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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  
RESPONSES TO ASIS INTERNET  
SERVICES' EVIDENTIARY  
OBJECTIONS**

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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1 **INTRODUCTION**

2 Prior to the filing of the motions for summary judgment/adjudication, AzoogLeAds.com,  
3 Inc. (“AzoogLe”) provided ASIS Internet Services (“ASIS”) with several opportunities to meet-  
4 and-confer regarding the material facts at issue. ASIS steadfastly refused to do so. Now that  
5 ASIS has seen the strength of AzoogLe’s evidence and arguments, ASIS has thrown out page-  
6 after-page of unfounded and/or hyper-technical evidentiary objections. The Court should look  
7 past the façade. The majority of ASIS’s objections lack any basis in law or in fact. A significant  
8 number relate to evidence that ASIS itself has placed before the Court. Still, as further described  
9 herein an in an effort to obviate Court intervention, AzoogLe herewith submits brief declarations  
10 curing any cognizable objection to AzoogLe’s evidence.

11 **AZOOGLE’S RESPONSES TO ASIS’S OBJECTIONS**

12 **I. Response to Objection No. 1: Dr. Cohen’s Second Supplementary Expert Disclosure**  
13 **Complies with the Court’s Orders.**

14 ASIS objects to Dr. Cohen’s Second Supplementary Disclosure on the basis that it  
15 exceeds the Court’s orders of December 3 and 7, 2007. Those orders permitted Dr. Cohen to  
16 examine and serve a supplemental disclosure addressing the server configuration files  
17 (“AZ0784—AZ0787”) produced by ASIS systems administrator FalconKnight Enterprises  
18 (“FalconKnight”). ASIS’s arguments, however, depend on patent misrepresentations, including  
19 as relate to AZ0784—AZ0787, the Court’s orders, and Dr. Cohen’s Second Supplementary  
20 Disclosure. Obscured by ASIS’s rhetoric is that Dr. Cohen was unable to sooner evaluate  
21 AZ0784—AZ0787 because ASIS withheld those documents, along with the mountain of other  
22 electronic evidence that necessarily existed at or after the time ASIS decided to file its claims.

23 **A. The Court’s December 3 and 7 Ordered Permitted Dr. Cohen to Examine and**  
24 **Serve a Supplemental Disclosure Concerning AZ0784—AZ0787.**

25 By way of background, in September 2007, ASIS’s systems administrator FalconKnight  
26 produced AZ0784—AZ0787, which were .pdf copies of various ASIS server configuration files.  
27 ASIS understood its server configuration information to be relevant, as evidenced by its having  
28 provided portions of AZ0787 to then-ASIS expert Posluns, who attached those portions,  
undesignated, to his expert disclosure. (Declaration of Henry M. Burgyone, III in Support of  
Case No. C-05-5124 JCS

1 AzoogLeAds.com, Inc.'s Motion for Summary Judgment/Adjudication ("Burgoyne Mot. Decl.")  
2 ¶27 & Ex. V ("Expert Witness Disclosure of Jeffrey Posluns").) Still, ASIS moved for a  
3 preliminary injunction requiring AzoogLe to return or destroy AZ0787, and forbade AzoogLe from  
4 disclosing any of AZ0784—AZ0787 to Dr. Cohen. On December 3, the Court denied ASIS's  
5 motion, and granted AzoogLe's cross-motion to permit Dr. Cohen to examine AZ0784—AZ0787.  
6 (Docket Entry No. 309.) Then, on December 7, the Court ordered that Dr. Cohen be permitted to  
7 serve a supplemental expert report "based solely on the electronic files that were ordered  
8 produced by the Court." (Docket Entry No. 313.) The Court further ordered that Dr. Cohen  
9 submit to a second deposition regarding the contents of that supplemental expert report. (*Id.*)

10 **B. Except for Two Pages Updating an Earlier Opinion, Dr. Cohen's Second**  
11 **Supplementary Disclosure Directly Addresses AZ0784—AZ0787.**

12 ASIS argues that Dr. Cohen's Second Supplementary Disclosure violated the Court's  
13 December 3 and December 7 orders in that it has "little or nothing to do with AZ0784—  
14 AZ0787." ASIS's representations regarding the contents of Dr. Cohen's Second Supplementary  
15 Disclosure, however, are demonstrably untrue. The Second Supplementary Disclosure repeatedly  
16 explains that its contents are "based on" AZ0784—AZ0787. (Declaration of Dr. Frederick B.  
17 Cohen in Support of AzoogLeAds.com, Inc.'s Motion for Summary Judgment/Adjudication  
18 ("Cohen Decl.") ¶12 & Ex. B ("Second Sup. Discl.") at 3 (introducing summary of Second  
19 Supplementary Disclosure); *id.* at 11 (prefacing summary of conclusions); *id.* at 13-19  
20 (describing contents of AZ0784—AZ0787).) What's more, the core of Dr. Cohen's analysis,  
21 contained at pages 20-35, constitutes a cross-referencing of AZ0784—AZ0787—in particular, the  
22 email address and user data contained therein—with other evidence. The only portion of Dr.  
23 Cohen's Second Supplementary Disclosure unrelated to AZ0784—AZ0787 is the section titled  
24 "Errors Related to the WayBack Machine," appearing on pages 35-36, which provides additional,  
25 later developed detail regarding an opinion expressed in Dr. Cohen's initial Expert Witness  
26 Disclosure, served October 10, 2007. (Cohen Decl. Ex. A at 45.)

27 In an attempt to avoid the results of Dr. Cohen's cross-referencing analysis, which are  
28 devastating to ASIS's claims, ASIS argues that the Court forbade Dr. Cohen's supplemental

1 disclosure from referencing evidence other than AZ0784—AZ0787. That’s simply not true. Nor  
2 would the Court have imposed such a limitation, given that it would have prevented Dr. Cohen  
3 from placing AZ-0784—AZ-0787 in any meaningful context. As Dr. Cohen explained in his first  
4 deposition, he didn’t sooner examine certain materials, including the Emails, because ASIS’s  
5 overall failure to produce evidence rendered those materials, standing alone, useless to Dr. Cohen  
6 as a rebuttal expert. (Declaration of Henry M. Burgoyne, III in Support of Azoogles.com,  
7 Inc’s Responses to ASIS’s Evidentiary Objections (“Burgoyne Decl.”) ¶2 & Ex. A at 49:1-12.) It  
8 is absurd to suggest that ASIS should profit from its withholding of obviously relevant evidence  
9 through some restriction on Dr. Cohen’s ability to meaningfully evaluate the little evidence  
10 actually produced.

11 **C. ASIS Should Not Profit from its Withholding of Electronic Evidence.**

12 It is undisputed that ASIS failed to preserve or simply withheld the mountain of electronic  
13 evidence, including AZ0784—AZ0787, that necessarily existed at or after the time that ASIS  
14 decided to file this action. (Azoogles.com’s Opposition to ASIS’s Motion for Summary Adjudication,  
15 Part IV, *Forthcoming Objections to Evidence*; Burgoyne Decl. ¶¶3-4 & Exs. B at 158:24-162:2, C  
16 at 190:2-8); Azoogles.com’s Separate Statement of Undisputed Facts in Support of Motion for  
17 Summary Judgment/Adjudication (“Az. Sep. St.”) No. 175; Azoogles.com’s Separate Statement of  
18 Undisputed Material Facts in Opposition to ASIS’s Motion for Summary Adjudication No. 137.)  
19 ASIS protests that it was under no obligation to produce any of that evidence because “there is no  
20 relevant case law regarding preservation of log files in *CAN SPAM Act* cases.” (ASIS’s  
21 Objections to Azoogles.com, Inc.’s Evidence (“ASIS Objections”) at 11:24-25.) That  
22 position, however, flies in the face of the federal rules and clear precedent.<sup>1</sup> ASIS already has  
23 managed to parlay its withholding of electronic evidence into a second deposition of Dr. Cohen.  
24

25 <sup>1</sup> See, e.g., *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (holding that  
26 parties are under an affirmative duty to preserve electronic evidence); *Zubulake v. UBS Warburg  
27 LLC*, 220 F.R.D. 212, 217-218 (S.D.N.Y. 2003) (discussing obligations regarding electronic  
28 evidence); *In re Krause*, 367 B.R. 740, 765-766 (Bkrcty. D. Kan. 2007) (regarding duty to  
prevent destruction of electronic evidence); *Inventory Locator Service, LLC v. PartsBase, Inc.*,  
Case No. 02-2695, 2005 WL 6062855 \*12-13 (W.D. Tenn. Oct. 19, 2005) (describing duty to  
preserve server logs).

1 It would be fundamentally unfair to permit ASIS to further leverage its gamesmanship into some  
2 restriction on Dr. Cohen’s disclosures or testimony.

3 **D. ASIS’s *Ad Hominem* Attacks Raise Questions about ASIS’s Motives.**

4 Dr. Cohen, whom ASIS continues to refer to as “Mr. Cohen,” is one of the nation’s  
5 foremost authorities on Internet technologies and communications. (Cohen Decl. ¶10 & Ex. A.)  
6 Dr. Cohen has been involved with the Internet and its predecessor the ARPAnet since 1974, and  
7 has published, lectured, and consulted extensively, including for the Federal Law Enforcement  
8 Training Center, the New York Electronic Crimes Task Force, Sandia National Laboratories and  
9 numerous multinational companies. (*Id.* ¶¶2-11 & Ex. A.) In his 1983 Ph.D. dissertation, Dr.  
10 Cohen coined the term “computer virus.”<sup>2</sup> Dr. Cohen’s primary areas of expertise—Internet and  
11 digital forensics, Internet communications forgeries, unsolicited email detection, and distributed  
12 coordinated attacks (such as BotNets)—bear directly on the central issues in this litigation. (*Id.*)  
13 Most disturbing, ASIS’s own expert, Jeffrey Posluns, appears to have abandoned ASIS’s cause.  
14 Thus, the record contains no basis for any of ASIS’s criticisms. It is difficult to interpret ASIS’s  
15 *ad hominen* attacks as other than a desperate attempt to distract from its failure to find an expert  
16 willing to vouch for its claims.

17 **II. Response to Objection No. 2: The Declarations of Jay Williams and Attachments**  
18 **Thereto Are Based on Mr. Williams’s Personal Knowledge and Thus Are Admissible.**

19 ASIS asks the Court to exclude the December 10 and 11, 2007, declarations of Jay  
20 Williams of Seamless Media Corp. (“Seamless”) because Williams’s “recollection regarding ...  
21 documents is not admissible.” The primary problem with ASIS’s objection is that the bulk of  
22 Williams’s testimony concerns not documents but Williams’s personal recollection of events  
23 during his tenure as a principal of Seamless. (ASIS Objections at 6:1.) It is true that Williams’s  
24 July 27, 2007 declaration, as proffered by ASIS, suggests that Williams did not initially recall  
25 certain of the details described in his December 10 and 11 declarations. Williams’s December 10  
26 declaration, however, makes clear that he subsequently refreshed his recollection. (Burgoyne

27 <sup>2</sup> See Meiring De Villiers, *Virus Ex Machina: Res Ipsa Loquitur*, 2003 STAN. TECH. L. REV. 1, 4,  
28 18 (2003); Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, n. 121,  
136, 247 (2001).

1 Mot. Decl. ¶¶18-19 & Exs. M, N.) The Federal Rules of Evidence expressly permit a witness to  
2 refresh his or her recollection, including by means of documents that contains hearsay or that are  
3 unauthenticated. *See* Fed. R. Civ. P. 612, *see also United States v. Schwarzbaum*, 527 F.2d 249,  
4 253, (2d Cir. 1975). Accordingly, Mr. Williams’s declarations regarding his personal  
5 recollections are proper and admissible.

6 Also admissible is the email chain attached to and authenticated by Williams’s December  
7 11 declaration. ASIS argues that this email chain must be excluded because Azoogle failed to file  
8 a separate declaration by Steve Soffer, the individual corresponding with Mr. Williams. That  
9 argument, however, borders on frivolous, insofar as there exists no requirement that  
10 correspondence be authenticated by every party thereto. There is nothing about the form or  
11 content of the email chain attached to Williams’s December 11 declaration that casts any doubt  
12 on Williams’s authentication. To the contrary, the statements contained in the email chain are so  
13 contrary to Williams’s interests that no reasonable person in Williams’s position would have  
14 authenticated those emails unless he truly believed them to be genuine.

15 ASIS claims the Court should discount Mr. Williams’s declaration testimony because of  
16 the “obvious stress placed on Mr. Williams by Defendant.” (ASIS Objections at 7:2.) As set  
17 forth in Williams’s December 10 declaration, the only party to coerce Williams into offering a  
18 declaration was ASIS, which secured Williams’s July 27 declaration under the implied threat that  
19 Williams might be named in this action.<sup>3</sup> (Burgoyne Mot. Decl. ¶18 & Ex. M at ¶¶5-7.) ASIS’s  
20 real objection to Williams’s declarations and the attachments thereto is that they dispose of  
21 ASIS’s claim that Azoogle hired Seamless to initiate unlawful emails. As ASIS is fond of  
22 pointing out, ASIS and not Azoogle dragged Williams and Seamless into this litigation as  
23 witnesses. (ASIS Objections at 7:13-21.) Having done so, ASIS cannot be heard to argue that  
24 Williams’s testimony is fatal to its claims.

25 ///

26 \_\_\_\_\_  
27 <sup>3</sup> As noted in the Azoogle’s summary judgment memo, Azoogle has filed an arbitration against  
28 Seamless and its principals for breaching the contract between them. The email chain attached to  
Williams’s declaration is damaging evidence against Seamless and its principals in this  
arbitration, because it establishes several material breaches of the contract.

1 **III. Response to Objection No. 3: The Declaration of David Graff Contains Admissible**  
2 **Testimony.**

3 ASIS's primary objection to the Declaration of David Graff in Support of Azoogles  
4 Motion for Summary Judgment is that Paragraphs 3 through 15 do not reflect Mr. Graff's  
5 personal knowledge. ASIS ignores that a corporate representative can educate him- or herself  
6 through the review of business records (or the absence of them as the case may be). Fed. R. Evid.  
7 803(6) and (7). Moreover, there is nothing in Mr. Graff's declaration that has not already been  
8 disclosed to ASIS. To the extent the Court requires additional testimony clarifying the basis of  
9 Mr. Graff's knowledge, Azoogles herewith submits a supplemental declaration of David Graff  
10 setting forth the detailed basis of Mr. Graff's knowledge. (Supplemental Declaration of David  
11 Graff in Support of AzooglesAds.com, Inc.'s Responses to ASIS's Evidentiary Objections ("Graff  
12 Supp. Decl."))

13 ASIS also objects to Mr. Graff's description in Paragraph 3 of Azoogles's Insertion Order  
14 with Seamless, on the basis that such description violates the Best Evidence Rule. Mr. Graff's  
15 description, however, amounts to a recitation of the Insertion Order's actual terms. Furthermore,  
16 to the extent Mr. Graff's testimony is considered an interpretation, it is admissible as parol  
17 evidence to resolve any questions regarding the Insertion Order's meaning. In this regard, and as  
18 explained in Mr. Graff's Supplemental Declaration, Mr. Graff's testimony is based on his review  
19 of Azoogles's past and current standard lead provider terms, as conducted in the course of Mr.  
20 Graff's duties as Azoogles General Counsel. (Graff Supp. Decl.)

21 ASIS's remaining arguments regarding the Insertion Order lack any cognizable basis.  
22 ASIS claims the Refinance Lead Criteria 2005 Document, produced by Azoogles as AZ0012,  
23 should not be considered part of Insertion Order. The Refinance Lead Criteria 2005 Document,  
24 however, is explicitly incorporated by reference into the Insertion Order. (Declaration of David  
25 Graff in Support of AzooglesAds.com, Inc.'s Motion for Summary Judgment/Adjudication ¶3 &  
26 Ex. A.) ASIS proffers no authority for the proposition that a party can selectively cleave  
27 attachments that do not support its claims. Nor does ASIS provide any authority for the argument  
28 that Azoogles's failure to sign the Insertion Order renders the Insertion Order unenforceable or  
otherwise inadmissible. ASIS repeatedly has offered the Insertion Order into evidence, and has

1 argued the Insertion Order’s terms in its summary judgment/adjudication and other briefs. ASIS  
2 thus has waived any hearsay, authentication, or other objection to the Insertion Order. *See Ohler*  
3 *v. United States*, 529 U.S. 753, 755-56 (2000) (holding a party cannot introduce evidence to  
4 which it has raised objections).

5 **IV. Response to Objection No. 4: Azoogole Has Remedied any Potential Concerns about**  
6 **Margarita Calpotura’s Declaration.**

7 ASIS raises four objections to the declaration of Margarita Calpotura and certain  
8 documents attached thereto. ASIS has waived most of those arguments by submitting the very  
9 evidence in relation to which it now objects. In any event, to the extent ASIS’s arguments might  
10 have merit, they have been remedied as described below:

- 11 • **Mathis Deposition Transcript:** ASIS complains that the Calpotura declaration attached  
12 an uncertified deposition transcript of Donald Mathis. Furthermore, ASIS waived any  
13 objection to Mathis’s testimony by proffering excerpts from the same transcript. While  
14 the case law that ASIS cites to support its purported certification requirement is  
15 misleading and inapposite, Azoogole hereby remedies any issue by submitting a certified  
16 copy of the relevant portions of the Mathis transcript, as attached to the Supplemental  
17 Declaration of Donald H. Mathis in Support of AzoogoleAds.com, Inc.’s Responses to  
18 ASIS’s Evidentiary Objections.
- 19 • **Emails between Azoogole & Spamhaus:** ASIS complains that Ms. Calpotura cannot  
20 authenticate the emails between Azoogole and Spamhaus. Again, ASIS has waived any  
21 objection to those emails by repeatedly introducing portions thereof. (Declaration of  
22 Richard E. Grabowski in Support of Motion for Summary Adjudication of Issues  
23 (“Grabowski Decl.”) ¶4 & Ex. C; Declaration of Jason K. Singleton in Support of  
24 Opposition to Azoogole’s Motion for Summary Judgment (“Singleton Opp. Decl.”) ¶26 &  
25 Ex. R; Declaration of Jason K. Singleton in Support of Reply to Azoogole’s Opposition to  
26 Motion for Summary Adjudication ¶16 & Ex. N.) Notwithstanding ASIS’s waiver, and  
27 notwithstanding the abundant indicia of authenticity contained in the Spamhaus emails  
28

1 themselves, Azoogle herewith submits the supplemental Mathis Declaration further  
2 authenticating those emails.

- 3 • **Letter between Azoogle & Savvis:** Again, ASIS has waived any objection to the Savvis  
4 correspondence by submitting the same in support of its summary judgment/adjudication  
5 briefs. (Singleton Opp. Decl. ¶25 & Ex. Q.) Most puzzling, ASIS submitted along with  
6 its objections a declaration from Savvis's custodian of records purporting to authenticate  
7 certain unidentified documents, presumably those already proffered by ASIS.  
8 (Declaration of Jason K. Singleton in Support of ASIS's Evidentiary Objections ¶6 & Ex.  
9 E.)
- 10 • **Cease & Desist Letter:** ASIS complains that Ms. Calpotura cannot authenticate the  
11 cease-and-desist letter sent by Azoogle in July 2007 because she is not a signatory or  
12 recipient of the letter. ASIS's purported requirement is fabricated and unsupported by any  
13 precedent. Ms. Calpotura served as counsel for Azoogle at the time the letter was drafted  
14 and sent, and thus has actual knowledge of the letter and of the circumstances surrounding  
15 its service.

16 **V. Response to Objection No. 5: Dr. Cohen's Declaration Constitutes Rebuttal, Including**  
17 **to Technical Arguments First Disclosed by ASIS in Its Summary Adjudication Brief.**

18 ASIS's objection to Dr. Cohen's Declaration in Opposition to ASIS's Motion for  
19 Summary Adjudication borders on frivolous. ASIS fails to identify any portion of Dr. Cohen's  
20 declaration not rooted in one or more of Dr. Cohen's highly detailed disclosures. Furthermore,  
21 the federal rules do not require the exclusion of expert testimony simply because it wasn't  
22 specifically set forth in a disclosure.<sup>4</sup> Perhaps most importantly, Dr. Cohen's declaration

23  
24 <sup>4</sup> See *Hill v. Reederei F. Laeisz G.M.B.H., Rostock*, 435 F.3d 404, 422-423 (3d Cir. 2006)  
25 (testimony of defense expert in injured longshoreman's action against ship's owner and operator,  
26 that it would have been "physically impossible" for accident to have occurred as represented, did  
27 exceed scope of his report, but it was elicited in rebuttal of testimonial account of the accident  
28 and its admission as such was within the court's discretion); *United States v. Philip Morris USA, Inc.*,  
223 F.R.D. 1, 5 (D.D.C. 2004) (the failure by the government's expert to file written report,  
setting forth new opinions, developed subsequent to his initial report and rebuttal report, and  
reasons for opinions, did not warrant preclusion of his testimony, where companies were not  
prejudiced by his failure to file the report; the companies had the opportunity to depose the expert  
about his new theories).

1 represented Dr. Cohen’s first opportunity to rebut a range of specific technical arguments and  
2 evidence not disclosed by ASIS prior to the filing of its Motion for Summary Adjudication.

3 For example, ASIS criticizes Dr. Cohen for “disputing the presentation of industry  
4 standards to the Court.” (ASIS Objections at 11:16.) Setting aside that the “standards” cited by  
5 ASIS are not standards at all,<sup>5</sup> ASIS never mentioned industry standards prior to the filing of its  
6 summary adjudication brief. Likewise, ASIS complains of Dr. Cohen’s testimony regarding the  
7 SMTP email protocol, including because ASIS “has provided no expert opinion on the subject[ ] .  
8 . . .” (ASIS Objections at 11:19-23.) Still, ASIS attached SMTP-related documents to Josh  
9 Mohland’s January 16, 2008 declaration, and made arguments in its summary adjudication  
10 motion regarding those documents. (Grabowski Decl. ¶23 & Ex. V; ASIS Motion for Summary  
11 Adjudication of Issues at 8:14-22.) If not by declaration, how were Dr. Cohen and Azoogie to  
12 address ASIS’s SMTP arguments and evidence? Does ASIS really believe its prior withholding  
13 of those materials insulates them from rebuttal expert testimony?

14 Throughout this litigation, ASIS has manipulated expert discovery for the apparent  
15 purpose of ambushing Azoogie on summary judgment. Still pending is ASIS’s October 2007  
16 motion to exclude Dr. Cohen as an expert witness, based on ASIS’s representation that Dr.  
17 Cohen’s testimony does not constitute rebuttal. The disclosure of one-time ASIS expert Posluns,  
18 however, articulated ten opinions so broad as to encompass every issue in this case.<sup>6</sup> If taken at  
19 face value, Posluns’s overarching primary conclusion—that Azoogie “failed to fully comply with  
20 the CAN SPAM Act and the California Business and Professions Code §17529.5”—would  
21 effectively bar any objection based on the scope of Posluns’s testimony. It is the height of  
22 hypocrisy for ASIS to serve the broadest imaginable expert disclosure and then to repeatedly  
23 object that Dr. Cohen’s testimony falls outside the bounds of proper rebuttal.

24  
25 \_\_\_\_\_  
<sup>5</sup> Az. Sep. St. No. 175-184.

26 <sup>6</sup> The opinions stated in Posluns’s disclosure include whether ASIS is an “Internet Access  
27 Provider”; whether the Emails’ headers and subject lines violate CAN-SPAM; whether the  
28 Emails “were sent on behalf of Azoogie”; and whether Azoogie “consciously avoids knowledge  
of the spam activities.” (Burgoyne Decl. ¶27 & Ex. V at 5:7-11, 6:14-15, 7:13-14, 9:1, 13:13-20,  
15:5-8.)

1 In response to ASIS's newly-raised technical arguments and evidence, Azoogie has  
2 served a Third Supplementary Disclosure of Dr. Cohen, attached as Exhibit Q to the Declaration  
3 of Henry M. Burgoyne, III in Support of AzoogieAds.com, Inc.'s Objections to ASIS's Summary  
4 Judgment/Adjudication Evidence. ASIS has thus far refused to stipulate to the introduction by  
5 Azoogie of any testimony by Dr. Cohen relating to that document. In the unlikely event that this  
6 case proceeds to trial, Azoogie will move the Court for an order permitting Dr. Cohen to testify to  
7 those opinions expressed in Dr. Cohen's Third Supplementary Disclosure.

8 **VI. Response to Objection No. 6: Donald Mathis's Declaration Describes his Knowledge of**  
9 **Azoogie's Business, not his Knowledge of Documents.**

10 ASIS complains that 17 paragraphs of Donald Mathis's Declaration in Support of  
11 Azoogie's Motion for Summary Judgment are inadmissible because they "discuss documents not  
12 presented in evidence" and therefore violate the Best Evidence Rule. (ASIS Objections at 12:8-  
13 10.) Contrary to ASIS's assertion, the vast majority of those paragraphs do not reference  
14 documents, but simply recount Mr. Mathis's personal knowledge regarding Azoogie's business  
15 model, legal compliance efforts, and other business practices. To the extent any of those  
16 paragraphs do refer to documents (*e.g.* Paragraph 15, referring to Azoogie's standard Insertion  
17 Order), such references are peripheral and the surrounding testimony recounts facts not contained  
18 in the documents. At no time does Mr. Mathis attempt to prove the contents of any documents,  
19 as is necessary to invoke Federal Rule of Evidence 1002.

20 ASIS also objects to several paragraphs of Mr. Mathis's declaration as not based on Mr.  
21 Mathis's personal knowledge (*i.e.* Paragraphs 6, 7, 20, 21, and 24). Two of those paragraphs,  
22 Paragraphs 20 and 21, concern Azoogie's business practices while Mr. Mathis was employed at  
23 Azoogie and thus fall squarely within Mr. Mathis's personal knowledge. The remaining  
24 paragraphs, which address Azoogie's general business practices before Mr. Mathis joined  
25 Azoogie, nevertheless are admissible, both because Mr. Mathis familiarized himself with those  
26 practices in the course of his duties (and in his role as Azoogie's organizational deponent) and  
27 because of Mr. Mathis's familiarity with Azoogie's business records concerning Azoogie's  
28 business model, compliance efforts, and business practices. To the extent the Court requires

1 additional testimony clarifying the basis of Mr. Mathis’s knowledge, Azoogle herewith submits  
2 Mr. Mathis’s supplemental declaration.

3 **VII. Response to Objection No. 7: Statements of Facts Are Not Evidence and Cannot Be**  
4 **Objected To.**

5 ASIS’s three-page tirade regarding Azoogle’s statements of undisputed facts  
6 misunderstands the purpose of the rules requiring parties to submit them, and attempts to leverage  
7 ASIS’s own refusal to meet-and-confer as required by the Northern District’s Civil Local Rules.

8 A statement of undisputed facts is neither evidence nor a pleading, and does not contain  
9 argument. Instead, it is a tool designed to assist the parties and the Court in identifying facts in  
10 regards to which no dispute exists, and to corral the parties’ evidentiary citations in a manner  
11 permitting quick reference. The Court’s standing order requires the submission of initial  
12 statements of undisputed facts, and in no way discourages the parties from submitting later  
13 statements incorporating materials cited in opposition and reply briefs. By comparison,  
14 California Code of Civil Procedure Section 437c actually requires parties to submit statements of  
15 undisputed facts along with their summary judgment oppositions. Azoogle, at significant  
16 expense and in good faith, drafted a statement of undisputed facts to accompany each of its  
17 summary adjudication/reply briefs. Azoogle continued to invite ASIS to meet-and-confer over  
18 those statements until such time as ASIS made clear that it would not in any event participate.  
19 (Declaration of Deepa Krishnan in Support of AzoogleAds.com, Inc.’s Separate Statement of  
20 Undisputed Material Facts (“Krishnan Decl.”) ¶¶3-11 & Exs. A-D; Declaration of Jeffrey M.  
21 Rosenfeld in Support of AzoogleAds.com, Inc.’s Separate Statement of Undisputed Material  
22 Facts (“Rosenfeld Decl.”) ¶¶6-9 & Ex. A; Declaration of Margarita Calpotura in Support of  
23 AzoogleAds.com, Inc.’s Supplemental Separate Statement of Undisputed Material Facts  
24 (“Calpotura Decl.”) ¶¶3-5.) To strike those statements would be to reward ASIS’s  
25 obstructionism, and would not in any event advance ASIS’s case.

26 ASIS primary criticism of Azoogle’s statements of undisputed facts is that they contain  
27 immaterial facts, and that they lack any basis in evidence. The vast majority of Azoogle’s facts,  
28 however, were cited in Azoogle’s summary judgment/adjudication briefs, and the remainder

1 directly support arguments raised therein. What's more, most of ASIS's responses to Azoogles  
2 separate statements of undisputed facts do not cite any contradictory evidence, and those  
3 responses that do cite evidence almost uniformly refer to inapposite or plainly inadmissible  
4 materials. Azoogles specifically invited ASIS to meet-and-confer regarding those of Azoogles  
5 initial undisputed facts that ASIS believed to be immaterial. (Krishnan Decl. ¶9 & Ex. D.) ASIS  
6 declined that invitation, and so has waived any objection to the materiality of Azoogles  
7 statements. (*Id.* ¶¶9-10 & Ex. A.)

8 In the face of what both parties agree to be a highly complex case, Azoogles has attempted  
9 to simplify the Court's task of reviewing and evaluating a near banker's box of evidence.  
10 Azoogles agreed to meet-and-confer over ASIS's proffered nine-fact statement of undisputed  
11 facts, and continued to invite ASIS to discuss Azoogles's statements until such time as ASIS made  
12 clear it would not participate in any meet-and-confer process. (*Id.* ¶¶3-11 & Exs. A-D; Rosenfeld  
13 Decl. ¶¶6-9 & Ex. A; Calpotura Decl. ¶¶3-5.) ASIS now claims, based on a December  
14 scheduling proposal, that Azoogles did not abide by its meet-and-confer obligations. (ASIS  
15 Objections at 12:26-13:7, 14:15-28.) The Court should look instead to the contemporaneous  
16 declarations of Azoogles, filed in accordance with Northern District Civil Local Rule 56-2(b).  
17 Those declarations demonstrate that Azoogles made every reasonable effort to meet-and-confer  
18 with ASIS.

19 Because Azoogles's statements of undisputed facts do not violate the local rules and do not  
20 prejudice ASIS, and because Azoogles attempted to meet-and-confer over those documents in  
21 good faith, the Court should reject ASIS's objections.

22 Dated: March 7, 2008

23 Henry M. Burgoyne, III  
24 Karl S. Kronenberger  
25 Jeffrey M. Rosenfeld  
26 Margarita Calpotura  
27 Kronenberger Burgoyne, LLP

28 By: \_\_\_\_\_ /s/  
Henry M. Burgoyne, III

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AZOOGLEADS.COM, INC.