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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  
OBJECTIONS TO ASIS INTERNET  
SERVICES' SUMMARY  
JUDGMENT/SUMMARY  
ADJUDICATION EVIDENCE**

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

The Honorable Joseph C. Spero

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## INTRODUCTION

1 In filing these objections to evidence (“Objections”), Defendant AzoogleAds.com, Inc.  
2 (“Azoogle”) does not intend to further burden the Court. Azoogle believes it is important,  
3 however, that a decision not be based on evidence that, in fundamental respects, fails to comport  
4 with the Federal Rules of Evidence and the rulings of this Court.

5 This case has attracted broad attention in the Internet marketing community. Plaintiff  
6 ASIS Internet Services, Inc. (“ASIS”) alone has filed five other CAN-SPAM lawsuits, at least  
7 one of which has been stayed pending the outcome of this case. The Court’s decisions regarding  
8 the admissibility of ASIS’s evidence—in particular ASIS’s “studies” regarding the supposed  
9 origins and unlawful nature of the emails—will fundamentally impact those litigations, as well as  
10 ones yet to be filed by ASIS and others.

11 The Court’s vigilance is all the more important in light of the technical nature of CAN-  
12 SPAM claims. The admission of unreliable technical evidence is likely to mislead anyone  
13 lacking a sufficient technical background to understand it. This case provides additional cause  
14 for concern in that ASIS’s purported expert, Jeffrey Posluns, has failed to submit a declaration.  
15 Accordingly, the only source of ASIS’s technical opinions and theories is ASIS counsel Jason  
16 Singleton, who is not, and who has not claimed to be, an expert.

17 Out of respect for the Court’s time, Azoogle raises only what it sees as the most serious  
18 objections to ASIS’s most problematic evidence. Azoogle reserves its right to make additional  
19 objections, including as contained in its other summary judgment/adjudication papers, at the  
20 hearing on the parties’ summary judgment/adjudication motions or as otherwise appropriate.

## ARGUMENT

### **I. ASIS May Not Rely on Evidence Withheld During Discovery, in Particular as Relates to the Three Court-Ordered Interrogatories.**

21 In support of its summary judgment/adjudication filings, ASIS submitted a broad range of  
22 evidence never before produced or referenced by ASIS. This Court’s orders require that such  
23 evidence be excluded from the record.  
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1           **A. The Court Precluded ASIS from Offering Evidence Not Referenced in its Responses**  
2           **to the Three Court-Ordered Interrogatories.**

3           The Court’s “Order re June 27, 2007 Joint Letter,” entered June 29, permitted Azoogle to  
4 serve three interrogatories seeking all facts relating to ASIS’s contentions that:

- 5           1. The Emails violate CAN-SPAM and Cal. Bus. & Prof. C. Section 17529.5;
- 6           2. The Emails originated from the same sender; and
- 7           3. The sender of the Emails used unlawful means to procure the IP addresses and/or  
8 email addresses from which the Emails were sent.

9           The Court’s June 29 order further stated that ASIS would “be precluded from introducing at trial  
10 or on summary judgment any facts to prove these contentions other than the facts set forth in  
11 response to these interrogatories.”

12           Azoogle served the three Court-ordered interrogatories, and ASIS responded.  
13 (Declaration of Henry M. Burgoyne, III in Support of AzoogleAds.com, Inc.’s Objections to  
14 ASIS Internet Services’ Summary Judgment/Adjudication Evidence (“Burgoyne Decl.”) ¶¶2, 3 &  
15 Exs. A, B.) In regards to the second contention, ASIS claimed that its response set forth its  
16 evidence demonstrating both that “these emails were sent by the same parties” and that “the  
17 emails were sent on Azoogle’s behalf.” (*Id.* at 21:16-17.) ASIS’s responses, however, omitted  
18 any mention of the following evidence:

- 19           1. Josh Mohland’s January 16, 2008 declaration summarizing his new “study” regarding the  
20 alleged emails’ (“Emails”) headers, and the nine separate exhibits to that declaration,  
21 collectively attached as Exhibit V to the Declaration of Richard Grabowski in Support of  
22 ASIS’s Motion for Summary Adjudication (“Grabowski Decl.”) (Court-Ordered  
23 Interrogatory Topic No. 1);
- 24           2. The Quicken Loans documents attached as Exhibits F and M to the Grabowski Decl. and  
25 as Exhibit G to Jason Singleton’s Declaration in Opposition to Azoogle’s Motion for  
26 Summary Judgment (“Singleton Op. Decl.”) (Court-Ordered Interrogatory Topic No. 2);
- 27           3. Grabowski Decl. Exhibit O (unauthenticated 2005 blog posting titled “Spam Report”)  
28 (Court-Ordered Interrogatory Topic No. 2);
4. Paragraph 2 of Nella White’s Declaration in Opposition to Azoogle’s Motion for  
          Summary Judgment (“White Op. Declaration”), concerning White’s purported attempt in

1 2005 to enter a second false lead into a second website (Court-Ordered Interrogatory  
2 Topic No. 2); and

3 5. Exhibit P to Jason Singleton’s Declaration in Support of Reply to ASIS’s Motion for  
4 Summary Adjudication (“Singleton Reply Decl.”) (supposed “domain history of  
5 wumort.net”) (Court-Ordered Interrogatory Topic No. 2).

6 ASIS attempts to pass off the first of these items—the new Mohland declaration—as  
7 “simply the same contentions as was included in the answers to Court imposed interrogatories,  
8 only as applied to the entire set of emails.” (ASIS’s Reply to Azoogles’s Motion for Summary  
9 Judgment/Adjudication (“ASIS Reply”) at 5:28-6:1.) However, a simple comparison of  
10 Mohland’s declarations, the first of which is attached to the Grabowski Decl. as Exhibit T, proves  
11 that representation to be untrue. Mohland’s second declaration describes a completely new  
12 theory: That the Emails’ presumed sending IP addresses should match the domain names in the  
13 Emails’ “From” headers (This is nowhere mentioned in Mohland’s first declaration, which  
14 concerned only the Emails’ “Message-ID” headers.) Additionally, Mohland’s second declaration  
15 discusses, and attaches, voluminous documents concerning email source authentication, a subject  
16 never referenced in Mohland’s first declaration. Mohland’s second declaration also refers to  
17 “Mail Exchange” records, “Perl modules,” IP address “octets,” “illegal characters,” physical  
18 locations of email servers, and a range of additional concepts wholly unrelated to Mohland’s first  
19 declaration. Even the exhibits to Mohland’s two declarations differ—a fact that ASIS covers up  
20 by not submitting the exhibits to Mohland’s first declaration.

21 Because ASIS failed to include Mohland’s second declaration and other listed evidence in  
22 its responses to the three Court-ordered interrogatories, that evidence should be excluded.<sup>1</sup>

23 **B. The Court’s Standard Case Management Order Bars ASIS from Relying on  
24 Evidence Not Produced During Discovery.**

25 According to the Court’s standard case management conference order, “[e]xcept for good  
26 cause, no item will be received in evidence if the proponent failed to produce it in the face of a

27 <sup>1</sup> Of course, even if the Court’s June 29 order didn’t preclude ASIS from offering the above-listed  
28 evidence in relation to the three contentions identified in that order, most of that evidence still  
would be inadmissible for ASIS’s failure to produce it during discovery, reference it in  
interrogatory responses and/or disclose it in depositions.

1 reasonable and proper discovery request covering the item, regardless of whether a motion to  
2 overrule any objection thereto was made.” Azoogole served document requests, interrogatories,  
3 and requests for admission, and asked ASIS’s organizational deponent numerous deposition  
4 questions, regarding: 1) ASIS’s alleged status as a provider of Internet Access Service (“IAS”)  
5 under CAN-SPAM and as an Electronic Mail Service Provider (“EMSP”) under California law;  
6 2) ASIS’s alleged adverse effects resulting from the Emails; and 3) Azoogole’s alleged knowledge,  
7 or conscious avoidance of knowledge. (Burgoyne Decl. ¶¶4, 5 & Exs. C, D.) Azoogole also  
8 served two subpoenas on ASIS expert Jeffrey Posluns seeking, among other things, Posluns’s  
9 communications with ASIS and Singleton, including in electronic format. (*Id.* ¶¶6, 7 & Exs. E,  
10 F.) Notwithstanding those requests, ASIS never produced or otherwise referenced the following  
11 evidence, all of which ASIS had in its actual or constructive possession:

- 12 1. Paragraph 4 of Nella White’s Declaration in Support of Summary Adjudication (“White  
13 S.A. Decl.”) and the DomainTools.com printouts attached as Exhibit A thereto, regarding  
14 ASIS’s domain name ownership;
- 15 2. Paragraph 6 of the White Op. Decl. regarding Postini, Inc. and adverse effects. In this  
16 Paragraph, White declares that Postini “is really an extension of ASIS.” However, ASIS  
17 failed to preserve or produce either its correspondence with Postini or various Postini logs  
18 and reports, which, to the extent later available, Azoogole was forced to subpoena from  
19 Postini. (*See* Azoogole’s Opposition to ASIS’s Motion for Summary Adjudication (“Az.  
20 Op.”), Part IV, *Forthcoming Objections to Evidence*; (Burgoyne Decl. ¶8 & Ex. G));
- 21 3. Exhibit B to the Singleton Reply Decl., containing the source code from emails from  
22 ASIS expert Jeffrey Posluns. During discovery, ASIS refused a specific request by  
23 Azoogole to produce electronic versions of these emails. (Burgoyne Decl. ¶13 & Ex. L);
- 24 4. Paragraphs 2-3 and 5-6 of the Singleton Op. Decl., regarding “spam” growth and other  
25 trends;
- 26 5. Paragraph 2 of the Singleton Reply Decl., regarding Singleton’s supposed August 2007  
27 conversation with the CEO of BurstNet; and
- 28 6. Congressional testimony given in 2003 by Earthlink CEO Charles Betty, a “Courtesy  
Copy” of which was submitted with ASIS’s Opposition to Azoogole’s Motion for  
Summary Judgment/Adjudication (“ASIS Op.”).

1 ASIS's withholding of the above-listed evidence violated the Court's case management  
2 order, and deprived Azoogole of any opportunity to examine that information or to conduct an  
3 investigation relating to it. Accordingly, that evidence should be excluded from the record.

4 **II. The Court Should Exclude ASIS Counsel Jason Singleton's Technical Opinions and**  
5 **the Unscientific and Misleading "Studies" of Laypersons Mohland and Scoles.**

6 It is the function of the Court to ensure that technical opinion testimony is the product of  
7 reliable principles and methods, and reflects "the same level of intellectual rigor that  
8 characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526  
9 U.S. 137, 152 (1999). "[S]ubjective belief or unsupported speculation," even if offered by an  
10 expert, is inadmissible. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590  
11 (1993). In lieu of the testimony of a *bona fide* expert, ASIS proffers the erroneous technical  
12 opinions of its counsel, accompanied by the unscientific and misleading "studies" of laypersons  
13 Josh Mohland and Carl Scoles. The Court must exclude such pseudo-scientific "evidence" in  
14 favor of competent expert testimony of the sort proffered by Azoogole.

15 **A. ASIS's Expert Posluns Did Not Testify in Connection with the Parties' Motions.**

16 ASIS counsel Jason Singleton ("Singleton") has represented to this and other courts that  
17 CAN-SPAM cases are complex. In another CAN-SPAM action, Singleton explained:

18 This case is [] about how a person can use the technology of the internet to deceive an  
19 [Internet Access Provider] or potential email recipient. This requires an in-depth  
20 knowledge of the technology, not just of how the Internet should work, but of the  
21 techniques used by spammers to defeat the security built into the Internet. . . .  
22 Clearly the technical issues in this case are well beyond the common knowledge of  
23 even a generally knowledgeable technician, much less a layman. The detail [sic]  
24 technical knowledge required to track SPAM back to its source, or to prevent SPAM  
25 from reaching the targeted consumer, is specialized and complex. (Burgoyne Decl. ¶9  
26 & Ex. H at 1:24-27, 7:28-8:3.)

27 To assist in prosecuting ASIS's claims, Singleton designated expert Jeffrey Posluns. For  
28 reasons unexplained, however, ASIS has failed to submit any declaration or other testimony by  
Posluns. ASIS's summary judgment/adjudication briefs occasionally reference Posluns's expert

1 disclosure, although that unsworn disclosure is hearsay and thus inadmissible. Because Posluns  
2 has failed to testify, the record contains no expert opinion testimony to support ASIS's claims.

3 **B. ASIS Counsel Jason Singleton's Technical Opinions Are Inadmissible and**  
4 **Erroneous.**

5 Notwithstanding ASIS's failure to submit any expert testimony, its summary  
6 judgment/adjudication briefs incorporate a host of complex technical arguments. The only  
7 apparent support for those arguments is the technical opinions of Singleton, who signed each of  
8 ASIS's briefs. Singleton, however, is not, and has not claimed to be, an expert. Accordingly,  
9 Singleton's technical opinions are *per se* inadmissible.<sup>2</sup> Occasionally, Singleton attempts to  
10 buttress his technical opinions with citations to the "studies" of Josh Mohland and Carl Scoles.  
11 But as explained below, neither Mohland nor Scoles is an expert. Thus, their studies provide no  
12 support for Singleton's own technical opinions.

13 Likely as a result of Singleton's lack of expertise, the vast majority of his technical  
14 opinions are wrong. By way of example:

- 15 • Singleton submits that the presence of "false header information" makes tracing the  
16 source of an email "impossible." (ASIS's Motion for Summary Adjudication ("ASIS  
17 Mo.") at 1:26-27.) But as explained by Dr. Cohen, reasonably reliable and generally  
18 accepted methods of tracing email communications exist. ASIS just didn't use any of  
19 them. (Azoogles.com, Inc.'s Separate Statement Of Material Undisputed Facts In  
20 Support of Summary Judgment/Adjudication ("Az. Sep. St.") Nos. 173-180);

21 <sup>2</sup> Pursuant to Federal Rule of Evidence 702, an expert must possess the "knowledge, skill,  
22 experience, training, or education relevant to such evidence or fact in issue." *United States v.*  
23 *Chang*, 207 F.3d 1169, 1172 (9th Cir. 2000). The record contains no evidence that Singleton has  
24 any training, education or experience sufficient to render his technical opinions competent or  
25 reliable. Thus, they are inadmissible. *Id.*; see also *Kumho Tire*, 526 U.S. at 149. Even if  
26 Singleton were an expert, his technical opinions would be inadmissible for ASIS's failure to  
27 incorporate them into its responses to the Court-ordered interrogatories or to otherwise to disclose  
28 them. In any event, to the extent Singleton now purports to serve as an expert witness, he should  
be required to withdraw as counsel for ASIS. *People v. Donaldson*, 93 Cal. App. 4th 916, 928  
(2001) ("The prohibition against a lawyer acting as both advocate and witness is a necessary  
corollary to the more fundamental tenet of our adversarial system that juries are to ground their  
decisions on the facts of a case and not on the integrity or credibility of the advocates. The  
enforcement of that prohibition is a matter of institutional concern implicating the basic  
foundations of our system of justice.") (internal citations and quotations omitted).

- 1 • Singleton submits that registration information about the “originating or source IP”  
2 address in an email’s header must match registration information about the domain name  
3 in the “sent from” header. Otherwise, according to Singleton, the email’s header is  
4 “false.” (ASIS Mo. at 7:27-8:1, 23:8-14.) But according to Dr. Cohen, it is commonplace  
5 for registration information about an email’s initiating IP address not to relate in any way  
6 to an email’s sender. (Az. Sep. St. Nos. 175-184);
- 7 • Singleton claims that there are “industry standards” governing email sender  
8 authentication. (ASIS Mo. at 8:14-9:21; ASIS Reply 5:25-26.) But as explained by Dr.  
9 Cohen, no such standards exist, and the supposed “standards” documents proffered by  
10 ASIS do not even purport to articulate standards. (Az. Sep. St. Nos. 175-184);
- 11 • Singleton asserts that “SPAM” has significant impacts on IAS providers, the costs of  
12 which are difficult or impossible to calculate. (ASIS Op. at 8:15-9:10; ASIS Reply at  
13 11:15-19.) However, ASIS has submitted no evidence of such impacts except several  
14 hearsay studies and testimony regarding the supposed growth and effect of “SPAM”;
- 15 • Singleton claims that certain factors prove a BotNet was used to send the Emails. (ASIS  
16 Mo. at 9:22-10:4, 23:15-18; ASIS Op. at 23:5-8.) However, ASIS’s own expert, Posluns,  
17 admitted that some, if not all, of the Emails may have been sent by means other than a  
18 BotNet, and that all of the Emails may have been sent using an Onion Router. (Az. Sep.  
19 St. Nos. 112-114.) As explained by Dr. Cohen, there is insufficient information to  
20 determine whether a BotNet was used to send the Emails. (Az. Sep. St. Nos. 112-113);
- 21 • Singleton claims that Azoogole made a “remarkable discovery” when it realized that  
22 Spamhaus contemporaneously identified Alexander Polyakov as the owner of most  
23 domain names appearing in the Emails. Singleton suggests that “remarkable discovery”  
24 establishes a relationship between Azoogole and Polyakov. (ASIS Reply at 8:20-9:12.) As  
25 Singleton must know from his own use of Spamhaus’s ROKSO, however, Spamhaus’s  
26 entire database can be searched by keyword, including by domain name. (Declaration of  
27 Adam Schneider in Opposition to Plaintiff ASIS Internet Services, Inc.’s Motion for  
28 Summary Adjudication ¶¶2-5 & Ex. A); and
- Singleton asserts that Azoogole could and should have taken additional steps to vet its lead  
providers and/or to ensure that they were complying with CAN-SPAM.<sup>3</sup> (ASIS Reply at  
13:21-15:20.) However, ASIS has submitted no evidence regarding whether any such  
steps were practicable, relied on by others in the Internet marketing industry, or even  
effective to some end.

<sup>3</sup> See, e.g., ASIS Op. at 16:13-14, 16:26-27, 17:3-4 and 8-9, 18:15-16, 18:19:7-8, 19:16-19, 19:28-20-2, 20:6-8, 20:10-12, 20:26-28, 21:5-10; ASIS Reply at 15:6-8.

1 In defense of his technical opinions, which almost uniformly conflict with those of  
2 Azoogole expert Dr. Cohen, Singleton charges that Dr. Cohen (whom Singleton refers to as Mr.  
3 Cohen) “doesn’t know what he is talking about.”<sup>4</sup> (ASIS Reply at 6:22, 7:1-2.) At one point,  
4 Singleton goes as far as to suggest that Dr. Cohen botched a simple “whois” lookup of IP  
5 addresses used by Dr. Cohen’s own firm, Fred Cohen and Associates.<sup>5</sup> But as explained by Dr.  
6 Cohen, Singleton’s criticisms demonstrate that Singleton lacks even a basic understanding of the  
7 technologies, tools, and techniques on which ASIS purports to rely. (Burgoyne Decl. ¶18 & Ex.  
8 Q (Defendant’s Expert Witness Third Supplementary Disclosure of Dr. Frederick B. Cohen  
9 (“Cohen Third Supp. Discl.”), at 5-13 (updating Dr. Cohen’s opinions based on the new evidence  
10 and technical arguments proffered by ASIS).)<sup>6</sup>

11 The technical arguments of lay counsel are not evidence, and cannot be relied on to create  
12 questions of fact. Both parties appointed experts. To the extent those experts testified, the Court  
13 should look to their opinions in deciding the parties’ summary judgment/adjudication motions.  
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15 <sup>4</sup> Singleton’s criticism of Dr. Cohen is, to say the least, misplaced. As demonstrated by Dr.  
16 Cohen’s declaration in support of Azoogole’s motion for summary judgment and the exhibits  
17 thereto, Dr. Cohen is one of the nation’s foremost experts in Internet technologies and  
18 communications. Dr. Cohen has been involved with the Internet and its predecessor the  
19 ARPAnet since 1974, and has published, lectured and consulted extensively, including for the  
20 Federal Law Enforcement Training Center, the New York Electronic Crimes Task Force, Sandia  
21 National Laboratories and numerous multinational companies. Dr. Cohen’s primary areas of  
22 expertise include Internet and digital forensics, Internet communications forgeries, unsolicited  
23 email detection and distributed coordinated attacks (such as BotNets). In his 1983 Ph.D.  
24 dissertation, Dr. Cohen coined the term “computer virus.” Meiring De Villiers, *Virus Ex*  
25 *Machina: Res Ipsa Loquitur*, 2003 STAN. TECH. L. REV. 1, 4, 18 (2003); Neal Kumar Katyal,  
26 *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, n. 121, 136, 247 (2001).

27 <sup>5</sup> As is clear from the unauthenticated, hearsay records Singleton relies on in criticizing Dr.  
28 Cohen, the whois information concerning the IP addresses in question was “updated” in  
November 2007, the month after Dr. Cohen served his primary disclosures. (Singleton Reply  
Decl. ¶3 & Ex. A.) Thus, Dr. Cohen’s disclosure accurately represented the contents of those  
records as they existed at the time Dr. Cohen prepare and served that document. Curiously, Dr.  
Cohen was not aware of the “update,” which could have been initiated at the request of a third  
party such as, for example, an Internet Services Provider like ASIS. (Burgoyne Decl. Ex. Q at p.  
10.) Given the timing of events, it is difficult to believe that Singleton and/or ASIS were not  
responsible for the change.

<sup>6</sup> Azoogole has requested that ASIS stipulate to the service of Cohen Third Supp. Discl., which  
rebutts certain of the new evidence and new technical arguments raised in ASIS’s summary  
judgment/adjudication briefs. (Burgoyne Decl. ¶16 & Ex. O.) In the event ASIS refuses to  
stipulate, Azoogole will move the Court for an order permitting such service and allowing Dr.  
Cohen to offer rebuttal testimony in accordance therewith.

1                   **C. Mohland and Scoles’s Unscientific and Misleading “Studies” Must Be Excluded.**

2                   Until August 2007, ASIS maintained that its investigators were “experts” who could be  
3                   deposed, if at all, only after expert designations. (Burgoyne Decl. ¶14 & Ex. M.)<sup>7</sup> During  
4                   Mohland and Scoles’s depositions, however, ASIS repeatedly objected to questions on the  
5                   grounds that they sought expert testimony, and that neither Mohland nor Scoles would be  
6                   designated as an expert. (Burgoyne Decl. ¶¶11, 12 & Exs. J at 110:20-25, K at 25:7-11.)

7                   As explained in Argument Section III.B of Azoogles’s motion for summary judgment,  
8                   Mohland and Scoles’s lack of expertise was apparent in their methodologies, in that both relied  
9                   on inaccurate sources of information and unreliable methodologies that rendered their initial  
10                  “studies” and accompanying declarations inherently unreliable. (Azoogles.com, Inc.’s Motion  
11                  For Summary Judgment/Adjudication (“Az. Mo.”) at 13:9-18:2; Az. Sep. St. Nos. 111, 143-154,  
12                  156-157, 161-166, 169-170, 173-190.) Less is known about Mohland’s latest study, since  
13                  Azoogles had no opportunity to depose Mohland about it. Still, judging from Mohland’s January  
14                  16, 2008 declaration, Mohland’s second study appears to rely on the same dated and inaccurate  
15                  information, and on many of the same flawed methodologies and assumptions, as Mohland’s  
16                  initial study.

17                  The unreliability of Mohland and Scoles’s studies is evidenced by the declarations  
18                  purporting to summarize their work. For example:

- 19                  • The header analysis contained in Mohland’s first declaration referenced only 11 hand-  
20                  picked sample Emails, and attached pages of definitions and charts unsupported by any  
21                  evidence whatsoever. (Grabowski Decl. ¶21 & Ex. T);
- 22                  • Mohland’s declarations describe Mohland’s creation and use of software tools in regards  
23                  to which Mohland admittedly lacks expertise. (Grabowski Decl. ¶¶21, 23 & Exs. T, V);

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25                  

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<sup>7</sup> ASIS’s designation of Mohland and Scoles was in bad faith, as neither Mohland nor Scoles has  
26                  the credentials of an expert. Mohland, who is 25 years old, received a B.A. from Humboldt State  
27                  University, where he majored in religious studies and minored in communications. (Burgoyne  
28                  Decl. ¶11 & Ex. J at 13:20-21, 14:22-15:12.) Mohland received his computer and related training  
                  “in the workplace and on [his] own”; he has not taken any computer or software related classes,  
                  and his only professional certification is as an Apple Certified Help Desk Specialist. (*Id.* at  
                  15:22-16:6.) Scoles, who is 27 years old, never attended college and, other than working for  
                  Singleton, delivers papers for a living. (Burgoyne Decl. ¶12 & Ex. K at 11:6-7, 21:1-2, 25:8-19.)

- 1 • Mohland and Scoles both concluded that not all of the Emails satisfied their concocted  
2 criteria for determining violations of CAN-SPAM. (Grabowski Decl. ¶¶9, 20-21, 23 &  
3 Exs. H, S, T, V);
- 4 • Despite his use of a wildly over-inclusive “link analysis,” Scoles was able to hypothesize  
5 connections between only 11,418 of the Emails, and further concluded that only 5,569 of  
6 the Emails linked to a website resembling that into which Nella White claimed to have  
7 entered the Bruce Wolf Lead. (Grabowski Decl. ¶20 & Ex. S); and
- 8 • Neither Mohland nor Scoles referenced any specific Emails, leaving Azoogle and the  
9 Court to guess which Emails they believe to violate CAN-SPAM and/or to have been  
10 initiated by the single hypothesized sender.

11 Federal Rules of Evidence 701(c) and 702 were intended is to bar testimony by “an expert  
12 in lay witness clothing.” R. E. Jones et al., *California Practice Guide: Federal Civil Trials and*  
13 *Evidence* ¶8:1483 (2007). Dr. Cohen, the only expert to testify, dismissed Mohland and Scoles’s  
14 “studies” as lacking a basis in Internet forensics or any other discipline. (Declaration of Dr.  
15 Frederick B. Cohen in Support of Azoogle’s Motion for Summary Judgment/Adjudication  
16 (“Cohen Decl.”) ¶¶22, 60-67 & Ex. C at 4-8.) Because unsound methodologies produce  
17 unreliable and misleading results, the Federal Rules of Evidence, *Kumho Tire* and *Daubert*  
18 require the Court to exclude Mohland and Scoles’s declarations and attached exhibits.

19 **D. The Probative Value, if Any, of Singleton’s Opinions and Mohland and Scoles’s**  
20 **Studies is Substantially Outweighed by their Tendency to Mislead a Trier of Fact.**

21 Even if relevant, evidence, including expert evidence, may be excluded “if its probative  
22 value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or  
23 misleading the jury. . . .” Fed. R. Evid. 403 and advisory notes; *see also, United States v.*  
24 *Cordoba*, 194 F.3d 1053, 1062-63 (9th Cir. 1999) (holding that probative value of defendant’s  
25 flawed polygraph exam did not outweigh substantial risk of unfair prejudice that might result  
26 from admitting such evidence). The danger of unfair prejudice and confusion is all the more  
27 heightened in the case of technical evidence that neither a judge nor jury has the ability to  
28 independently evaluate. *See Daubert*, 509 U.S. at 595 (holding that expert testimony is powerful  
and therefore, can be especially misleading). Cloaked as they are in the language of science,  
Singleton’s technical opinions and Mohland and Scoles’s “studies” are entirely likely to confuse

1 and mislead any trier of fact. Accordingly, regardless of any redeeming probative value that  
2 ASIS might postulate, the Court should exclude those materials from evidence.

3 **III. Nella White’s Declarations Contradict Her Deposition Testimony and Other**  
4 **Undisputed Evidence, and So Should Be Disregarded.**

5 A party cannot manufacture an issue of fact by means of a declaration that contradicts the  
6 party’s own deposition or other sworn testimony, unless such deposition or other sworn testimony  
7 is shown to have resulted from mistake or confusion. *Cleveland v. Policy Mgmt. Systems Corp.*,  
8 526 U.S. 795, 806 (1999). Furthermore, a court may reject declarations “that are so undermined  
9 as to be incredible,” *e.g.*, self-serving declarations that are physically impossible or that are both  
10 uncorroborated and contradicted by other credible evidence. *See Johnson v. Washington Metro.*  
11 *Area Transit Auth.*, 883 F.2d 125, 128 (D.C. Cir. 1989).

12 As explained in Azoogles’ summary judgment/adjudication papers, the declarations of  
13 ASIS CEO Nella White contradict in almost every material respect White’s deposition testimony,  
14 as well as documents produced by ASIS and its contractors. (Az. Mo. at 21:10-13; Az. Op. at  
15 8:6-10:20; Az. Reply at 9:25-10:5, 11:22-12:12, 14:27-15:3.) As relates to the website into which  
16 White supposedly entered the Bruce Wolf lead, White’s declaration in opposition to an earlier  
17 motion to dismiss even contradicts itself. (Az. Op. at 8:9-13.) ASIS does not argue that any of  
18 those contradictions resulted from White’s mistake or confusion.<sup>8</sup> Nor could ASIS credibly make  
19 such argument, since documents produced by ASIS contractors Postini and FalconKnight,<sup>9</sup> and  
20 FalconKnight’s deposition testimony, all contradict White’s declaration testimony. On issues  
21 such as adverse effects, White’s deposition testimony is ASIS’s only evidence. ASIS should not

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22 <sup>8</sup> White’s declaration in support of ASIS’s opposition to a motion to dismiss indicated that she  
23 entered the Bruce Wolf lead into two different websites. ASIS attempts to explain that  
24 contradiction as “likely” the result of “Ms. White or the persons helping to prepare her  
25 Declaration simply print[ing] out the wrong page for the first page of the Exhibit.” (ASIS Reply  
at 10:20-21.) ASIS does not offer any evidence, however, to support that hypothesis, despite that  
the “persons helping” White were ASIS’s current counsel Singleton.

26 <sup>9</sup> ASIS now claims, for the first time, that the server configuration information produced by  
27 FalconKnight, including the portions relied on by Posluns, does not reflect ASIS’s server  
28 configuration during the incident period, including as relates to its use of the “Postfix” mail  
transfer agent software. (White Op. Decl. ¶5; ASIS Reply at 3:23-25.) ASIS should not be  
permitted to selectively produce information, and then to disavow the information it has produced  
when it ends up contradicting ASIS’s claims.

1 be permitted to manufacture questions of fact regarding those issues by means of incredible  
2 declarations. Because White's declarations contradict her deposition and other more credible  
3 evidence, the Court should disregard them.

4 **IV. Most of ASIS's Remaining Evidence, Including the Emails, Cannot Be Authenticated  
and/or Constitutes Hearsay.**

5 Electronic evidence is subject to the same rules as other forms of evidence. *Lorraine v.*  
6 *Markel Am. Ins. Co.*, 241 F.R.D. 534, *passim* (D. Md. 2007) (attached for convenience as Exhibit  
7 N to the Burgoyne Decl.) As described below, a wide range of ASIS's evidence fails to satisfy  
8 one or more of those rules. The below summary omits mention of certain documents proffered  
9 by ASIS and earlier produced by Quicken Loans. In a good faith effort to promote judicial  
10 economy, Azoogole has agreed to cooperate with ASIS in attempting to reach a stipulation  
11 regarding those documents. (Burgoyne Decl. ¶17 & Ex. P.)<sup>10</sup> Other of ASIS's documents,  
12 however, are so susceptible of inaccuracy and/or fabrication as to compel Azoogole to require  
13 evidence of their authenticity. And still other of ASIS's evidence is hearsay of a sort that should  
14 not be admitted in any judicial proceeding.

15 **A. The Emails Are Alterations of Unproduced Original Documents, and Cannot Now  
16 Be Authenticated.**

17 ASIS has made no legitimate attempt to demonstrate that the Emails are accurate or  
18 authentic reproductions, or even that they were ever received by ASIS. As ASIS expert Posluns  
19 testified, the Emails would have been received by ASIS as raw text files. (Burgoyne Decl. ¶10 &  
20 Ex. I at 182:20-22.) ASIS produced the Emails, however, in .dbx format. ASIS fails to explain  
21 the tools, methods or techniques used to translate the Emails from their original to their current  
22 format, or even whether the Emails were translated into any intermediate formats. (*Id.* at 182:20-  
23 185:1.) What is certain is that the process of translation from raw text to .dbx format deleted or  
24 destroyed data that, to the extent not permanently lost, cannot now be introduced. (Cohen Decl.  
25 ¶¶12, 31 & Ex. B at 23-24.) Because the Emails are not, and cannot be considered, "original  
26 writings" or duplicates thereof, they must be excluded under Federal Rule of Evidence 1002.

27 \_\_\_\_\_  
28 <sup>10</sup> ASIS has refused to discuss a stipulation regarding documents proffered by Azoogole.  
(Burgoyne Decl. ¶17 & Ex. P.)

1 With regards to authenticity, ASIS submits no expert or other evidence explaining how  
2 the Emails’ “contents, substance, internal patterns, or other distinctive characteristics” suggest the  
3 Emails to be genuine. *Lorraine*, 241 F.R.D. at 554 (quoting Jack B. Weinstein & Margaret A.  
4 Berger, *Weinstein’s Federal Evidence* §900.07(3)(c) (Matthew Bender 2d ed. 1997)); *see also*  
5 Cohen Decl. ¶12 & Ex. B at 3 (concluding “complete forgery remains a possibility”). Nor does  
6 ASIS proffer evidence regarding the processes, systems or methods by means of which the  
7 Emails—which cannot in any event be considered self-authenticating “business records”—  
8 supposedly were received, generated or gathered. ASIS didn’t even preserve or produce the  
9 ASIS and Postini server logs that would have demonstrated the Emails ever arrived to ASIS’s  
10 email server. (Azoogles Separate Statement of Undisputed Material Facts in Opposition to  
11 ASIS’s Motion for Summary Adjudication No. 148; Az. Op. Part IV, *Forthcoming Objections to*  
12 *Evidence*.) The only purported witness to the supposed authenticity of the Emails is Nella White,  
13 who was not an intended recipient of any of the Emails and whose declarations, as explained  
14 above, are so incredible as to require exclusion from the record. Because ASIS proffers  
15 insufficient evidence to permit a jury to find that the Emails are what ASIS claims them to be, the  
16 Emails must be excluded under Federal Rule of Evidence 901.

17 **B. ASIS’s Website Printouts Cannot Be Authenticated, and Constitute Hearsay.**

18 Website printouts must be properly authenticated, and statements contained therein are  
19 subject to the hearsay rule. R. E. Jones et al., *California Practice Guide: Federal Civil Trials*  
20 *and Evidence* ¶¶8:473 (regarding authentication) & 8:1776 (regarding hearsay rule). ASIS  
21 proffers a number of website printouts. It fails, however, to establish who procured those  
22 printouts, or the means used to procure them. In many cases, the accompanying declarations  
23 don’t establish that the printouts are true and accurate copies. Some of ASIS’s website printouts  
24 don’t even contain URL or date information, as might suggest that they were printed using a  
25 typical Internet browser. The accuracy and authenticity of ASIS’s website evidence is all the  
26 more questionable in that much of it was culled not from the actual Internet but from the  
27 “Wayback Machine,” an informal archive that disclaims its own accuracy and that is not reliable  
28

1 for forensic purposes. (Sep. St. Nos. 145-155.)<sup>11</sup> Furthermore, ASIS’s website printouts—  
2 offered, as they are, for the truth of the information contained therein—are hearsay. ASIS’s  
3 objectionable website evidence includes:

- 4 • Exhibit C to the Declaration of Nella White in Support of Opposition to Motion to  
5 Dismiss, incorporated into the “Courtesy Copies” submitted in support of ASIS’s motion  
6 for summary adjudication. White’s declaration suggests that the printouts constituting  
7 Exhibit C are from the same website, although they are patently different;
- 8 • Exhibit G to the Grabowski Decl.;
- 9 • Exhibit H to the Grabowski Decl. at sub-attachments B, C, D and E. Sub-attachments B,  
10 C and D contain what appears to be website source code, although ASIS does not explain  
11 who generated or procured that code or by what means; and
- 12 • Exhibit O to the Grabowski Declaration.

13 Because the above-listed website printouts were not authenticated, and because they  
14 constitute hearsay, they must be excluded under Federal Rules of Evidence 801, 802 and 901.

15 **C. ASIS’s DomainTools Printouts Cannot Be Authenticated, and Constitute Hearsay.**

16 ASIS makes repeated use of records downloaded from DomainTools.com, a private online  
17 service that provides selected historical information concerning IP addresses and domain names.  
18 DomainTools, however, does not hold itself out to be, and is not, reliable for forensic purposes.  
19 (Az. Sep. St. Nos. 143-144.) Furthermore, because ASIS relies on the proffered DomainTools  
20 records for the truth of the information contained therein, those records constitute hearsay.  
21 ASIS’s proffered DomainTools records appear at:

- 22 • Exhibits A and B to the Singleton Reply Decl.;
- 23 • Exhibit P to the Singleton Op. Decl.;
- 24 • Exhibit A to the White S.A. Decl.; and
- 25 • Exhibit H to the Grabowski Decl. at sub-attachment B;

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26 <sup>11</sup> ASIS’s attempted use of Wayback Machine records is entirely distinguishable from that upheld  
27 in *Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, No. 02 C 3293, 2004 WL 2367740  
28 (N.D. Ill. Oct. 15, 2004), in that ASIS has produced no declaration or other testimony suggesting  
its Wayback Machine records to be accurate or authentic, or to pertain to websites owned or  
operated by Azoog. See *Lorraine* 241 F.R.D. at 553 (summarizing holding in *Telewizja Polska  
USA*).

1           Because these documents contain unauthenticated hearsay, ASIS’s DomainTools printouts  
2 must be excluded from evidence under Federal Rules of Evidence 801, 802 and 901.

3           **D. Jeffrey Posluns’s Unsworn Expert Report Constitutes Hearsay.**

4           As discussed above, for reasons unexplained, ASIS had not submitted any declaration or  
5 other testimony by its expert, Jeffrey Posluns. However, ASIS’s summary judgment/adjudication  
6 briefs make occasional reference to Posluns’s expert report, attached as Exhibit W to the  
7 Grabowski Decl. But that report is unsworn, and thus is not admissible as a declaration. ASIS  
8 has provided no evidence that Posluns is unavailable to testify, or that the contents of his report  
9 fit within some exception to the hearsay rule. Accordingly, Posluns’s expert report must be  
10 excluded from evidence under Federal Rules of Evidence 801 and 802.

11           **E. Miscellaneous Additional Third-Party Documents Proffered by ASIS Are**  
12 **Unauthenticated and/or Constitute Hearsay.**

13           ASIS proffers a range of additional third-party documents, none of which has been  
14 authenticated and all of which are relied upon for the truth of the matters asserted therein. They  
15 include:

- 16           • Exhibit P to the Grabowski Decl., consisting of “production documents from SAVVIS”;
- 17           • Exhibit Q to the Singleton Op. Decl., consisting of “SAVVIS production documents”;
- 18           • Exhibit L to the Singleton Reply Decl., consisting of “production documents” from  
19 Lendance;
- 20           • “Courtesy Copies” of studies by IronPort, Barracuda Networks and the Radicati Group,  
21 submitted with ASIS’s opposition and reply briefs; and
- 22           • Congressional testimony by Earthlink CEO Charles Betty, a “Courtesy Copy” of which  
23 was submitted with ASIS’s opposition brief.

24           The above-listed documents must be excluded from evidence under Federal Rules of  
25 Evidence 801, 802 and/or 901.

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**CONCLUSION**

For the reasons stated herein, the Court should exclude the above-referenced evidence from the record of this action.

Dated: February 29, 2008

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