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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ASIS INTERNET SERVICES,

Plaintiff,

v.

OPTIN GLOBAL, INC., ET AL.,

Defendants.

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Case No. C-05-05124 JCS

**ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT,  
DENYING PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AND DISMISSING  
ACTION [Docket Nos. 318, 320]**

~~(FILED UNDER SEAL)~~

REDACTED - PUBLIC VERSION

**I. INTRODUCTION**

Plaintiff, ASIS Internet Services ("ASIS"), filed this action on December 12, 2005, asserting that various Defendants, including Azoogles.com ("Azoogles"), violated the CAN-SPAM Act of 2003, 15 U.S.C. §§ 7701 *et seq.*, and California Business and Professions Code § 17529.5. Azoogles and ASIS now bring motions for summary judgment (hereinafter "Plaintiff's Motion" and "Defendant's Motion"). The parties have consented to the jurisdiction of a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). A hearing on the Motions was held on Friday, March 21, 2008, at 1:30 p.m. For the reasons stated below, Plaintiff's Motion is DENIED. Defendant's Motion is GRANTED.<sup>1</sup>

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<sup>1</sup> The Court declines to rule on Azoogles's objections to Plaintiff's evidence [Docket No. 374] because the objections have no bearing on the Court's holding; even assuming that all of Plaintiff's evidence is admissible, the result is the same as to the issues on which the Court's ruling depends.

1 **II. BACKGROUND**

2 **A. Facts<sup>2</sup>**

3 **1. The Parties**

4 Plaintiff ASIS is a California corporation and an Internet Access Service Provider. Second  
5 Amended Complaint (“SAC”) at 2; *see also* Joint Statement of Stipulated Facts in Support of Motion  
6 for Summary Judgment (“Joint Statement”), No. 1 (stipulation that ASIS is a provider of Internet  
7 Access Service with the meaning of 15 U.S.C. § 7706(g)(1), 15 U.S.C. § 7702(11) and 47 U.S.C.  
8 § 231(e)(4)), No. 2 (stipulation that ASIS is an Electronic Mail Service Provider within the  
9 definition of California Business and Professions Code §§ 17529.5 and 17529.1(h)). According to  
10 ASIS President and CEO Nella White, ASIS was created in 1995 and in 2005 had just under 1,000  
11 Internet access and e-mail customers. Declaration of Nella White in Support of Plaintiff’s Motion  
12 for Summary Adjudication of Issues (“White Motion Decl.”), ¶¶ 2-3.

13 Azoogie is an Internet marketing company through which “lead vendors” and providers  
14 channel leads to sellers of goods and services. Declaration of David Graff in Support of  
15 AzoogieAds.com, Inc.’s Motion for Summary Judgment or in the Alternative Summary  
16 Adjudication (“Graff Motion Decl.”), ¶ 2.

17 **2. How Azoogie Obtained and Transmitted Leads**

18 Azoogie’s CEO, Donald Mathis, explains how Azoogie obtained and transmitted leads in  
19 2005, during the relevant period for this case, as follows:

20 Since 2003, Azoogie has acquired marketing leads by way of two  
21 categories of third party lead providers: affiliates and third party  
22 vendors. Azoogie has always relied primarily on registered affiliates  
23 to generate leads, which Azoogie then sells to the ultimate purchaser.  
24 Azoogie no longer uses third-party vendors as lead providers.

25 Prior to generating any leads for Azoogie, prospective affiliates must  
26 register with, and be accepted after a vetting process by, Azoogie to  
27 become an affiliate. A prospective affiliate must agree to Azoogie’s  
28 Affiliate Terms and Conditions, which among other things, expressly  
prohibits the affiliate from violating CAN-SPAM or any other law.

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<sup>2</sup> Although each party submitted literally hundreds of facts that are alleged to be undisputed, the parties were able to agree on only *nine* facts in their Joint Statement of Undisputed Facts. The Court, therefore, has been left to determine, based on the evidence and arguments by the parties, which facts are undisputed and which are not.

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An Azoogle affiliate generates leads for Azoogle by first logging into the AzoogleAds 2.0 (previously AzoogleAds 1.0) software system and selecting from a list of Azoogle's branded offers to serve as the basis for its lead generation. During October 2005, Azoogle had a few such properties in its mortgage lead business, which included its branded offers: Low Rate Advisors and Christian Mortgages USA. Azoogle maintained creative material for each of these branded offers, which an affiliate could download, if contractually permitted, from Azoogle's protected computers, through the AzoogleAds software system. Once an affiliate downloaded Azoogle's creative material, that affiliate could use the creative material as specified in the terms of its contract with Azoogle. The contract might permit the affiliate to use the creative material in emails, website banners, or other specified media, though only in connection with the related Azoogle branded offer. When an affiliate placed the downloaded creative material in an email or banner ad, users would click on a link in the email or banner add and be redirected to the Azoogle website for that respective branded offer, such as LowRateAdvisors.com.

[REDACTED]

Even with its broad affiliate network, Azoogle has at times been unable to satisfy the demands of its lead purchasers by affiliate lead generation alone. In such situations, Azoogle has used third party vendors to provide qualified mortgage leads to Azoogle, in order to satisfy the remainder of the demand. Because vendors represented that they had their own internal compliance procedures, Azoogle did not vet them in the same manner that it vetted its own affiliates.

...

Unlike affiliates, a third-party vendor would enter into a contract with Azoogle, known as an Insertion Order, whereby the vendor agreed to sell Azoogle certain qualified mortgage leads subject to express contractual criteria. These leads were *not* generated by sending consumers to web pages owned and operated by Azoogle. Rather, the leads were generated solely through the methods and creative materials owned by the vendor, though the Insertion Order expressly limited the acceptable methods the vendors could use to generate the leads.

[REDACTED]

1 Declaration of Donald H. Mathis in Opposition to Plaintiff ASIS Internet Services, Inc.'s Motion for  
2 Summary Adjudication of Issues ("Mathis Opposition Decl."), ¶¶ 7-14. According to Azoogole, it  
3 has never sent unsolicited emails to generate leads for its clients. *Id.*

4 Regarding the use of Azoogole's creative materials by vendors, Azoogole's Director of Media  
5 Buying, Julian Mossanen, testified in his deposition that [REDACTED]

6 [REDACTED]

7 [REDACTED] Supplemental Declaration of Henry M. Burgoyne, III in Support of AzzogleAds.com,  
8 Inc.'s Reply Memorandum for Summary Judgment or in the Alternative Summary Adjudication  
9 ("Burgoyne Supp. Decl."), Ex. C (Mossanen Depo) at 97-98. [REDACTED]

10 [REDACTED]

11 [REDACTED] *Id.* at 98.

12 Mossanen also testified in his deposition regarding the process of finding third party vendors.

13 [REDACTED]

14 [REDACTED] Singleton Opposition Decl., Ex. J (Mossanen  
15 Depo.) at 22. [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 *Id.* at 23-24. [REDACTED]

19 [REDACTED]

20 [REDACTED] *Id.* at 33. [REDACTED]

21 [REDACTED] *Id.* at 24. [REDACTED]

22 [REDACTED]

23 [REDACTED] *Id.* at 24. [REDACTED]

24 [REDACTED] *Id.* at 36. [REDACTED]

25 [REDACTED] *Id.* [REDACTED]

26 [REDACTED] *Id.* [REDACTED]

27 [REDACTED] *Id.* at 37. [REDACTED]

28 [REDACTED] *Id.* at 51. [REDACTED]

1 [REDACTED]  
2 [REDACTED] *Id.* at 129.

3 [REDACTED]  
4 [REDACTED] Singleton Opposition Decl., Ex. M  
5 (Zhardanovsky Depo.) at 21. However, Marvin Hernandez, who handled spam complaints at  
6 Azoogle, testified in his deposition that there were a handful of Azoogle affiliatees who had received  
7 more than ten spam complaints. Singleton Opposition Decl., Ex. K (Hernandez Depo.) at 67-68.

### 8 3. Azoogle and Spam Compliance

9 Azoogle was founded in 2001 as an email Application Service Provider (“ASP”), which  
10 worked with bulk email providers on behalf of sellers of goods and services. Mathis Opposition  
11 Decl., ¶ 6. According to CEO Mathis, Azoogle gave up its ASP line of business in 2003 when it  
12 began receiving complaints about its email partners. *Id.* However, in September 2004, Azoogle was  
13 suspended by ISP Savvis because an email marketing watchdog, SpamCop, had complained about  
14 Azoogle’s work with bulk emailers. *Id.*; *see also* Declaration of Margarita Calpotura in Opposition  
15 to Plaintiff ASIS Internet Services, Inc.’s Motion for Summary Adjudication of Issues (“Calpotura  
16 Opposition Decl.”), Ex. B at 853 (letter from Savvis to Azoogle dated September 10, 2004, notifying  
17 Azoogle that Savvis was suspending its services due to excessive spam complaints).

18 In February 2005, Azoogle learned that it was listed on the ROKSO website maintained by  
19 Spamhaus Project. Mathis Opposition Decl., ¶ 6. Spamhaus describes itself as “an international  
20 non-profit organization whose mission is to track the Internet Spam Gangs . . . .” Calpotura  
21 Opposition Decl., Ex. G (Spamhaus Project web page). Spamhaus publishes the Register of Known  
22 Spam Operations, known by its acronym, “ROKSO.” *Id.* Starting in February 2005, Azoogle  
23 worked with Spamhaus to improve its compliance with Spamhaus’s anti-spam guidelines and in  
24 early 2006, Azoogle was removed from ROKSO. Mathis Opposition Decl., ¶ 6; Calpotura  
25 Opposition Decl., Ex. B (email correspondence between Azoogle and Spamhaus).

### 26 4. “Knock-Off” Websites

27 In an email dated February 9, 2005, Azoogle asked Spamhaus for advice about spammers  
28 who were copying Azoogle images:

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Calpotura Opposition Decl., Ex. B at AZ 49-50.

One such knock-off website was LowRateAdvisors.net. Mathis Decl., ¶ 26. The creator of this website, Scott Tesler, described his activities with respect to LowRateAdvisors.net as follows:

I have registered a domain, "lowrateadvisors.net." For some time this site redirected to Azoogles web pages, and I drove traffic to Azoogles in this manner, and did so as an Azoogles affiliate.

At one point . . . I copied Azoogles web page, "lowrateadvisors.com" and published it on the web as "lowrateadvisors.net." . . . I may have generated leads using this page but I cannot recall.

Declaration of Henry M. Burgoyne, III in Support of Azoogles.com, Inc.'s Motion for Summary Judgment or on the Alternative Summary Adjudication ("Burgoyne Motion Decl."), Ex. K (Tesler Decl.). According to Azoogles CEO, Donald Mathis, he became aware of the LowRateAdvisors.net website, for the first time, at his deposition in this action. Mathis Opposition Decl., ¶ 26. Mathis further states that Azoogles neither permitted or approved the creation of LowRateAdvisors.net. *Id.* Soon after Mathis's deposition, Azoogles sent a cease-and-desist order to Tesler. *Id.*, ¶ 27.

According to Azoogles, another "knock-off" web site copied from the lowrateadvisors.com web site was greatratecentral.com. Mathis Motion Decl., ¶ 28. That web site was the subject of an action by the Federal Trade Commission in 2005 against Optin Global, Inc. and three other former defendants in this action ("the FTC" Action"). Calpotura Decl., ¶9. Azoogles was not named as a defendant in that action. *Id.*

**5. ASIS's Anti-Spam Efforts**

Regarding the burden that spam has imposed on ASIS, Nella White states as follows:

ASIS Internet has received an ever-increasing amount of SPAM for the past several years. The cost of processing email and filtering out

1 SPAM has grown dramatically. ASIS has had to add software,  
2 hardware, staff, and network bandwidth to fight the SPAM. ASIS also  
3 currently uses a service, POSTINI, to preprocess all of the mail sent to  
4 its email server, at considerable expense.

5 White Opposition Decl., ¶ 2.

6 In her deposition, White estimated that ASIS spends \$3,000.00/month on spam filtering and  
7 employee time devoted to dealing with spam issues. Declaration of Jason Singleton in Support of  
8 Opposition to Azoogles Motion for Summary Judgment ("Singleton Opposition Dec."), Ex. A  
9 (White Depo.) at 223. She also testified that a third of ASIS employee time is spent dealing with  
10 spam complaints. Calpotura Opposition Decl., Ex. K (White Depo.) at 90-91, 98-99. However, she  
11 explained that the "bulk" of that time is spent dealing "indirectly" with spam complaints, namely,  
12 helping people who don't have proper email configurations. *Id.* Later in her deposition, she  
13 admitted that she had never been able to get her staff to provide breakdowns of how they spent their  
14 time and could not say how much time they spent dealing with spam. Calpotura Opposition Decl.,  
15 Ex. K (White Depo.) at 99-100. White also testified that ASIS added only one employee during the  
16 relevant period, who was not hired to address spam problems but rather, was primarily involved in  
17 installing wireless broadband services. *Id.* Supplemental Declaration of Henry M. Burgoyne, III in  
18 Opposition to Plaintiff ASIS Internet Services, Inc.'s Motion for Summary Adjudication of Issues  
19 ("Burgoyne Supp. Decl."), Ex. A (White Depo.) at 89.

20 ASIS began using its current spam filtering service, Postini, in 2001. Burgoyne Motion  
21 Decl., Ex. S. Postini charges ASIS based on the number of customers who use the service rather  
22 than the volume of spam that it filters. Burgoyne Motion Decl., Ex. C (White Depo.) at 219, Ex. S  
23 (Postini Contract). Based on Postini invoices, the cost of Postini's services to Azoogles in 2005 was  
24 as follows: \$465.90 (January 2005); \$471.00 (February 2005); \$474.00 (March 2005); \$462.60  
25 (April 2005); \$467.40 (May 2005); \$471.00 (June 2005); \$474.60 (July 2005); \$360.00 (August  
26 2005); \$453.00 (September 2005); \$457.50 (October 2005); \$439.80 (November 2005); \$439.80  
27 (December 2005). ASIS's system administrator is Falcon Knight, which has leased two servers to  
28 ASIS since 2004 or 2005. Burgoyne Decl., Ex. J (Deposition of Shawn O'Connor) at 18, 55.

## 6. The Bruce Wolf Lead

1 Plaintiff's claims arise from a "lead" that ASIS asserts shows that Azoogole was responsible  
2 for the initiation of over 12,000 unsolicited email messages, so-called "spam," most of which were  
3 sent to the mailboxes of former Azoogole users. The history of this lead, as recounted by Nella  
4 White, is as follows. According to Nella White, on the night of October 25-26, 2005, the ASIS  
5 email service received many messages regarding real estate financing. Declaration of Nella White in  
6 Support of Opposition to Motion to Dismiss ("White Motion to Dismiss Opposition Decl."), ¶ 5.  
7 White became aware of these e-mails because many of the emails were sent to addresses that were  
8 no longer active. *Id.*, ¶ 5. To see if they were spam, she aliased these addresses to a single account  
9 name. *Id.*, ¶ 5. White found that many of the emails directed recipients to URLs in the form  
10 xxmort.com or xxmort.net, where the "x" consisted of any number or letter, causing White to  
11 conclude that the e-mails were related. *Id.*, ¶ 6. According to White, although the emails directed  
12 recipients to a number of different web sites, the various sites were "exactly the same." *Id.*, ¶ 4.

13 On October 27, 2005, White filled out a form on one of these web sites, wumort.net.<sup>3</sup> A  
14 "whois" search of the domain name wumort.net indicates that that web site was registered to an  
15 individual named John Dillinger with a physical address in Texas. Singleton Opposition Decl., Ex.  
16 P. ASIS witness Carl Scoles states in a declaration that the web page White saw on October 27,  
17 2005 was "virtually the same" as Azoogole's site, lowrateadvisors.com. Grabowski Decl., Ex. H  
18 (Declaration of Carl Scoles (2)).<sup>4</sup> White states that she chose the web site because "it clearly had  
19 been sent to a large percentage of my customer base, listed alphabetically, leading me to suspect  
20 they had been gathered by means of a Directory Harvest Attack." *Id.*, ¶ 7. White filled in the form  
21 on the web page with fictitious information about an individual named "Bruce Wolf." *Id.*, ¶¶ 7-9.  
22 She does not state the time at which she uploaded the Bruce Wolf information. *Id.*

23  
24 <sup>3</sup> Although White stated in her declaration that she typed the lead into wumort.net, she attached  
25 a page to her declaration – purportedly the blank page she typed the lead into – carrying a vcmort.com  
26 footer. At oral argument, Plaintiff stated that the web site White actually typed the Bruce Wolf lead into  
was wumort.net.

27 <sup>4</sup> Scoles explains in his declaration that on July 10, 2007, he discovered a web site titled  
28 lowrateadvisors.net which included a link to Azoogles lowrateadvisors.com. According to Scoles, both  
the dot-com and the dot-net addresses contained images that were identical to the wumort.net website  
that White says she typed the Bruce Wolf lead into.

1 The telephone number White provided was a real number, attached to an answering machine  
 2 to record responses to the Bruce Wolf lead. *Id.*, ¶ 9. A transcript of the messages received at the  
 3 number shows that the next day, Friday October 28, 2005, eight calls were received from mortgage  
 4 brokers for the fictitious Bruce Wolf, between 10:34 a.m. and 3:25 p.m. Declaration of Teresa  
 5 Singleton in Support of Opposition to Motion to Dismiss (“Singleton Motion to Dismiss Opposition  
 6 Decl.”), Ex. A (transcript of telephone messages).<sup>5</sup>

7 In a recent declaration, dated January 31, 2008, White stated for the first time that after she  
 8 submitted the Bruce Wolf information at the wumort.com web site<sup>6</sup> she attempted to submit lead  
 9 information into another data entry form on a different web site with a similar URL that was also  
 10 listed in some of the Emails. Declaration of Nella White in Opposition to Azoog’s Motion for  
 11 Summary Judgment (“White Opposition Decl.”), ¶ 2. White’s declaration does not reveal the URL  
 12 of this web site. She used new fictitious information but the same telephone number and received an  
 13 error message stating that the submission had been rejected due to duplicate field information. *Id.*

14 [REDACTED]

15 [REDACTED] Declaration of Richard E. Grabowski in Support of Motion for Summary Adjudication of  
 16 Issues (“Grabowski Motion Decl.”), Ex. I at AZ 22. According to Azoog, it received the lead from  
 17 Seamless Media Corp. (“Seamless Media”). Grabowski Motion Decl., Ex. R (Azoog interrogatory  
 18 responses). [REDACTED]

19 [REDACTED]

20 [REDACTED] Grabowski Motion Decl., Ex. I  
 21 (Insertion Order) at AZ 5. [REDACTED]

22 [REDACTED]

23 [REDACTED] *Id.* at AZ 20. [REDACTED]

24 [REDACTED]

25 \_\_\_\_\_

26 <sup>5</sup> Plaintiff asserts that from these messages, Plaintiff’s attorneys were able to identify nine  
 27 separate mortgage companies who were responding. Plaintiff’s Motion at 2. It is unclear how  
 28 Plaintiff’s attorneys arrived at this figure, as only eight messages were recorded, and of the eight  
 messages, four were left by two mortgage brokers, both of whom left two messages.

<sup>6</sup> Presumably, White meant wumort.net rather than wumort.com.

1 [REDACTED] *Id.*  
2 at AZ 5. [REDACTED]

3 [REDACTED] Singleton Opposition Decl., Ex. D (Mossanen Depo.) at 55.

4 According to Jay Williams, a principal at Seamless Media, at the time it provided the Bruce  
5 Wolf lead to Azoogle, Seamless purchased all of its leads from third parties. Burgoyne Motion  
6 Decl., Ex. M (Declaration of Jay Williams, dated December 10, 2007) (“First Williams Decl.”), ¶ 17.  
7 According to Williams, it was not uncommon for a lead to travel through several parties before it  
8 reached Seamless Media. *Id.* Williams further states that at the time Azoogle and Seamless Media  
9 had entered into the Insertion Order, Seamless Media had a good reputation, had never been accused  
10 of violating the CAN-SPAM Act and had never been listed on ROKSO. *Id.*, ¶ 19. Seamless Media  
11 obtained the Bruce Wolf lead from a third-party vendor of mortgage leads, Scribe Interactive  
12 (“Scribe”), which, according to Williams, also had a good reputation in the mortgage lead industry.  
13 *Id.*, ¶ 22. In response to an inquiry to Scribe regarding the Bruce Wolf lead, the president of Scribe,  
14 Steve Soffer, stated that one of *Scribe’s* vendors had obtained the lead from an individual named  
15 John Stothers. Burgoyne Decl., Ex. N (Declaration of Jay Williams, dated December 11, 2007)  
16 (“Second Williams Decl.”), Ex. A. (November 7, 2005 email from Steve Soffer to Jay Williams  
17 regarding source of Bruce Wolf lead).

18 According to Azoogle, it sold the Bruce Wolf lead to another lead aggregator, eLeadZ, as  
19 well as to Quicken Loans. *See* Grabowski Motion Decl., Ex. D (Azoogle’s Response to request for  
20 Admission, No. 22 and Amended Admission No. 19).<sup>7</sup> The code that accompanied the lead when it  
21 was sent to Quicken Loans reflects the “lead type” as AZIQL. Grabowski Motion Decl., Ex. F.  
22 According to ASIS, this indicates that the lead came from LowRateAdvisors.com. Plaintiff’s  
23 Motion at 3.<sup>8</sup>

24  
25 <sup>7</sup> ASIS also asserts the lead was sold to Aegis Lending but does not cite any evidence in support  
26 of that assertion. *See* Plaintiff’s Motion at 2.

27 <sup>8</sup> At oral argument, Azoogle stipulated that the AZIQL code referred to Azoogle’s web site  
28 lowrateadvisors.com. According to Azoogle, this code does not indicate that the lead actually came  
from lowrateadvisors.com but rather, reflects that the lead conforms to the offer criteria in relation to  
which Quicken sought to purchase leads from Azoogle.

1 On November 2, 2005, Quicken Loans contacted Azoogle to learn more about the Bruce  
2 Wolf lead, stating that it received an inquiry from an attorney who represented a consumer who had  
3 received spam and had been referred to Quicken Loans by Azoogle. Declaration of Jason Singleton  
4 in Opposition to Motion for Summary Judgment (“Singleton Opposition Decl.”), Ex. G at QL 84-85.  
5 On November 8, 2005, Azoogle responded, stating “the affiliate that provided Azoogle the lead” was  
6 John Stothers. *Id.*

7 **7. The Emails**

8 Plaintiff alleges that Defendants sent over 10,000 deceptive and unsolicited emails (“the  
9 Emails”) to ASIS’s server during the period between October 25, 2005 and November 14, 2005.  
10 SAC at 7. The Emails were provided to the Court in electronic form. Declaration of Nella White in  
11 Support of Plaintiff’s Motion for Summary Adjudication of Issues (“White Motion Decl.”), Ex. E.  
12 According to ASIS, all of the Emails were sent to accounts at asis.com. White Motion to Dismiss  
13 Opposition Decl., ¶ 5. They were obtained by ASIS by aliasing emails directed to former user  
14 addresses to an account for a user identified as “ng.” Declaration of Dr. Frederick B. Cohen in  
15 Support of AzoogleAds.com, Inc.’s Motion for Summary Judgment or in the Alternative Summary  
16 Adjudication (“Cohen Decl.”) at 5. Based on documents provided to Azoogle by ASIS vendor,  
17 Falcon Knight, Azoogle’s expert, Frederick Cohen, has concluded that the email addresses of 1,507  
18 ASIS former users were aliased to the ng account. *Id.*

19 According to Cohen, in order for the emails at issue in this case to be sent to the ng account,  
20 ASIS must have paid Postini for these accounts, as Postini would have sent a notice to senders that  
21 the addresses were invalid if the fee had not been paid. *Id.* at 6. In addition, if the accounts had not  
22 been aliased, ASIS’s server would have produced error messages informing senders that the  
23 accounts were not active and valid. *Id.* Further, Cohen posits that ASIS likely altered its spam  
24 filtering to allow the emails to come through, as Postini would almost certainly have filtered the  
25 emails if ASIS had not done so. *Id.*

26 The parties disagree with respect to the number of emails at issue. According to ASIS’s  
27 investigator, Josh Mohland, there at 12,756 emails at issue. Grabowski Motion Decl., Ex. T  
28 (Declaration of Josh Mohland) at 1. According to Azoogle’s expert, Frederick Cohen, the emails at

1 issue consist of 1,421 individual messages, some or all of which were sent to multiple addresses.  
2 Cohen Decl. at 7. According to Cohen, many of the Emails were not received during the period  
3 alleged in the complaint. *Id.* at 7-8; *see also* Cohen Decl., Ex. B (Supplementary Disclosures) at 14  
4 (stating that Emails contained date and time stamps). ASIS asserts, however, that Cohen's opinion  
5 is not valid with respect to the date stamps, pointing to Nella White's statement that the ASIS's  
6 "Postfix" system wasn't in place in 2005. *See* ASIS Reply at 3 (citing Declaration of Nella White in  
7 Opposition to Azoogole's Motion for Summary Judgment ("White Opposition Decl."), ¶ 5).

8 According to ASIS investigator, Carl Scoles, 110 different subject lines were used in the  
9 Emails and 9,737 of the Emails contain "bad" subject lines. Grabowski Decl., Ex. H (Scoles (2)  
10 Decl.) at ¶ 3 & Ex. A-2. According to Mohland, all of the Emails contain false headers, a conclusion  
11 that is based on Mohland's comparison of the IP addresses of the sender of the Emails with the  
12 domain names listed in the message ID or From: header. Grabowski Motion Decl., Ex. T  
13 (Declaration of Josh Mohland) at 2. To determine the registrants of IP addresses, Mohland used the  
14 ARIN "whois" database. *Id.* at 5. Relying, in part, on Mohland's conclusions, ASIS expert Jeffrey  
15 Posluns also concluded that the header information was false. Posluns explained his conclusions as  
16 follows:

17 In many of the emails, the sending IP address' reverse DNS  
18 information does not match the sender's email domain name nor does  
19 it match the domain name with which the sending host identifies itself.  
20 While this may occur in some virtual hosting environments, many of  
21 the IP addresses belonged to the computers of individuals making use  
22 of a standard internet provider to access the internet. This indicates  
23 that the header information is false. This false information was  
24 generated at the time that the emails were sent using a program that  
25 specifically generates false header information while sending emails.

26 An investigation of the IP addresses in the email headers indicates that  
27 the emails were sent or relayed from individual computers making use  
28 of standard internet service providers for access to the internet. In  
order to send out the subject emails, these computers would have been  
infected with a malicious code (commonly referred to as a virus,  
Trojan, or botnet application) and made members of a botnet. The use  
of a botnet conceals the true sender of the emails from the receiving  
ISP.

Grabowski Motion Decl., Ex. M (Plaintiffs' Expert Witness Disclosure of Jeffrey Posluns) at 6-7.

1 Azoogole's expert, however, questions the validity of the Mohland's study and Poslun's  
2 conclusions. He states that "IP address data available through a whois lookup does not reliably  
3 indicate IP address use." Cohen Decl., ¶ 58. He further states it is common that a sender's actual  
4 identity does not correspond to host data pertaining to the IP address of the email server from which  
5 the sender transmits the emails. Cohen Decl., ¶ 59. Cohen concludes, Mohland's "method of  
6 inferring a sender based on host data pertaining to the IP address of the server from which an email  
7 is transmitted is inherently unreliable and is not based on any generally accepted forensic  
8 methodology." *Id.* He also states that the Emails could have been sent using an Anonymizer or an  
9 Onion Router rather than a botnet. *Id.*, ¶¶ 29-30.

10 According to ASIS's expert, Posluns, and investigators Scoles and Mohland, a connection  
11 between the Emails can also be found on the basis of the facts that the URLs referenced in the emails  
12 contain a number of identical images. Posluns explains as follows:

13 An analysis of the IP addresses for the landing pages of the URLs  
14 contained in the subject emails clearly show the landing pages are  
15 connected. The URL in 5,569 of the subject emails open an identical  
16 page, or a page containing identical images to those seen at  
17 WUMORT.NET – the page that Nella White used to enter the "Bruce  
18 Wolf" lead in October of 2005. Of the 5,569 emails, 4,217 linked to  
19 an identical page as that seen by Nella White in October 2005. The  
20 other 1,352 linked to pages containing at least 6 of the same image  
21 files used in the wumort.net web page. When a comparison of the IP  
22 addresses of the URL links were made, a connection became apparent  
23 between the 92 web domains in 11,418 of the subject emails.

24 The probability is extremely remote that landing pages from different  
25 emails will contain the same images and be housed on a network of the  
26 same IP addresses and not be from the same source. There are some  
27 four trillion possible IP addresses on the Internet, making coincidences  
28 relating to IP addresses very unlikely.

29 Grabowski Motion Decl., Ex. W (Plaintiffs' Expert Witness Disclosure of Jeffrey Posluns) at 9-10.

30 *See also* Grabowski Decl., Ex. S (Declaration of Carl Scoles re Supplemental Disclosure Six  
31 Amended), ¶ 15 & Ex. 5 thereto. Scoles also concludes, based on similar words and phrases used in  
32 many of the Emails, that they came from the same source. *See* Grabowski Decl., Ex. H at 3.

33 Posluns does not state in his expert disclosures that he relied on the Wayback Machine for  
34 images of the web sites referenced in the Emails. However, ASIS states in its Opposition that this is  
35 how the comparison was made. ASIS Opposition at 22. Scoles also states in his study that he relied

1 on the Wayback Machine. *See* Grabowski Decl., Ex. H at 2. Azoogole’s expert, Frederick Cohen,  
2 however, states that the Wayback Machine is not an accurate representation of historical Web  
3 content and cannot be relied on for forensic purposes. Cohen Decl., ¶¶ 49-50.

4 The parties agree that the Emails didn’t contain physical opt-out addresses. Joint Statement  
5 of Stipulated Facts, No. 5. With respect to the question of whether the Emails contained valid  
6 electronic opt-out links at the time they were sent, ASIS witness Carl Scoles concludes that some of  
7 the Emails contained no unsubscribe links and the unsubscribe links contained in many of the  
8 Emails are either questionable or invalid. Grabowski Decl., Ex. H (Declaration of Carl Scoles (2)) at  
9 ¶ 4 & Ex. A-1. However, with respect to the allegedly questionable and invalid links, ASIS  
10 admitted in interrogatory responses that “it cannot determine if any of these email unsubscribe  
11 functions ever actually worked.” Burgoyne Decl., Ex. P.

12 According to ASIS witness Scoles, the Emails contained at least 110 different web domain  
13 titles. *Id.* at 1. Azoogole, in turn, presents evidence that 81 of these URLs were owned by n  
14 individual named Alex Polyakov in 2005-2006. Declaration of Adam Schneider in Opposition to  
15 Plaintiff ASIS Internet Services, Inc.’s Motion for Summary Adjudication of Issues (“Schneider  
16 Opposition Decl.”), ¶ 3.

17 **B. Plaintiff’s Claims and Azoogole’s Defenses**

18 In its Second Amended Complaint, Plaintiff asserts a federal law claim under the CAN-  
19 SPAM Act of 2003, 15 U.S.C. §§ 7701 *et seq.*, and a state law claim based on California Business  
20 and Professions Code § 17529.5. Plaintiff’s CAN-SPAM Act claim is based upon the following  
21 specific alleged violations: 1) 15 U.S.C. § 7704(a)(1), prohibiting the transmission of email  
22 messages with false or misleading header information, based on the allegations that the Emails were  
23 sent using stolen or hijacked Email identities and that they included domain names that were  
24 registered to unknown and false entities; 2) 15 U.S.C. § 7704(a)(2), prohibiting the transmission of  
25 email messages with deceptive subject headings, based on the allegation that the subject lines in the  
26 Emails were intended to get someone to open the messages by telling them their loan was approved;  
27 the misspellings in the email subject lines were also misleading, ASIS alleges, because they were  
28 intended to evade Plaintiff’s spam blocking hardware; 3) 15 U.S.C. § 7704(a)(3), requiring the

1 inclusion in commercial electronic email of a valid electronic opt-out link; 4) 15 U.S.C.  
2 § 7704(a)(5), requiring the inclusion in commercial email addresses of a valid physical postal  
3 address of a sender; 5) 15 U.S.C. § 7704(b)(1), establishing that CAN-SPAM Act violations shall be  
4 considered “aggravated violations” if the email address of the recipient was obtained through  
5 directory harvests or dictionary attacks; and 6) 15 U.S.C. § 7704(b)(2), establishing an aggravated  
6 violation where the email addresses were obtained using automated tools or scripts.

7 Azoogle, in turn, asserts the following eleven affirmative defenses: 1) ASIS has failed to  
8 state a cause of action upon which relief may be granted; 2) with respect to the California state law  
9 claim, ASIS assumed the risk and contributed to its own damages; 3) the allegations in the complaint  
10 fail to confer personal jurisdiction over Azoogle; 4) any loss, injury, or damage ASIS incurred was  
11 proximately caused by third parties or non-parties whom Azoogle neither controlled nor had the  
12 right to control; 5) ASIS’s claims are barred by the doctrine of unclean hands and therefore ASIS  
13 should be estopped from bringing this lawsuit; 6) ASIS failed to mitigate its damages; 7) damages  
14 were proximately caused by ASIS and therefore require an allocation of fault; 8) ASIS consented to  
15 the acts of Azoogle alleged in the complaint; 9) ASIS waived any claim against Azoogle alleged in  
16 the complaint; 10) ASIS has failed to bring this action in the appropriate venue; 11) ASIS’s claims  
17 are barred under the doctrine of preemption. Answer to Amended Complaint, Docket No. 134.

### 18 C. The Motions

#### 19 1. ASIS Motion

20 ASIS seeks summary judgment in its favor with respect to eight of Azoogle’s affirmative  
21 defenses as well as five issues that are key to ASIS’s claims. ASIS asserts that it is entitled to  
22 summary judgment on the following affirmative defenses:

23 Assumption of risk: ASIS argues that the affirmative defense of assumption of risk does not  
24 apply to Plaintiff’s claims because that doctrine applies to negligence claims, not statutory claims as  
25 are asserted here.

26 Loss caused by third parties: ASIS argues that this defense fails because it is based on  
27 negligence concepts of proximate causation and control, whereas the statutory claims asserted by  
28

1 ASIS turn on whether Azoogole “procured” the Emails. This standard, ASIS asserts, does not turn on  
2 control or proximate causation.

3 Unclean hands: ASIS asserts that its conduct – and particularly, its actions that allowed it to  
4 receive the Emails, namely, aliasing former user accounts and altering its spam filters – does not  
5 amount to unclean hands and that assertion of this affirmative defense is an attempt to place the  
6 burden of receiving spam on the recipient.

7 Failure to mitigate damages: ASIS argues that the doctrine of mitigation of damages does  
8 not apply to either of its claims, citing *Phillips v. Netblue, Inc.*, 2006 WL 3647116 (N.D. Cal.).

9 Damages caused by ASIS: ASIS argues that the affirmative defense that damages were  
10 proximately caused by ASIS is based on tort concepts that are not applicable to Plaintiff’s statutory  
11 claims.

12 ASIS invited or consented to alleged acts of Azoogole: ASIS argues that there is no legal or  
13 factual basis for Azoogole’s consent affirmative defense because Azoogole has presented no evidence  
14 that the Emails were solicited by the intended recipients.

15 Waiver: ASIS challenges Azoogole’s waiver affirmative defense, arguing that Azoogole has  
16 not explained the basis for this affirmative defense.

17 Preemption: ASIS argues that this affirmative defense fails because although the CAN-  
18 SPAM Act contains a preemption clause, 15 U.S.C. § 7707(b), it also contains a savings clause  
19 which permits state laws that prohibit conduct in cyberspace that sounds in fraud. According to  
20 ASIS, its state law claim sounds in fraud and therefore is not preempted

21 In addition to Azoogole’s affirmative defenses, ASIS seeks summary judgment on a number  
22 of issues related to its claims. The issues on which ASIS seeks summary judgment are as follows:

23 Whether ASIS is an Internet Access Provider (“IAS”) as defined under the CAN-SPAM Act  
24 and an electronic mail service provider under California law: ASIS argues that it is entitled to  
25 summary judgment that it is an Internet Access Provider as that term is defined under the CAN-  
26 SPAM Act and further, that it is an electronic mail service provider under California Business and  
27 Professions Code § 17529.1(h).

28

1           Whether the Emails were sent to or transmitted to ASIS email accounts: ASIS argues that  
2 there is no issue of material fact regarding whether the Emails were sent or transmitted to ASIS  
3 email accounts, pointing to evidence that the Emails all contain “@asis.com” in the address.

4           Whether the Emails contained false header information: ASIS asserts that it can be  
5 established, as a matter of law, that the headers on the Emails are false under both the CAN-SPAM  
6 Act and Cal. Bus. & Prof. Code § 17529.5. First, it asserts that by comparing the originating source  
7 IP address (in the email’s header information) and the sending email domain names, it can be  
8 established that the headers on the Emails are false. According to ASIS, this is because it is an  
9 accepted industry standard that the sending domain name must match the sending IP address. Using  
10 this standard, ASIS witness Josh Mohland has conducted a study on the basis of which he concludes  
11 the Email headers are false. Second, ASIS argues that the DomainKey authentication system is also  
12 an industry standard that can be used to show the Email header information is false. According to  
13 ASIS, the DomainKey authentication system was created by Yahoo and requires that a DomainKey  
14 authentication code be included in the header of every email. Mohland concludes in his study that  
15 the absence of such a DomainKey authorization code in the headers of most of the Emails indicates  
16 that the headers are false and misleading. Finally, ASIS asserts that all of the Emails were sent in a  
17 nonrandom fashion from different computers in alphabetical order of intended recipients and that the  
18 contents of the Emails were very similar, supporting the conclusion that the Emails were sent by a  
19 “botnet” that hijacked the computers of individual users to send the spam.

20           Whether the Emails contain false or misleading subject lines: Citing to a declaration by ASIS  
21 witness Carl Scoles, who reviewed the Emails and classified their subject lines, ASIS asserts that  
22 there is no dispute that 9,737 of the emails have false or misleading subject lines under both the  
23 CAN-SPAM Act and Cal. Bus. & Prof. Code § 17529.5.

24           Whether the Emails contained a valid unsubscribe option: ASIS asserts, based on the study  
25 of Carl Scoles, that none of the Email contain a physical unsubscribe address and 12,625 of the  
26 Emails don’t contain a valid unsubscribe link.

27  
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1                   2.     **Azoogle Opposition to ASIS Motion**

2                   Azoogle objects to evidence that ASIS cited in its Motion and also asserts that ASIS should  
3 be barred from presenting evidence relating to various issues with respect to which ASIS failed to  
4 produce – or in some cases, preserve – relevant evidence. As noted above, the Court declines to  
5 rule on Azoogle’s objections because this evidence, even if admissible, does not change its result.

6                   Next, Azoogle argues that ASIS should not be allowed to use a summary judgment motion to  
7 establish specific factual issues rather than to determine entire claims.

8                   On the merits, Azoogle makes the following arguments with respect to the issues on which  
9 ASIS seeks summary judgment:

10                   Whether ASIS is an Internet Access Service (“IAS”) as defined under the CAN-SPAM Act  
11 and an electronic mail service provider under California law: Although Azoogle has stipulated both  
12 that ASIS is an IAS as that term is defined under the CAN-SPAM Act and that it is an electronic  
13 mail service provider under California Business and Professions Code § 17529.1(h), it argues  
14 nonetheless that ASIS was not *acting* as an IAS or an electronic mail service provider when it  
15 intercepted the email of its former users. Azoogle further asserts that ASIS lacks standing under the  
16 CAN-SPAM Act because it has not been “adversely affected” by the alleged violations, as required  
17 under 15 U.S.C. § 7706(g)(1). In support of this position, Azoogle cites *Gordon v. Virtumondo,*  
18 *Inc.*, 2007 WL 1459395 (W.D. Wash. May 15, 2007). Azoogle also argues that it wasn’t an  
19 electronic mail service provider under California law because Postini likely filtered out the spam  
20 and, therefore, with respect to the Emails, ASIS was not an intermediary in sending and receiving  
21 email as required under California law.

22                   Whether the Emails were sent to or transmitted to ASIS email accounts: Azoogle does not  
23 address ASIS’s argument that it is entitled to summary judgment that the Emails were sent or  
24 transmitted to ASIS email accounts.

25                   Whether the Emails contained false header information: Azoogle rejects ASIS’s evidence in  
26 support of summary judgment, arguing that neither Mohland nor Scoles is an expert and that the  
27 methodologies used by both are flawed. Azoogle cites to its own expert’s testimony that there is no  
28

1 industry standard regarding email authentication. It also challenges the evidence that underlies the  
2 conclusion that a botnet was used to send the Emails.

3 Whether the Emails contain false or misleading subject lines: Azoogole argues that ASIS's  
4 position on this issue fails because it is based on the opinion of a lay witness, Carl Scoles, who  
5 didn't tie his findings to particular emails. In any event, Azoogole argues, many of the subject lines  
6 (e.g., "Excellent mortgagee [sic]," "Offering funding," "Pre-approvedd [sic] rate" are not likely to  
7 mislead a recipient within the meaning of 15 U.S.C. § 7704(a)(2).

8 Whether the Emails contained a valid unsubscribe option: Azoogole does not dispute that the  
9 Emails don't contain physical unsubscribe addresses but challenges ASIS's position with respect to  
10 the unsubscribe links, pointing to ASIS's stipulation that it does not know if the links ever worked.

11 With respect to ASIS's arguments regarding Azoogole's affirmative defenses, Azoogole  
12 expressly addresses only two of them in its Opposition: the unclean hands and consent affirmative  
13 defenses.<sup>9</sup> Regarding the unclean hands affirmative defense, Azoogole argues that ASIS has  
14 systematically violated the statutory privacy rights of users, former users and third parties in order to  
15 obtain millions of dollars through litigation and that ASIS should not be permitted to profit from this  
16 conduct in this litigation. Azoogole asserts that its consent affirmative defense should not be stricken  
17 because ASIS consented to receipt of the Emails by aliasing former user names and altering spam  
18 filters to allow the Emails to be sent.

### 19 3. Azoogole Motion

20 In its Motion, Azoogole seeks summary judgment on the following grounds:

21 Lack of standing to assert CAN-SPAM Act claim: Azoogole argues that ASIS does not have  
22 standing to assert a CAN-SPAM Act claim because there is no evidence that it was adversely  
23 affected by the Emails and because ASIS was not acting as an IAS when it collected the Emails.

24 Lack of evidence that Azoogole "procured" the Emails: Azoogole argues that it can only be  
25 liable under the CAN-SPAM Act if it is shown to have "procured" the transmission of the spam and  
26

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27 <sup>9</sup> The Court notes, however, that Azoogole's failure to address the preemption affirmative defense  
28 in its Opposition appears to have been an oversight as Azoogole did raise this issue in its own summary  
judgment motion, as discussed below.

1 that ASIS has presented no evidence sufficient to create a jury question on this issue. Azoogole  
2 points in particular to 15 U.S.C. § 7706(g)(2), which specifies that an Internet Access Service  
3 provider may only sue as a private attorney general if Azoogole initiated the Emails “with actual  
4 knowledge, or by consciously avoiding knowing” that it was inducing another person to violate the  
5 CAN-SPAM Act. Azoogole further asserts that undisputed evidence shows that it did not know and  
6 could not have known that Seamless media would engage in a pattern or practice of violating the  
7 CAN-SPAM Act.

8 Lack of evidence of CAN-SPAM Violations: Azoogole argues that ASIS has pointed to no  
9 significant, probative evidence of any CAN-SPAM violations and therefore, Plaintiff’s CAN-SPAM  
10 Act claim should be dismissed. First, Azoogole argues that the evidence shows no actionable emails.  
11 In support of this contention, Azoogole points to evidence that only 242 of the Emails were sent  
12 during the relevant time period; of these, only 109 were directed at then-current ASIS users, while  
13 the remaining e-mails were sent to the ng mailbox. The latter, Azoogole argues, were not actually  
14 transmitted to the former users’ mailboxes and therefore do not conform with the CAN-SPAM Act’s  
15 definition of “electronic mail messages.” As to the former, Azoogole asserts, of the 109 emails, 11  
16 were duplicates created by ASIS’s aliasing mechanism, leaving 98 emails. Counting all then-current  
17 ASIS users listed in these messages, Azoogole argues, 175 email messages directed to then-current  
18 users. These, however, were likely filtered out by Postini and thus probably were not received by  
19 any ASIS users.

20 Second, Azoogole rejects the analysis of Plaintiff’s investigator Mohland on the question of  
21 whether the header information in the Emails is materially false. Mohland completed a study  
22 comparing domain names and IP addresses in the Emails that was disclosed to Azoogole in response  
23 to the contention interrogatories (discussed above). Azoogole argues that the study is flawed in  
24 numerous respects, including Mohland’s reliance on “whois” lookups, his use of 2007 registration  
25 data rather than data pertaining to the period in which the Emails were sent and his use of a flawed  
26 methodology.

1 Third, AzoogLe argues that there is no significant probative evidence that the Emails were  
2 sent using a “directory attack” to gather ASIS user addresses, and therefore ASIS’s assertion that the  
3 alleged violations were “aggravated violations” under 15 U.S.C. § 7704(b)(1)(A) fails.

4 Deficiencies relating to Cal. Bus. & Prof. Code Claim § 17529.5: AzoogLe argues that ASIS  
5 was not an electronic mail service provider under California law for the same reasons it lacks  
6 standing under the CAN-SPAM Act, namely, that the Emails were likely filtered by Postini and did  
7 not reach any active users. Second, AzoogLe argues that ASIS fails to offer any specific probative  
8 evidence that AzoogLe had anything to do with the initiation of the Emails and therefore, it cannot be  
9 established that AzoogLe is an “advertiser” under Section 17529.1. Third, AzoogLe argues that ASIS  
10 fails to offer any specific probative evidence that the Emails contained falsified, misrepresented, or  
11 forged header information. Finally, AzoogLe argues that the Section 17529.5 claim is preempted by  
12 the CAN-SPAM Act because it does not sound in tort, citing *Klefman v. Vonage Holdings Corp.*,  
13 2007 WL 1518650 (C.D. Cal. May 23, 2007).

14 Evidence relating to Unclean Hands and Consent: AzoogLe argues that the Court should grant  
15 summary judgment in its favor based on its unclean hands and consent affirmative defenses for the  
16 same reasons discussed above in connection with AzoogLe’s Opposition to ASIS’s summary  
17 judgment motion.

#### 18 4. ASIS Opposition

19 ASIS responds to AzoogLe’s arguments as follows:

20 Standing: ASIS argues that AzoogLe’s arguments regarding standing are flawed. First, ASIS  
21 argues that the assertion that ASIS was not acting as an IAS because it was acting to gather evidence  
22 by collecting the Emails in the ng mailbox is contradicted by 15 U.S.C. §7707(c), which provides  
23 that:

24 [n]othing in this chapter shall be construed to have any effect on the  
25 lawfulness or unlawfulness, under any other provision of law, of the  
26 adoption, implementation, or enforcement by a provider of Internet  
access service of a policy of declining to transmit, route, relay, handle,  
or store certain types of electronic mail messages.

27 15 U.S.C. §7707(c). Second, ASIS argues that the adverse effects test adopted in *Gordon*, cited by  
28 AzoogLe, is likely incorrect, citing language in the Act’s statutory damages provision that allows for

1 damages not only for messages that are “transmitted” but also for those that are “attempted to be  
2 transmitted.” 15 U.S.C. § 7706(g)(3)(A). Third, ASIS argues that in any event, ASIS has  
3 established adverse effects under *Gordon*.

4 Whether Azoogole “procured” the Emails: ASIS argues that Azoogole has overstated the  
5 “consciously avoiding knowing” requirement in 15 USC § 7706(g)(2) and that evidence that  
6 Azoogole knew its third-party vendor regularly hired spammers to obtain leads – even if Azoogole was  
7 not aware of who actually sent the spam – is sufficient to meet this test. In support of this position,  
8 ASIS points to the following evidence:

- 9 • the Insertion Order between Azoogole and Seamless media specifically permitted the use of  
10 email to generate leads, indicating that Azoogole and Seamless were engaged in joint internet  
11 marketing using email.
- 12 • Azoogole’s November 8, 2005 email to Quicken loans referred to John Stothers as an affiliate,  
13 rather than as an “affiliate’s affiliate,” indicating that Stothers was an Azoogole affiliate.
- 14 • The code in the lead that was sent to Quicken Loans designated the lead as coming from  
15 lowrateadvisors.com.
- 16 • The lowrateadvisors.com’s web page was almost identical to the web page White completed,  
17 which was referenced in the Emails, indicating that Azoogole knew about the web sites  
18 referenced in the Emails and was aware the Emails were being sent to generate leads.
- 19 • Evidence that ASIS asserts shows that the Bruce Wolf lead was transmitted through  
20 Azoogole’s Lead Agent system in real time, indicating that the wumort.net page was  
21 configured in advance so as to link up with Azoogole’s Lead Agents system.
- 22 • Testimony of Julian Mossanen regarding white labeling, which ASIS asserts shows that  
23 Azoogole permitted its web pages to be copied in order that these vendors could generate  
24 leads for Azoogole.
- 25 • The statement by White in her January 31, 2008 Declaration that when she tried to enter  
26 fictitious information into another web site referenced in the Emails using the same  
27 telephone number she had used for “Bruce Wolf” she received an error message, indicating  
28 that both web sites were linked through Azoogole’s Lead Agents system.

- 1 • Testimony by Julian Mossanen and others at Azoogole indicating that Azoogole did not  
2 investigate its third-party vendors before entering into insertion agreements with them and  
3 did not have any official policy for ensuring that its vendors did not use spam to generate  
4 leads.
- 5 • The conclusions of investigators Mohland and Scoles and expert Posluns that the Emails  
6 were all sent by the same entity.

7 Sufficiency of ASIS's Cal. Bus. & Prof. Code Claim § 17529.5: ASIS rejects Azoogole's  
8 argument that it doesn't have standing to assert a claim under Cal. Bus. & Prof. Code Claim §  
9 17529.5, pointing out that Azoogole has already stipulated that ASIS is an electronic mail service  
10 provider under California law. Second, ASIS argues that to the extent Azoogole procured the Emails  
11 by entering into the Insertion Order with Seamless Media, it is an advertiser under California law.  
12 Third, ASIS argues that its shown that the Emails contain false and deceptive headers. Finally,  
13 ASIS asserts that the state law claim is not preempted under *Klefman v. Vonage Holdings Corp.*,  
14 2007 WL 1518650 (C.D. Cal. May 23, 2007) because the claim sounds in fraud.

15 Unclean Hands and Consent: For the reasons stated in ASIS's Motion, ASIS asserts that both  
16 the unclean hands and consent affirmative defenses fail.

### 17 **III. ANALYSIS**

#### 18 **A. Legal Standard Applicable to Summary Judgment Motions**

19 Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories,  
20 and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to  
21 any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ.  
22 P. 56(c). In order to prevail, a party moving for summary judgment must show the absence of a  
23 genuine issue of material fact with respect to an essential element of the non-moving party's claim,  
24 or to a defense on which the non-moving party will bear the burden of persuasion at trial. *Celotex*  
25 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Further, "*Celotex* requires that for issues on which the  
26 movant would bear the burden of proof at trial, that party must show affirmatively the absence of a  
27 genuine issue of material fact," that is, "that, on all the essential elements of its case on which it  
28 bears the burden of proof at trial, no reasonable jury could find for the non-moving party."

1 *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116 (11th Cir.1993). Once the movant has made this  
2 showing, the burden then shifts to the party opposing summary judgment to designate “specific facts  
3 showing there is a genuine issue for trial.” *Id.* at 323. On summary judgment, the court draws all  
4 reasonable factual inferences in favor of the non-movant. *Anderson v. Liberty Lobby Inc.*, 477 U.S.  
5 242, 255 (1986).<sup>10</sup>

6 **B. The CAN-SPAM Act Claim**

7 The parties have raised a multitude of issues in their motions. The Court finds that two of  
8 those issues are dispositive of Plaintiff’s CAN-SPAM Act claim: 1) whether ASIS has standing  
9 under the CAN-SPAM Act; and 2) whether there is evidence from which a reasonable jury could  
10 conclude that Azoogole “procured” the Emails that are the subject of this action. With respect to both  
11 questions, the evidence presented by the parties was voluminous. In addition, the case law regarding  
12 the relevant legal standards was scant due to the fact that the CAN-SPAM Act was enacted so  
13 recently. As a result, resolutions of these issues was difficult, presenting close calls. Nonetheless,  
14 the Court concludes that the answer to both questions is “no.” As a result, Azoogole is entitled to  
15 summary judgment in its favor on Plaintiff’s CAN-SPAM Act claim.

16 **1. Standing Under the CAN-SPAM Act**

17 Azoogole asserts that it is entitled to summary judgment that ASIS has no standing under the  
18 CAN-SPAM Act. The Court agrees.

19 The CAN-SPAM Act allows an IAS to bring an action for injunctive relief or damages for  
20 where it is “adversely affected” by a violation of sections 7704(a)(1), 7704(b), or 7704(d) of the Act.

21  
22 <sup>10</sup> The parties dispute whether it is permissible to seek summary judgment as to discrete issues  
23 rather than claims. There is a split of authority on this question, which has not been addressed by the  
24 Ninth Circuit. *See SEC v. Thrasher*, 152 F. Supp. 2d 291, 295 (S.D.N.Y. 2001) (holding that summary  
25 judgment motion by plaintiff was improper because it requested disposition of elements of a claim rather  
26 than judgment on the claim as a whole); *Arado v. General Fire Extinguisher Corp.*, 626 F. Supp. 506,  
27 509 (N.D. Ill. 1985) (same); *G & C Auto Body, Inc. v. GEICO General Ins. Co.*, 2007 WL 4350909  
28 (N.D. Cal. December 12, 2007). *But see Barker v. Norman*, 651 F.2d 1107, 1123 (5th Cir. 1981)  
(summary judgment may be appropriate as to issues as well as claims); *McDonnell v. Cardiothoracic  
& Vascular Surgical Associates, Inc.*, 2004 WL 1234138 (S.D. Oh. May 27, 2004) (same). While the  
court finds persuasive the reasoning in *McDonnell*, in which the court concluded that parties should be permitted  
to seek summary judgment on discrete issues under some circumstances, it need not resolve this issue  
because it concludes that Azoogole is entitled to summary judgment on its CAN-SPAM Act claim.  
Therefore, the Court does not reach Plaintiff’s request for summary judgment on specific issues.

1 15 U.S.C. § 7706(g)(1). In *Hypertouch, Inc. v. Kennedy-Western University*, 2006 WL 648688  
2 (N.D. Cal. March 8, 2006), the court held, on summary judgment, that the “adversely affected”  
3 requirement was met where an IAS submitted a declaration “indicating that high spam loads ha[d]  
4 caused decrease server response and crashes, led to higher bandwidth utilization, and forced  
5 expensive hardware and software upgrades.” *Id.* at \* 4.

6 In contrast, in *Gordon v. Virtumundo, Inc.*, 2007 WL 1459395 (W.D. Wash. May 15, 2007),  
7 the court found that the plaintiff was not adversely affected, even though it provided email service  
8 and its users received spam, explaining its conclusion as follows:

9 Plaintiffs undisputedly have suffered no harm related to bandwidth,  
10 hardware, Internet connectivity, network integrity, overhead costs,  
11 fees, staffing, or equipment costs, and they have alleged absolutely no  
12 financial hardship or expense due to e-mails they received from  
13 Defendants. Plaintiffs have spam filters available to them, and such  
14 filters continue to become more sophisticated. Nor do Plaintiffs allege  
15 that they use “dial-up,” the costs associated with which were  
16 specifically discussed by Congress (and likely are becoming an  
17 obsolete concern as high-speed broadband usage becomes the norm).  
18 Moreover, even if there is some negligible burden to be inferred from  
the mere fact that unwanted e-mails have come to Plaintiffs’ domain, it  
is clear to the Court that whatever harm might exist due to that  
inconvenience, it is not enough to establish the “adverse effect”  
intended by Congress. Indeed, the only harm Plaintiffs have alleged is  
the type of harm typically experienced by most e-mail users. The fact  
that Congress did not confer a private right of action on consumers at  
large means that “adverse effect” as a *type* of harm must rise beyond  
the level typically experienced by consumers- *i.e.*, beyond the  
annoyance of spam.

19 *Id.* at \* 8. In support of this conclusion, the *Gordon* court looked to the legislative history of the  
20 CAN-SPAM Act and in particular, the burden imposed by spam on internet access providers:

21 In the Committee Report, under the heading “Costs to ISPs,  
22 Consumers, and Businesses,” the Senate Committee on Commerce,  
23 Science, and Transportation found that “[s]pam imposes significant  
24 economic burdens on ISPs, consumers and businesses” because  
25 “[m]assive volumes of spam can clog a computer network, slowing  
26 Internet service for those who share that network. ISPs must respond  
27 to rising volumes of spam by investing in new equipment to increase  
28 capacity and customer service personnel to deal with increased  
subscriber complaints.” S. REP. NO. 108-102, at 6 (2003) (Comm.  
Rep. on CAN-SPAM Act of 2003 (S.877)). “Dictionary attacks” can  
hijack a server, slowing it and making it appear that legitimate users  
are sending spam, and “web bugs” infect a computer. *Id.* at 3-4. Increased  
costs of anti-spam software are “passed on as increased charges to  
consumers .... [and] some observers expect that free e-mail services ...  
will be downsized.” *Id.* at 6. The Committee also noted that

1 “[a]lthough Internet access through broadband connections is steadily  
2 growing, a dial-up modem continues to be the method by which a vast  
3 majority of Americans access the Internet and their e-mail accounts.”  
4 *Id.* at 7. The “per-minute” and long distance charges for Internet  
5 connctions for many e-mail users were exacerbated by time spent on  
6 manual spam filtering, resulting in additional per-customer costs. *Id.*

7 In subsequently describing the various enforcement provisions in the  
8 Act, the Committee discussed the private right of action provision at  
9 issue here, which would allow a provider of Internet access service  
10 adversely affected by a violation ... to bring a civil action.... This could  
11 include a service provider who carried unlawful spam over its facilities  
12 or who operated a website or online service from which recipient e-  
13 mail addresses were harvested in connection with a violation. . . .

14 *Id.* at \*6. The court concluded that the “adverse effect” requirement is satisfied only if an IAS  
15 alleges a particular type of harm and that harm is “significant.” *Id.* at \*8.

16 This Court finds the reasoning of *Gordon* to be sound. Further, having carefully reviewed  
17 the evidence, the Court concludes that no reasonable jury could find, based on the undisputed  
18 evidence, that the Emails that are the subject of this action caused any significant adverse effect to  
19 ASIS. While there is some evidence that spam generally has imposed costs on ASIS over the years,  
20 there is *no* evidence that the Emails at issue in this action resulted in adverse effects to ASIS: there is  
21 *no* evidence in the record that any of the Emails either reached any active ASIS users (rather than  
22 being filtered by Postini) or were the subject of complaints to ASIS; there is *no* evidence in the  
23 record that ASIS had to increase its server capacity or experienced crashes as a result of the Emails;  
24 and there is *no* evidence in the record that ASIS experienced higher costs for filtering by Postini as a  
25 result of the Emails. Indeed, the monthly charge for filtering that Postini charged ASIS was  
26 somewhat lower in the second half of 2005, when the Emails were sent, than in the first half of 2005.  
27 In short, ASIS suffered no meaningful adverse effect as a result of the Emails of any kind. As a  
28 result, it does not have standing to assert its claims under the CAN-SPAM Act.

1                   **2.       Whether Azoogie Procured the Emails**

2                   Azoogie asserts, as an independent basis for summary judgment, that there is no evidence  
3 from which a jury could reasonably conclude that it “procured” the Emails as that term is used in the  
4 CAN-SPAM Act. The Court agrees.

5                   Sections 7704(a) and (b) of the CAN-SPAM Act prohibit the “initiation” of certain types of  
6 deceptive or misleading commercial email messages. 15 U.S.C. § 7704(a) & (b). Section 7702(9)  
7 defines “initiation” as follows:

8                   The term “initiate”, when used with respect to a commercial electronic  
9 mail message, means to originate or transmit such message or to  
10 procure the origination or transmission of such message, but shall not  
11 include actions that constitute routine conveyance of such message.  
12 For purposes of this paragraph, more than one person may be  
13 considered to have initiated a message.

14 15 U.S.C. § 7702(9). The term “procure,” in turn, is defined generally to mean “intentionally to pay  
15 or provide other consideration to, or induce, another person to initiate such a message on one’s  
16 behalf.” 15 U.S.C. § 7702(12). A special definition, however, is provided where the action is  
17 brought by an IAS. 15 U.S.C. § 7706(g)(2). In particular, section 7706(g)(2) provides as follows:

18                   In any action brought under paragraph (1), this chapter shall be applied  
19 as if the definition of the term “procure” in section 7702(12) of this  
20 title contained, after “behalf” the words “with actual knowledge, or by  
21 consciously avoiding knowing, whether such person is engaging, or  
22 will engage, in a pattern or practice that violates this chapter.”

23 15 U.S.C. § 7706(g)(2).

24                   Neither party has cited to any case law that provides meaningful guidance as to the conscious  
25 avoidance standard in the context of the CAN-SPAM Act, and the court has found none. Therefore,  
26 the Court looks for guidance to the doctrine of conscious avoidance that has been applied in criminal  
27 law. In criminal law, the doctrine of conscious avoidance has been defined as follows:

28                   [w]hen knowledge of the existence of a particular fact is an element of  
an offense, such knowledge is established if a person is aware of a  
high probability of its existence, unless he actually believes it does not  
exist.

29 *United States v. Netkalov*, 461 F.3d 309, 314 (2d Cir. 2006) (quoting *Leary v. United States*, 395  
U.S. 6, 46 n. 93 (1969)). The court in *Netkalov* explained, “essential to the concept of conscious

1 avoidance [is] that the defendant must be shown to have decided not to learn the key fact, not merely  
2 to have failed to learn it through negligence.” *Id.* (quoting *United States v. Rodriguez*, 983 F.2d 455,  
3 458 (2d Cir. 1993). The court continued, “a court can properly find wilful blindness only where it  
4 can almost be said that the defendant actually knew. He suspected the fact; he realized its  
5 probability; but he refrained from obtaining the final confirmation because he wanted in the event to  
6 be able to deny knowledge.” *Id.*

7 A separate question is what “fact” the defendant must have consciously avoided knowing.  
8 Azoogle asserts that the defendant must have consciously avoided knowing that the particular  
9 individual or entity that sent the spam would do so. Azoogle cites to *Hypertech* in support of this  
10 assertion, quoting the court’s statement in that case that the plaintiff had “failed to provide any  
11 evidence that [the defendant] had actual knowledge or consciously avoided knowing of a current or  
12 future violation of the CAN-SPAM Act by anyone who sent the emails at issue.” 2006 WL 648688  
13 (N.D. Cal. March 8, 2006) at \* 5. ASIS argues that a defendant need not have specific knowledge of  
14 the identity of the individual sending the spam to meet the “conscious avoidance” standard. The  
15 Court agrees with ASIS.

16 First, Azoogle’s reliance on *Hypertouch* is misplaced. The *Hypertouch* court did not  
17 directly address whether conscious avoidance might be established, even where the defendant knew  
18 nothing about a specific spammer, on the basis that the defendant consciously avoided knowing its  
19 agent was procuring the transmission of spam by third parties on the its behalf. Indeed, the court  
20 implied that “refusal to investigate” whether its agent was paying third parties to send spam on its  
21 behalf *would* be a CAN-SPAM violation but found no evidence that defendants had engaged in such  
22 conduct. *Id.* Second, it is evident from the plain language of the CAN-SPAM Act that an entity that  
23 consciously avoided knowing that its agent was paying others to send spam on its behalf – even if it  
24 had no knowledge of who was being paid to send the spam – would meet the special definition of  
25 “procure” discussed above. This is because the agent, by paying others to send email on *its* behalf  
26 would be engaging in a pattern and practice of violating the CAN-SPAM Act. Thus, the special  
27 definition in § 7706(g)(2) would be satisfied.

28

1           The Court nevertheless finds that Plaintiff has failed to point to evidence sufficient to  
2 establish a jury question as to whether Azoogole “procured” the Emails at issue in this case under the  
3 definition discussed above. Although ASIS has pointed to significant evidence that Azoogole, during  
4 the relevant time period, did little to investigate the third party vendors it engaged, there is no  
5 evidence in the record from which a jury could conclude that Azoogole, in contracting with Seamless  
6 Media, made a deliberate choice not to know that Seamless Media would engage third parties to  
7 send out spam on Azoogole’s behalf. The evidence cited by ASIS to establish knowledge on  
8 Azoogole’s part is entirely speculative. Even assuming it is true that the Emails were sent by a single  
9 individual and that the lead was typed into a web site that was copied from Azoogole’s  
10 lowrateadvisors site, this is insufficient to show that Azoogole consciously avoided knowing that the  
11 Emails would be sent. Further, while ASIS relies primarily on the allegation that Azoogole failed to  
12 adequately investigate its third-party vendors, ASIS has pointed to no evidence that if Azoogole *had*  
13 investigated Seamless Media prior to entering into the Insertion Order, it would have learned facts  
14 sufficient to show that Seamless Media was likely to engage in CAN-SPAM violations. There is no  
15 evidence in the record that would put Azoogole on notice that Seamless Media, or Seamless Media’s  
16 vendors, obtained leads from spammers. Indeed, the only evidence on this subject is that Seamless  
17 Media had a good reputation at the time, and was obliged by its contract with Azoogole to follow the  
18 law.

19           Accordingly, the Court grants summary judgment in favor of Azoogole on the CAN-SPAM  
20 Act claim.

21           **C.     The Cal. Bus. & Prof. Code § 17529.5 Claim**

22           The Court also finds that Plaintiff’s state law claim fails. Under California law, it is unlawful  
23 for an entity to “advertise” in a commercial email under certain circumstances. Cal. Bus. & Prof.  
24 Code § 17529.5(a). Azoogole did not send the offending spam. Nor did it knowingly “procure” the  
25 spam, as discussed above. At most, Azoogole may have benefitted from the spam (although even on  
26 this point, the evidence is scant). ASIS has cited to no California case law that suggests that a  
27 defendant that did not itself send spam advertising and did not knowingly commission another entity  
28 to send spam advertisements could be held liable under state law merely because it benefitted from

1 the spam. Indeed, to the extent a state law permitted the imposition of liability on such a basis it  
2 would not fall within the savings clause of the CAN-SPAM Act, which permits state law to regulate  
3 the use of electronic messages only to the extent those regulations are based on traditional principles  
4 of fraud. *See Kleffman v. Vonage Holdings Corp.*, 2007 WL 1518650 (C.D. Cal. May 23, 2007).  
5 Because the Court concludes that no reasonable jury could find that Azoogole “advertised” on the  
6 current record, Plaintiff’s state law claim also fails.

7 **IV. CONCLUSION**

8 For the reasons stated above, Defendant’s Motion is GRANTED on the basis that: 1) ASIS  
9 lacks standing to assert a CAN-SPAM Act claim against Azoogole; 2) Azoogole did not “procure” the  
10 Emails that are the subject of this action under the CAN-SPAM Act; and 3) Azoogole did not  
11 “advertise” for the purposes of Plaintiff’s state law claim. Accordingly, Plaintiff’s claims against  
12 Azoogole are dismissed with prejudice.

13 IT IS SO ORDERED.

14  
15 Dated: March 27, 2008

  
\_\_\_\_\_  
JOSEPH C. SPERO  
United States Magistrate Judge