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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
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR SANCTIONS**

Date: June 20, 2008
Time: 1:30 AM
Ctrm: A, 15th Floor

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INTRODUCTION

For purposes of this motion, defendant AzoogleAds.com, Inc. (“Azoogle”) does not dispute that plaintiff ASIS Internet Services (“ASIS”) received unsolicited commercial emails (the “Emails”). What Azoogle does dispute is that ASIS had a right to pursue claims arising therefrom against nearly 20 defendants with the thinnest imaginable connection to those Emails, and then to force those claims to a judgment months and months after it became apparent that ASIS couldn’t even demonstrate its own standing. ASIS’s irrational persistence in this litigation had predictable and significant financial consequences, in that Azoogle was forced to spend more than \$1 million on its defense. By this motion, Azoogle asks the Court to shift some of that burden back to ASIS.¹

ASIS’s tactics in this litigation—a broadly-brushed, cumulative pleading, followed by threats of multi-million dollar judgments against a score of mostly unrelated entities—strongly suggest an intention to coerce settlements. To a frightening extent, those tactics worked, in that all but two defendants settled. (The other, Leads Limited, never appeared and was ultimately voluntarily dismissed by ASIS.) ASIS’s intention to strong-arm settlements did not go unnoticed. Two years ago, in denying a motion for security brought by a defendant (Quicken Loans, Inc.) all but identically situated to Azoogle, Judge Claudia Wilken warned ASIS: “If you had included them in your amended complaint, you better give that some thought and discuss it with your clients because I will not hesitate to award attorneys’ fees for [the defendant] if it turns out that they weren’t properly included.” (Burgoyne Decl. ¶¶2 & Ex. A at 16:17-21.) ASIS, of course, persisted, and Quicken later settled.

¹ Including fees paid to consulting experts and New York counsel, who consulted with Azoogle and managed discovery and indemnity issues, Azoogle’s out-of-pocket expenses reached approximately \$1.5 million. (Declaration of Henry M. Burgoyne, III in Support of AzoogleAds.com, Inc.’s Motion for Sanctions (“Burgoyne Decl.”) ¶¶28 & Ex. M; Declaration of Stephen Fox in Support of AzoogleAds.com, Inc.’s Motion for Sanctions (“Fox Decl.”) ¶¶2-7 & Exs. A-E.) By this motion, however, Azoogle only seeks to recover those fees charged by appearing counsel Kronenberger Burgoyne and by testifying expert Dr. Frederick Cohen, as well as non-taxable costs not included in Azoogle’s Bill of Costs, filed concurrently with this motion.

1 ASIS’s bullying tactics were evident in its motions practice and written discovery.
2 Not including administrative requests to file documents under seal, ASIS brought eight
3 motions, all of which were denied by the Court. ASIS also served written discovery so
4 sweeping as to encompass nearly every document relating to Azoogole’s lead provider
5 business. (The Court observed during an *in-camera* meet-and-confer that ASIS’s
6 requests would have to be “narrowed dramatically.”) Perhaps most illustrative, ASIS
7 issued more than 120 third-party subpoenas demanding documents concerning any
8 “SPAM complaint[s] regarding or relating to Azoogole.” Eventually, the Court issued a
9 protective order concluding that ASIS’s third-party discovery was “overbroad and
10 oppressive,” and that ASIS had “abused the privilege of serving discovery on non-
11 parties.” The damage to Azoogole’s reputation and business interests, however, already
12 was done.

13 CAN-SPAM, Rule 11, and 28 U.S.C. Section 1927 all were intended to deter this
14 sort of groundless litigation, and to compensate parties harmed as a result of this sort of
15 bullying. CAN-SPAM’s attorneys’ fees provision, located at 15 U.S.C. §7706(g)(4), has
16 been applied under the even-handed approach, such that awards of fees are the rule
17 and not the exception. Accordingly, the Court need not find ASIS’s intentions to have
18 been questionable or its claims to have been frivolous in order to award Azoogole the full
19 measure of its sought-after fees and costs.

20 This is one of eight CAN-SPAM cases brought by ASIS, six others of which
21 remain pending. Despite its inability to prove its standing, ASIS continues to persist in
22 those cases and to inflict these same sorts of harms on other defendants. ASIS and its
23 attorneys of record, the Singleton Law Group (“Singleton”), need to understand that their
24 actions have caused, and continue to cause, real harm to real parties. Refusing to grant
25 Azoogole some measure of its fees and non-taxable costs would impose on Azoogole the
26 entire burden of defending this case, and would send the clear message that litigation
27 conduct of this sort is to be tolerated. For those and other reasons described herein, the
28

1 Court should award against ASIS and its attorneys some or all of Azoogle’s fees and
2 costs in defending this action.

3
4 **BACKGROUND**

5 **I. Procedural Background.**

6 ASIS filed its initial Complaint on December 12, 2005, its First Amended
7 Complaint on July 14, 2006, and its Second Amended Complaint (“SAC”) on October 4,
8 2006, adding Azoogle as a defendant. Since the inception of this action, ASIS has filed
9 eight motions, none of which was granted, and several of which were denied without oral
10 argument. ASIS has also engaged in sweeping abusive discovery, issuing, for example,
11 in excess of 120 third party subpoenas. (Order Re August 7, 2007 Joint Letter [D.E.
12 250].) On March 27, 2008, the Court granted Azoogle’s motion for summary judgment,
13 thereby dismissing all of ASIS’s claims.

14 **II. Azoogle’s Attorneys’ Fees & Costs.**

15 Azoogle incurred considerable expense in defending this lawsuit. Over the year-
16 and-a-half of litigation, Azoogle was forced to engage in substantial offensive and
17 defensive discovery and motions practice. In addition to the fees and costs Azoogle
18 paid to appearing counsel Kronenberger Burgoyne, LLP and to testifying expert Dr.
19 Frederick Cohen, Azoogle incurred additional expenses from New York-based counsel
20 retained to advise Azoogle on the litigation and to manage discovery, and to negotiate
21 and defend indemnification claims by other defendants. (Fox Decl. ¶¶2-7 & Exs. A-E.)
22 Nonetheless, Azoogle seeks to recover only its non-taxable costs and those fees paid to
23 Kronenberger Burgoyne and Dr. Frederick Cohen, in a total amount of \$912,413.84, or
24 such portion of this sum as the Court believes is equitable and just.² (Burgoyne Decl.
25 ¶¶28 & Ex. M; Fox Decl. ¶¶6 & Ex. E.)

26
27
28 ² This sum does not include taxable court costs, which have been submitted to the Court with Azoogle’s Bill of Costs, filed concurrently with this motion.

1 **III. Azoogle’s Notice to ASIS of Azoogle’s Intent to Seek Sanctions, and the**
2 **Parties’ Meet and Confer Efforts.**

3 On December 15, 2006, during Azoogle’s first status conference, Azoogle
4 informed the Court and ASIS of Azoogle’s intention to seek sanctions in connection with
5 the filing of the SAC. (Declaration of Henry M. Burgoyne, III in Support of
6 AzoogleAds.com, Inc.’s Motion for Rule 11 Sanctions [D.E. #224] (“Burgoyne Rule 11
7 Decl.”) ¶17 & Ex. Q.) On January 4, 2007, Azoogle provided written notice of that
8 intention by means of a letter to ASIS. (Burgoyne Rule 11 Decl. ¶11 & Ex. L.) Azoogle
9 has repeated its intention to seek sanctions at every stage of this litigation, including in
10 multiple papers filed with the Court. On May 11, 2007, Azoogle served a draft motion for
11 Rule 11 sanctions on counsel for ASIS. (Burgoyne Rule 11 Decl. ¶23.) Three weeks
12 later, on June 1, Azoogle filed its initial Rule 11 motion with the Court.
13 (AzoogleAds.com, Inc.’s Motion for Rule 11 Sanctions [D.E. #223]). On October 10,
14 2007, the Court denied Azoogle’s motion *without prejudice*, with the assumption that
15 these issues could be revisited after the disposition of the merits of the case. (Order
16 Denying Defendant’s Motion for Rule 11 Sanctions [D.E. #261].) Azoogle here renews
17 that motion, and files concurrent motions under CAN-SPAM and 28 U.S.C. Section
18 1927.

19 On April 10, 2008, counsel for Azoogle met-and-conferred with counsel for ASIS
20 regarding Azoogle’s planned requests for attorneys’ fees, with the hopes of resolving
21 this issue without the need for a motion. During this conference, counsel for ASIS stated
22 that ASIS would not agree to pay a dime in costs or fees, and would file for bankruptcy if
23 any award of costs or fees was granted. (Burgoyne Decl. ¶17.) Nevertheless, in an
24 attempt to settle the issue, on April 16 Azoogle served a written offer that ASIS pay
25 Azoogle \$450,000 in satisfaction of Azoogle’s costs and fees, and potential related
26 claims, arising from ASIS’s two cases against Azoogle. (*Id.* ¶3 & Ex. B.) ASIS never
27 responded to that offer. (*Id.*)
28

1 **ARGUMENT**

2 **I. Under 15 U.S.C. §7706(g)(4), Costs and Fees Should Be Awarded against ASIS**
3 **as a Matter of Course.**

4 CAN-SPAM provides that in a private action, the “court may, in its discretion,
5 require an undertaking for the payment of costs of the action, and assess reasonable
6 costs, including reasonable attorneys’ fees against any party.” 15 U.S.C. §7706(g)(4).
7 The *Gordon* case, relied on by the Court in finding that of ASIS lacked standing, applied
8 the evenhanded approach in assessing the prevailing party’s request for attorneys’ fees
9 under CAN-SPAM. *Gordon v. Virtumundo, Inc.*, No. 06-0204, 2007 WL 2253296, at *3-
10 4, (W.D. Wash. Aug. 1, 2007). The *Gordon* Court analogized the attorneys’ fees
11 provision in CAN-SPAM to the one in the Copyright Act, to which the Supreme Court
12 had previously applied the evenhanded approach. In so analogizing, the *Gordon* court
13 recognized that Congress had acknowledged that defendants in CAN-SPAM actions
14 “have an interest in establishing that their practices are legitimate,” and that the
15 “[p]romotion of prolific private CAN-SPAM litigation is not what Congress intended.” *Id.*
16 at *4. *Gordon* went on to find that “preventing abuse of [CAN-SPAM’s] limited private
17 right of action is entirely appropriate.” *Id.*

18 Under the evenhanded approach, the grant of fees and costs is the rule rather
19 than the exception, and fees should be awarded routinely. *Bridgeport Music, Inc. v. WB*
20 *Music Corp.*, 520 F.3d 588, 592 (6th Cir. 2008), quoting *Positive Black Talk Inc. v. Cash*
21 *Money Records, Inc.*, 394 F.3d 357, 380 (5th Cir. 2004) (quotations omitted). The Court
22 does not need to apply a specific standard or make a finding of “frivolousness” to apply
23 attorneys’ fees under the evenhanded approach. *EMI Mills Music, Inc. v. Empress*
24 *Hotel, Inc.*, 470 F. Supp. 2d 67, 76 (D. P.R. 2006). Rather, the Court need only be
25 equitable in its evaluation, and may consider other factors such as “motivation, objective
26 unreasonableness (both in the factual and legal components of the case) and the need
27 in some cases to advance considerations of compensation and deterrence.” *Id.*, citing
28 *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994) (internal quotations omitted).

1 As relevant to Azoogole’s request for fees and non-taxable costs, the facts in this
2 case closely parallel the facts in *Gordon*. As in *Gordon*, it is obvious that ASIS is “testing
3 [its] luck at making [its] ‘spam business’ extraordinarily lucrative through a strategy of
4 spam collection and serial litigation.”³ *Gordon*, 2007 WL 2253296, at *5. Here, ASIS
5 has brought eight nearly identical CAN-SPAM lawsuits, all seeking huge sums in
6 statutory damages.⁴ In each of these cases, ASIS has relied on broadly-brushed, vague
7 conspiracy and other allegations such as those contained in the SAC. In the present
8 case, ASIS’s strategy was unfortunately successful, in that ASIS managed to coerce
9 settlements from all appearing defendants except Azoogole. When the merits of this case
10 eventually were examined, however, it became apparent that ASIS had no information—
11 much less admissible evidence—to support its allegations, or even to demonstrate its
12 own standing. As in *Gordon*, ASIS’s “instant lawsuit is an excellent example of the ill-
13 motivated, unreasonable, and frivolous type of lawsuit that justifies an award of
14 attorneys’ fees.” *Gordon*, 2007 WL 2253296, at *6.

15 During the parties’ meet-and-confer, ASIS relied on *Phillips v. Worldwide Internet*
16 *Solutions, Inc.*, No. 05-5125, 2007 WL 184719 (N.D. Cal. Jan 22, 2007)—another
17 unsuccessful CAN-SPAM action brought by Singleton, though on behalf of another
18 client—for the proposition that under CAN-SPAM, fees were to be awarded only in the
19 context of a patently frivolous action. In fact, the *Phillips* Court found it unnecessary to
20 address what standard to apply, given the early dismissal of the case for lack of
21

22 ³ As in *Gordon*, it is also significant that ASIS “did not seek actual damages in the instant
23 litigation, because none exist, and that [it] is instead seeking solely statutory damages
for each e-mail sent.” *Gordon*, 2007 WL 2253296, at *5.

24 ⁴ The eight CAN-SPAM lawsuits brought by ASIS include: *ASIS Internet Services v.*
25 *Optin Global, Inc.* (12/12/05) (Case 3:05-cv-05124-JCS); *ASIS Internet Services v.*
26 *Valueclick, Inc. et al.* (6/21/07) (Case 3:07-cv-03261-PJH); *ASIS Internet Services v.*
27 *Azoogole.com, Inc.* (9/7/07) (Case 07-cv-04630-JSW); *ASIS Internet Services v.*
28 *IMarketing Consultants, Inc.* (10/19/07) (Case 4:07-cv-05357-CW); *ASIS Internet*
Services v. All In, LLC (11/9/07) (Case 3:07-cv-05717-JSW); *ASIS Internet Services v.*
Active Response Group, Inc. et al. (12/7/07) (Case 3:07-cv-06211-TEH); *ASIS Internet*
Services v. Pure Ads, LLC (3/21/08) (Case 3:08-cv-01566-SC); and *ASIS Internet*
Services v. Member Source Media, LLC (3/7/08) (Case 3:08-cv-01321-EMC).

1 personal jurisdiction. The *Philips* Court did conclude, though, that the Singleton Law
2 Group had “utterly failed to meet [its] ‘high’ burden of establishing that this Court has
3 general jurisdiction over Worldwide.” *Id.* at *4. The fact that a prior Singleton client
4 escaped an order to pay costs and fees in a prior improvident CAN-SPAM action is no
5 excuse for ASIS’s failure to pay sanctions here. Accordingly, the Court should order
6 ASIS to pay the full measure of Azoogole’s sought-after costs and fees.

7 **II. ASIS and Singleton’s Unsupported, and Unsupportable, Allegations and**
8 **Arguments Violated Rule 11.**

9 Federal Rule of Civil Procedure 11 is intended to deter dilatory and abusive
10 pretrial tactics and to streamline litigation by excluding baseless filings. *Cooter & Gell v.*
11 *Hartmarx Corp.*, 496 U.S. 384, 393 (1990). The baseless filings targeted by Rule 11
12 include “expeditionary pleadings” and complaints “filed in a speculative effort to find
13 someone financially liable for plaintiffs’ injuries . . .” *Southern Leasing Partners, Ltd. v.*
14 *McMullan*, 801 F.2d 783, 788 (5th Cir. 1986); *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir.
15 1987).⁵ While Rule 11 is not intended to chill creative advocacy, it requires creativity to
16 be tempered with a good faith application of the law and a reasonable investigation of
17 the facts. *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 484 (3d Cir. 1987); *Truesdell v.*
18 *Southern Cal. Permanente Med. Group*, 293 F.3d 1146, 1153-54 (9th Cir. 2002).

19 Rule 11 imposes sanctions even where only certain portions of a pleading violate
20 the Rule’s requirements. *Gurary v. Nu-Tech Bio-Med, Inc.*, 303 F.3d 212, 220-21 (2d Cir.
21 2002). Thus, unsubstantiated allegations or claims may be sanctioned despite other
22 colorable claims in the pleading. *Cross & Cross Properties, Ltd. v. Everett Allied Co.*,
23 886 F.2d 497, 504 (2d Cir. 1989). Similarly, a colorable claim against one defendant
24 does not justify adding other defendants against whom the claim is frivolous. *Townsend*
25 *v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir. 1990).

26
27 ⁵ The “shotgun approach to pleadings [citation omitted], where the pleader heedlessly
28 throws a little bit of everything into his complaint in the hopes that something will stick, is
to be discouraged.” *Rodgers v. Lincoln Towing Service, Inc.*, 596 F. Supp. 13, 27 (D.C.
Ill. 1984), quoting *Whiten v. Ryder Truck Lines, Inc.*, 520 F. Supp. 1174, 1176 (1981).

1 The Court has previously indicated that Azoogole will need to demonstrate its
2 entitlement to an award of sanctions under Rule 11. Azoogole respectfully submits that a
3 review of the record satisfies the Court's charge. Azoogole therefore requests that the
4 Court order ASIS and Singleton to compensate Azoogole for the full measure of its
5 sought-after costs and fees.

6 **A. The SAC's Allegations Were Unsupported and Unsupportable.**

7 Under Rule 11, the presentation of a pleading or other paper certifies that,
8 to the best of the filer's knowledge and belief, formed after an inquiry reasonable under
9 the circumstances, the factual contentions in the paper have evidentiary support, *or if*
10 *specifically so identified*, are likely to have evidentiary support after a reasonable
11 opportunity for further investigation or discovery. FED. R. CIV. P. 11(b)(3); *Christian v.*
12 *Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002). It is not acceptable for a party to file
13 suit first and find out later whether or not it has a case. *Hale v. Harney*, 786 F.2d 688,
14 692 (5th Cir. 1986).⁶ Contentions based on information and belief do not relieve a
15 plaintiff from its obligation to conduct an appropriate investigation. Fed. R. Civ. P. 11(b).
16 Furthermore, if "evidentiary support is not obtained after a reasonable opportunity for
17 further investigation or discovery," a plaintiff has a "duty under the rule not to persist with
18 that contention." Committee Notes on Amendments to Federal Rules of Civil Procedure
19 (1993) 146 FRD 401, 585-86.

20 **1. ASIS and Singleton Never Possessed Information to Support the**
21 **SAC's Allegations.**

22 The SAC contains allegation after allegation in relation to which ASIS and
23 Singleton never possessed, and still do not possess, any information. Most of those
24 allegations were made not on information and belief, but on *actual knowledge*.
25 Moreover, ASIS and Singleton persisted in those allegations long after they possessed

26 ⁶ A reasonable inquiry requires attorneys to seek credible information rather than to
27 proceed on mere suspicion or supposition. *Cooter & Gell*, 496 U.S. at 393. It requires
28 the plaintiff to interview available witnesses and review relevant documents. *King v.*
Idaho Funeral Services Ass'n, 862 F.2d 744, 747-48 (9th Cir. 1988); *Wold v. Minerals*
Engineering Co., 575 F. Supp. 166, 167 (D. Colo. 1983).

1 evidence foreclosing them, or had exhausted the means to prove them. Examples of
2 ASIS and Singleton’s unsupported, and unsupportable, allegations include:

- 3 • **Paragraphs 9 & 11:** Azoogle hired and managed the activities of the
4 “SPAMMERS” (*i.e.* the senders of the Emails);
- 5 • **Paragraphs 11, 21, 30, 49:** The “SPAMMERS” were at all times acting as
6 Azoogle’s “employees or agents”;
- 7 • **Paragraph 18:** Azoogle and the other defendants—including the
8 “SPAMMERS”—were engaged in a “joint venture and common enterprise” to
9 violate CAN-SPAM;
- 10 • **Paragraphs 21-22, 24-26, 31-32, 34-36, 51-21:** Azoogle sent or transmitted, or
11 caused or initiated the sending or transmission of, the Emails;
- 12 • **Paragraphs 21, 30, 49:** The “SPAMMERS” transmitted the Emails “for and in the
13 hire of” Azoogle;
- 14 • **Paragraph 27:** Azoogle used a “harvest directory attack or used an automated
15 creation of multiple email accounts” in connection with its alleged wrongdoing;
- 16 • **Paragraph 31:** Azoogle stole or “hijacked” the “email identities” to which the
17 Emails were sent;
- 18 • **Paragraph 13:** Azoogle conspired with the “SPAMMERS” in their misconduct;
19 and
- 20 • **Paragraphs 13 & 16:** Azoogle conspired with Quicken Loans Inc. and other
21 mortgage brokers in the sending of the Emails.

22 On summary judgment, ASIS and Singleton couldn’t produce evidence of ASIS’s
23 standing, an issue that would have been strictly within ASIS and Singleton’s knowledge.⁷

24
25 ⁷ In applying the adverse effect requirement to ASIS, Judge Spero found:

26 No reasonable jury could find, based on the undisputed evidence that the [12,000
27 emails at issue] caused any significant adverse effect to ASIS. While there is
28 some evidence that spam generally has imposed costs on ASIS over the years,
there is *no* evidence that the Emails at issue in this action resulted in adverse
effects to ASIS: there is *no* evidence in the record that any of the Emails either
reached any active ASIS users (rather than being filtered by [ASIS’s spam
filtering service]) or were the subject of complaints to ASIS’ there is *no* evidence

1 In fact, ASIS and Singleton couldn't even produce information supporting ASIS's verified
2 discovery response relating to adverse effects.⁸ In retrospect, it is hard to identify any
3 allegation in relation to which ASIS and Singleton ultimately offered admissible proof.

4 **2. ASIS and Singleton Made No Effort to Investigate or Verify the
5 SAC's Allegations.**

6 The likely reason that ASIS and Singleton ended up with no information
7 supporting the SAC's allegations is that they made no effort to verify those allegations
8 before filing ASIS's claims. Joshua Mohland and Carl Scoles, the lay persons who
9 conducted ASIS's "studies" regarding the origins of and relationships between the
10 Emails, did not begin their work until at least the late winter or spring of 2007.
11 (Burgoyne Decl. ¶¶5-6 & Ex. D at 22:20-23:5, Ex. E at 44:9-17, 45:4-47:4.) ASIS and
12 Singleton made no effort to review ASIS or others' server logs, or to contact the
13 operators of the computers supposedly used to send the Emails, or to determine the
14 actual use or ownership of any of the supposedly involved IP addresses and domain
15 names. ASIS and Singleton didn't even attempt to determine the date or circumstances
16 of the supposed "directory harvest" of email addresses on which ASIS based its claim for
17 aggravated CAN-SPAM damages. (Burgoyne Decl. ¶15 & Ex. L at 250:1-251:1, 251:14-
18 252:19, 260:25-262:6.)

19 In the months after the SAC was filed, the only information Singleton could point
20 to and linking Azoogole to the Emails was the supposed presence of Azoogole and its

21 in the record that ASIS had to increase its server capacity or experienced
22 crashes as a result of the Emails; and there is *no* evidence in the record that
23 ASIS experienced higher costs for filtering by Postini as a result of the Emails. . .
24 . . . As a result, [ASIS] does not have standing to assert its claims under CAN-
25 SPAM. (Order Granting Defendant's Motion for Summary Judgment, denying
26 Plaintiff's Motion for Summary Judgment and Dismissing Action ("MSJ Order")
27 [D.E. #401] (emphasis in original).)

28 ⁸ In its verified response to Azoogole's Third Set of Interrogatories (Rog No. 39), ASIS
stated:

Plaintiff has incurred adverse effect and monetary loss in the form of: the purchase
of SPAM filtering services, a necessity to increase bandwidth, consumption of
employee time to address client complaints regarding spam, and to configure
solutions to the false positive and false negative aspect of spam filtering, a necessity
to increase server capacity, increased service charges, and a partial disruption of
services to its clients. (Burgoyne Decl. ¶4 & Ex. C.)

1 affiliates on Spamhaus' ROKSO—a non-governmental spam watchdog list. Thus, in a
2 January 8, 2007 email responding to a request that ASIS withdraw the SAC, Singleton
3 suggested that Azoogole “ask [its] client how many Spamhaus and Rokso listings it, and
4 its affiliates, have.” (Burgoyne Decl. ¶7 & Ex. F.) As ASIS and Singleton conceded
5 months later, the answer to that question, including at the time the SAC was filed, was
6 “zero.” Most ironic, had ASIS and Singleton bothered to actually check ROKSO before
7 purporting to rely on it, they almost certainly would have discovered that ROKSO
8 specifically linked three-fourths of the domain names contained in the Emails to a known
9 individual spammer based in the Ukraine and with no connection to Azoogole. (See
10 Declaration of Adam Schneider in Opposition to Plaintiff ASIS Internet Services, Inc.'s
11 Motion for Summary Adjudication of Issues [D.E. #345] ¶¶2-5 & Ex. A.)

12 ASIS was under no deadline to file claims against Azoogole. Dispositive
13 information was readily available, if not already in ASIS and Singleton's hands. ASIS
14 and Singleton nevertheless filed suit against Azoogole and began asking questions later.
15 It is no defense that Singleton drafted the SAC's sweeping conspiracy and vicarious
16 liability allegations to insulate the SAC from a motion to dismiss, or that ASIS and
17 Singleton hoped to unearth some factual support for their claims by means of industry-
18 wide third-party discovery. Any reasonable litigant would have dropped this case
19 months prior to summary judgment. ASIS and Singleton, by contrast, chose to pursue
20 this case to a disposition on the merits. They cannot now claim wash their hands of
21 responsibility for that decision and its inevitable financial consequences.

22 **B. ASIS and Singleton Ignored Obvious Precedent, Basing their Legal**
23 **Arguments on Inapposite or No Authority.**

24 A complaint violates Rule 11 where there is “absolutely no chance of success
25 under the existing precedents, and where no reasonable argument can be advanced to
26 extend, modify or reverse the law as it stands.” *Eastway Const. Corp. v. City of New*
27 *York*, 762 F.2d 243, 254 (2d Cir. 1985). In assessing a Rule 11 violation premised on
28 allegedly frivolous legal arguments, a court should consider the extent to which a litigant

1 has researched the issues and found some support for them. Committee Notes on
2 Amendments to Federal Rules of Civil Procedure (1993) 146 FRD 401, 587. The
3 “ostrich-like tactic of pretending that potentially dispositive authority against a litigant's
4 contention does not exist” is, in of itself, sanctionable. *Szabo Food Service, Inc. v.*
5 *Canteen Corp.*, 823 F.2d 1073, 1081 (7th Cir. 1987), *quoting Hill v. Norfolk & Western*
6 *Ry.*, 814 F.2d 1192, 1198 (7th Cir. 1987). A claim for conspiracy fails to comply with
7 prevailing standards where, for example, it is unsupported by any supposed act in
8 furtherance of the alleged conspiracy. *Holgate v. Baldwin*, 425 F.3d 671, 676 (9th Cir.
9 2005) (upholding Rule 11 sanctions where conspiracy plaintiff failed to plead act in
10 furtherance).

11 Several of ASIS and Singleton’s legal arguments went beyond the bounds of
12 reasonable advocacy, relying on peripheral secondary sources or no authority at all,
13 while ignoring primary authority that disposed of ASIS’s position. As an example, during
14 the pendency of this litigation, two different federal judges interpreted CAN-SPAM’s
15 standing provision to require a provider of Internet Access Services (“IAS”) to have
16 suffered real and substantial adverse effects of a type uniquely experienced by an IAS.
17 Rather than dismissing its claims or even attempting to meaningfully distinguish the facts
18 of this case, ASIS and Singleton ultimately rested on the naked conclusion that “both the
19 *Hypertouch* and *Gordon* courts are wrong.” (Opposition to Motion for Summary
20 Judgment or in the Alternative Summary Adjudication of Issues [D.E. #335] (“ASIS Op.
21 to MSJ”) at 4.) A plea to ignore relevant authority is no argument at all.

22 As another example, before they filed the SAC, ASIS and Singleton knew that
23 Azoogole did not send the Emails, and that Azoogole’s CAN-SPAM liability hinged on
24 whether Azoogole “procured” those Emails. Also before the SAC was filed, this Court
25 issued an opinion—*Hypertouch, Inc. v. Kennedy-Western Univ.*, No. C 04-05203, 2006
26 WL 648688, at *5-6 (N.D. Cal., March 8, 2006)—clarifying that a plaintiff could satisfy the
27 CAN-SPAM’s procurement requirement only by proffering admissible evidence “that [the
28 defendant] had actual knowledge or consciously avoided knowledge of a current or

1 future violation of the CAN-SPAM Act by anyone who sent the emails at issue.”
2 (Emphasis added.) Despite an utter lack of information regarding Azoogle’s alleged
3 knowledge, ASIS and Singleton plowed ahead with their case, arguing that Azoogle’s
4 liability could be premised instead on Azoogle’s failure to properly vet and manage its
5 lead providers. By the time of the parties’ summary judgment hearing, ASIS and
6 Singleton’s only authority supporting that “vendor management” theory was a speech on
7 behalf of two individual lawmakers, made the year *after* CAN-SPAM had been passed.
8 And that speech, as the Court observed, did not represent the text of CAN-SPAM.⁹

9 ASIS and Singleton’s legal argument in support of their California Business &
10 Professions Code Section 17529.5 claim fared no better. ASIS and Singleton’s
11 definition of “advertising”—culled from a concurrence in a 1925 California Court of
12 Appeal case—would have defined an advertiser as any person or entity that received
13 any benefit from an advertisement. (ASIS Op. to MSJ at 25.) That nonsensical
14 definition would have imposed liability on any defendant who arguably benefited from
15 alleged unlawful emails, regardless of whether the defendant knew about or had
16 anything to do with them. Before the filing of the SAC, Judge Wilken dismissed ASIS
17 and Singleton’s theory, concluding that ASIS’s Section 17529.5 claim would stand only if
18 ASIS could “truthfully” assert that a defendant “advertised [its] services in the allegedly
19 fraudulent emails.” *ASIS Internet Services v. Optin Global, Inc.*, No. C 05-5124 CW,
20 2006 WL 2792436, *5 (N.D. Cal. Sept. 27, 2006). In disregard of Judge Wilken’s
21 admonishment, ASIS and Singleton filed the SAC and then renewed their bankrupt
22 “benefit” argument in front of Your Honor, only to have Your Honor dismiss it not once
23 but twice on separate summary adjudication motions. But for ASIS and Singleton’s
24 indifference to Judge Wilken’s admonition, Azoogle would never have incurred the
25 expense of defending against ASIS’s Section 17529.5 claim. On that basis alone, the

26 ⁹ At the hearing for the motion for summary judgment, counsel for ASIS stated as to the
27 interpretation of the conscious disregard requirement: “The statute is too new. The only
28 thing we have is John Dingell’s speech, which says exactly that.” The Court responded:
“Yeah, I understand. Thank you very much Congressman Dingell, but that’s not the
statute.” (Burgoyne Decl. ¶8 & Ex. G at 19:10-14.)

1 Court should impose sanctions against ASIS and Singleton in the amount of Azoogle’s
2 sought-after fees and costs.

3 **C. Circumstances Compel the Conclusion that ASIS and Singleton Filed**
4 **the SAC for the Purpose of Coercing Settlements.**

5 By signing a pleading, an attorney certifies that the pleading “is not being
6 presented for any improper purpose, such as to harass or to cause unnecessary delay
7 or needless increase in the cost of litigation.” FED. R. CIV. P. 11(b)(1). A lack of factual
8 and legal merit to a pleading suggests that it was filed for an improper purpose,
9 particularly where it has caused unnecessary delay and expense to other parties. W.
10 Schwarzer et al., *California Practice Guide: Federal Civil Procedure Before Trial* ¶17:349
11 (2008). An improper purpose may also be inferred from an attorney’s expertise. When
12 an experienced attorney asserts a meritless claim, a “strong inference arises” that an
13 action was brought for an improper purpose. *Huettig & Schromm, Inc. v. Landscape*
14 *Contractors Council of Northern California*, 790 F.2d 1421, 1427 (9th Cir. 1987). The
15 signer’s “purpose” is to be tested by an objective standard.

16 The SAC constitutes a thinly-guised effort to coerce quick settlements from
17 numerous defendants. Singleton represents itself to be uniquely qualified and highly
18 experienced at “spam litigation.” (Burgoyne Decl. ¶9 & Ex. H.) Despite that experience,
19 the only proof ultimately offered in support of the SAC’s sweeping allegations was a
20 single sales lead and a range of inadmissible speculation. On summary judgment, ASIS
21 and Singleton couldn’t even muster an expert declaration or other admissible evidence
22 connecting the Emails to each other, let alone to the almost 20 named defendants. In a
23 January 2007 meet-and-confer, Singleton admitted that ASIS named several defendants
24 for the sole purpose of extracting information and settlements. (Burgoyne Decl. ¶10.)
25 True to Singleton’s word, ASIS and Singleton culled settlements from every appearing
26 defendant but Azoogle.

27 Had ASIS and Singleton intended to litigate this case on the merits, they would
28 have invested in a *bona fide* expert analysis, and made a cursory attempt to identify the

1 sender, and otherwise conducted an investigation permitting ASIS to make at least a
2 prima facie showing on summary judgment. ASIS and Singleton’s failure to do so,
3 particularly in light of Singleton’s expertise and the number of named defendants, is
4 sufficient to demonstrate ASIS and Singleton’s intention to use this litigation to strong-
5 arm settlements. On that basis alone, the Court should require ASIS and Singleton to
6 pay Rule 11 sanctions in the amount of Azoogole’s sought-after fees and costs.

7 **III. Singleton Vexatiously Multiplied this Litigation.**

8 Pursuant to 28 U.S.C. Section 1927, “[a]ny attorney . . . who so multiplies the
9 proceedings in any case unreasonably and vexatiously may be required by the court to
10 satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred
11 because of such conduct.” The Ninth Circuit has held that an attorney need not act in
12 bad faith for Section 1927 to apply. Rather, when an attorney acts recklessly in
13 multiplying the proceedings, Section 1927 sanctions are warranted. *B.K.B. v. Maui*
14 *Police Dept.*, 276 F.3d 1091, 1107 (9th Cir. 2002). The test is whether an attorney’s
15 conduct is objectively harassing or annoying, such that it reflects a serious disregard for
16 the orderly process of justice. *An-Port, Inc. v. MBR Industries*, 142 F.R.D. 47 (D.P.R.
17 1992). As explained below, throughout the course of this litigation, Singleton has
18 engaged in reckless conduct with no ostensible purpose except to harass Azoogole and
19 multiply Azoogole’s costs of defense. That conduct, as further explained below, warrants
20 an award of Azoogole’s costs and fees.

21 **A. Singleton Filed Eight Frivolous Motions, and Lost Every One.**

22 Not counting *ex parte* discovery communications and administrative requests to
23 file documents under seal, Singleton filed eight motions, not a single one of which was
24 granted, and several of which were denied without oral argument and/or with critical
25 remarks from the Court.

26 • **ASIS’s Motion for Summary Adjudication of Issues** [D.E. #199] (filed on
27 04/11/07): Singleton disregarded the stipulated order specifying the issues to be
28 briefed, and addressed issues of its own choosing. In support of its arguments,

1 Singleton filed 40 pages of briefing and 184 pages of exhibits. The Court denied
2 Singleton’s motion, stating: “I certainly think that the way that, Mr. Singleton, you
3 couched your motions, is completely inappropriate for summary judgment. It’s not a
4 summary judgment motion. I’ll also take you to task, but I’ll leave it at that, for defying
5 the stipulation you entered into—Completely Improper.” (Burgoyne Decl. ¶¶29 & Ex. N at
6 2:12-17.) The Court also warned Singleton:

7 I don’t see, Mr. Singleton, how you can prove your case unless you can find
8 who sent the e-mails. I don’t believe that - - I don’t believe you can, under the
9 statute. I think in order for there to be a procurement of an unlawful e-mail,
10 there must be an identity of the specific sender of the email; that you can
11 prove that this defendant procured the specific activity and knowingly or in
12 conscious disregard of the fact that that third party was going to, had, or did,
13 act in violation of the CAN-SPAM Act. I don’t see how you can possibly prove
14 this case without that. (*Id.* at 4:7-16.)

15 • **Motion for Issuance of Letters Rogatory** [D.E. #220] (filed on 05/14/07):
16 Singleton asked the Court to authorize the issuance of a foreign subpoena by the
17 Quebec, Canada judicial authority. Singleton claimed the subpoena—directed to a
18 small, unrelated third party—was necessary to prove that Azoogle violated CAN-SPAM.
19 The Court denied Singleton’s motion, finding that Singleton had “not provided any
20 justification” for the supposed connection between the third party and Azoogle. The
21 Court concluded: “[I]t appears that this discovery request is a ‘wholly exploratory
22 operation.’” (Order Denying Motion for Issuance of Letters Rogatory [D.E. #241] at 6.)

23 • **Motion to Supplement the Second Amended Complaint** [D.E. 231] (filed on
24 06/08/07): A year-and-a-half after Singleton initiated this action, Singleton moved for
25 leave to supplement the SAC, claiming that searches of its spam database had revealed
26 7,000 additional emails supposedly connected to Azoogle. The Court denied the
27 motion. (Order Denying Plaintiff’s Motion to Supplement the Second Amended
28 Complaint and Further Case Management Conference and Pretrial Order [D.E. #249].)
Singleton currently continues to prosecute a separate lawsuit based on those emails,
despite this Court’s finding that ASIS lacks standing.

1 • **Motion for Preliminary Injunction Ordering the Return or Destruction of**
2 **Sensitive Materials** [D.E. #268] (filed on 10/25/07): During discovery, Azoogle
3 requested that ASIS produce relevant server logs and other electronic evidence.
4 Singleton refused. Azoogle then successfully subpoenaed some of the same
5 documents from ASIS's third party systems administrator, FalconKnight, Inc. Singleton
6 refused Azoogle's offer to treat the subpoenaed documents as HIGHLY CONFIDENTIAL
7 – ATTORNEYS' EYES ONLY, and instead moved for an order requiring the documents
8 to be returned or destroyed. Again, the Court denied Singleton's motion without oral
9 argument finding:

10 [If] this document is designated as "Attorneys' Eyes Only," Plaintiff has not
11 demonstrated that it will suffer any injury as a result of the disclosure of this
12 document. . . . In light of the fact that these documents may be relevant to the
13 issues in this case, it is Plaintiff's burden to show that injury would result from
14 the disclosure of this information to [Azoogle's Expert]. This, Plaintiff has failed
15 to do. (Order Granting In Part and Denying In Part Motion for Preliminary
16 Injunction and Granting In Part and Denying In Part Counter-Motion to
17 Disclose Documents to Expert Witness [D.E. #309] at 2.)

18 • **Motion to Shorten Time to Hear Plaintiff's Motion for Preliminary Injunction**
19 **Ordering Return or Destruction of Sensitive Materials** [D.E. #269] (filed on 10/25/07):
20 Along with its motion for preliminary injunction, Singleton moved the Court for an
21 expedited hearing schedule. Again, without oral argument, the Court denied Singleton's
22 motion. (Order Denying Plaintiff's Motion to Shorten Time to Hear Plaintiff's Motion for
23 Preliminary Injunction and Setting Hearing on Plaintiff's Motion for Preliminary Injunction
24 [D.E. #277].)

25 • **Motion for Exclusion of Azoogle's Expert Witness** [D.E. #272] (filed on
26 10/26/07): Singleton brought this procedurally improper motion seeking to exclude
27 Azoogle's expert witness report; Azoogle had not submitted this expert report to the
28 Court as evidence—or for any other purpose. In support of this motion, Singleton
submitted over 85 pages of exhibits. In response, Azoogle explained:

 [ASIS's] motion is not recognized under statutory or common law. It isn't even
clear what relief ASIS is seeking. If ASIS is dissatisfied with the content of Dr.
Cohen's Rebuttal Report and Supplemental Report (collectively, the

1 “Reports”), it should move the Court for an order compelling the expert to
2 provide the information required by Rule 26. If, on the other hand, ASIS
3 believes that Dr. Cohen intends to give improper testimony on specific topics,
4 ASIS must bring a motion in limine to exclude such testimony. Until ASIS
5 chooses one of these procedurally sanctioned paths, the Court should refuse
6 relief. (Azoogles.com, Inc.’s Opposition to Motion for Exclusion of Expert
7 Witness [D.E. #282] at 5 (internal citations omitted).)

8 The Court denied oral argument and ultimately disregarded the motion.

9 • **Motion for Evidentiary Sanctions for Failure to Produce Witness at
10 Deposition** [D.E. #285] (filed on 11/16/08): Singleton took the deposition of Jennifer
11 Evans after several delays caused by scheduling conflicts, unexpected medical
12 difficulties and a death in Ms. Evans’ family. Immediately after taking the deposition,
13 Singleton moved the Court for evidentiary sanctions arising out of the scheduling
14 difficulties. In denying Singleton’s motion without oral argument, the Court observed:
15 “[I]t is clear to the Court that both sides bear some measure of responsibility in the
16 difficulty in scheduling Ms. Evans’ deposition.” (Order Denying Plaintiff’s Motion for
17 Evidentiary Sanctions for Failure to Produce Witness at Deposition [D.E. #312].)

18 • **Motion for Summary Adjudication of Issues** [D.E. #318] (filed on 01/18/08): In
19 addition to opposing Azoogles’ motion for summary judgment, ASIS filed its own motion
20 for summary adjudication. The Court denied Singleton’s motion in its entirety, finding
21 that Singleton had failed to meet its burden of production as to several issues, including
22 ASIS’s standing to bring a CAN-SPAM claim. Specifically, the Court found that after a
23 year-and-a-half of prosecuting its case:

24 There is *no* evidence in the record that any of the Emails either reached any
25 active ASIS users (rather than being filtered by Postini) or were the subject of
26 complaints to ASIS; there is *no* evidence in the record that ASIS had to
27 increase its server capacity or experienced crashes as a result of the Emails;
28 and there is *no* evidence in the record that ASIS experienced higher costs for
filtering by Postini as a result of the Email. . . . In short, ASIS suffered no
meaningful adverse effect as a result of the Emails of any kind. (MSJ Order at
26 (emphasis in original).)

It is unusual for a party to file eight motions. It is extraordinary for a party to file
eight motions and lose every one. In light of Singleton’s record, and the frivolousness of
so many of Singleton’s supporting arguments, it cannot be said that Singleton’s motions

1 practice was intended to advance ASIS's case. Each and every one of Singleton's
2 reckless and unreasonable motions cost Azoogle time and money. The Court should
3 shift that burden back to Singleton by awarding Azoogle sanctions equal to its sought-
4 after costs and fees.

5 **B. Singleton Engaged in Abusive Offensive Discovery.**

6 Singleton's offensive discovery reveals a thinly-guised effort to impose costs on
7 Azoogle while conjuring up unrelated litigation. As the Court is well aware, the sole
8 connection between the Emails and Azoogle was a single mortgage lead provided to
9 Azoogle from a single vendor, namely Seamless Media Corp. This lead did not involve
10 any of Azoogle's affiliates, it did not involve ROKSO or Spamhaus, and it did not involve
11 Azoogle's telecommunication service providers. Nevertheless, Singleton served
12 Azoogle with sweeping discovery requests, seeking all but every document relating to
13 Azoogle's lead provider business. As limited examples, Singleton sought:

- 14 • All agreements between Azoogle and its 20,000 plus affiliates (RFPs No. 4, 6);
- 15 • All documents relating to payments Azoogle made to any of its 20,000 plus
16 affiliates from August 2005 to the present (RFP No. 7);
- 17 • All correspondence between Azoogle and its 20,000 plus affiliates (RFP No. 8);
- 18 • All of Azoogle's business plans for a two-and-a-half year period (RFPs No. 21-
19 23);
- 20 • All of Azoogle's documents relating to its mortgage vertical marketing program
21 (RFP No. 41);
- 22 • All emails that Azoogle received in its spam traps for over a year (RFP No. 46);
- 23 • The name, address, and telephone number for each of Azoogle's 20,000 plus
24 affiliates (Rog No. 9); and
- 25 • The amount of money that Azoogle paid and received for leads since 2005 (Rogs
26 No. 11-12). (Burgoyne Decl. ¶¶11-12 & Exs. I-J.)

27 In the face of Singleton's refusal to narrow *any* of those requests, Azoogle filed its first
28 motion for protective order. During an *in-camera* meet-and-confer regarding that motion,

1 the Court observed that Singleton’s requests would have to be “narrowed dramatically.”
2 (*Id.* ¶13.)

3 Nearly a year after Singleton filed the SAC, it switched its focus away from
4 Azoogle’s 20,000 plus affiliates (none bearing any relation to the Bruce Wolf Lead) to
5 Azoogle’s lead vendors. Singleton demanded that Azoogle produce vendor lists—
6 including a ranking of the ten that provided Azoogle the most sales leads. Azoogle
7 spent considerable time and money collecting this information for Singleton. Yet, in its
8 70 pages of summary judgment briefing, Singleton did not mention any of these
9 materials, or even reference a single Azoogle lead vendor other than Seamless Media
10 Corp.

11 Singleton’s abusive discovery climaxed with its service of 120 third party
12 subpoenas to Azoogle’s affiliates, business partners and service providers, and to wholly
13 unrelated entities. Those subpoenas demanded, among other things, documents
14 concerning any “SPAM complaint[s] regarding or relating to Azoogle.” (Burgoyne Decl.
15 ¶14 & Ex. K.) Ultimately, Azoogle was forced to seek another protective order from the
16 Court. The Court granted that order, quashing all of Singleton’s then-outstanding
17 subpoenas and concluding:

18 **[I]t is apparent that Plaintiff has abused the privilege of serving**
19 **discovery on non-parties.** Plaintiff has served approximately 121
20 subpoenas on non-parties in this matter. Those subpoenas, as
21 demonstrated in the case management conference statement, are not limited
22 to the subject matter of the action, let alone to the claims raised in this
23 action. To the contrary, **those subpoenas are overbroad and oppressive,**
and seek information regarding Azoogle that has nothing to do with
this lawsuit. (Order Re August 7, 2007 Joint Letter [D.E. #250] (emphasis
added).)

24 As a final, but by no means insignificant, discovery issue, Singleton engaged in
25 unreasonable and vexatious expert discovery. The overblown “studies” on which ASIS
26 based its case were not performed by ASIS expert Jeffrey Posluns, but rather by two
27 Singleton clerical employees, Joshua Mohland and Carl Scoles. As Azoogle briefed
28 extensively in its summary judgment papers, Mohland and Scoles’s lack of expertise

1 was apparent in their analyses, in that both relied on inaccurate sources of information
2 and unreliable methodologies that rendered their “studies” and accompanying
3 declarations inherently unreliable. (See Azoogles.com, Inc.’s Objections to ASIS
4 Internet Services’ Summary Judgment/Summary Adjudication Evidence (“Objections to
5 Evidence”) [D.E. #374] at 9:1-10:16.) Still, through the spring of 2007, Singleton refused
6 to permit depositions of Mohland and Scoles, claiming they were undesignated
7 “experts.” In an effort to untangle Singleton’s haphazard technical arguments, Azoogles
8 was forced to retain Dr. Frederick Cohen, and to participate in three expert depositions.
9 Notwithstanding its technical bluster, on summary judgment Singleton failed to submit
10 any expert testimony—a circumstance that, in-and-of-itself, doomed ASIS’s case.

11 Singleton’s sweeping discovery required Azoogles to expend considerable time
12 and resources researching, reviewing, and responding to Singleton’s requests. In the
13 end, none of Singleton’s discovery provided any substantive support to ASIS’s
14 allegations. Singleton’s offensive discovery served only to multiply the costs of litigation,
15 and to harass Azoogles. Accordingly, Singleton’s offensive discovery is sanctionable
16 under 28 U.S.C. §1927.

17 **C. Singleton Failed to Search for Discovery Materials, and Withheld**
18 **Existent and Obviously Relevant Electronic Evidence.**

19 At the same time Singleton was engaging in abusive offensive discovery, he and
20 ASIS were failing to fulfill their own discovery obligations. This case focused on emails
21 purportedly received through ASIS’s email servers. Yet, prior to this litigation—and
22 during its pendency—ASIS and Singleton undertook no apparent efforts to preserve or
23 produce relevant electronic documents that must have existed. Examples of these
24 documents include:

- 25 • **Postini Records:** ASIS services provider Postini generated monthly invoices and
26 various service logs, which would have demonstrated whether and when the
27 Emails arrived and how they were routed. Singleton produced none of that
28 information.

- 1 • **FalconKnight Records:** Other than the few pages provided through ASIS’s
2 expert Posluns, Singleton produced no server configuration data, severely limiting
3 Azoogles ability to track the routing of and receipt of the Emails.
- 4 • **Server Logs:** Internet servers generate a complex of “server” and “daemon” logs,
5 including as demonstrate the receipt and routing of email. Singleton produced
6 none of these documents.

7 (See Azoogles.com Inc.’s Memorandum of Points and Authorities in Opposition to
8 Plaintiff ASIS Internet Services, Inc.’s Motion for Summary Adjudication of Issues [D.E.
9 #338] at 11:7-12:8.) Indeed, witness after ASIS witness, including ASIS CEO Nella
10 White, testified that Singleton made no meaningful effort to locate responsive
11 information, and produced only hand-picked document on Singleton-selected topics.
12 (See, e.g., Burgoyne Decl. ¶¶5-6, 15, Ex. L at 138:8-23, 142:23-143:4, 143:10-145:21,
13 146:9-147:5, 149:4-15, Ex. D at 104:15-25, Ex. E at 71:22-72:13.) The only electronic
14 information produced to Azoogles came not from ASIS but from ASIS’s systems
15 administrator FalconKnight. Ironically, Singleton demanded that Azoogles return or
16 destroy the documents produced by FalconKnight, and filed a motion to accomplish the
17 same. (The Court, as described above, denied Singleton’s motion.)

18 By the summer of 2007, Azoogles became so worried about Singleton’s failure to
19 produce electronic documents and other information that it raised the issue with the
20 Court. In response, the Court ordered Singleton to answer three additional
21 interrogatories concerning ASIS’s primary contentions. (Order Re June 27, 2007 Joint
22 Letter [D.E. #242].) The Court’s order warned: “Plaintiff will be precluded from
23 introducing at trial or on summary judgment any facts to prove these contentions other
24 than the facts set forth in response to these interrogatories.” (*Id.*) Despite the Court’s
25 warning, Singleton failed to incorporate into ASIS’s responses a range of information
26 that he nevertheless attempted to submit on summary judgment:

- 27 • Josh Mohland’s January 16, 2008 declaration and nine attachments summarizing
28 Mohland’s new “study” regarding the Emails’ headers;

- 1 • Various Quicken Loans documents that Singleton failed even to authenticate, and
2 that were thus inadmissible;
- 3 • Unauthenticated blog postings about spam, purportedly showing Azoogle's
4 reputation as a spammer;
- 5 • A description of White's supposed attempt in 2005 to enter a second false lead
6 into a second website, which attempt White failed to mention during her seven-
7 hour deposition; and
- 8 • A description of the supposed domain history of wumort.net, purportedly showing
9 some connection to Azoogle. (Objections to Evidence at 2:1-3:21.)

10 Singleton has yet to offer an excuse for his failure to comply with discovery
11 obligations. Nor could he, since the Federal Rules of Civil Procedure do not permit
12 withholding of discoverable information. At every stage of this litigation, Singleton's
13 failure to provide discoverable information vexatiously multiplied Azoogle's burden of
14 defense, and unreasonably increased Azoogle's costs in defending itself. Accordingly,
15 the Court should grant sanctions under Section 1927.

16 **D. Singleton Engaged in Purposefully Obstructionist and Dilatory**
17 **Tactics.**

18 In addition to its reckless motion and discovery practice, Singleton engaged in
19 misconduct that can only be perceived as purposefully obstructionist. This misconduct,
20 initiated at Singleton's sole discretion, forced Azoogle to incur additional, avoidable
21 costs:

- 22 • **Singleton Refused to Permit the Amendment of Discovery Response:** Early
23 in discovery, Singleton refused to permit Azoogle to serve certain discovery responses
24 after the initial deadline. (Azoogle delayed service of the responses based on
25 Singleton's withholding of relevant information earlier requested by Azoogle.)
26 (Defendant AzoogleAds.com, Inc.'s Motion for 1) Protective Order and 2) Leave to
27 Amend Discovery Responses [D.E. #178] at 7:9-10:27.) Azoogle was forced to file a
28 motion to amend. During an *in-camera* meet-and-confer over that motion, the Court

1 observed that Azoogole would “inevitably” be permitted to amend its responses.
2 (Burgoyne Decl. ¶13.)

3 • **Singleton Refused to Consent to a Magistrate in its Second-Filed Case**
4 **against Azoogole:** Initially, Singleton’s second case against Azoogole was deemed
5 related to this action, and so was also assigned to Your Honor. Singleton, however,
6 refused to consent to have a magistrate hear the second case. As a consequence, both
7 cases were referred to Judge Patel. At the initial case management conference, Judge
8 Patel raised serious questions about Singleton’s motives in refusing to consent to Your
9 Honor, and even accused Singleton of forum shopping. As a result, Judge Patel sent
10 this case back to Your Honor. Ultimately, Singleton’s gambit delayed summary
11 judgment by two months, and resulted in two separate actions to be litigated along two
12 separate tracks.

13 • **Singleton Engaged in Improper, *Ex Parte* Communications with the Court.**
14 During the first half of 2007, Singleton filed several improper *ex parte* letter briefs
15 regarding discovery issues. They included letters filed on April 16 and April 23, 2007.
16 On April 30, 2007 the Court ordered the parties “not to file any discovery motions or
17 letters (other than joint letters) without leave of Court.” (Order to Meet-and-Confer and
18 Submit One Joint Letter Brief [D.E. #218].) Despite the Court’s clear admonition,
19 Singleton continued to file *ex parte* letter briefs. (See, e.g., briefs filed May 3, 2007 [D.E.
20 #219] and November 16, 2007 [D.E. #285].)

21 The above-described conduct had, and continues to have, the predictable result
22 of harassing Azoogole and increasing Azoogole’s costs of its defense. It is difficult to
23 imagine any reasonable purpose to be served by so much of Singleton’s litigation
24 conduct. Section 1927 was intended to discourage these sorts of tactics. The Court
25 should take advantage of that statute to award Azoogole its fees and costs resulting from
26 Singleton’s reckless and vexatious tactics.

