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13
14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 ASIS INTERNET SERVICES, a California) Case No. C-05-5124 JCS
17 corporation,)
18)
19 Plaintiff,) JOINT CASE MANAGEMENT STATEMENT
20 vs.)
21) DATE: March 14, 2008
22 OPTIN GLOBAL, INC., et al.,) TIME: 1:30 p.m.
23) CTRM: A, 15th Floor
24)
25)
26)
27)
28)

29 The parties to the above-entitled action jointly submit this Case Management Statement
30 and request that the Court adopt it as its Case Management Order in this case.

31 1. Jurisdiction and Service: The basis for the Court's subject matter jurisdiction over
32 plaintiff's claims and defendant's counterclaims, whether any issues exist regarding personal
33 jurisdiction or venue, whether any parties remain to be served, and, if any parties remain to be

1 served, a proposed deadline for service.

2 **The parties do not dispute subject matter jurisdiction, personal jurisdiction,**
3 **or venue, except to the extent those issues were raised or preserved in the**
4 **parties' pleadings. All parties have been served.**

5 **2. Facts:** A brief chronology of the facts and a statement of the principal factual issues in
6 dispute.

7 **Plaintiff's Statement:**

8 Plaintiff claims it is an Internet Access Provider and
9 alleges Defendant's violation of the CAN SPAM Act of 2003 and
10 California Business and Professions Code §17529.5 from October
11 25, 2005, through January 31, 2006. Plaintiff's complaint is for
12 injunctive relief and damages per the applicable statutes.

13 **Azoogole's Statement:**

14 ASIS's Second Amended Complaint alleges that Azoogole procured the
15 sending of certain emails purportedly received by ASIS between October 25, 2005
16 through November 14, 2005. ASIS has failed to meet its burden of production in
17 order to establish a violation of CAN-SPAM (15 U.S.C. §7701, *et. seq.*) or
18 California Business and Professions Code §17529.5. Azoogole has moved for
19 summary judgment.

20 **3. Legal Issues:** A brief statement, without extended legal argument, of the disputed points
21 of law, including reference to specific statutes and decisions.

22 **Azoogole's Statement:**

- 23 • **Whether ASIS can establish that Azoogole procured the origination or**
24 **transmission of each of the alleged emails in question, under 15 U.S.C. §7701,**
25 ***et. seq.***
- 26 • **Whether ASIS can establish that Azoogole intentionally paid or provided other**
27 **consideration to, or induced, another person to initiate the alleged emails,**
28 **under 15 U.S.C. §7701, *et. seq.***

- 1 • Whether ASIS can establish that Azoogole procured the alleged emails with
2 knowledge or consciously avoiding knowing whether such person is engaging
3 or will engage in a pattern or practice that violates the CAN-SPAM Act, under
4 15 U.S.C. §7701, *et. seq.*
- 5 • Whether ASIS can establish that each of the alleged emails was unsolicited by
6 the intended email recipient.
- 7 • Whether ASIS can establish that it has been adversely affected by the alleged
8 emails, under 15 U.S.C. §7701, *et. seq.*
- 9 • Whether an email sent from a domain name registered using a privacy service
10 contains false or materially misleading information by virtue of that fact alone,
11 under 15 U.S.C. §7701, *et. seq.*, and if so, whether such a determination
12 violates the First Amendment of the United States Constitution.
- 13 • Whether CAN-SPAM preempts California Business and Professions Code
14 §17529.5.
- 15 • Whether the alleged emails constitute commercial email advertisements under
16 California Business and Professions Code §17529.5.
- 17 • Whether Azoogole advertised in the alleged emails under California Business
18 and Professions Code §17529.5.
- 19 • Whether the alleged emails contained falsified, misrepresented, or forged
20 header information California Business and Professions Code §17529.5.
- 21 • Whether ASIS and ASIS's counsel have violated Rule 11 of the Federal Rules
22 of Civil Procedure by signing and filing the Second Amended Complaint, with
23 the allegations contained therein.
- 24 • Whether ASIS and ASIS's counsel have violated 28 U.S.C. §1927 for
25 maintaining this lawsuit for over two years without a legal or factual basis to
26 do so.

27 4. Motions: All prior and pending motions, their current status, and any anticipated
28 motions.

1 The parties have filed their Motions for Summary Judgment/Summary
2 Adjudication and wait the court's ruling thereon.

3 Plaintiff has provided emails from October 25, 2005 through January 31,
4 2006 as part of its discovery responses. Plaintiff alleges that all of these emails
5 are at issue in this case since they are transactions of the same nature as those
6 originally described in the original Complaint and represented an ongoing
7 violation of the applicable statutes. The 9th Circuit allows for a supplemental
8 pleading for similar transactions or events that have occurred since the filing of
9 the original complaint in order to conserve judicial resources and reduce the
10 number of suits. *FRCP Rule 15(d); Day v. Kaiser Aluminum & Chemical Corp.*,
11 905 F.2d 1540 (9th Cir., 1990). These emails have been available to Defendants
12 since Plaintiff's initial disclosure in December, 2006. Plaintiff has continuously
13 stated in its motions and papers that these emails were part of this case.
14 Defendant has disputed in its moving papers that these emails are part of
15 Plaintiff's claim. These emails are exactly the same as the original emails in that
16 their appearance is in some cases is exactly the same and they all represent
17 email advertisements for mortgage financing. Many of the emails directed the
18 recipient to the exact same sites as the original emails. Defendant has had these
19 emails in their possession since December 2006, and has had sufficient
20 opportunity to investigate the emails. Therefore, there is no prejudice to
21 Defendant and Defendant had good notice that Plaintiff was including these
22 emails.

23 Plaintiff seeks a resolution of this issue by the Court or the Court's leave to
24 submit a supplemental complaint to add these emails to this action.

25 **Azoogole's Statement:**

26 Azoogole and ASIS have filed cross motions for summary
27 judgment/adjudication. Azoogole has initiated the meet-and-confer process regarding
28 ASIS's confidentiality designations as to certain documents/testimony, and Azoogole

1 intends to file a motion regarding the same if this issue cannot be resolved through the
2 meet-and-confer process. These documents/testimony contain information commonly
3 in the public domain, which relates to ASIS's purported adverse effects, Azoogle also
4 intends to renew its Rule 11 motion for sanctions upon the disposition of its motion for
5 summary judgment.

6 **5. Amendment of Pleadings:** The extent to which parties, claims, or defenses are expected
7 to be added or dismissed and a proposed deadline for amending the pleadings.

8 **With leave of the Court, Plaintiff will move for inclusion of the mortgage**
9 **finance emails received by Plaintiff from November 15, 2005 through January 31,**
10 **2006, under *FRCP Rule 15(d)*. See paragraph 4 above.**

11 **Azoogle's Statement:**

12 **ASIS's paragraph above is the first time Azoogle has heard of ASIS's**
13 **anticipated motion to supplement, and Azoogle intends to strenuously oppose any such**
14 **motion as highly prejudicial and inappropriately and unnecessarily late.**

15 **6. Evidence Preservation:** Steps taken to preserve evidence relevant to the issues
16 reasonably evident in this action, including interdiction of any document-destruction program
17 and any ongoing erasures of e-mails, voice mails, and other electronically-recorded material.

18 **Fact discovery has now closed in this case. Accordingly, this section is no**
19 **longer applicable.**

20 **Azoogle's Statement:**

21 **Azoogle has serious concerns regarding ASIS's preservation of evidence**
22 **in compliance with discovery as addressed more fully in Azoogle's Motion for Summary**
23 **Judgment and supporting papers.**

24 **7. Disclosures:** Whether there has been full and timely compliance with the initial
25 disclosure requirements of Fed. R. Civ. P. 26 and a description of the disclosures made.

26 **Disclosures have been made by both parties.**

27 **8. Discovery:** Discovery taken to date, if any, the scope of anticipated discovery, any
28 proposed limitations or modifications of the discovery rules, and a proposed discovery plan

1 pursuant to Fed. R. Civ. P. 26(f).

2 **Discovery is now closed and pretrial preparations have commenced**

3 **9. Class Actions:** If a class action, a proposal for how and when the class will be certified.

4 **N/A**

5 **10. Related Cases:** Any related cases or proceedings pending before another judge of this
6 court, or before another court or administrative body.

7 **Case No. C-07-04630 MHP is related to C-05-5124 JCS and has been stayed**
8 **pending resolution of this case.**

9 **11. Relief:** All relief sought through complaint or counterclaim, including the amount of any
10 damages sought and a description of the bases on which damages are calculated. In addition,
11 any party from whom damages are sought must describe the bases on which it contends
12 damages should be calculated if liability is established.

13 **Plaintiff is seeking statutory damages for violations of**
14 **the Can Spam Act as follows:**

- 15 **1. For statutory damages of up to \$100.00 for each**
16 **violation of 15 U.S.C. §7704(a)(1) in the sum of**
17 **\$1,275,600;**
- 18 **2. For statutory damages of \$25.00 for each violation**
19 **of 15 U.S.C. §7704(a)(2) in the sum of \$318,900;**
- 20 **3. For aggravated damages under 15 U.S.C.**
21 **§7706(g)(1)(C) of up to three times the amount**
22 **above for these violations committed by the**
23 **defendants' violations of 15 U.S.C. §7704(b) in**
24 **the sum of \$4,783,500;**
- 25 **4. For a preliminary and permanent injunction**
26 **preventing the defendants and all persons acting**
27 **in concert with them from the violation of the**
28 **Can-Spam Act of 2003;**

1 5. For liquidated damages of \$1,000.00 for each
2 violation of California Business and Professions
3 Code § 17529.5(a) in the sum of \$12,756,000;

4 6. Plaintiff also seeks attorneys' fees and costs.

5 **Azoogle seeks judgment in its favor and further that the Court order ASIS**
6 **to pay Azoogle's costs and attorneys' fees pursuant to 15 U.S.C. §7706.**

7 **12. Settlement and ADR:** Prospects for settlement, ADR efforts to date, and a specific ADR
8 plan for the case, including compliance with ADR L.R. 3-5 and a description of key discovery
9 or motions necessary to position the parties to negotiate a resolution.

10 **The parties have already participated in court-ordered mediation, which**
11 **failed to achieve a settlement of the case or any issues in the case. ASIS**
12 **does not believe that additional ADR efforts will prove useful in settling the**
13 **case. Azoogle remains open to the possibility of additional ADR efforts in the**
14 **event its motion for summary judgment does not succeed in its entirety.**

15 **13. Consent to Magistrate Judge For All Purposes:** Whether all parties will consent to have
16 a magistrate judge conduct all further proceedings including trial and entry of judgment.

17 **The parties consented to have Magistrate Judge Joseph C. Spero conduct**
18 **all proceedings in this case.**

19 **14. Other References:** Whether the case is suitable for reference to binding arbitration, a
20 special master, or the Judicial Panel on Multidistrict Litigation.

21 **No.**

22 **15. Narrowing of Issues:** Issues that can be narrowed by agreement or by motion,
23 suggestions to expedite the presentation of evidence at trial (e.g., through summaries or
24 stipulated facts), and any request to bifurcate issues, claims, or defenses.

25 **None.**

26 **16. Expedited Schedule:** Whether this is the type of case that can be handled on an
27 expedited basis with streamlined procedures.

28 **No.**

1 **17. Scheduling:** Proposed dates for designation of experts, discovery cutoff, hearing of
2 dispositive motions, pretrial conference and trial.

3 **The Court has issued its order for the following dates:**

4 **Pretrial Conference:** 05/23/08

5 **Trial:** 06/09/08

6 **18. Trial:** Whether the case will be tried to a jury or to the court and the expected length of
7 the trial.

8 **Plaintiff expects the trial will last for the following number of days: 10**

9 **Azoogle expects the trial will last for the following number of days: 5**

10 **19. Disclosure of Non-party Interested Entities or Persons:** Whether each party has filed the
11 "Certification of Interested Entities or Persons" required by Civil Local Rule 3-16. **In addition,**
12 each party must restate in the case management statement the contents of its certification by
13 identifying any persons, firms, partnerships, corporations (including parent corporations) or
14 other entities known by the party to have either: (i) a financial interest in the subject matter in
15 controversy or in a party to the proceeding; or (ii) any other kind of interest that could be
16 substantially affected by the outcome of the proceeding.

17 **Plaintiff is a corporation and has no parent or subsidiaries**
18 **that have any kind of interest in its operation. Defendant**
19 **AZOGLE.COM, INC., filed an answer on behalf of itself but**
20 **identifies the attorney as representing AZOGLEADS.COM.**
21 **Defendant also filed a Certificate of Interested Parties but did**
22 **not identify any relationship between the two corporations.**

23 **Plaintiff took the default of Defendant Leads Limited in**
24 **this case and judgment on the default has been deferred by the**
25 **court until the case is concluded.**

26 **Azoogle certifies that the following listed persons, associations of persons,**
27 **firms, partnerships, corporations (including parent corporations) or other entities**
28 **(i) have a financial interest in the subject matter in controversy or in a party to the**

1 proceeding, or (ii) have a non-financial interest in that subject matter or in a party
2 that could be substantially affected by the outcome of this proceeding:

3 As of this date, other than the named parties, there is no such interest to
4 report.

5 **20.** Such other matters as may facilitate the just, speedy and inexpensive disposition of this
6 matter.

7 **None.**

8 **SINGLETON LAW GROUP**

9
10 Dated: March 6, 2008

11 /s/ Jason K. Singleton
12 Jason K. Singleton, Attorney for Plaintiff,
13 ASIS INTERNET SERVICES

14 **KRONENBERGER BURGOYNE, LLP**

15 Dated: March 6, 2008

16 /s/ Jeffrey M. Rosenfeld
17 Jeffrey M. Rosenfeld, Attorneys for
18 Defendants, AZOOGLE.COM, INC., and
19 AZOOGLEADS US, INC., dba
20 AZOOGLEADS.COM