.net, containing an application
10 for mortgage lending information. Sep. State. No. 41. White completed the application with
11 fictitious contact information, including the name “Bruce Wolf” and a telephone number
12 corresponding to a Singleton-operated answering machine. Sep. State. Nos. 42-43.

13 Later on October 28, Azoogle received from third party lead vendor Seamless Media
14 Corp. (“Seamless”) a mortgage lead in the name of Bruce Wolf (the “Bruce Wolf Lead”). Sep.
15 State. No. 47. Seamless had received the lead from another company, Scribe Interactive, Inc.
16 (“Scribe”), which in turn had received it from an apparent individual, John Stothers (“Stothers”),
17 perhaps by way of yet another entity, BestLeadz. Sep. State. Nos. 52, 56. At the time, Azoogle
18 had never heard of Scribe, Stothers or BestLeadz, and had no idea any played a role in providing
19 leads to Azoogle. Sep. State. Nos. 54-55, 57-58, 60-61. Nor, given Seamless’s good reputation
20 in the Internet marketing industry, did Azoogle have any idea that Seamless or its contractors
21 were, or might be, in any way connected to unlawful activity. Sep. State. Nos. 63-66, 68.

22 Azoogle’s contract with Seamless (the “Insertion Order”) barred Seamless from providing
23 leads generated by unlawful means. Sep. State. No. 48. It also prohibited Seamless from
24 providing Azoogle with any lead that had been provided to any other party. Sep. State. No. 48.
25 After learning of the violations relating to the Bruce Wolf Lead, Azoogle received a credit for
26 amounts paid in connection therewith and, subsequently, terminated its relationship with
27 Seamless. Sep. State. Nos. 69-70. In early 2008, Azoogle filed an arbitration demand against
28 Seamless for indemnification under the Insertion Order. Sep. State. No. 69.

ARGUMENT

I. ASIS Must Proffer Significant, Probative Evidence To Survive This Motion.

Where the movant has demonstrated an absence of proof, a party opposing summary judgment the opposing party must produce significant, probative evidence sufficient to sustain a jury verdict on every issue as to which it bears the burden of proof. *See Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir. 1995). Where the factual context renders the non-moving party's claim of a disputed fact implausible, then that party must come forward with more persuasive evidence than otherwise would be necessary. *See Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1998), *citing California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir.1987).

II. ASIS Cannot Demonstrate Standing Under CAN-SPAM.

Pursuant to 15 U.S.C. §7706(g)(1), “[a] provider of Internet access service adversely affected by a violation of section 7704(a)(1), (b), or (d)⁵ ... or a pattern or practice that violates paragraph (2), (3), (4), or (5) of section 7704(a)⁶ ... may bring a civil action in any district court . . .” The recent case of *Gordon v. Virtumondo, Inc.* (“*Gordon*”), Case No. 06-0204, 2007 WL 1459395 (W.D. Wash. May 15, 2007) construed that language as imposing two distinct requirements: 1) that the plaintiff be a provider of an Internet Access Service (an “IAS”), and 2) that the plaintiff be adversely affected.

Regarding the second requirement, the *Gordon* Court reasoned that Congress intended to grant standing only where the adverse effects in question were “real,” “significant,” and “of the type uniquely experienced by IASs . . .” *Gordon*, 2007 WL 1459395 at *7-8. As examples, the *Gordon* Court cited “network functioning, bandwidth usage, increased demands for personnel, and new equipment needs ...” *Id.* at *7. The *Gordon* Court further reasoned that Congress intended “the definition of an IAS to be considered in conjunction with the harm caused,” in particular where a purported IAS seeks only statutory damages. *Id.* at *7-8. Any other construction, the *Gordon* Court concluded, would render Section 7706(g)(1)’s “limited” standing

⁵ As concerns this case, those sections relate to materially false or misleading header information and the use of email addresses obtained by unlawful automated or electronic means.

⁶ As concerns this case, those sections relate to deceptive subject headings.

1 requirement a nullity, and would “permit[] private parties with *no harm* to invoke CAN-SPAM to
2 collect millions of dollars . . .” *Id.* at *8 (emphasis in original).

3 **A. As Relates to the Emails, ASIS Did Not Function as an IAS.**

4 ASIS may be an IAS in other contexts. With regard to the Emails and this litigation, it
5 was playing another role.

6 The *Gordon* Court could have been describing ASIS when it observed:

7 [B]ecause other entities actually house the hardware and bandwidth that could be
8 burdened by spam, Plaintiffs' structural dependence might be quite significant.
9 Moreover, because Plaintiffs' volume is so small, it is unlikely that they alone
10 would realize the ISP- or IAS-specific strains described by Congress ... Apart
11 from the question of whether Plaintiffs actually realized any adverse effects, these
12 factors suggest that Plaintiffs might not be an IAS as Congress envisioned one.
13 *Id.* at *7.

14 It is undisputed that ASIS, like the *Gordon* plaintiff, [REDACTED]

15 [REDACTED] Sep. State.

16 Nos. 92-93, 100-103. It also is undisputed that ASIS, like *Gordon*, does not disable relinquished
17 email accounts, but leaves them open for the sole purpose of generating litigation. Sep. State.
18 Nos. 11, 82-84. The Emails were directed to ASIS’s then-current users at a rate of just one every
19 2.75 hours.⁷ Had ASIS not been trolling for lawsuits, neither it nor anyone else would have
20 noticed the Emails, since they almost certainly would have been filtered by Postini. Sep. State.
21 No. 79.

22 In just over two years, ASIS’s CAN-SPAM litigation plan has matured into a separate
23 business that increasingly marginalizes its Internet operation. For example:

- 24 • ASIS has retained counsel, [REDACTED]

25 [REDACTED] Sep. State. Nos. 1, 3-4, 14, 19.

- 26 • ASIS systematically provides the emails it collects to Singleton to be searched, sorted,
27 reviewed, and converted into lawsuits. Sep. State. Nos. 11, 19. The high number
28 (1,507) of email addresses aliased to the “ng” account raises the possibility that ASIS

⁷ See section III C.1, below, for calculation of Emails directed to ASIS’s then-current users.

1 created hundreds of additional addresses just for its litigation initiative. Sep. State. No.
2 8.

- 3 • ASIS avoided configuring its email server in ways that would have excluded certain
4 spam, and effectively disabled Postini's spam filtering in relation to the aliased email
5 addresses. Sep. State. Nos. 86-88.

6 ASIS's efforts have netted six lawsuits in just over two years. Should it succeed in the current
7 action, it would earn many, many times its historical revenue.⁸ Sep. State. Nos. 38-40.

8 The only problem with ASIS's plan is that it violates the law, specifically the Electronic
9 Communications Privacy Act. 18 U.S.C. §2511(3)(a); *see Hall v. Earthlink Network, Inc.*, 396
10 F.3d 500 (2d Cir. 2005) (IAS violates ECPA when it intercepts customer emails when not acting
11 in ordinary course of business) (*dicta*). ASIS does not appear to have the consent of its current or
12 former users, and almost certainly doesn't have the consent of third parties, to intercept and
13 divulge their email communications. Sep. State. Nos. 22-23. The situation is exacerbated by
14 Singleton's failure to seek employment and contractor agreements (including as relate to
15 confidentiality) with its personnel. Sep. State. Nos. 24-28. One contractor to whom Singleton
16 gave the Emails could not even remember executing the Court-ordered confidentiality agreement,
17 despite that Singleton designated the addresses in the Emails as "Highly Confidential-Attorneys'
18 Eyes Only." Sep. State. Nos. 26-27. Combine those violations with the deception resulting from
19 ASIS aliasing its former users' email addresses, and one might conclude ASIS sometimes forgets
20 it still operates an IAS.⁹

21 In the same way that an interactive computer service cedes Communications Decency Act
22 Section 230(c) immunity when it slips into the role of "information content provider."¹⁰ ASIS

23 _____
24 ⁸ ASIS expert Jeffrey Posluns ("Posluns") testified that he found ASIS's \$16 million damages
claim to be "rather high." Sep. State. No. 40.

25 ⁹ Posluns testified that he would not advise a client to leave open the email accounts of former
26 users, as such might violate Canadian privacy laws. (Posluns's firm, SecuritySage Overdrive, Inc.
is located in Canada.) Sep. State. Nos. 30-32. Posluns further testified that he considered it an
27 invasion of privacy to even share server logs regarding users' email communications, because
such logs reveal whom individuals have correspond with, as well as how often and when they
28 have done so. Sep. State. No. 29.

¹⁰ *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003).

1 should not be permitted to claim CAN-SPAM standing when, at least with respect to the Emails,
2 its operation departs from, if not subverts, its duties as an IAS. None of the aliased email
3 addresses pertains to then-current ASIS users. Sep. State. Nos. 8, 72. ASIS’s continued use of
4 those addresses to “generat[e] lawsuit-fueled revenue” suggests that ASIS, at least in this context,
5 is “not the type of entity that Congress intended to possess the limited private right of action”
6 granted by Section 7706(g)(1). *Gordon*, 2007 WL 1459395 at *9.

7 **B. The Evidence Refutes that ASIS Suffered Any Adverse Effects.**

8 ASIS, it ends up, exaggerated when it claimed to have “suffer[ed] egregious injury by a
9 group of conspirators ...” (ASIS’s Opposition to Aegis Corp., *et al.* Motion to Dismiss 1:26-27)

10 Again, the *Gordon* Court could have been speaking about ASIS when it observed:

11 Plaintiffs undisputedly have suffered no harm related to bandwidth, hardware,
12 Internet connectivity, network integrity, overhead costs, fees, staffing, or
13 equipment costs, and they have alleged absolutely no financial hardship or
14 expense due to e-mails they received from Defendants. ... [E]ven if there is some
15 negligible burden to be inferred ... it is not enough to establish the “adverse
16 effect” intended by Congress. ... The fact that Congress did not confer a private
17 right of action on consumers at large means that “adverse effect” ... must rise
18 beyond the level typically experienced by consumers- i.e., beyond the annoyance
19 of spam. *Id.* at *8.

20 ASIS’s discovery responses claimed a range of adverse effects, including “monetary
21 losses in the form of: the purchase of SPAM filtering services, a likely increase in the cost of
22 purchasing ... bandwidth [sic.], consumption of employee time to address client complaints
23 regarding spam, and to configure solutions to the false positive and false negative aspects of spam
24 filtering, a necessity to increase server capacity, increased service charges, and a partial
25 disruption of services . . .” Sep. State. No. 207. Those supposed adverse effects—relating to
26 spam generally and not to the Emails in particular—are irrelevant, since Section §7706(g)(1)
27 speaks to adverse effects resulting from the alleged violations. And even if generalized adverse
28 effects were relevant, the undisputed evidence demonstrates that none occurred:

- Purchase of Spam Filtering Services: ASIS began subscribing to Postini in 2001. Sep.
State. No. 92. White testified that every IAS uses a spam filtering service, whether
internal or external. Sep. State. No. 94. White further testified that users sometimes
select an IAS based on its spam filter, and that certain ASIS users signed up specifically

1 because of Postini. Sep. State. Nos. 95-97. Besides spam filtering, Postini offers a range
2 of other services, from virus filtering to attack blocking to email traffic monitoring. Sep.
3 State. No. 93. ASIS even publicizes its use of Postini on its homepage. Sep. State. No.
4 98. Postini charges ASIS based on ASIS's total number of email addresses (including
5 those aliased to the "ng" account), and not based on email volume, meaning ASIS's costs
6 do not increase with the amount of spam directed toward ASIS's email server. Sep. State.
7 No. 99.

- 8 • Bandwidth Costs: [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED] Sep. State. No. 103.

- 12 • Employee Time/User Complaints: White testified that ASIS received no user complaints
13 regarding the Emails. (Likely, that's because any Emails directed to ASIS's then-current
14 users almost certainly were filtered by Postini.) Sep. State. No. 105. In fact, the only
15 ASIS employee to spend any time reviewing or responding to the Emails was White, and
16 she did so in order to initiate this lawsuit. Sep. State. Nos. 11, 106.

- 17 • Increased Server Capacity: [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED] Sep. State. No. 108.

- 22 • Disruption of Services: [REDACTED]
23 [REDACTED]
24 [REDACTED] Sep. State. Nos. 104, 110.

25 This case is distinguishable from *Hypertouch, Inc. v. Kennedy-Western University*, No. C
26 04-05203, 2006 WL 648688, *3 (N.D. Cal. March 8, 2006). In *Hypertouch*, the plaintiff
27 provided "mail server logs and screen captures" demonstrating more than 2,000 emails received
28

1 from the defendant. It submitted evidence that spam had “caused decreased server response and
2 crashes, led to higher bandwidth utilization, and forced expensive hardware and software
3 upgrades.” It even provided declarations from three customers. *Id.* at *3-4. ASIS has not, and
4 cannot now, produce any such evidence.

5 The only losses suffered by ASIS in connection with the Emails were the time spent
6 disabling Postini’s spam filtering and aliasing email addresses of former users, and payments to
7 Postini relating to the aliased email addresses. And ASIS voluntarily assumed those losses as
8 part of its ██████████ in its CAN-SPAM plan. ASIS long ago abandoned any claim for actual
9 damages, and seeks only statutory penalties in the amount of \$16 million. If Section 7706(g)(1)’s
10 limited private right of action is given “any traction at all,” the Court will deny ASIS standing.
11 *Gordon*, 2007 WL 1459395 at *8.

12 **III. Neither the Law nor the Facts Supports That Azoogole “Procured” the Emails.**

13 During the June 1, 2007 hearing on the parties’ cross-motions for summary adjudication,
14 the Court observed:

15 I think in order for there to be a procurement of an unlawful e-mail, there must be
16 an identity of the specific sender of the e-mail; that you can prove that this
17 defendant procured the specific activity and knowingly or in conscious disregard
18 of the fact that that third party was going to, had, or did, act in violation of the
19 CAN-SPAM act. I don’t see how you can possibly prove this case without that.

20 ASIS is no closer to meeting that burden than before it filed this action. Furthermore, to the
21 extent evidence exists on the subject of procurement, it all points to the fact that Azoogole did not,
22 and could not, have initiated or even known about the Emails, their sender(s), or the sender(s)’
23 propensity to commit a violation of CAN-SPAM.

24 **A. ASIS Cannot Possibly Prove Azoogole’s Knowledge.**

25 ASIS bears the burden of proving that Azoogole not only intended to initiate (or induce
26 another to initiate) the Emails, but that Azoogole did so “with actual knowledge, or by consciously
27 avoiding knowing, whether [the sender of the emails] is engaging, or will engage, in a pattern or
28 practice that violates [CAN-SPAM].” 15 U.S.C. §7706(g)(2). That is a burden ASIS cannot
meet, since undisputed evidence proves the contrary.

1 **1. ASIS Must Prove Azoogle’s Knowledge Regarding the Actual Sender.**

2 The single court decision known to Azoogle concerning Section 7706(g)(2) is
3 *Hypertouch, Inc. v. Kennedy-Western Univ.*, No. C 04-05203, 2006 WL 648688, *5-6 (N.D. Cal.
4 March 8, 2006). In granting the defendant’s motion for summary judgment, the *Hypertouch*
5 Court confirmed that CAN-SPAM liability could not be premised on anything less than
6 “evidence that [the defendant] had actual knowledge or consciously avoided knowledge of a
7 current or future violation of the CAN-SPAM Act by anyone who sent the e-mails at issue.”
8 *Hypertouch*, 2006 WL 648688, at *5 (emphasis added).

9 The language of Section 7706(g)(2) is unambiguous, making specific reference to the
10 sender. Accordingly, there is no reason for the Court to look outside the statute’s plain text. *In re*
11 *County of Orange*, 262 F.3d 1014, 1018 (9th Cir. 2001) (“When the statute's language is plain,
12 the sole function of the courts—at least where the disposition required by the text is not absurd—is
13 to enforce it according to its terms.”). If the Court were to seek additional guidance, though, it
14 might first look to the likely source of Section 7706(g)(2)’s “consciously avoiding knowing”
15 language: A long line of conspiracy case law holding that a defendant may be charged with
16 conscious avoidance of knowledge—otherwise known as “willful blindness”—only where the
17 defendant “decided not to learn the key fact, not merely to have failed to learn it through
18 negligence.” *Untied States v. Nektalov*, 461 F.3d 309, 315 (2d. Cir. 2006).¹¹

19 ASIS has encouraged the Court to lower Section 7706(g)(2)’s bar to encompass
20 negligence, or less. For example, ASIS has urged the Court to infer knowledge from supposed
21 past bad acts, of Azoogle and others, as might (presumably) reflect a predisposition to avoid
22 knowledge of potential future wrongdoing. Elsewhere, ASIS has suggested that the Court impose
23 what amounts to an affirmative duty on Azoogle to vet its lead providers. The problem with such
24 approaches is that they find no support in Section 7706(g)(2), and so require the Court to choose
25 between creating *de facto* liability for unproven past acts and imposing a framework of new

26 _____
27 ¹¹ A finding of willful blindness is appropriate “only where it can almost be said that the
28 defendant actually knew. He suspected the fact; he realised its probability; but he refrained from
obtaining the final confirmation because he wanted in the event to be able to deny knowledge.
This, and this alone, is willful blindness.” *Nektalov*, 461 F.3d at 315.

1 standards that Azoogle could not previously have known about. If Congress had intended the
2 Court to take either path, it would more clearly have said so.

3 **2. Undisputed Evidence Demonstrates Azoogle Could Not Possibly Have Known**
4 **That the Sender Violated, or Would Violate, CAN-SPAM.**

5 Neither party can prove who sent the Emails. What is undisputed is that Azoogle couldn't
6 possibly have known that the sender had engaged, or would engage, in a pattern and practice of
7 violating CAN-SPAM.

8 Azoogle received the Bruce Wolf Lead from Seamless. Sep. State. Nos. 47-48.
9 Seamless, in turn, received it from Scribe Interactive, which received it from John Stothers,
10 perhaps by way of BestLeadz. Sep. State. Nos. 52, 56. Prior to this litigation, Azoogle had never
11 heard of, and didn't have relationship with, Scribe, Stothers or BestLeadz, and Seamless had
12 never informed Azoogle that it received leads from Scribe. Sep. State. Nos. 54-55, 57-61. Also
13 at the time Azoogle received the Bruce Wolf Lead, Seamless had a good reputation in the Internet
14 marketing industry, as did Scribe. Sep. State. No. 66. Azoogle did not know, and had no reason
15 to know, that Seamless or its contractors had engaged, or might engage, a pattern and practice
16 violative of CAN-SPAM. Sep. State. Nos. 63-66. Those undisputed facts, without more, compel
17 the granting of this motion.

18 Furthermore, even if the Court were to interpret §7706(g)(2) as imposing an affirmative
19 duty to vet lead providers, ASIS's CAN-SPAM claim still would fail. The Insertion Order barred
20 Seamless from providing leads generated by unlawful means. Sep. State. No. 48. At the time
21 Azoogle received the Bruce Wolf Lead, Seamless had never been listed on Spamhaus's ROKSO.
22 Sep. State. No. 68. After learning of the violations relating to the that lead, Azoogle received a
23 credit for amounts paid in connection therewith and, subsequently, terminated its relationship
24 with and later filed an arbitration against Seamless. Sep. State. Nos. 69-70.

25
26
27
28
[REDACTED] Sep.

1 State. No. 120. Those undisputed facts demonstrate that if Azoogle were under an affirmative
2 duty to vet lead providers, it was fulfilling it.

3 White has stated that this action is, for her, a form of social activism. Sep. State. No. 37.
4 This motion being White and ASIS’s last opportunity to exercise its voice, Azoogle anticipates a
5 storm of unproved accusations relating to Azoogle and its present and past lead providers. In a
6 concession to page limits, Azoogle will not attempt to here respond, except to forecast that such
7 accusations will be founded, like the rest of ASIS’s case, on innuendo and speculation, and not on
8 significant, probative evidence of the type required to defeat this motion.

9 **B. ASIS Cannot Prove that a Single Party, Much Less Azoogle, Initiated or Induced**
10 **Another to Initiate the Emails.**

11 ASIS bears the burden of proffering significant, probative evidence that Azoogle
12 “intentionally paid or induced another person to initiate” each and every one of the Emails. ASIS
13 claims its studies to satisfy that burden. However, an examination shows that ASIS’s findings are
14 the product of sloppy research, baseless assumptions, and methodologies so flawed that one of
15 ASIS’s two investigators could not explain them, and ASIS’s expert could not vouch for them.
16 With discovery closed, ASIS can’t even proffer evidence of a single sender.

17 **1. There Is No Question That Azoogle Did Not Initiate, or Induce Another to**
18 **Initiate, the Emails.**

19 The undisputed evidence demonstrates Azoogle’s intent not to initiate, or to have anything
20 to do with, unlawful email advertising. The Insertion Order prohibited Seamless, whom Azoogle
21 terminated as a result of the Bruce Wolf Lead, from providing leads generated “by any means or
22 method which is in violation of state and/or federal law [] including, but not limited to, the CAN-
23 SPAM act of 2003 . . .” Sep. State. No. 48¹² Furthermore, as demonstrated by undisputed
24 evidence, the Emails were not even initiated by Seamless, but by a party at least two or three
25 steps removed from Seamless and wholly unknown to Azoogle. Sep. State. Nos. 52, 56. Perhaps
26 most probative, ASIS continues to seek the full measure of its damages from Leads Limited—

27 ¹² ASIS expert Jeffrey Posluns (“Posluns”) testified that such contractual language evidences an
28 intent not only to limit one’s liability relating to the actions of third parties, but also to ensure that
third parties comply with one’s email, security, and related policies. Sep. State. Nos. 50-51.

1 another alleged “Lead Generator” and Azoogole competitor—who could not under any imaginable
2 circumstance have played the same exclusive role as initiator. ASIS failure to choose between
3 Leads Limited and Azoogole demonstrates that not even ASIS believes its initiation allegations.

4 **2. ASIS Expert Posluns Cannot Vouch for ASIS’s Studies.**

5 The Expert Witness Disclosure of ASIS expert Jeffrey Posluns (“Disclosure”) repeatedly
6 claimed to rely on “studies” performed, and declarations authored, by Singleton lay investigators
7 Josh Mohland (“Mohland”) and Carl Scoles (“Scoles”). Those studies and declarations are the
8 backbone of ASIS’s case, having been produced in response to three Court-ordered
9 interrogatories requiring ASIS to state all facts supporting its contentions that: 1) the Emails
10 violate CAN-SPAM and Cal. Bus. & Prof. C. Section 17529.5; 2) the Emails originated from the
11 same sender; and 3) the sender of the Emails used unlawful means to procure the IP addresses
12 and/or email addresses from which the Emails were sent.¹³ Sep. State. No. 208.

13 During his deposition, however, Posluns conceded that he could not explain the processes
14 and methods used by Mohland and Scoles, much less vouch for their forensic validity. Sep.
15 State. Nos. 187-190. Posluns volunteered that he and his firm, SecuritySage Overdrive, Inc., had
16 performed a separate study of the Emails “to validate the results of [Mohland and Scoles’]
17 process and conclusions.” Sep. State. No. 188. That purported separate study, though, was
18 nowhere mentioned in Posluns’s Disclosure, and has not been a subject of any materials produced
19 by ASIS. Sep. State. No. 187. What’s more, Posluns explained that he and an assistant reviewed
20 only a “statistical sample” of the Emails (amounting to an estimated 25% of the total), and then
21 only to verify that each manifest “one characteristic [of] noncompliance,” rather than the litany of
22 flaws alleged by ASIS. Sep. State. Nos. 192-194. (The invalidity of Posluns “statistical sample”
23 is demonstrated by his failure to realize that 96 of 1,421 email messages in the “.dbx” mailbox
24 file produced by ASIS were duplicates created by ASIS’s aliasing mechanism.) Posluns even
25 admitted that he was not an expert in statistics, and that despite his stated role on behalf of ASIS,
26 he had no formal training in forensic investigation and analysis. Sep. State. Nos. 81, 191.

27 _____
28 ¹³ The Court’s order, issued on June 29, 2007, stated that ASIS would be precluded from offering
any evidence on these three issues not included in ASIS’s responses. Sep. State. No. 208.

1 Postluns’s testimony was problematic to begin with, because, among other things, ASIS
2 made no reference to Postluns in its response to the Court-ordered interrogatories. Sep. State. No.
3 187. That issue, however, now seems moot, as Postluns’s failure to even familiarize himself with
4 Mohland and Scoles’s studies forecloses his ability to verify the reliability or accuracy of
5 anything Mohland and Scoles did. Nor can ASIS now substitute Postluns’ purported separate
6 study, since it still hasn’t produced any materials relating to it. Should ASIS attempt to resurrect
7 Postluns as an expert witness, whether in regard to the “procurement” or any other issue, Azoogle
8 will file more detailed, formal objections.

9 **3. ASIS’s “Link Analysis” Suffers from Flaws Too Numerous to Catalog.**

10 During his deposition, ASIS lay investigator Scoles was unable to interpret the “Chart of
11 Linked Domains,” which purported to establish a relationship between most (though not all) of
12 the links appearing in the Emails. Sep. State. Nos. 156, 169. Even if Scoles were able to explain
13 his chart, the Court would almost certainly have to ignore it, given the multiple, obvious flaws in
14 Scoles’s methodology. The following list of such flaws is far from exclusive, and is intended
15 only to offer examples:

16 Unreliable and Inaccurate Sources of Information

17 In performing his research, Scoles relied on two sources of information. The first, the
18 Wayback Machine, is a partial archive of Web content. Sep. State. No. 145. (Scoles used it to
19 compare the website into which White entered the Bruce Wolf Lead with other websites
20 hypothesized to be related to the sender of the Emails.) The second, Domaintools.com, is a Web-
21 based service that provides information concerning the historical registration and use of IP
22 addresses and domain names. Sep. State. Nos. 143-144. (Scoles used it to research IP address,
23 server host and domain name registration information.) Neither holds itself out to be, or is,
24 reliable for forensic purposes. Sep. State. Nos. 143-154. The Wayback Machine’s FAQs
25 specifically disclaim its accuracy, and even warn that Web pages calling images from the page’s
26 originating host server (such as the Web pages examined by Scoles) “will fail when archived.”¹⁴
27 Sep. State. No. 150.

28 ¹⁴ The Wayback Machine’s operators recently implemented measures to prevent most Web
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1 Sloppy Research

2 Scoles made no attempt to verify that the Web pages and IP address, hosting and domain
3 name data he gathered corresponded to the dates on which related Emails were sent. Sep. State.
4 Nos. 162-163. Scoles admitted to finding Web pages from relevant times that didn't correspond
5 to the sample he was trying to match, and to disregarding them in favor of others that did. Sep.
6 State. No. 164. Scoles made, and was aware of, no effort by ASIS to contact any of the registered
7 users of the IP addresses, host servers and domain names he recorded, despite that Domaintools
8 provides (even if inaccurate) contact information. Sep. State. No. 170. Other than his cursory
9 declaration, Scoles produced no notes reflecting his work, and at his deposition couldn't even
10 remember whether the information used to populate his charts and spreadsheets corresponded to
11 the year period beginning in June 2004 or June 2005. Sep. State. No. 161. In light of Scoles's
12 haphazard approach, it is difficult to image what, if any, conclusions may be drawn from his
13 work.

14 Flawed Assumptions

15 Scoles's analysis assumed that one can reliably associate the registrant of a domain name
16 with an IP address relating to that domain, and then associate all domain names resolving to a
17 particular IP address with each other. Sep. State. No. 169. In fact, one cannot. Multiple domain
18 names pertaining to multiple parties often resolve to the same IP address. Sep. State. Nos. 176-
19 186. Furthermore, IP address and domain name hosting, registration, and use changes over time.
20 Sep. State. No. 157. Any attempt to link domain names to IP addresses to more domain names to
21 more IP addresses is therefore likely to be over-inclusive at best, and wholly unreliable at worst.
22 Sep. State. Nos. 173-179. Simply said, "link analysis" of the form practiced by cannot be
23 accepted as probative. Sep. State. Nos. 173-179. Similarly, Scoles attempted to draw
24 connections between web pages based on a visual comparison of images contained therein. Sep.
25 State. No. 165. Even ASIS expert Posluns was of the opinion that a simple visual comparison of
26

27
28 browsers from displaying unarchived images in the context of partially-archived pages. Sep.
State. No. 155.

1 images, in particular by a lay person such as Scoles, is insufficient to demonstrate whether those
2 images are identical. Sep. State. No. 166.

3 Scoles' "link analysis" is ASIS's primary "evidence" of a single sender. Exclude that
4 analysis, as the Court must, and ASIS is left with nothing tying the Emails together but
5 speculation. In the event ASIS attempts to introduce Scoles' link analysis, Azoogole will file
6 formal objections.

7 **4. ASIS's Evidence of a BotNet Amounts to Rank Speculation.**

8 As explained in his declaration, Mohland examined the Emails for patterns suggestive of a
9 common form. Sep. State. No. 168. By his own admission, however, the three templates he
10 identified—two of which were distinct from the other—appear in only 93% of the Emails. Sep.
11 State. No. 209. Furthermore, Mohland testified that email templates of the sort he identified are
12 likely publicly available in emailing software—a fact that, standing alone, suggests the
13 unreliability of speculation based on common templates. Sep. State. Nos. 167-168.

14 Apparently ignorant of Mohland's concessions, Posluns, who relied on Mohland's
15 template analysis, stated definitively in his Disclosure that the Emails "were sent using a botnet
16 of compromised computers without the permission of the computers' owners." Sep. State. No.
17 210. During his deposition, Posluns backpedaled, conceding that some of the Emails may have
18 been sent by some other means, and that all of the Emails could have been sent using an Onion
19 Router. Sep. State. Nos. 112-113. Posluns also admitted that he did not have access to the
20 computers used to send of the Emails, rendering suspect his conclusions regarding the mental
21 states of those computers' owners. Sep. State. No. 115.

22 For ASIS' BotNet theory to survive this motion, it must proffer "evidence sufficient for
23 the Court to infer [a BotNet's] use ..." *Myspace, Inc. v. Wallace D.B.A Freevegasclub.com*, 498
24 F. Supp. 2d 1293, 1304 (C.D. Cal. 2007) (holding that creation of multiple accounts, some
25 similarly named and all sharing similar email addresses, "do[es] not necessarily compel the
26 conclusion that Defendant used an automated bot"). Speculation based on lay observation is not
27 proof. ASIS cannot point to any significant, probative evidence of a BotNet, or a single sender,
28

1 much less of an intent by Azoogle to initiate, or induce the initiation of, the Emails. Accordingly,
2 this motion must be granted.

3 **C. ASIS Proffers No Significant, Probative Evidence of CAN-SPAM Violations.**

4 Even if ASIS had standing, and even if Azoogle procured the Emails, this motion still
5 would succeed. For ASIS cannot proffer evidence that any of the alleged Emails—much less all
6 of them—violate any provision of CAN-SPAM.

7 **1. The Actual Number of Emails at Issue Is Zero.**

8 To justify its claim of 12,576 Emails (and \$16 million in damages), ASIS includes
9 duplicates created by ASIS, Emails transmitted months after the Incident Period and Emails
10 directed to addresses that don't satisfy the definitions of CAN-SPAM. Adjusting for those errors,
11 the actual number of Emails as to which ASIS might state a claim is zero.

12 ASIS arrived at its total of 12,576 Emails by counting every recipient address appearing
13 on each of the 1,421 email message records (“email messages”) produced to Azoogle in the form
14 of a “.dbx” (Outlook Express) file. Based on the Postini date stamps appearing on those email
15 messages, only 242 were transmitted during the October 25, 2005 - November 14, 2005 Incident
16 Period alleged in ASIS’s operative Second Amended Complaint. Sep. State. No. 131. Of those
17 242, only 109 were directed to one or more then-current ASIS users. Sep. State. No. 132.

18 The distinction between current and non-current (in this case former) users is significant,
19 since CAN-SPAM defines an “electronic mail message” as a message sent to an “electronic mail
20 address.” 15 U.S.C. §7706(6). CAN-SPAM further defines an “electronic mail address” as “a
21 destination, commonly expressed as a string of characters, consisting of a unique username or
22 mailbox ... to which an electronic mail message can be sent or delivered.” *Id.* at §7706(5).
23 Because ASIS aliases the addresses of its former users to the “ng” account, emails directed to
24 those addresses cannot, as a matter of fact, be sent or delivered to the destination (the former
25 users’ unique mailboxes) associated therewith. Those emails do not therefore satisfy 15 U.S.C.
26 §7706(6)’s definition of “electronic mail message,” and are not actionable.

27 Of the remaining 109 email messages, 11 are duplicates, created internally at ASIS by the
28 aliasing mechanism used to collect emails. Sep. State. No. 132. That leaves just 98 email

1 messages. Sep. State. No. 132. The total number of times that each of those 98 email message
2 was directed to a then-current ASIS user—calculated by counting the number of then-current
3 users listed in each email message’s “To,” “CC” or “BCC” fields—is 175. Sep. State. No. 133.
4 “Directed to,” however, does not mean “sent or delivered.” ASIS uses Postini, which almost
5 certainly would have filtered out, Emails directed to the addresses of then-current users. Sep.
6 State. No. 79. Presuming Postini was working properly, it’s likely that none of those 175 Emails
7 were “sent or delivered” to any “unique username or mailbox,” and the number of Emails at issue
8 falls to zero.

9 ASIS may argue that the Court should consider Emails transmitted outside the Incident
10 Period. Even if the Court did, the total of Emails at issue still would be zero, since (as explained
11 above) Emails directed to former users don’t satisfy the definition of “electronic mail message,”
12 and Emails directed to current users can’t be “sent or delivered” to those users’ unique mailboxes.
13 ASIS may also argue that Emails directed to current users, even if filtered out or rejected by
14 Postini, still are “sent” within the meaning of Section 7706(6). That argument, however, ignores
15 that because ASIS routes its email through Postini, ASIS-bound emails aren’t actually “sent” to
16 ASIS users unless and until Postini clears them. And it’s almost certain that Postini would have
17 flagged the emails.

18 This counting exercise may seem like technical mumbo-jumbo. But it’s not. CAN-
19 SPAM’s definitions are specific, and appear to account for the actual function of the Internet
20 generally and email systems in particular. Those definitions work unusually well in this case,
21 since it’s highly unlikely that Congress intended to flood the courts with litigation over emails
22 that couldn’t possibly have reached any user’s mail server. Had ASIS not gone to such lengths, it
23 never would have seen or even known about the Emails. Under those circumstances, it’s hard to
24 argue that granting Azoogole’s motion deprives ASIS of a legitimate claim.

25 **2. ASIS’s Header Analysis Is Incomplete, Inaccurate and Misleading.**

26 ASIS’s header analysis, like its link analysis, is the product of unreliable information
27 sources, slipshod research and a methodology selected for economy and not reliability. It proves
28 nothing about individual Emails—much less the Emails as a whole.

1 In his study in support of ASIS’s response to the Court-ordered interrogatories, ASIS lay-
2 investigator Mohland purported to compare the domain name in each Email’s “Message-ID” field
3 to the listed registrant of IP addresses found in those Emails’ “Received” headers. In each case
4 that the domain name and registrant information did not, in his opinion, correspond, he declared
5 the header “materially false or materially misleading” within the meaning of CAN-SPAM Section
6 7704(a)(1). Sep. State. No. 159. The problems with Mohland’s approach are manifest. By way
7 of example, and example only:

- 8 • Inaccurate Sources of Information: Mohland used “whois” lookups to determine the
9 registrants of IP addresses. Sep. State. No. 211. Such data does not reliably indicate IP
10 address use, and is not therefore forensically reliable. Sep. State. No. 178.
- 11 • Sloppy Research: Mohland relied on IP address registration data that was current not
12 during the Incident Period, but during July 2007, when he began his research. Sep. State.
13 Nos. 158-159. He conceded that the IP addresses in question “could have changed hands”
14 in the almost two-year interim. Sep. State. No. 160. Additionally, Mohland did not
15 attempt to contact any of the registered users of the domain names or IP addresses. Sep.
16 State. Nos. 171-172.
- 17 • Flawed Methodology: Mohland assumed the Message-ID field to accurately represent the
18 identity of an email’s initiator. That assumption is completely unfounded, in that the
19 Message-ID is an optional field intended only to provide a unique message identifier, and
20 is not supposed to identify a sender. Sep. State. Nos. 180-181. According to the Internet
21 RFC’s, which Mohland elsewhere relied on, the Message-ID isn’t even intended to be
22 read, or readable, by humans. Sep. State. No. 182. As the FTC has explained, the only
23 portion of the header subject to Section 7704(a)(1)’s “materially false or materially
24 misleading” requirement is the “‘From,’ ‘To,’ and routing information.” Sep. State. No.
25 183. As for IP addresses, The Internet RFC’s don’t require a transmitting or transferring
26 server to even add an IP address. Sep. State. No. 184. And even if they did, it is
27 commonplace that a sender’s identity not to correspond to host data relating to the IP
28 address from which the sender transmits emails. Sep. State. No. 186.

1 It is hard to blame Mohland for his errors. He is not an expert. Sep. State. No. 111. And
2 Posluns, the expert presumably available to him, spent so little time overseeing Mohland that he
3 couldn't explain Mohland's methodology. From a forensics standpoint, there exist reasonably
4 reliable and authoritative approaches to tracing email. Sep. State. No. 173. ASIS, however, did
5 not attempt any, and so cannot now prove its Section 7704(a)(1) claims.¹⁵

6 **3. ASIS's Speculation of a Directory Harvest Is Trumped by Actual Evidence to**
7 **the Contrary.**

8 ASIS alleges aggravated violations of CAN-SPAM under Section 7704(b)(1)(A), relating
9 to the use of automated means (in particular a "directory attack") to gather ASIS's users' email
10 addresses. The claim hardly merits addressing. Contrary to White's testimony that a "large
11 percentage" of ASIS users received an Email containing the www.wumort.net link, the email
12 addresses of only 34 of ASIS's 945 then-active users appeared in Emails initiated during the
13 Incident Period. Sep. State. No. 136. The addresses of some of those users appeared on as many
14 as 15 and 17 Emails, while other of those users' addresses appeared on as few as 1 or 2. Sep.
15 State. No. 137. The low number of recipients and skewed distribution suggest not that someone
16 had stolen ASIS's entire user list, but that the Emails were targeted to individual users—perhaps
17 including to those who affirmatively sought to receive them.¹⁶ White made no attempt to verify
18 the date on which the alleged directory attack took place. Lacking even that information, it's a
19 wonder ASIS continues to press its aggravated damages claim.

23 ¹⁵ ASIS also alleges that the headers in the Emails violated 7704(a)(1)(A) and (C), relating to,
24 respectively, the use of email and IP addresses and domain names as "obtained by means of false
25 or fraudulent pretenses or representations," and the relay or retransmission of emails through a
26 protected computer without authorization for the purpose of disguising the sender's identity.
27 Other than ASIS's speculation regarding a BotNet, dismissed in section III B 4, ASIS has
28 produced nothing to support either claims. Azoogle therefore does not here address them.

27 ¹⁶ A Google search demonstrates ASIS's users' email addresses to be scattered all over the Web.
28 A search on the address to which the email relating to the Bruce Wolf Lead was sent returns 40
 matches, including at least two identifying a user business name and three stating the user's
 physical address.

1 **IV. ASIS’s California Business & Professions Code Section 17529.5 Claim Fails on**
2 **Multiple, Incontestable Grounds.**

3 **A. Undisputed Evidence Demonstrates That ASIS Lacks of Standing.**

4 Business and Professions Code Section 17529.5 grants standing to any email “recipient”
5 (“addressee of an unsolicited commercial email advertisement”) or “electronic mail service
6 provider” (“an intermediary in sending or receiving electronic mail or that provides to end users
7 ... the ability to send or receive electronic mail”). Cal. B & P Code §17529.1(h) and (m). ASIS
8 may be those things elsewhere. But in the context of the Emails it was neither. The Emails were
9 addressed to ASIS’s users. Accordingly, ASIS wasn’t a “recipient.” *Infinite Monkeys v. Global*
10 *Resource Systems*, No. 1-05-CV-039918, Order Re Motion for Summary Judgment or Summary
11 Adjudication (Santa Clara Superior Court, Dec. 30, 2006). Furthermore, because Postini almost
12 certainly filtered all the Emails sent to ASIS’s then-current users, as relates to the Emails ASIS
13 was neither an “intermediary in sending or receiving” email nor a “provide[r] [of] the ability to
14 send or receive electronic mail.” Sep. State. No. 79. Thus, ASIS wasn’t an “electronic mail
15 services provider.” Lacking standing, ASIS California law claims fail.

16 **B. Azoogle Cannot Prove a Violation or Even an Advertiser.**

17 As discussed above, ASIS has failed to proffer any evidence that Azoogle had anything to
18 do with the initiation of the Emails. Absent that link, it simply cannot be said that Azoogle
19 “advertised.” In the past, ASIS has attempted to avoid that common sense requirement by
20 arguing that “advertiser,” as used in Section 17529.1(a), encompasses anyone who “benefitted”
21 from an email. That interpretation can’t be right, as it would render liability under Section
22 17529.5 essentially limitless. And even if it were right, as a factual matter the only thing to
23 accrue to Azoogle as a result of the Emails has been this lawsuit, which is no benefit at all.

24 ASIS also has failed to proffer evidence that the Emails contain falsified, misrepresented,
25 or forged header information within the meaning of Section 17529.5(a)(2). There is no
26 requirement, legal, technical or otherwise, that Message-ID fields contain domain name
27 information accurately identifying the initiator. Sep. State. Nos. 180, 184. Nor is there any
28 requirement that the Message-ID relate to the initiating IP address, or that the initiating IP address

1 relate to the sender. Sep. State. No. 182-186. ASIS’s failure of proof on every level compels the
2 Court to grant this motion.

3 **C. ASIS’s Section 17529.5 Claim Is Preempted by CAN-SPAM.**

4 ASIS’s Section 17529.5 claim is expressly preempted by CAN-SPAM because it does
5 not sound in fraud. Congress has permitted states to adopt their own anti-spam legislation only
6 where the state law incorporates fraud elements, such as requiring the plaintiff to prove the
7 defendant’s knowledge of the wrongdoing. *See Omega World Travel, Inc. v. Mummagraphics,*
8 *Inc.*, 469 F.3d 348, 354-56 (4th 2006); *Klefman v. Vonage Holdings Corp.*, No. CV 07-
9 2406GAFJWJX, 2007 WL 1518650, *3 (C.D. Cal. May 23, 2007) (finding that Section 17529.5
10 claim preempted by CAN-SPAM when it did not sound in fraud). Congress determined that a
11 “strict liability standard for errors would impede unique opportunities for the development and
12 growth of frictionless commerce.” *Mummagraphics*, 469 F.3d at 355. Congress thus left states
13 with “room only to extend their *traditional* fraud prohibitions to the realm of commercial emails
14 because [Congress] was confident that legitimate businesses would not unwittingly transgress
15 such well-established prohibitions.” *Klefman*, 2007 WL 1518650 at *3.

16 While Section 17529.5 does not, *per se*, appear to run afoul of CAN-SPAM’s preemption
17 clause, ASIS seeks to invoke it in a way that significantly deviates from fraud. ASIS “does not
18 allege a traditional tort theory at all, or even that [it] was at any point misled by any of the]
19 emails at issue.” *Klefman*, 2007 WL 1518650 at *3. Rather, ASIS relies on Section 17529.5 to
20 circumvent the more arduous elements of CAN-SPAM, namely, Azoogole’s knowledge, ASIS’s
21 reliance, and consequential harm. As Judge Wilken noted earlier in *this* case, ASIS seeks to
22 “extend liability to anyone who ‘advertises’ in a commercial email containing a misleading
23 header or subject line, regardless of whether the advertiser was also the one who actually sent the
24 spam or caused it to be sent.” *ASIS Internet Services v. Optin Global, Inc.*, No. C 05-5124, 2006
25 WL 1820902, *6 (N.D. Cal. June 30, 2006) (emphasis added). Such a use of Section 17529.5,
26 without proving knowledge, reliance, or consequential harm, must be preempted.

1 **D. Should Azoogle’s Motion Be Granted as to ASIS’s CAN-SPAM Claims, the Court**
2 **Should Dismiss Any Remaining California Claims.**

3 Once the Court enters judgment on ASIS’s CAN-SPAM claim, it need not continue to
4 exercise jurisdiction over ASIS’s Section 17529.5 Claim. *Hypertouch*, 2006 WL 648688, at *6;
5 *see Gini v. Las Vegas Metropolitan Police Dept.*, 40 F.3d 1041, 1046 (9th Cir. 1994) (finding that
6 where federal-law claims are eliminated before trial, the balance of factors points toward
7 declining jurisdiction over remaining state law claims.) On that basis, it should dismiss those
8 claims, if any, that survive this motion.

9 **V. ASIS Claims Are Barred By the Doctrines of Consent & Unclean Hands.**

10 ASIS is not an innocent bystander. Awed by the prospect of millions of dollars in
11 statutory damages, ASIS initiated a CAN-SPAM litigation operation that, in a very concrete
12 sense, created the events it now complains of. As a result, ASIS’s claims relating to those events
13 should be barred.

14 Equity does not permit the award of damages to a party that acted with a bad intent and
15 solicited any harm it suffered. A federal court may exercise its equitable powers in a variety of
16 contexts, including cases in which a party is proceeding under statute. *Imprisoned Citizens Union*
17 *v. Shapp*, 11 F. Supp. 2d 586 (E.D. Pa. 1998). Even where a federal statute specifically
18 enumerates affirmative defenses, courts have wide latitude to use equitable factors to allocate
19 damages. *See Western Properties Service Corp. v. Shell Oil Co.*, 358 F.3d 678 (9th Cir. 2004);
20 *see also Northern Cheyenne Tribe v. Norton*, 503 F.3d 836 (9th Cir. 2007).

21 As a general rule, consent by a plaintiff precludes litigation as to the matters to which
22 consent is given. Consent means a deliberate and voluntary assent, but may also be implied by
23 conduct. Substantial evidence of consent exists here. During the three-week Incident Period,
24 only 175 Emails were directed to addresses pertaining to ASIS’s then-current users. Sep. State.
25 No. 136. That’s a paltry amount, given that ASIS claims to have received the almost 13,000
26 alleged Emails in a span of three months, and that the addresses appearing on those Emails were
27 organized alphabetically, as if pulled from a roster of ASIS email accounts. One would expect
28 the proportion of messages directed to addresses of then-current users to be much, much higher,
 since unlike former users, then-current users still are performing acts—such as opting-in to

