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7  
8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**

10 **ASIS INTERNET SERVICES, a California ) Case No. C-05-5124 JCS**  
corporation, )  
11 )  
12 **Plaintiff, ) PLAINTIFF'S EVIDENTIARY OBJECTIONS**  
vs. )  
13 ) **DATE: March 14, 2008**  
**OPTIN GLOBAL, INC., a Delaware ) TIME: 1:30 p.m.**  
14 **Corporation, also dba Vision Media Limited ) CTRM: 15, 18<sup>TH</sup> FLOOR**  
**Corp., USA Lenders Network, USA Lenders, )**  
15 **and USA Debt Consolidation Service; et al., )**  
16 **Defendants. )**  
17 )

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1 **I. INTRODUCTION**

2 In general, Defendant’s Declarants have made a considerable number of statements that are  
3 clearly not in their personal knowledge as they were not employees of Azoogole at the time of the events  
4 described. The Declarants have also made statements based on their recollection and interpretation of  
5 documents that have not been produced by Defendant at any time, much less attached to the  
6 declarations. In fact, Defendants has strenuously objected to the production of documents relating to  
7 their affiliates, yet Defendant’s Declarants are now relying on those same documents. Therefore the  
8 Court cannot consider the statements made by these Declarants in its consideration of summary  
9 judgment. Defendant’s expert has clearly violated the Court’s order in his reports and declaration and  
10 has based his opinions on invalid assumptions. His opinions are therefore invalid and should not be  
11 considered by the Court.

12 **II. OBJECTIONS**

13 **1. Plaintiff objects to Defendants’ Expert Second Supplementary Report in its entirety.**

14 Plaintiff objects to the second supplementary report of Defendant’s Expert, Dr. Cohen, in its  
15 entirety. The Court gave Defendant the opportunity to present an expert *rebuttal only* report based  
16 solely on AZ-0784–AZ-0787. See Docket 309 ordering the production of AZ-0784–AZ-0787 and  
17 Docket 315 granting the supplementary expert disclosure based solely on the documents described in  
18 Docket 315. Dr. Cohen then proceeded to produce a report that appears to have little or nothing to do  
19 with AZ-0784–AZ-0787.

20 The Court may exclude evidence on the basis that it is irrelevant (*FRE* 402) or on the grounds of  
21 prejudice, confusion, or waste of time. (*FRE* 403). The opinions of Mr. Cohen in his report are not  
22 relevant as the software (AZ-0787) he surveyed was not in place during the incident period of this case.  
23 See Declaration of Nella White in Support of Opposition to Motion for Summary Judgment, ¶5 (Docket  
24 335-31). The other opinions expressed by Mr. Cohen in his report are clearly outside the bounds of the  
25 restrictions set by the Court, as to this second supplementary report, and will only cause confusion and  
26 will waste both the Court’s and the jury’s time.

27 AZ-0784–AZ-0787 consist of files containing some of Plaintiff’s email accounts, some with  
28

1 dates, and certain configuration files found on one of Plaintiff's servers. Mr. Cohen assumed that the  
2 dates indicated in AZ-0784 and AZ-0785 are the close dates for those email accounts. This is simply  
3 sloppy work. These files contain no headings for the lists and no information concerning the layout or  
4 configuration of the files was provided. Mr. Cohen states on page 18 of his report:

5 Plaintiff's vendor did apparently respond to a request for documents by supplying  
6 a list of the user identities on their systems and the expiration dates of said  
7 accounts. This was the file identified as "Azoogle Production AZ-000784.pdf."

8 Note the use of the word "apparently," indicating that Mr. Cohen did not actually know this to be  
9 a fact. Mr. Cohen did not check to verify his assumption. Therefore, any conclusions about what the  
10 files contain or resultant opinions are invalid.

11 Mr. Cohen states that he used the following materials in his second supplementary report:

12 The materials reviewed and considered in the course of writing this report  
13 included all materials from the previous reports submitted and additional files  
14 provided to me on CD-ROMs and identified therein as:

15 Azoogle Production AZ-000784.pdf  
16 Azoogle Production AZ-000785.pdf  
17 Azoogle Production AZ-000786.pdf  
18 Azoogle Production AZ-000787.gz  
19 ASIS mort Aug 1 2005 - Jan 30 2006.dbx

20 A pair of stapled sheets identified as "Closed/Inactive Accounts" and  
21 marked as "ATTORNEY EYES ONLY"

22 Various elements of the U.S. Code as available on uscode.house.gov

23 In addition, the motions and court order related to these materials were provided  
24 and reviewed.

25 At the hearing regarding the Court's decision, Defendant requested that the expert be allowed to use  
26 other documents and sources previously used. The Court denied Defendant's request and stated that  
27 only AZ-0784–AZ-0787 were to be used.

28 Most if not all of Mr. Cohen's report has nothing to do with AZ-0784–AZ-0787. For example,  
29 Pages 5 and 23–36 appear to be a convoluted attempt to recount the actual emails at issue, based entirely  
30 on Mr. Cohen's speculations. There is not even a mention of the AZ-0784–AZ-0787 on these pages.  
31 On ¶36 and ¶37 Mr. Cohen discusses his theories on the internet Wayback Machine. Not only are his  
32 discussions regarding the Wayback Machine wrong, they have no possible connection to AZ-0784–AZ-  
33 0787. The Wayback Machine was used by Plaintiff's investigators well after filing the original  
34 Complaint to recreate images of the web sites in the emails at issue. The Wayback Machine had nothing

1 to do with processing the emails. This also illustrates Mr. Cohen's complete lack of experience and  
2 knowledge with current Internet archiving systems.

3 In addition, most of Mr. Cohen's report is based on speculative scenarios that he creates, such as  
4 his discussion of "Emailchemy" and his experiments on P23. This has nothing to do with anything that  
5 Mr. Posluns stated in his report and therefore represents a new theory, not allowed in rebuttals. An  
6 expert rebuttal must limit itself to rebutting the theories and concepts put forth by the opposing parties  
7 expert. A rebuttal expert cannot put forth their own theories. *FRCP* Rule 26(a)(2)(C)(ii); *International*  
8 *Business Machines Corp. v. Fasco Industries, Inc.*, Not Reported in F.Supp., 1995 WL 115421 at 3  
9 (N.D.Cal., 1995) – courtesy copy attached.

10 Mr. Cohen's summary of opinions 1–8, (P3–5) do not appear to be drawn from or have any  
11 relation to AZ-0784–AZ-0787. These summary opinions all appear to be based on a new assessment of  
12 the actual emails not an analysis of AZ-0784–AZ-0787. Mr. Cohen opines on various subjects such as:  
13 Plaintiff's duty to preserve evidence; Whether or not the emails could have been sent from China;  
14 Plaintiff caused the mails to be sent; Plaintiff's failure to limit damages; Lack of evidence regarding the  
15 Defendant; and minimal adverse affect to Plaintiff. These opinions simply have nothing to do with the  
16 AZ-0784–AZ-0787.

17 Only on P18–21 does Dr. Cohen even discuss AZ-0784–AZ-0787, primarily describing what the  
18 files contain. Here, Mr. Cohen's incompetence as relates to email systems and programming in general  
19 is most exposed. Mr. Cohen fails to ask the basic question any competent programmer would ask.  
20 Were the emails at issue actually processed by the configuration files in AZ-0787? They were not. This  
21 software is the software in place currently; it was not in place in 2005. See Declaration of Nella White  
22 in Support of Opposition to Defendant's Motion for Summary Motion, ¶5 (Docket 335-31). Defendant  
23 did not bother to ask either Plaintiff or Plaintiff's agent, Falcon Knight, when this software was  
24 installed. At deposition Mr. Cohen admitted that he had no evidence to indicate that the configuration  
25 files he reviewed were in place at the time of the incident. Cohen Depo. P232, L 18–22Exhibit A to  
26 Declaration of Jason K. Singleton (hereafter Dec. JKS) submitted herein under seal.

27 In addition, even if the software had been in place in 2005, the emails had already been  
28 processed by Postini prior to being sent to the red.asis.com server (where the AZ-0787 software is

1 currently installed), and then were all aliased to the valid email account of ng@asis.com, the emails  
2 would have then bypassed all of the code in the configuration files. See Declaration of Nella White,  
3 (Docket 335-31) ¶¶5 and 6. A competent programmer would have figured this fact out almost  
4 immediately on reviewing the files. A competent programmer would also have asked for the installation  
5 dates of the software.

6 As to Mr. Cohen's count of the emails, it is based entirely on speculation and his personal  
7 reading of the law. It does not in any manner represent a clear technical analysis of the facts. For  
8 example, Mr. Cohen decides, based on his reading of the SAC and his knowledge of the law, that emails  
9 outside of the date range listed in the SAC should not be counted. Exhibit A to Dec. JKS, Cohen Depo  
10 P181, L.12-P182, L.9, also see P186, L11-P187, L5. This clearly indicates that Mr. Cohen was  
11 reviewing documents for this disclosure that were not allowed in the Court's order. Then Mr. Cohen  
12 decided that emails that were sent to closed accounts did not fit his interpretation of the law as a valid  
13 email, so he threw those out. Exhibit A to Dec. JKS, Cohen Depo P181, L.12-P182, L.9. Mr. Cohen  
14 then threw out emails that appear to him to be duplicated by the alias process. This explanation is  
15 completely convoluted as Mr. Cohen is unable to explain how emails from different senders, with  
16 different subject lines, and different received dates are duplicate emails, relying entirely on the Postini  
17 received date to prove they are duplicates. Mr. Cohen assumes the message ID for emails must be  
18 different to indicate a separate email. This is seriously flawed, as message ID's can easily be altered by  
19 a sending spammer. Mr. Cohen didn't bother to run his analysis using the wider range of emails because  
20 he was sure his legal analysis was correct, even though he is not a legal expert. Exhibit A to Dec. JKS,  
21 Cohen Depo P188, L5-16. Instead of performing a technical analysis of the emails, Mr. Cohen  
22 performed a legal analysis. His reading of the law is clearly wrong, and should have been left to the  
23 Court. These legal assumptions clearly make Mr. Cohen's analysis and email count fatally flawed.

24 The opinions of Mr. Cohen therefore do not apply to this matter in any possible manner. *FRE*  
25 402 and 403. Therefore, Plaintiff requests that the Court strike Defendant's Expert Second  
26 Supplementary Disclosure in its entirety as both irrelevant and a waste of time.

27 **2. Plaintiff objects to submission of the second and third Declaration of Jay Williams.**

28 Witness Jay Williams, identified as a principal of Seamless Media, has produced three separate

1 declarations. Attached hereto as Exhibit B, C, and D (originally submitted as exhibits M and N to the  
2 Declaration of Hank Burgoyne, Docket 322, and Exhibit N to Declaration of Jason Singleton, Docket  
3 335-2). The second (Ex. C) and third (Ex. D) declarations contradict the first (Ex. B) declaration and  
4 contain statements and documents that are clearly hearsay. Plaintiff therefore objects to the  
5 admissibility of Jay Williams' Second and Third Declarations.

6 The Court must exclude recollections of documents when those documents exist and could be  
7 presented in evidence. **FRE** 1002. The Court must exclude documents attached to an affidavit if the  
8 person providing the affidavit has no personal knowledge of the documents. **FRE** 602; *Orr v. Bank of*  
9 *America, NT & SA*, 285 F.3d 764 at 778 (9th Cir., 2002). Authentication is a condition precedent to  
10 admissibility of evidence and must be satisfied prior to consideration by "evidence sufficient to support  
11 a finding that the matter in question is what its proponent claims." *Orr v. Bank of America, NT & SA*,  
12 285 F.3d 764, 773 (9th Cir., 2002); **FRE** 901(a); **FRE** 602.

13 Hearsay evidence is inadmissible at trial, unless it is defined as non-hearsay or an exception  
14 exists. **FRE** 801(c) and (d) and **FRE** 802, 803; 804; and 807; *Orr v. Bank of America, NT & SA*, 285  
15 F.3d 764, 778 (9th Cir., 2002).

16 Mr. Williams states in his first declaration (Exhibit B to Dec. JKS) at P2, L. 19–24, that he has  
17 searched all of the records of Seamless Media and can find no reference to John Strothers in a business  
18 relationship to Seamless Media. Mr. Williams also states that he does not have any of the documents  
19 regarding the Azoogole relationship because his computer was given to his child.

20 However, in his Second Declaration (Exhibit C), Mr. Williams, states that he talked to his  
21 partner Will Martin and that Will Martin had documents on his computer regarding the Azoogole  
22 Contract. Supposedly Mr. Martin's documents were not part of Seamless Media's business records.  
23 There is no declaration by Mr. Martin. Mr. Williams is referring to documents that were not in his  
24 possession and describing the contents as evidence. No authentication of the documents referred to by  
25 Mr. Williams is provided – nor or copies of the documents provided, only Mr. Williams supposed  
26 recollections even though the documents are apparently available on Mr. Martin's computer. Therefore  
27 the recollections regarding the Azoogole contract and attached document are improper. The *Best*  
28 *Evidence* rule requires that these documents be presented if they exist, rather than Mr. Williams'

1 recollections. *FRE* 1002. Mr. Williams’ recollection regarding these documents is not admissible, and  
2 cannot be accepted as evidence.

3 In Mr. Williams third declaration (Exhibit D) he states that attached are true and correct copies  
4 of an email chain sent to him by Steve Stouffer and attached as Exhibit A. P2, L. 1–2. No declaration  
5 from Mr. Stouffer is provided. Mr. Williams does not claim any independent recollection of these  
6 emails, only that he apparently found them on Mr. Martin’s computer. This is especially troublesome  
7 given that Mr. Williams had no recollection of these emails at the time of his first Declaration.  
8 Therefore authentication of the emails is not proper, as they are not within the personal knowledge of  
9 Mr. Williams.

10 In addition, these emails refer to other documents obviously intended to show that the email sent  
11 to Bruce Wolf came from a particular source. For example, the mailer campaign described in the  
12 emails. Even in the email the author admits that the attached email was not the actual email only a copy  
13 from the email campaign.

14 References to the attached documents, not produced, such as the mailer campaign, are not  
15 admissible as they are recollections by Mr. Stouffer and not the actual documents. *FRE* 1002. In  
16 addition, since Mr. Stouffer may be available as a witness and since he is the person who apparently sent  
17 the emails; it is likely that these documents would only be admissible if authenticated by Mr. Stouffer.

18 There is some indication that the emails are what the Defendants claim they are, as the first two  
19 emails appear to be from Mr. Stouffer to Mr. Williams. But this evidence is hardly conclusive. Without  
20 a clear authentication by either Mr. Stouffer or Mr. Williams, even the first two emails are not  
21 admissible.

22 In the case of the second two emails they are to and from a: John; Rick;  
23 michaelstothers@yahoo.com; Rick Suman; and Eric. In the final email the “From” name is blank, so  
24 that the sender of the email cannot even be identified. Mr. Williams was not a party to these emails and  
25 these emails are clearly not in the personal knowledge of Mr. Williams. The last two emails are also  
26 hearsay, and inadmissible at trial, in that they are written assertions offered by the Declarant (Jay  
27 Williams) to prove the assertion that John Strothers was the sender of the emails. *FRE* 801(a), (b) and  
28 (c).

1           The problem with these emails is that it would have been a simple matter for Mr. Williams to  
2 have fabricated the emails. Given the obvious stress placed on Mr. Williams by Defendant this creates a  
3 serious matter of credibility. Mr. Williams goes to great lengths, in his second Declaration, to point out  
4 he was pressured by Plaintiff's counsel to make the first Declaration. However, neither Mr. Williams, in  
5 his declarations nor Defendant point out that the Insertion Order signed by Mr. Martin on August 10,  
6 2005, contains an indemnification clause (at ¶8) requiring Seamless Media to indemnify Azoogole for  
7 any liability arising from any breach by Seamless Media. See ¶14 to Declaration of Jason Singleton in  
8 Support of Plaintiff's Opposition to Motion for Summary Judgment (Docket 335-2), and Exhibit F AZ-  
9 007 (Docket 335-9). Defendant states that it filed an arbitration demand under the Insertion Order  
10 against Seamless Media in early 2008. See Defendant's MPA in Support of Motion for Summary  
11 Judgment Pg. 4, L.27-28. In effect, Mr. Williams and Seamless Media are now under threat for all of  
12 Azoogole's losses including Azoogole's own attorney fees.

13           No discovery has been possible, as discovery is closed, regarding the new evidence declared by  
14 Mr. Williams. The new evidence provided by Mr. Williams contradicts his earlier Declaration. The  
15 original Declaration of Williams was made and presented to Defendant on July 27, 2007, when  
16 discovery was still open to both parties. The new Williams' Declarations were not provided until just  
17 prior to Defendant filed its Summary Judgment motion.

18           Defendant had information regarding Seamless Media and John Stothers, including the email  
19 address of michaelstothers28@yahoo.com, as early as November 7, 2005. See ¶14 and Exhibit F, AZ-  
20 009 (Docket 35-2 and 8). Yet Azoogole either did not pursue this obvious line of investigation for over  
21 two years or concealed the information until just prior to filing its Motion for Summary Judgment.

22           Therefore, the Court should strike the second and third Declaration of Jay Williams as either not  
23 in his personal knowledge or as inaccurate statements contradicted by prior testimony.

24 **3. Plaintiff Objects to certain statements in the Declaration of Attorney Graff (Docket 321).**

25           Mr. Graff makes statements that are contradicted by the record. Mr. Graff describes documents  
26 from his personal knowledge but does not produce those documents. Mr. Graff declares facts that are in  
27 his own personal knowledge regarding events that took place two years before he joined Azoogole.

28           As discussed above recollections of documents offered regarding those documents are not the

1 best evidence when the documents exist. *FRE* 1002. Evidence not within the personal knowledge of  
2 the witness is not admissible. *FRE* 602.

3 Mr. Graff, at ¶3, discusses the Azoogle/Seamless Media Insertion Order and the fact that the  
4 Azoogle Refinance Lead Criteria was attached to the Insertion Order. Mr. Graff provides copies of both  
5 documents. However, the Azoogle Insertion Order states, at ¶11 under “Entire Agreement” that the  
6 Insertion Order sets forth the entire understanding of the parties and that it can only be changed by a  
7 subsequent writing signed by both parties. In the versions of these documents provided by Azoogle in  
8 AZ-005–AZ-008, the Azoogle Refinance Lead Criteria document is not attached. See Exhibit A to Dec  
9 of Graff, Docket 321, AZ-005-AZ-008. Note that the Azoogle Refinance Lead Criteria is AZ-0012,  
10 supposedly four pages away from the Insertion Order ending at AZ-008, and is not signed by anyone.  
11 See Exhibit B to Dec of Graff, Docket 321, AZ-0012. Note also that the Insertion Order is not signed by  
12 an Azoogle officer. In addition, no signed version of the Azoogle Refinance Lead Criteria has ever been  
13 produced.

14 Therefore, the Azoogle Refinance Lead Criteria produced by Mr. Graff cannot be a portion of  
15 the actual Insertion Order. If Mr. Graff is correct regarding whether the Azoogle Refinance Lead  
16 Criteria was attached, then the actual signed copy of the Azoogle Refinance Lead Criteria must be  
17 produced. *FRE* 1002.

18 Mr. Graff’s statements regarding whether there was an agreement between the parties based on  
19 the Insertion Order are also disputed by the Insertion Order document attached to Mr. Graff’s  
20 Declaration. The Insertion Order was never signed by Azoogle. This is not a contract dispute. The  
21 evidence being offered is being offered to prove essential elements of the *CAN SPAM Act*, including  
22 consciously avoids knowing. The fact that the documents do not indicate a properly executed agreement  
23 is clearly an issue in this case. The documents speak for themselves. Therefore, Mr. Graff’s statements  
24 regarding the documents are not admissible and contradicted by the evidence provided.

25 As stated in his declaration, Mr. Graff is the general counsel for Defendant. As an attorney there  
26 is a higher expectation of legal knowledge for attorneys than for non-attorneys. Therefore statements  
27 made in a declarations or affidavits cannot be excused as not understanding the legal requirements for  
28 the statements as being made under penalty of perjury.

1 Mr. Graff was reported to start at Azoogole in October of 2007 by EON Business Wire. See  
2 AzoogoleAds Appoints David Graff to General Counsel, *Business Wire EON*, October 30, 2007  
3 (Courtesy copy attached). If this article is correct then Mr. Graff was working at Edison Schools, Inc. in  
4 2005, not at Azoogole. Statements made by Mr. Graff in his declaration make him a percipient witness to  
5 the critical facts in this matter. Not that someone else told him they were true, but that he observed them  
6 himself. Mr. Graff makes no statement that the facts he attests are based on documents he has read or  
7 investigations he undertook at Azoogole.

8 In ¶5 of his declaration, Mr. Graff states that Azoogole at the time the lead was provided did not  
9 know or suspect that the lead had been provided in violation of any law. This statement assumes that  
10 Mr. Graff personally knew about the lead and that he had personal knowledge that Azoogole did not  
11 know that the lead was in violation of the law. It is unclear how a witness who was not working for  
12 Azoogole in October of 2005, and did not start at Azoogole for two years, has personal knowledge  
13 concerning key issues specific to October of 2005.

14 If other persons told Mr. Graff this information then it is not in his personal knowledge and only  
15 represents hearsay as to these issues. If Mr. Graff conducted an investigation, then he should have so  
16 stated that the facts described were as a result of an investigation he personally conducted. If an  
17 investigation was conducted, then this investigation and its results have not been provided to Plaintiff as  
18 is required by *FRCP* Rule 26, requirement for initial and supplemental disclosures.

19 Mr. Graff makes similar statements in ¶¶3–15 of his Declaration. All made from his personal  
20 knowledge, all made under penalty of perjury.

21 Some of these statements are clearly inaccurate based on other evidence. For example, in ¶11,  
22 Mr. Graff states that prior to this litigation Azoogole had never heard of John Stothers. This is clearly an  
23 inaccurate statement. Emails provided by Defendant Azoogole indicate that Ragi Mahil of Azoogole  
24 received information about John Stothers on November 7, 2005. See ¶14 and Exhibit F to Declaration  
25 of Jason Singleton in Support of Plaintiff’s Opposition to Motion for Summary Judgment, AZ–009  
26 (Dockets 335-2 and 8). The original Complaint in this litigation was filed on December 12, 2005, over a  
27 month later. See Complaint.

28 Therefore, if Mr. Graff did in fact start at Azoogole in October of 2007, then Mr. Graff’s

1 declarations made in ¶¶3 through 15, concerning events that occurred in 2005, are improper and the  
2 Court should strike those statements. *FRE* 602.

3 **4. Plaintiff Objects to certain statements and exhibits contained in the Declaration of**  
4 **Margarita Calpotura In Opposition (Docket 343).**

5 Ms. Calpotura attaches copies of uncertified deposition and correspondence between various  
6 persons and describes these documents in ¶¶2, 3, 4, and 17 of her declaration. Ms. Calpotura is neither a  
7 party to the correspondence nor is she an employee of Defendant. As neither a party to the  
8 correspondence or an employee who could have personally observed or handled the correspondence,  
9 Ms. Calpotura cannot authenticate the documents from her own personal knowledge. *FRE* 602.

10 Ms. Calpotura's Declaration ¶2 and Exhibit A refers to the uncertified deposition of Don Mathis.  
11 Deposition testimony must be certified by a qualified clerk who records the testimony. Uncertified  
12 deposition testimony is not admissible at Summary Judgment. *Orr v. Bank of America, NT & SA*, 285  
13 F.3d 764at (9th Cir., 2002); citing *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157, 161 (7th  
14 Cir. 1963). Therefore, Paragraph 2 and Exhibit A must be struck as unauthenticated and inadmissible.

15 Ms. Calpotura's Declaration ¶3 and Exhibit B refer to emails between Azoogole and Spamhaus.  
16 Since Ms. Calpotura is not a party to the emails and not an employee of Azoogole or SPAMHAUS  
17 responsible for their business records, she cannot authenticate these emails as being in her own personal  
18 knowledge. Therefore, they are not admissible at Summary Judgment. *FRE* 602.

19 Ms. Calportura's Declaration ¶4 and Exhibit C purport to be correspondence between Joe Speiser  
20 of Azoogole and Caryn Moran of Savvis. Since Ms. Calpotura is not a party to the letter and not an  
21 employee of Azoogole or Savvis responsible for their business records, she cannot authenticate these  
22 emails as being in her own personal knowledge. Therefore, they are not admissible at Summary  
23 Judgment. *FRE* 602. In contrast, Plaintiff has provided the SAVVIS termination letter and emails as  
24 certified responses to its subpoena to SAVVIS and attaches the declaration of the SAVVIS custodian of  
25 records as Exhibit E to the Dec. JKS.

26 Ms. Calpotura's Declaration ¶17 and Exhibit P purport to be correspondence between Azoogole  
27 and an unnamed party. Since Ms. Calpotura is not a party to the letter and not an employee of Azoogole  
28 or the unnamed party responsible for their business records, she cannot authenticate these emails as

1 being in her own personal knowledge. Therefore, they are not admissible at Summary Judgment. *FRE*  
2 602.

3 It would have been far better if these documents had been attached to declarations of the parties  
4 involved or a custodian of records for Azoogole. Without such authentication and/or certification, none  
5 of these documents are admissible at summary judgment.

6 **5. Plaintiff objects to the Declaration of Cohen in Opposition to Plaintiff's Motion for**  
7 **Summary Adjudication (Docket 344) in its entirety as an improper supplementary**  
8 **disclosure in direct contradiction of the Court's order.**

9 The Court allowed Defendant to make a second supplementary disclosure of its expert, Cohen,  
10 based on the materials in AZ-0784–AZ-787. The Court specifically allowed for only the second  
11 supplementary disclosure. Docket 315. The standing Court order allows for supplemental disclosures  
12 only with the stipulation of the opposing party or the Court's permission. CASE MANAGEMENT  
13 AND PRETRIAL ORDER, Docket 167, P.8, L. 10-11.

14 Now Defendant attempts to sneak in a fourth supplemental disclosure by calling it a declaration.  
15 Because the initial disclosure of Mr. Cohen was over 30 days late, the Court limited Mr. Cohen's expert  
16 testimony to rebuttal of Plaintiff's expert, Mr. Posluns. Mr. Posluns has made no supplementary  
17 disclosure at all. Instead Mr. Cohen is now disputing the presentation of industry standards to the Court.

18 Cohen also describes how Postini should handle emails. Mr. Cohen has no direct evidence of  
19 any kind as to how Postini does or should handle emails.

20 Mr. Cohen does not understand SMTP and is clearly not an expert on internet email or SMTP.  
21 Plaintiff has provided no expert opinion on the subjects that Mr. Cohen pontificates about. Instead  
22 Plaintiff provided the Court with copies and citations to the SMTP documents and other industry  
23 standard documents (RFC 2821, Microsoft's Sender ID Framework and the DomainKey authentication  
24 system).

25 As to what logs Plaintiff should have kept, there is no relevant case law regarding the  
26 preservation of log files in *CAN SPAM Act* cases. Plaintiff's expert did not discuss logs and the non-  
27 production of logs does not dispute any opinion proposed by Mr. Posluns. While these types of logs  
28 may be useful in criminal cases, there has been no judicial decision that they are required in civil cases.  
Log files are required in criminal cases because of the higher burden of evidence and the absolute

1 requirement to show a proper chain of evidence. This burden exists because a decision in a criminal  
2 case deals with the life and liberty of an accused. The burden of proof in civil cases is a preponderance  
3 of evidence, while a showing of a chain of evidence might be useful, it has never been required in a civil  
4 case.

5 Therefore, Plaintiff objects to Mr. Cohen's Declaration (Docket 344) as both improper under the  
6 Court's Orders and not in rebuttal to Plaintiff's expert's opinions.

7 **6. Plaintiff objects to certain statements in the Declaration of Don Mathis, Docket 340.**

8 Plaintiff objects to ¶¶5, 8, 9, 11, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 26, 27, and 28 as they  
9 discuss documents not presented in evidence by Mr. Mathis. These statements must be excluded and the  
10 original documents produced. *FRE* 1002.

11 Mr. Mathis states that he was hired and joined Azoogle in August of 2005. Mr. Mathis then  
12 claims to have knowledge concerning events prior to joining Azoogle. Mr. Mathis provides no basis as  
13 to how he gained this knowledge in order to swear under penalty of perjury that the events are true.  
14 Plaintiff objects to ¶¶6, 7, 20, 21, and 24 as they deal with subjects that took place prior to Mr. Mathis  
15 joining Azoogle and are therefore not in his personal knowledge. *FRE* 602.

16 Mr. Mathis makes statements not within his own personal knowledge. Plaintiff objects to ¶4 as  
17 Mr. Mathis is reporting that other companies rely on Azoogle's reputation. The basis of other  
18 companies decisions are not likely within Mr. Mathis' personal knowledge and are therefore not  
19 admissible. *FRE* 602.

20 Plaintiff objects to ¶5 as it is directly contradicted by Savvis in their termination letter. See  
21 Letter of cancellation from SAVVIS and log of incidents, Bate 0852-0856, Docket 335-19. Since this  
22 event occurred in 2004, prior to Mr. Mathis joining Azoogle it cannot be within his personal knowledge.  
23 *FRE* 1002.

24 **7. Plaintiff objects to Defendant's Separate Statement of Facts in Support of Defendant's**  
25 **Opposition to Plaintiff's Motion for Summary Adjudication, Docket 339, and Defendant's**  
26 **Supplemental Separate Statement of Facts attached to Defendant's Reply, Docket 356.**

27 There is no basis for a separate statement of undisputed facts for an opposition to a summary  
28 judgment motion. Oppositions are not to exceed 25 pages without leave of the court. *L.R.* 7-3.  
Supplemental papers are defined in *L.R.* 7-3(d) as notices to the court of new judicial decisions and

1 make no reference to a supplemental statement of facts. *L.R.* 56-2(b) states that as a procedure the  
2 parties must meet and confer, on a date set by the court. The parties agreed to deliver their initial  
3 statements of undisputed facts by January 10, 2008, with resolution by January 16, 2008, two days prior  
4 to the deadline for submission of the Summary Judgment Motions. See Exhibit F to Dec. JKS, Email  
5 from Hank Burgoyne with schedule. Therefore the deadline for consideration of undisputed facts was  
6 January 16, 2008. Defendant's continued submission of separate facts is completely contrary to the  
7 Local Rules.

8 In the case of Defendant's Supplemental Statement, Docket 356, Plaintiff cannot even reply to  
9 this document under the Local Rules as the rules clearly prohibit any supplemental papers after the  
10 Reply, without the Court's approval. **If the Court decides to allow the Supplemental then Plaintiff**  
11 **requests the Court's approval to submit a response to this document.**

12 Defendant has attempted to double the size of its Opposition to 50 pages by another ridiculous  
13 separate statement of undisputed facts, and the size of its Reply paper of fifteen pages by an additional  
14 four pages.. This is particularly egregious since most of the supposed facts have no material bearing on  
15 this case.

16 The Court allows for a separate statement of undisputed material facts to accompany the motion  
17 for summary judgment. There is no mention and Plaintiff knows of no precedent for allowing a separate  
18 statement of facts to accompany an opposition or reply paper. *L.R.* 7-3(d) specifically defines  
19 supplemental materials and limits supplemental materials to notices to the court of new judicial  
20 decisions.

21 Also, apparently Defendant's are not familiar with the word "material" as used in the Court's  
22 standing order. Material Evidence is defined as evidence having some logical connection with the  
23 consequential facts or the issues. *Black's Law Dictionary*, Second Pocket Edition, 2001. Defendant  
24 produces a flood of statements, many of which have no bearing on the issues in Plaintiff's Motion for  
25 Summary Adjudication.

26 Many if not most of the facts in this case are in dispute. Both sides have provided witnesses who  
27 have provided evidence. When that testimony is contradicted by other testimony then it is up to a trier-  
28 of-fact to weigh the testimony and judge the credibility of the witnesses. Defendant apparently thinks

1 that just because one witness says something it is automatically an undisputed fact. As is demonstrated  
2 in Plaintiff's Response to Defendant's Statement of Undisputed Facts, Docket 337, most of Defendant's  
3 evidence is disputed. Defendant believes it has established an uncontested fact even when they have  
4 clearly misrepresented the statement of the witness.

5 It is proper to cite evidence in a motion to establish evidence regarding an issue or to contradict  
6 another parties evidentiary citations. Simply because evidence exists does not make that an uncontested  
7 fact. For example, citations to the testimony of individuals not authorized to speak for a company do not  
8 establish un-contested facts as to the policy and procedures of that company. The witness is not  
9 competent to testify. *FRE* 601 and 602. They may represent issues, but they do not establish  
10 uncontested facts about that company. Statements by a witness later contradicted by that witness or  
11 another witness do not establish uncontested facts.

12 Defendants first and second separate statement of undisputed facts are nothing more than their  
13 presentation of evidence. Defendant apparently decided to present their evidence in this manner to get  
14 around the page limitation for motions.

15 In addition, Defendant's representation of history of its Separate Statement of Facts, as disclosed  
16 by Jeffrey Rosenfeld in his declaration, Docket 346, is seriously flawed. Defendant attempted to  
17 introduce its first statement of undisputed facts to Plaintiff, some 24 pages and 211 statements, the day  
18 before the Summary Judgment Motion was due. The attorneys had agreed to provide their fact  
19 statements for consideration by January 10 or 11, 2008, with resolution by January 16. Plaintiff  
20 provided its statement of facts on January 10, 2008. Defendant did not provide any statement of facts  
21 until January 16. This statement consisted of three pages. On January 17, at three o'clock in the  
22 afternoon, the day before the Motions were due, Defendant produced 20 some pages of facts and wanted  
23 Plaintiff to sit down and meet and confer. This was after both parties had agreed to the Joint Statement  
24 of Undisputed Facts filed with the Court as Docket 329. Two days before the Opposition papers were  
25 due Defendant again called to negotiate its completely new 25-page separate statement of facts for its  
26 Opposition. See Exhibit A to Docket 346, Dec of Rosenfeld, note that Mr. Rosenfeld sent the email at  
27 "6:52 pm" on January 29. As Plaintiff was involved in filing its own opposition papers there was no  
28 time to review or discuss this ridiculous new document produced by Defendant.

1 Finally, Defendant produced its latest supplement with no notice at all to Plaintiff. Defendant  
2 did not even give Plaintiff a courtesy call concerning the supplemental. This clearly violates the  
3 standing rules and local rules regarding separate statements of facts.

4 The Court should strike Defendant's Second Statement of Undisputed Facts, Docket 339, and  
5 Defendant's Supplemental Statement, Docket 356, as improper under *L.R.* 7-3(d), and a serious waste of  
6 time for the Court. *FRE* 403. In the alternative Plaintiff has responded to Defendant's improper second  
7 statement of undisputed facts. Plaintiff will not respond to the Defendant's Supplement without  
8 approval by the Court as the Reply's have been submitted.

9  
10 **SINGLETON LAW GROUP**

11 Dated: February 19, 2008

12 /s/ Jason K. Singleton  
13 Jason K. Singleton  
14 Richard E. Grabowski, Attorneys for Plaintiff,  
15 **ASIS INTERNET SERVICES**