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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT
 SAN FRANCISCO DIVISION**

11 SUSAN SIMON, individual, on behalf of
 herself and all others similarly situated,

12 Plaintiff,

13 v.

14 ADZILLA, INC. [NEW MEDIA], a
 15 Delaware Corporation; CONDUCTIVE
 CORPORATION, a Delaware Corporation;
 16 CONTINENTAL VISINET
 BROADBAND, INC., a Delaware
 17 Corporation; CORE
 COMMUNICATIONS, INC., d/b/a
 18 CORETEL COMMUNICATIONS, INC., a
 Delaware Corporation; AND JOHN DOES
 19 1-50, Corporations Defendants,

20 Defendants.

CASE NO. 3:09-cv-00879-MMC

**JOINT CASE MANAGEMENT CONFERENCE
 STATEMENT**

Initial Case Management Conference:

Judge: Hon. Maxine M. Chesney
 Date: June 12, 2009
 Time: 10:30 a.m.

1 Plaintiff alleges that Defendants engaged in the interception, copying, transmission,
2 collection, storage, usage, and altering of personal, private data of the class members.

3 Defendant Adzilla denies that it engaged in the interception, copying, transmission,
4 collection, storage, usage, or altering of personal, private data of any individual or entity.

5 Defendant Adzilla further states that the alleged “Deep Packet Inspection” products referenced in
6 the Complaint were never activated, and no consumer data was collected, such that Adzilla
7 cannot be held liable for the claims asserted by Plaintiff.
8

9 **3. Legal Issues:**

10 The parties agree that the issue of whether or not any class may be properly certified
11 under the requirements of Rule 23(b) is one of the primary issues in this case, and that other
12 issues include:

- 13 • Whether Adzilla owed the ISP subscribers a duty to disclose the fact and nature of
14 the DPI, if any, conducted by the Adzilla device with respect to their internet
15 communications;
- 16 • Whether consumers consented to DPI, if any, of their internet communications;
- 17 • Whether conduct complained of constitutes a violation of the federal Electronic
18 Communications Privacy Act (“ECPA”) and the Computer Fraud and Abuse Act
19 (“CFAA”), and state law claims pursuant to the California Invasion of Privacy Act
20 (“CIPA”) and California Computer Crime Law (“CCCL”), both as to Adzilla, and
21 separately, as to Continental VisiNet and Core; and
- 22 • The appropriate remedies if the conduct alleged in the Complaint supports liability
23 under any of the claims in the Complaint, including the propriety of any monetary
24 and or injunctive relief requested by Plaintiff.
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1 **4. Motions:**

2 None contemplated at present time.

3 **5. Amendment of Pleadings:**

4 Plaintiff believes that there may exist a number of unidentified ISPs that also implemented
5 the Adzilla Deep-Packet Inspection technology directed to their subscriber base at some time
6 during the Class Period. Plaintiff plans to serve discovery against Adzilla to ascertain the identity
7 of these additional ISP defendants who are presently identified as DOE defendants in the
8 operative complaint. Responsive discovery will likely result in Plaintiff seeking leave to file an
9 amended pleading to name additional parties that may be identified.

10 **6. Evidence Preservation:**

11 The parties each represent that they are complying in good faith with their obligations to
12 preserve potentially relevant documents. Plaintiff believes that more specific discussions about
13 the scope of document preservation activity, including electronic discovery, record management
14 and destruction practices and any related instructions or correspondence with potential or actual
15 custodians can be deferred until the parties' anticipated meeting regarding this matter.

16 Defendants believe that it is premature to conduct a meeting regarding this preservation matter
17 until the Court has ruled on the pending motions to dismiss.

18 Defendant Adzilla is complying with its preservation obligations, but notes that it ceased
19 all California business operations in October, 2008, prior to the filing of the Complaint. In
20 connection with the winding down of its operations, Adzilla sold almost all of its assets, including
21 computer equipment, computer servers, and databases. Accordingly, Adzilla possesses only a
22 small number of documents relevant to this dispute.

23 **7. Disclosures:**

24 Initial disclosures, per rule Rule 26(a)(1)(C), have been served.

1 **8. Discovery:**

2 a. **Discovery Taken to Date.** No discovery has yet been served.

3 b. **The Scope of Anticipated Discovery.** The Parties anticipate depositions,
4 interrogatories, document requests, and other fact and expert discovery available under the FRCP
5 and Local Rules.

6 c. **Proposed Limitations or Modifications to the Discovery Rules.** At the present
7 time, the Parties do not anticipate limitations or modifications to the discovery rules.
8

9 d. **Proposed Discovery Plan Pursuant to Fed. R. Civ. P. 26(f).** The Parties have
10 not yet agreed on the general parameters of a discovery plan, as the outcome of any motions to
11 dismiss may alter the scope of these proceedings.

12 **9. Class Actions:**

13 Plaintiff provides the following class action information pursuant to L.R. 16-9(b):

14 a. This action is maintainable as a class action under Fed. R. Civ. P. 23(a) and (b)(1)
15 (b)(2) and (b)(3).
16

17 b. The action is brought on behalf of the following Class initially defined as:

18 A) All AAISP Subscribers whose internet communications were monitored,
19 intercepted, accessed, copied, transmitted, altered and/or used at any time by
20 or through an Adzilla device.

21 and:

22 B) All AACLEC end-users whose internet communications were monitored,
23 intercepted, accessed, copied, transmitted, altered and/or used at any time by
24 or through an Adzilla device.
25

26 Additionally and/or alternatively, Plaintiff bring this Complaint on behalf of herself
27 and the following subclasses:
28

1 i) All Doe AACLEC end-users whose internet communications were
2 monitored, intercepted, accessed, copied, transmitted, altered and/or used at
3 any time by or through an Adzilla device.

4 ii) All Doe AAISP subscribers whose internet communications were
5 monitored, intercepted, accessed, copied, transmitted, altered and/or used at
6 any time by or through an Adzilla device.
7

8 c. The following facts alleged in the Complaint demonstrate that this action is
9 maintainable as a class action under Fed. R. Civ. P. 23(a) and (b):

10 **Numerosity** – While the precise number of Class members is unknown to Plaintiff at this
11 time, Plaintiff estimates that the Class consists of tens of thousands of members.

12 **Common Questions** – There are numerous common questions of fact and law. The
13 principal factual issues in dispute (Section 2 above) and points of law (Section 3 above) are
14 common to all Class members, and predominate over any questions affecting Plaintiff or other
15 individual members of the Class.
16

17 **Typicality** – Plaintiff’s claims are typical of those of the Class. Plaintiff and all Class
18 members were subscribers of ISPs at the times in which and in the locations in which
19 Continental VisiNet and/or Core activated the Adzilla device that intercepted their internet
20 communications.
21

22 **Adequacy** – Plaintiff has no interests adverse or antagonistic to those of the Class and
23 have retained competent and experienced class counsel to prosecute the action.

24 **Superiority** – A class action is superior to all other available methods for the fair and
25 efficient adjudication of this controversy because joinder of all members is impracticable.
26 Furthermore, as the damages suffered by individual Class members may be relatively small, the
27 expense and burden of individual litigation makes it impossible for members of the Class to
28

1 individually redress the wrongs done to them. There will be no difficulty in the management of
2 this case as a class action.

3 Additionally, the Class may be certified because:

4 • the prosecution of separate actions by the individual members of the Class would
5 create a risk of inconsistent or varying adjudication with respect to individual Class
6 members which would establish incompatible standards of conduct for Adzilla,
7 Continental VisiNet, and Core;

8 Continental VisiNet, and Core;

9 • the prosecution of separate actions by individual Class members would create a
10 risk of adjudications with respect to them that would, as a practical matter, be dispositive
11 of the interests of other Class members not parties to the adjudications, or substantially
12 impair or impede their ability to protect their interests; and

13 • Adzilla, Continental VisiNet, and Core have acted or refused to act on grounds
14 generally applicable to the Class, thereby making appropriate final and injunctive relief
15 with respect to the members of the Class as a whole.

16 **d.** Barring substantial delays caused by discovery disputes Plaintiff anticipates
17 bringing their motion for class certification 120 days after the close of discovery.
18

19 Defendants contend that class certification is not appropriate for multiple reasons,
20 including without limitation:

21 **a.** The statutory damages sought by the class are disproportionate to any possible
22 harm suffered, especially in light of the fact that no consumer data was ever collected, accessed,
23 or maintained by defendants.
24

25 **b.** The proposed class members are citizens of states other than California and lack
26 standing to maintain the claims alleged in the Complaint.
27

28

1 c. Injunctive relief is not an available or necessary remedy here in light of the
2 cessation of Adzilla's business operations.

3 **10. Related Cases:**

4 There are no known related cases.

5 **11. Relief:**

6 Plaintiff seeks:

- 7
- 8 • An order certifying the Class, directing that this case proceed as a class action, and
9 appointing Plaintiff and her counsel to represent Plaintiff and the Class;
 - 10 • Judgment in favor of Plaintiff requiring Defendants to cleanse all systems of all
11 data obtained through the Adzilla device and enjoin any party or third party from any
12 use of said data;
 - 13 • Judgment in favor of Plaintiff and Class members in an amount of actual damages,
14 compensatory damages, or restitution to be determined at trial;
 - 15 • Judgment in favor of Plaintiff and Class members for statutory damages in an
16 amount to be determined at trial;
 - 17 • An order granting reasonable attorneys' fees and costs, as well as pre- and post-
18 judgment interest at the maximum legal rate; and
 - 19 • Such other and further relief as this Court may deem appropriate.
20

21
22 Defendants deny that any such relief is appropriate, due, either entirely or in part, to the
23 fact that no consumer data was ever collected or accessed and Plaintiff and the putative class
24 members have suffered no cognizable injury.

25 **12. Settlement and ADR:**

26 The parties are currently engaged in settlement discussions that may lead to private
27 mediation.
28

1 **13. Consent to Magistrate Judge For All Purposes:**

2 The parties do not consent to have a magistrate judge conduct all further proceedings.

3 **14. Other References:**

4 At this time, the Parties do not believe this case is suitable for reference to binding
5 arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.
6

7 **15. Narrowing of Issues:**

8 The parties do not believe that the issues can be narrowed at this time. After a ruling on
9 the anticipated motion to dismiss and appropriate discovery the parties are willing to further meet
10 and confer regarding whether any narrowing of the factual or legal issues, including issues related
11 to class certification, can be achieved by way of voluntary agreement.
12

13 **16. Expedited Schedule:**

14 The parties do not believe this case should be expedited at this point.

15 **17. Scheduling:**

16 No discovery has been taken by or against defendants to date.

17 **18. Trial:**

18 Plaintiff has demanded a jury trial and estimates that a trial would take 10 days. The
19 defendants believe that it is premature to estimate the length of trial and that it is premature to
20 schedule a trial date until the Court rules on any motions to dismiss and whether the class should
21 be certified. After the Court has ruled on certification, the parties will reconvene and jointly
22 submit a proposed trial date and estimated trial length.
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