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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  
SEPARATE STATEMENT OF  
UNDISPUTED FACTS IN SUPPORT OF  
MOTION FOR SUMMARY  
JUDGMENT OR IN THE  
ALTERNATIVE SUMMARY  
ADJUDICATION**

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

The Honorable Joseph C. Spero

KRONENBERGER BURGOYNE, LLP  
150 Post Street, Suite 520  
San Francisco, CA 94108  
www.KronenbergerLaw.com

1 Pursuant to the Court’s Standing Order and its local rules, Defendant, AzoogleAds.com,  
 2 Inc., by and through its respective counsel, hereby submits the following undisputed facts in  
 3 support of its Motion For Summary Judgment, or in the alternative, Summary Adjudication.  
 4

NO.	FACT	CITATION
1. 6 7 8 9 10 11 12 13 14	In or about August 2005, Plaintiff ASIS Internet Services (“ASIS”) retained its counsel in this action for the purpose of initiating CAN-SPAM and related actions.	Declaration of Henry M. Burgoyne, III in Support of AzoogleAds.com, Inc.’s Motion for Summary Judgment or in the Alternative Summary Adjudication (“Burgoyne Decl.”) ¶¶8, 22 Exs. C (“White”) 299:16-25 & Q
15 16 17 18 19	[REDACTED]	[REDACTED]
20 21 22	[REDACTED]	[REDACTED]
23 24 25 26 27	[REDACTED]	[REDACTED]
5. 28	In or about late October 2005, ASIS began providing ASIS’s	Burgoyne Decl. ¶9, Ex.

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NO.	FACT	CITATION
	counsel with emails to be included in ASIS’s counsel’s “spam database.”	D (“Mohland”) 83:10-84:20, White 331:2-5, Burgoyne Decl. ¶11, Ex. F (“Grabowski”) 131:4-132:3
6.	Nicholas Grabowski, a contract employee of ASIS’s counsel, designed the spam database.	Grabowski 125:5-9, 130:10-14
7.	ASIS gathers the emails that it provides to ASIS’s counsel by “aliasing” emails directed to addresses pertaining to ASIS’s former users to an account pertaining to a user identified as “ng.”	White 291:3-292:25, Declaration of Dr. Frederick B. Cohen in Support of Azoogles.com, Inc.’s Motion for Summary Judgment or in the Alternative Summary Adjudication (“Cohen Decl.”) ¶12, Ex. B at 19
8.	ASIS’s server configuration and related files reflect 1507 aliases to the “ng” account.	Cohen Decl. ¶13, Ex. B at 9
9.	As a result of the “aliasing” referenced in the prior fact, no emails directed to ASIS’s former customers can be sent or delivered to, or received by, the mailboxes pertaining to those former customers’ addresses.	Cohen Decl. ¶14, Ex. B at 16, 31
10.	The account relating to “ng” is not used as a typical remote access account for ASIS’s services.	Cohen ¶15, Ex. B at 9, 16-17, 19, 23
11.	White collected the Emails in connection with the bringing of lawsuits.	Burgoyne Decl. ¶22, Ex. Q
12.	ASIS provides the emails that it gathers to ASIS’s counsel in the form of a compressed “.zip” file.	White 336:19-337:1, Grabowski 191:10-18
13.	ASIS’s counsel’s spam database also contains emails from two of ASIS’s counsel’s other clients.	Mohland 70:13-71:8, Grabowski 134:20-

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NO.	FACT	CITATION
		136:21
14.	On a nightly basis, the two clients referenced in the prior fact and ASIS upload to ASIS’s counsel the emails to be included in ASIS’s counsel’s spam database.	Mohland 71:11-17
15.	The total number of emails added to ASIS’s counsel’s spam database as a result of the uploads referenced in the prior fact varies between 20,000 and 200,000 emails per day.	Mohland 72:18-25
16.	As of the early fall of 2007, ASIS’s counsel’s spam database contained roughly 10 million emails, approximately 6-7 million of which had been provided to ASIS’s counsel by ASIS.	Mohland 72:1-13
17.	Some of the emails provided by ASIS for inclusion in ASIS’s counsel’s spam database also were directed to addresses pertaining to then-current users of ASIS’s services.	White 324:21-22; Cohen Decl. ¶16, Ex. B at 26; Declaration of Nella White in Support of Plaintiff’s Motion for Summary Adjudication of the Issues ¶9, Ex. E (“Emails”)
18.	One of the emails provided by ASIS for inclusion in ASIS’s counsel’s spam database also was directed to addresses pertaining to third parties with no established relationship to ASIS.	Cohen Decl. ¶17, Ex. B at 31; Emails
19.	ASIS’s counsel and ASIS’s counsel’s employees and contractors search, sort, and visually review the emails in ASIS’s counsel’s spam database for the purpose of generating CAN-SPAM and related actions.	Mohland 74:13, Grabowski 129:5-17, 134:20-135:7
20.	ASIS’s counsel’s spam database contains CAN-SPAM compliant emails.	Mohland 77:11-22, 80:23-81:22
21.	ASIS’s counsel’s spam database contains emails that do not satisfy the definition of “commercial electronic email	Mohland 80:23-81:22

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NO.	FACT	CITATION
	message” as used in CAN-SPAM.	
22.	ASIS has no way of determining which of its users make their email addresses publicly available.	White 31:5-17, 31:25-32:9
23.	ASIS’s counsel has no method of determining whether the intended recipients of emails contained in ASIS’s counsel’s spam database opted-in, or expressed affirmative consent, to receive such emails.	Mohland 80:23-81:22
24.	Neither Josh Mohland, Carl Scoles nor Dave Marshall, contractors and employees of ASIS’s counsel, executed a written employment or contactor agreement with ASIS’s counsel.	Mohland 54:1-5, Burgoyne Decl. ¶10, Ex. E (“Scoles”) 47:24-48:1, 49:6-21, 50:22-25, Burgoyne Decl. ¶14, Ex. I (“Marshall”) 54:10:10-13
25.	ASIS’s counsel never discussed the confidentiality of the Emails with contractor Dave Marshall.	Marshall 89:1-7
26.	Marshall could not recall whether he entered into a confidentiality agreement in relation to this action before being provided copies of the Emails.	Marshall 86:2-21
27.	Marshall was provided a CD containing copies of the Emails.	Marshall 86:22-24
28.	ASIS’s counsel objected when Mohland and Scoles were asked whether they signed confidentiality agreements in relation to this action, on the ground that such question invaded the “internal process[es]” of ASIS’s counsel’s office.	Mohland 273:13-19; Scoles 74:6-14
29.	It would invade the privacy of individuals to disclose server logs concerning those individuals’ email communications, since such logs would demonstrate whom those individuals were corresponding with, how often and at what times.	Burgoyne Decl. ¶12, Ex. G (“Posluns”) 207:8-209:7
30.	Posluns would not advise a client to leave open the email accounts of former users.	Posluns 238:12-21
31.	Posluns would feel uncomfortable advising a client in	Posluns 238:20-239:1

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NO.	FACT	CITATION
	relation to the client's continued use of email account pertaining to former users.	
32.	Posluns testified that failing to close the email accounts of former users could constitute a violation of Canadian privacy laws.	Posluns 239:3-8
33.	By searching its Spam Database for reference to the domain names of Azoogle, as discovered in this litigation, ASIS was able to generate a whole new lawsuit, which it filed this fall.	Burgoyne Decl. ¶17, Ex. L at 2:28-3:3
34.	ASIS President and organizational deponent Nella White ("White") once submitted an Internet request for information concerning mortgage financing.	White 289:21-290:14
35.	White later regretted having submitted the request referenced in the prior fact, since she received "nuisance phone calls every day from mortgage companies for over a year on [her] personal telephone, and the reason [she] was getting them was because [she] once filled out a form on the Internet, and every day for a year [she] got phone calls	White 289:21-290:14
36.	White believes that "spams ruin the Internet."	White 232:19
37.	White considers this lawsuit a form of social action.	White 284:6-285:18
38.	[REDACTED]	[REDACTED]
39.	[REDACTED]	[REDACTED]
40.	ASIS expert Jeffrey Posluns ("Posluns") testified that the \$16 million in statutory damages sought by ASIS is "rather high."	Posluns 243:13-17
41.	On or about October 28, 2005, White visited the website then located at <a href="http://www.wumort.net">www.wumort.net</a> , a URL that appeared in one or more suspected unlawful emails provided to ASIS's counsel for inclusion in ASIS's counsel's spam database.	Burgoyne Decl. ¶21, Ex. P at 2:25-3:14
42.	During the visit referenced in the prior fact, White initiated a request for mortgage information under the fictitious name	Burgoyne Decl. ¶21, Ex. P at 3:28-4:3

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NO.	FACT	CITATION
	“Bruce Wolf. During the visit referenced in the prior fact, White initiated a request for mortgage information under the fictitious name “Bruce Wolf.”	
43.	The telephone number incorporated into the request for mortgage information referenced in the prior fact corresponded to a telephone and answering machine under the control of ASIS’s counsel.	Burgoyne Decl. ¶21, Ex. P at 4:4-10; White 299:21-300:14
44.	Azoogle is an Internet marketing company through which lead vendors and other lead providers channel marketing leads to sellers of goods and services.	Declaration of David Graff in Support of AzoogleAds.com, Inc.’s Motion for Summary Judgment or in the Alternative Summary Adjudication (“Graff Decl.”) ¶2
45.	Azoogle has never sent unsolicited email, whether to generate marketing leads or for any other reason.	Graff Decl. ¶2
46.	Azoogle acquires its marketing leads from third parties.	Graff Decl. ¶2
47.	On or about October 28, 2005, Azoogle received from Seamless Media Corp. (“Seamless”) a mortgage lead bearing the name “Bruce Wolf” (the “Bruce Wolf Lead”).	Graff Decl. ¶4, Ex. C
48.	Seamless provided the Bruce Wolf Lead to Azoogle pursuant to a contract (the “Insertion Order”) that prohibited Seamless from providing Azoogle with leads generated “by any means or method which is in violation of state and/or federal law [including, but not limited to, the CAN-SPAM act of 2003 . . .”	Graff Decl. ¶3, Exs. A-B
49.	The Insertion Order required Seamless to indemnify Azoogle for “any and all liability, claim, loss, damage, demand or expense (including reasonable attorneys’ fees) asserted by any third party . . .”	Graff Decl. ¶3, Exs. A-B

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<b>NO.</b>	<b>FACT</b>	<b>CITATION</b>
50.	One purpose of contractual language requiring other parties to comply with one’s own security and spam-related policies is to limit one’s liability relating to actions taken by those other parties.	Posluns 44:1-5, 48:6-19
51.	Another purpose of requiring other parties to comply with one’s own security and spam-related policies is to ensure one’s comfort and confidence that those other parties are complying with one’s policies.	Posluns 44:1-5, 48:6-19
52.	Seamless received the Bruce Wolf Lead from Scribe Interactive, Inc. (“Scribe”) before providing it to Azoogle.	Burgoyne Decl. ¶¶18-19, Exs. M-N
53.	Seamless never informed Azoogle that Seamless received some of its marketing leads from Scribe.	Burgoyne Decl. ¶¶18, Ex. M
54.	Prior to this litigation, Azoogle had never heard of Scribe.	Graff Decl. ¶10
55.	Azoogle has never had any form of relationship with Scribe.	Graff Decl. ¶10
56.	Scribe received the Bruce Wolf Lead from John Stothers, possibly by way of another entity called BestLeadz.	Burgoyne Decl. ¶¶18-19, Exs. M-N
57.	Prior to this litigation, Azoogle had never heard of Stothers (“Stothers”).	Graff Decl. ¶11
58.	Azoogle has never had any form of relationship with Stothers.	Graff Decl. ¶11
59.	Azoogle could not have known who Stothers was.	Burgoyne Decl. ¶¶18-19, Exs. M-N
60.	Prior to this litigation, Azoogle had never heard of BestLeadz.	Graff Decl. ¶12
61.	Azoogle has never had any form of relationship with BestLeadz.	Graff Decl. ¶12
62.	Scribe never informed Seamless that Scribe received some of its marketing leads from Stothers.	Burgoyne Decl. ¶18, Ex. M
63.	At the time Seamless provided the Bruce Wolf Lead to Azoogle, Azoogle did not know or suspect that such lead had been generated in connection with a violation of any law,	Graff Decl. ¶5

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NO.	FACT	CITATION
	including without limitation CAN-SPAM or California Business and Professions Code Section 17529.5.	
64.	At the time Seamless provided the Bruce Wolf Lead to Azoogle, Azoogle did not know or suspect that Seamless had committed, or would commit, a violation of CAN-SPAM or California Business and Professions Code Section 17529.5.	Graff Decl. ¶6
65.	At the time Seamless provided the Bruce Wolf Lead to Azoogle, Azoogle did not know or suspect that any of Seamless’s contractors or agents had committed, or would commit, a violation of CAN-SPAM or California Business and Professions Code Section 17529.5.	Graff Decl. ¶8
66.	At the time Seamless provided the Bruce Wolf Lead to Azoogle, Seamless had a good reputation in the lead generation business, and had never been accused of violating CAN-SPAM or any other law regarding the sending of unlawful unsolicited email.	Burgoyne Decl. ¶18, Ex. M
67.	Through the Incident Period, Scribe had a good reputation in the lead generation business, and Seamless had no reason to suspect that Scribe would provide Seamless with a lead generated by unlawful means.	Burgoyne Decl. ¶18, Ex. M
68.	At the time Seamless provided the Bruce Wolf Lead to Azoogle, Seamless had never been listed on SPAMHAUS’s ROKSO list.	Burgoyne Decl. ¶18, Ex. M
69.	As a result of the Bruce Wolf Lead, Azoogle terminated its relationship with Seamless, and has since filed an arbitration relating to this action.	Graff Decl. ¶16, Ex. E
70.	Seamless credited Azoogle all amounts paid to Seamless in connection with the Bruce Wolf Lead.	Graff Decl. ¶16
71.	Postini charges ASIS a fee in connection with each email address in relation to which Postini provides services.	White 219:9-11; Burgoyne Decl. ¶24, Ex. S

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NO.	FACT	CITATION
72.	ASIS was required to continue paying Postini the fee referenced in the prior fact in relation to the email addresses aliased to the “ng” account, even though those addresses no longer pertained to a unique user or mailbox to which email could be sent or delivered.	Cohen Decl. ¶18, Ex. B at 9; Burgoyne Decl. ¶25, Ex. T
73.	Had ASIS not continued to pay the fee referenced in the prior two facts, Postini’s servers would not have accepted mail directed to those former users’ email addresses.	Cohen Decl. ¶19, Ex. B at 9, 31-33
74.	Had ASIS not continued to pay the fee referenced in the prior three facts, Postini’s servers would not have transferred to ASIS mail directed to those former users’ email addresses.	Cohen Decl. ¶20 Ex. B at 12, 31-33
75.	Had ASIS not continued to pay the fee referenced in the prior four facts, Postini’s servers would have communicated to senders that such addresses were invalid.	Cohen Decl. ¶21, Ex. B at 31-33
76.	Postini’s email filtering technology operates on Postini’s own servers.	Cohen Decl. ¶22, Ex. C at 85-86; O’Connor 82:25-83:11, Burgoyne Decl. ¶25, Ex. T
77.	Suspected spam emails filtered by Postini never reach ASIS’s email servers.	Cohen Decl. ¶23, Exs. A at 7, 17 & B at 8; O’Connor 69:7-10, Burgoyne Decl. ¶25, Ex. T
78.	On October 21, 2005, ASIS adjusted the filtering relating to the email addresses aliased to the “ng” account such that suspected unlawful emails directed to those addresses would freely flow to ASIS’s “ng” account.	White 331:6-20
79.	Had ASIS not adjusted the spam filtering as referenced in the prior fact, the Emails almost certainly would have been filtered at Postini’s servers.	Cohen Decl. ¶24, Exs. A at 7, 17 & B at 8
80.	Posluns does not have sufficient background or information	Posluns 209:17-210:22

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NO.	FACT	CITATION
	to offer an opinion regarding whether a reasonably sophisticated spam filter, operating normally, would have filtered the Emails.	
81.	Posluns does not have any formal training in forensic investigation and analysis.	Posluns 167:5-7
82.	ASIS's aliasing of its former users' email addresses created the deception that such users' accounts were still active and valid.	Cohen Decl. ¶25, Ex. B at 8, 11-12, 35
83.	ASIS's aliasing of its former users' email addresses created the deception that emails directed to those addresses could still be sent or delivered to, or received in, those former users' mailboxes.	Cohen Decl. ¶26, Ex. B at 8, 11-12, 35
84.	Had ASIS not aliased its former users' email addresses to the "ng" account, ASIS's email server would have produced 500-level error messages informing senders that such email addresses did not pertain to active and valid accounts.	Cohen Decl. ¶27, Ex. B at 32-33
85.	Typically, an email server will not receive or store the data portion of an inbound email rejected on account of a 500-level error.	Posluns 232:8-23
86.	ASIS could have avoided receiving the vast majority of Emails directed to then-current users during the Incident Period simply by adding the URL <a href="http://www.wumort.net">www.wumort.net</a> to the list of content not permitted to pass inbound through ASIS's email server, as reflected in ASIS's server configuration and related files.	Cohen Decl. ¶28, Ex. B at 9, 21
87.	ASIS's email servers could be adjusted to make them more restrictive "as to what [the server] will and will not accept."	Posluns 146:9-16
88.	ASIS's email server is configured to accept emails that do not comply in certain respects with the RFCs.	Posluns 146:23-147:6
89.	ASIS did not allege any actual damages resulting from the Emails.	Burgoyne Decl. ¶20, Ex. O



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105.	ASIS received no user complaints regarding the Emails.	White 55:10-58:19, Burgoyne Decl. ¶13, Ex. H (“Then”) 74:5-20, 80:6-21
106.	White was the only one of ASIS’s employees to spend any time reviewing or otherwise responding to the Emails.	White 55:10-14, Then 74:5-20
107.	[REDACTED] [REDACTED] [REDACTED] [REDACTED]	[REDACTED]
108.	[REDACTED] [REDACTED]	[REDACTED]
109.	[REDACTED] [REDACTED]	[REDACTED]
110.	[REDACTED] [REDACTED]	[REDACTED]
111.	ASIS investigator Josh Mohland is not an expert in regard to any subject or discipline relevant to this litigation, including without limitation linguistics, marketing communications or distributed coordinated attacks such as BotNets.	Mohland 38:8-13, 38:17- 21, 44:17-19, 53:18-20, 110:20-25, 125:2-17, 146:15-23, 247:16
112.	Some of the Emails may have been sent other than by means of a BotNet.	Posluns 274: 1-9
113.	The Emails could have been sent by means of an Onion Router.	Posluns 274:17-25; Cohen Decl. ¶29, Ex. A at 51, 57-58
114.	The Emails could have been sent by means of an Anonymizer.	Cohen Decl. ¶30, Exs. A at 51, 58 & C at 83
115.	Posluns did not examine any of the servers used to send the Emails.	Posluns 275:1-18
116.	Azoogole never owned or operated any of the websites	Graff Decl. ¶13

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NO.	FACT	CITATION
	appearing in the links contained in the Emails.	
117.	Azoogle does not know who owned or operated the websites appearing in the links contained in the Emails.	Graff Decl. ¶13
118.	Azoogle was in communication with SPAMHAUS in October and November 2005.	Burgoyne Decl. ¶21, Ex. P at 5:16-17
119.	Azoogle was addressing the issue of unlawful commercial email advertising in October and November 2005.	Burgoyne Decl. ¶21, Ex. P at 5:19-20
120.	[REDACTED]	[REDACTED]
121.	[REDACTED]	[REDACTED]
122.	Azoogle was removed from SPAMHAUS’s ROKSO listing in April 2006.	Burgoyne Decl. ¶21, Ex. P at 5:18-19
123.	The Emails were provided to Azoogle in a “.dbx” file consisting of 1,421 individual messages, some or all of which were directed to multiple email addresses.	Cohen Decl. ¶31, Ex. B at 5-6, 10, 23-24; Emails
124.	96 of the 1,421 individual messages in the .dbx file provided by ASIS were duplicates of other messages in that .dbx file.	Cohen Decl. ¶32, Ex. B at 6, 28; Emails
125.	The duplicate messages referenced in the prior fact were created as a result of ASIS’s method of aliasing messages directed to multiple addresses to a single account pertaining to “ng.”	Cohen Decl. ¶33, Ex. B at 6, 16, 27-28, 35; Emails
126.	As duplicates, the messages referenced in the prior two facts were initiated by, if anyone, ASIS.	Cohen Decl. ¶34, Ex. B at 6, 16, 27, 35
127.	ASIS produced a list of 242 user account names and	Burgoyne Decl. ¶3, Ex.

NO.	FACT	CITATION
	corresponding expiration dates.	A
128.	FalconKnight produced a nearly identical list of user account names but with different expiration dates.	Burgoyne Decl. ¶4
129.	ASIS's production of user account names omitted any reference to "ng."	Burgoyne Decl. ¶5
130.	Of the 1,421 individual messages in the .dbx file, no more than 109 appear to have been received during the Incident Period.	Cohen Decl. ¶36, Ex. B at 25; Emails
131.	Accepting as accurate the document produced by ASIS containing 242 user account names and corresponding expiration dates, of the 242 individual messages in the .dbx file that were transmitted during the Incident Period, no more than 39 were directed to one or more of ASIS's then-current users. <sup>1</sup>	Cohen Decl. ¶37, Ex. B at 26; Emails
132.	Of the 109 individual messages in the .dbx file that appear to have been received during the Incident Period and that were directed to one or more of ASIS's then-current users, at least 11 were duplicates, leaving only 98 individual messages directed to one or more of ASIS's then-current users.	Cohen Decl. ¶38, Ex. B at 27; Emails
133.	The total number of times that one of the 98 individual messages referred to in the prior fact appear to have been delivered to the mailbox of a then-current user of ASIS is 175, as calculated by counting the number of times that an email address pertaining to a then-current user appears as a recipient on one of those messages.	Cohen Decl. ¶39, Ex. B at 28; Emails
134.	According to ASIS, Emails containing the link <a href="http://www.wumort.net">www.wumort.net</a> were sent to a "large percentage of her user base."	Burgoyne Decl. ¶21, Ex. P at 3:11-13
135.	During the Incident Period, ASIS had just under 1,000 users.	Declaration of Nella

<sup>1</sup> Azoogle reserves the right to challenge the accuracy of Plaintiff's representations regarding its user base and account expiration dates.

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NO.	FACT	CITATION
		White in Support of Plaintiff's Motion for Summary Adjudication of Issues (on file with the Court) ¶3
136.	During the Incident Period, Emails were directed to addresses pertaining to not more than 34 of ASIS's then-current users.	Cohen Decl. ¶40, Ex. B at 6, 26, 28; Emails
137.	During the Incident Period, 17 Emails were directed to an address pertaining to one of ASIS's then-current users, while 15 Emails were directed to an address pertaining to another of ASIS's then-current users and 12 Emails were directed to each of two addresses pertaining to two other of ASIS's then-current users.	Cohen Decl. ¶41, Ex. B at 28; Emails
138.	During the Incident Period, two or less emails were directed to those addresses pertaining to 10 of ASIS's then-current users.	Cohen Decl. ¶42, Ex. B at 6, 26, 28; Emails
139.	At least one of the Emails was directed to email addresses pertaining to third parties with no established relationship with ASIS.	Cohen Decl. ¶43, Ex. B at 31; Emails
140.	The individual messages identified by Azoogole expert Dr. Fred Cohen as number 806 and having a date and time stamp of December 19, 2005, 16:54:20 does not relate to mortgage lending.	Cohen Decl. ¶44, Ex. B at 31; Emails
141.	The individual message identified by Azoogole expert Dr. Fred Cohen as number 806 and having a date and time stamp of December 19, 2005, 16:54:20 was directed to 399 email addresses, only 1 of which contained "@asis.com."	Cohen Decl. ¶45, Ex. B at 31; Emails
142.	Eighty-one (81) of the 109 individual messages in the .dbx file that were collected during the Incident Period contained the following text and link: "to be remov(ed): <a href="http://www.wumort.net/book">http://www.wumort.net/book</a> ."	Cohen Decl. ¶81, Ex. B at 27; Emails

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NO.	FACT	CITATION
143.	DomainTools is not a complete source of information concerning the historical registration and use of IP addresses and domain names.	Cohen Decl. ¶46, Ex. C at 64
144.	DomainTools is not an accurate source of information concerning the historical registration and use of IP addresses and domain names.	Cohen Decl. ¶47, Ex. C at 64
145.	The Wayback Machine, a partial archive of Web content located at <a href="http://www.archive.org">www.archive.org</a> , is not a complete representation of historical Web content.	Cohen Decl. ¶48, Exs. A at 45 & B at 35-36
146.	The Wayback Machine is not an accurate representation of historical Web content.	Cohen Decl. ¶49, Exs. A at 45 & B at 35-36
147.	Graphical images produced by the Wayback Machine cannot be relied upon for forensic purposes, including without limitation for the purpose of demonstrating the presence of such images on websites at historical dates.	Cohen Decl. ¶50, Exs. A at 45 & B at 35-36
148.	The Wayback Machine's automated systems "crawl" the Web "every few months or so" to gather data to be archived.	Burgoyne Decl. ¶18, Ex. B
149.	The Wayback Machine does not reflect the functionality of any Web page that, at the time it was archived, required "interaction with the originating host."	Burgoyne Decl. ¶7, Ex. B
150.	A Web page that incorporates images loaded from "the originating server ... will fail when archived."	Burgoyne Decl. ¶7, Ex. B
151.	If an Internet user disables the Javascript functionality of their Web browser, images and other content relating to links appearing in such pages "will be from the live web, not from our archive of old Web files."	Burgoyne Decl. ¶7, Ex. B
152.	Not every archived Web site in the Wayback Machine is complete.	Burgoyne Decl. ¶7, Ex. B
153.	In cases where a Web page has not been completely archived, the Wayback Machine will "grab" missing content from "the closest available date to the one you are in."	Burgoyne Decl. ¶7, Ex. B

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NO.	FACT	CITATION
154.	In cases where a Web page has not been archived at all the Wayback Machine will “grab” any content then available on the Web.	Burgoyne Decl. ¶7, Ex. B
155.	The operators of the Wayback Machine recently have implemented measures to prevent most Web browsers from displaying unarchived images in the context of archived Web content.	Cohen Decl. ¶51
156.	ASIS investigator Carl Scoles is not an expert in regard to any subject or discipline relevant to this litigation.	Scoles 21:1-22:2, 34:1-12
157.	IP address and domain name hosting, registration and use changes over time, often at shorter intervals than the timespan between the Incident Period and ASIS’s attempts to determine the source of the Emails.	Cohen Decl. ¶52, Ex. C at 29, 78
158.	Mohland did not begin researching the IP addresses appearing in the Emails’ headers until July 2007. The data available to Mohland reflected the hosting of IP addresses at the time Mohland performed his research and not during the Incident Period.	Mohland 168:8-17, 170:4-11
159.	Mohland opined that if the domain name and registrant information did not correspond, the header was “materially false or materially misleading” within the meaning of CAN-SPAM Section 7704(a)(1).	Mohland 119:24-120:21
160.	Mohland admitted that certain of IP addresses “could have changed hands” in the interim between the Incident Period and when Mohland performed his research.	Mohland 169:3-13
161.	At his deposition, Scoles stated that he could not remember whether certain of the data he gathered in connection with his research related to the year period beginning in June 2004 or the year period beginning in June 2005.	Scoles 101:2-18; 102:7-17
162.	Scoles made no attempt to verify whether the dates of archived Web content he examined corresponded to the dates	Scoles 103:22-105:19

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NO.	FACT	CITATION
	of particular Emails.	
163.	Scoles made no attempt to verify whether the IP hosting and domain name registration information relied on in his study pertained to the dates of particular Emails.	Scoles 228:10-229:2
164.	Scoles disregarded archived Web content that differed from the sample he was trying to match, as received from ASIS's counsel.	Scoles 105:21-106:9
165.	Scoles regarded as identical images appearing in archived Web pages and images on a printout provided to him by ASIS's counsel if, to Scoles' visual inspection, they appeared to be so.	Scoles 215:9-16
166.	Posluns believes that a simple visual comparison is insufficient to determine whether two images are identical.	Posluns 180:7-13
167.	A number of technological and other tools exist for determining whether two images are identical.	Posluns 180:13-21
168.	Mohland believes that software is available to automate the process of generating emails conforming to templates like the three he identified in the Emails.	Mohland 131:2-21
169.	Scoles was unable to interpret the "Chart of Linked Domains" incorporated into Exhibit A to the Declaration of Carl Scoles Re Supplemental Disclosure Six Amended submitted in support of ASIS's response to the Court Ordered Interrogatories. Scoles's link analysis assumes that one can reliably associate the registrant of a domain name with an IP address relating to that domain, and then associate all domain names resolving to a particular IP address with each other.	Scoles 249:14-250:15; 255:15-256:13
170.	Scoles made no attempt, and was not aware of any attempt, to contact the registrants of the domain names appearing in links contained in the Emails.	Scoles 235:18-236:3
171.	ASIS made no attempt to contact the users of the "From" addresses appearing in the Emails.	Mohland 167:21-168:4

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NO.	FACT	CITATION
172.	ASIS made no attempt to contact the users of the email addresses appearing in the Message-ID fields of the Emails.	Mohland 170:18-22
173.	The approaches to tracking an email to its source that lead to a level of certainty adequate to consider them reasonably reliable and authoritative include: (1) matching patterns of content, timing, or behaviors to specific features of specific systems, people, or organizations in such a manner as to largely eliminate the possibility of forgeries; (2) forensically examining systems from and/or through which emails were sent to determine that the emails were in fact sourced from those systems; and (3) gaining a materially supported admission by a sender or other party involved in the sending and that evidences the sourcing.	Cohen Decl. ¶53
174.	ASIS has not attempted to use the approaches referenced in the prior fact.	Cohen Decl. ¶54
175.	ASIS has not attempted the generally accepted means of identifying, collecting and preserving evidence of the type necessary to identify the sender of the Emails.	Cohen Decl. ¶55, Ex. A at 11, 24
176.	It is commonplace that a sender's actual identity not correspond to host data pertaining to the IP address of the email server from which that sender transmits emails.	Cohen Decl. ¶56, Ex. A at 29-30
177.	It is commonplace that a DNS lookup of an IP address yield inaccurate domain name information.	Cohen Decl. ¶57, Ex. A at 29, 49
178.	IP address data as available through a whois lookup does not reliably indicate IP address use.	Cohen Decl. ¶58, Ex. A at 28, 30
179.	ASIS's method of inferring a sender based on host data pertaining to the IP address of the server from which an email is transmitted is inherently unreliable and is not based on any generally accepted forensic methodology.	Cohen Decl. ¶59
180.	The presence of the Message-ID field is optional.	Cohen Decl. ¶62, Exs. C at 7 & D

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NO.	FACT	CITATION
181.	The Message-ID field is intended to “provide[] a unique message identifier that refers to a particular version of a particular message.”	Cohen Decl. ¶63, Exs. C at 7 & D
182.	The Message-ID field “is intended to be machine readable and not necessarily meaningful to humans.”	Cohen Decl. ¶64, Exs. C at 107 & D
183.	According to the FTC, the portions of an email header subject to CAN-SPAM’s “false or misleading” requirement include the “‘From,’ ‘To,’ and routing information.”	Cohen Decl. ¶71, Ex. E
184.	The Internet RFCs do not require that a server transmitting or transferring an email message add a header indicating the IP address of the transmitter or transferrer’s email server.	Cohen Decl. ¶72, Ex. E
185.	ASIS’s link analysis, as reflected in the Declaration of Carl Scoles Re Supplemental Disclosure Six Amended and the attachments thereto, is inherently unreliable and is not based on any generally accepted forensic methodology.	Cohen Decl. ¶60, Ex. C at 2, 11, 20, 75
186.	It is commonplace that multiple domain names registered to unrelated parties resolve to a single IP address.	Cohen Decl. ¶61, Ex. C at 8, 13-14, 16
187.	Posluns’s expert witness disclosure does not mention any study of the Emails performed by Posluns or SecuritySage Overdrive, Inc. (“SecuritySage”), Posluns’ firm, nor does ASIS’s Responses to the Court-ordered Interrogatories reference Posluns’s purported studies.	Burgoyne Decl. ¶¶21, 27, Exs. P, V; Posluns 252:8-17
188.	Posluns claimed that SecuritySage performed a study of the Emails to “validate the results of [Scoles and Mohland’s] process and [Scoles and Mohland’s] conclusions.”	Posluns 250:9-11; 251:5-11
189.	At his deposition, Posluns couldn’t remember the methodology employed by Scoles and Mohland in their analysis of the Emails.	Posluns 250:13-251:3
190.	At his deposition, Posluns couldn’t compare or contrast the methodology employed by Scoles and Mohland with the methodology employed by SecuritySage.	Posluns 250:13-251:3

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<b>NO.</b>	<b>FACT</b>	<b>CITATION</b>
191.	Posluns is not an expert in statistics.	Posluns 214:14-19
192.	Posluns and his staff reviewed the sample of Emails referenced in the prior fact to verify that each Email had “at least one characteristic of each email within the sample that would confirm its noncompliance with ... CAN-SPAM.”	Posluns 139:20-23
193.	Posluns and his staff did not verify that any of the Emails contained more than a single “characteristic of each email within the sample that would confirm its noncompliance with ... CAN-SPAM.”	Posluns 139:20-140:6
194.	ASIS’s expert Posluns and Posluns’s staff reviewed a sample of approximately 25 percent of the Emails.	Posluns 253:3-8
195.	Posluns personally examined just over half of the sample of Emails referenced in the prior fact.	Posluns 212:21-23
196.	Many email addresses relating to ASIS’s current and former users are available on publicly-accessible Web pages.	Cohen Decl. ¶76, Ex. A at 39
197.	A Google search on the email address pertaining to the Bruce Wolf Lead, and to which was directed the email by means of which White accessed the <a href="http://www.wumort.net">www.wumort.net</a> website, returns 40 matches.	Burgoyne Decl. ¶6
198.	Each of the 40 matches referred to in the prior fact is a publicly-accessible Web page.	Burgoyne Decl. ¶6
199.	Many of the 40 matches in the prior two facts identify the “Bionic Baking Brigade” as the user of the email address pertaining to the Bruce Wolf Lead.	Burgoyne Decl. ¶6
200.	Based on a review of less than half of those 40 matches, at least three active Web pages identify the user of the email address pertaining to the Bruce Wolf Lead by physical address.	Burgoyne Decl. ¶6
201.	Based on a review of less than half of those 40 matches, at least two active Web pages identify the user of the email address pertaining to the Bruce Wolf Lead by business name.	Burgoyne Decl. ¶6

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NO.	FACT	CITATION
202.	The server configuration and related files produced by FalconKnight evidence 945 ASIS user accounts.	Cohen Decl. ¶77, Ex. B at 7, 9, 19
203.	It is unlikely that an attempt to harvest email addresses from ASIS’s email server would yield information on only a small portion of the total number of ASIS’s user accounts.	Cohen Decl. ¶78
204.	The low number of then-current users to whom Emails were directed during the Incident Period suggests that the emails were targeted to only certain of ASIS’s users.	Cohen Decl. ¶79
205.	The inequitable distribution of Emails directed to addresses pertaining to ASIS’s then-active users suggests that the emails were targeted to only certain of ASIS’s users.	Cohen Decl. ¶80
206.	ASIS made no attempt to verify the date on which the alleged directory harvest took place.	White 261:14-262:1
207.	ASIS claims a range of adverse effects, including “monetary losses in the form of: the purchase of SPAM filtering services, a likely increase in the cost of purchasing . . . bandwidth [sic.], consumption of employee time to address client complaints regarding spam, and to configure solutions to the false positive and false negative aspects of spam filtering, a necessity to increase server capacity, increased service charges, and a partial disruption of services . . .”	Burgoyne Decl. ¶29, Ex. X
208.	The studies performed by Josh Mohland and Carl Scoles, and their declarations, are the backbone of ASIS’s case, having been produced in response to three Court-ordered interrogatories requiring ASIS to state all facts supporting its contentions that: 1) the Emails violate CAN-SPAM and Cal. Bus. & Prof. C. Section 17529.5; 2) the Emails originated from the same sender; and 3) the sender of the Emails used unlawful means to procure the IP addresses and/or email addresses from which the Emails were sent. The Court stated that ASIS would be precluded from offering any evidence on	Burgoyne Decl. ¶21, Ex. P

NO.	FACT	CITATION
	these three issues not included in ASIS's responses.	
209.	Mohland admitted that the three templates he identified—two of which were distinct from the other—appear in only 93% of the Emails.	Burgoyne Decl. ¶28, Ex. W
210.	Posluns stated in his Disclosure that the Emails “were sent using a botnet of compromised computers without the permission of the computers’ owners.”	Burgoyne Decl. ¶27, Ex. V
211.	Mohland used “whois” lookups to determine the registrants of IP addresses.	Burgoyne Decl. ¶28, Ex. W at 5

Dated: January 18, 2008

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