

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JOHN W. FERRON,	:	
	:	
Plaintiff,	:	Civil Action No. 2:06-cv-322
	:	
vs.	:	Judge Frost
	:	
VC E-COMMERCE SOLUTIONS, INC., <i>et</i>	:	Magistrate Judge Abel
<i>al.</i> ,	:	
	:	
Defendants.	:	

PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT
AS TO PLAINTIFF’S FIRST CAUSE OF ACTION
AGAINST DEFENDANT OPTINREALBIG.COM, LLC

NOW COMES PLAINTIFF JOHN W. FERRON, by and through his undersigned counsel, pursuant to Federal Rule of Civil Procedure 56, and hereby moves this Court for an Order granting summary judgment in Plaintiff’s favor and against Defendant OptInRealBig.com, LLC, as to Plaintiff’s First Cause of Action.

The reasons why the Court should grant this Motion are set forth in the following Memorandum in Support of Motion, and the attachments to it.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

The case involves Plaintiff's claims against Defendants VC E-Commerce Solutions, Inc. and OptInRealBig.com, LLC, and an unknown number of unidentified "Doe" defendants, arising from Defendants' transmittal to Plaintiff of thousands of commercial email messages, the contents of which violate the Ohio Consumer Sales Practices Act ("CSPA"), R.C. §1345.01, *et seq.*, in multiple ways. In particular, Plaintiff's Complaint alleges that Defendants' email advertising campaigns violate the CSPA and applicable provisions of the Ohio Administrative Code by, among other things: (1) deceptively using the word "FREE" in connection with commercial advertisement; and (2) falsely stating that Plaintiff has won a prize or will receive something of value without properly disclosing all of the material terms and conditions of Defendants' offers. (Complaint ¶¶8-14)¹

Although discovery in this case has just begun, particularly with respect to the identities of other persons and entities that may have participated in the transmittal to Plaintiff of the commercial email messages at issue, the facts developed thus far demonstrate that Plaintiff is entitled to summary judgment in his favor as to his First Cause of Action against Defendant

¹ References to Plaintiff's First Amended Complaint, Document No. 8, which was filed on June 8, 2006, are designated herein by "(Complaint ¶_)."

OptInRealBig.com, LLC.

II. STATEMENT OF THE UNDISPUTED FACTS

Plaintiff John W. Ferron (“Plaintiff” or “Ferron”) is an individual who resides in Dublin, Delaware County, Ohio and practices law at his law firm in Columbus, Franklin County, Ohio. (Ferron Aff. ¶2)² Plaintiff has several Internet email addresses that he uses for both work and personal matters, including jferron@ferronlaw.com and jferron@columbus.rr.com, which Plaintiff can access from anywhere in the world where there is a computer with a web browser and access to the Internet. (Ferron Aff. ¶3)

Defendant OptInRealBig.com (“Defendant Opt” or “Opt”) is a Nevada limited liability company, having its principal place of business in Westminster, Colorado. (Complaint ¶3; Answer ¶3; Ferron Aff. ¶4) Defendant OptIn – a self-described “*high-volume email deployer*” – is an Internet marketer of epic proportion, operating a multitude of commercial websites and boasting the transmittal of “*several hundred million*” commercial email messages *per day*. (Ferron Aff. ¶6; Exhibit C³; Exhibit D, Attachment 4) So prolific is Defendant OptIn in its transmittal of commercial email messages that its CEO, Scott Richter, enjoys the ignominy of having once been dubbed the “Spam King.”⁴ (Ferron Aff. ¶6-9, Exhibits D-G, Attachments 4-7) Richter and Defendant OptIn have been sued by the New York Attorney General and Microsoft Corporation over their deceptive emails, but settled both cases recently after agreeing to pay over

² References to Plaintiff John W. Ferron’s attached sworn affidavit, Attachment 1, are designated herein by “(Ferron Aff. ¶[]).”

³ Pursuant to the Court’s October 2, 2006 Order (Document No. 27), Plaintiff has filed separately and manually with the Court a CD-ROM containing the 1,844 email messages at issue that he has received from Defendant OptIn, and other electronic media pertaining to this Motion. The CD-ROM is hereby designated as “Exhibit C” to this Motion, which is Document No. 28. (Ferron Aff. ¶5)

⁴ “The term ‘spam’ derives from a 1970 Monty Python Flying Circus sketch in which a waitress recites a menu containing ‘egg and spam; egg bacon and spam; egg bacon sausage and spam; spam bacon sausage and spam; spam egg spam spam bacon and spam; spam sausage spam spam bacon spam tomato and spam’ See Roger Allen Ford, Comment, Preemption of State Spam Laws by the Federal CAN-SPAM ACT, 72 U. CHI. L. REV. 355, 355 n.1 (2005) (citing DAVID CRYSTAL, LANGUAGE AND THE INTERNET 53 (Cambridge 2001)).” *White Buffalo Ventures, LLC v. Univ. of Texas*, 420 F.3d 366 (5th Cir. 2005, cert. den. *White Buffalo Ventures, LLC v. Univ. of Texas*, 2006 U.S. LEXIS 61 (U.S., Jan. 9, 2006), n. 1.

\$7 million dollars. (Ferron Aff. ¶9-10; Exhibits G-H, Attachments 7-8)

Between October 2005 and May 2006, OptIn directed some of its “high-volume email deployment” activities toward Plaintiff’s Internet email addresses and sent Plaintiff over 2,500 commercial email messages, 1,844 of which are at issue in this case. (Ferron Aff. ¶5; Exhibits A, B and C) Although the content of these email messages varies in some respects, they are the same in several significant ways. (Ferron Aff. ¶11) Almost all of the OptIn email messages have a subject line that indicates the recipient has won something of value or will receive something valuable for “free”. (Ferron Aff. ¶11) Here is a very small sampling the subject lines of OptIn’s many, many emails to Plaintiff:

“Pick any color for your Free* Motorola® PEBL Colors Cell Phone”

“Get A Free Ringtone jferron@columbus.rr.com”

“Get a free* Sanyo® CameraCorder™ worth \$900 !”

“Congratulations jferron@columbus.rr.com on your Sony 42” Widescreen Plasma TV offer”

“Get a Free* Coach® Gift Card and improve your look”

“jferron@columbus.rr.com, Would you want Starbucks free for a Year?”

“Congratulations jferron@ferronlaw.com on your \$1800 Grocery Shopping Spree”

“Abercrombie or American Eagle? Tell Us And Get \$500 Of Clothes!

“jferron@ferronlaw.com, Free Video Phone, Plus Free Shipping!”

(Ferron Aff. ¶12; *see also* Exhibits A, B and C)

Each of the 1,844 OptIn email messages plainly advises Plaintiff that he has either won something of significant value or that he has been chosen to receive some item of significant

value for “FREE”. (Ferron Aff. ¶13) Many of the email messages feature a photo or image of a “FREE” item – such as an “Abercrombie gift card” – a description of the item, the word “FREE” in large letters of a different color, and usually some representation of the dollar value of the item. (Ferron Aff. ¶13) None of the 1,844 OptIn email messages states that the recipient must purchase anything in order to receive the “FREE” item or prize described within the email message. (Ferron Aff. ¶13)

Some of the emails contain, often in a small typeface, a statement indicating that the consumer’s receipt of the “FREE” item or prize featured in the email requires the recipient’s “participation in sponsors’ programs” or the offer is subject to “terms and conditions” that are not set forth anywhere within the email message itself. (Ferron Aff. ¶14; *see also* Exhibits V, W, X, Z, AA, BB, CC, DD and FF, Attachments 22, 23, 24, 26, 27, 28, 29, 30 and 32)

Each of OptIn’s email messages provides an Internet hyperlink⁵ that the recipient is directed to “click” on in order to claim the “FREE” item or prize. (Ferron Aff. ¶16; *see also* Exhibits V, W, X, Y, Z, AA, BB, CC, DD, EE, FF, GG and HH, Attachments 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32 and 33) Upon clicking on the Internet hyperlink within each email message, the consumer’s computer’s Internet browser (such as Microsoft’s Internet Explorer) is activated and briefly displays the URL address⁶ of OptIn’s registered web site – “www.tracking101.com” – followed soon thereafter by the display of the website of one of OptIn’s affiliates. (Ferron Aff. ¶16, 19) The first affiliate website page that is displayed invariably describes the same “FREE” item or prize that was mentioned in OptIn’s

⁵ A “hyperlink” is a reference (link) from some point in one hypertext document to another document or another place in the same or another document. An Internet browser usually displays a hyperlink in some distinguishing way, e.g. in a different color, font or style. When the user activates the link (e.g. by clicking on it with the mouse or other pointing device) the browser will display the target of the link. *The Free On-line Dictionary of Computing*, © 1993-2005 Denis Howe.

⁶ “URL address” means the Uniform Resource Locator address, which is the full unique address of a website, page or file on the Internet.

corresponding email message. The words appearing on the first page of the affiliate's website are usually congratulatory, and this page typically displays a photo or image of the item, emphasizing that it is "FREE". (Ferron Aff. ¶16; *see, e.g.*, Exhibits AA, BB, EE and HH) The first page of the website to which the consumer is directed – often referred to as the website's "landing page" – requires the email recipient to provide his or her email address in order to claim the "FREE" item or prize. (Ferron Aff. ¶16; *see, e.g.*, Exhibits Z, AA, BB, CC, DD, EE, FF, GG and HH)

After the recipient of an OptIn email inserts his or her email address on the landing page and clicks as directed, the recipient computer's Internet browser loads another page of OptIn's affiliate's website. (Ferron Aff. ¶17; *see, e.g.*, Exhibits Z, AA, BB and DD) The second page invariably asks the consumer to insert his or her full name, address, telephone number, birth date and sometimes gender so that, according to a prominent statement on the second page, the "FREE" item or prize may be "shipped" to the consumer. (Ferron Aff. ¶17) After inserting this required "shipping" information, and then clicking as directed, the consumer's computer's Internet browser loads another page from OptIn's client's website, which typically asks the consumer to participate in a "survey" regarding his or her interest or preferences for various consumer goods and services. (Ferron Aff. ¶17)

After answering a number of survey questions and then clicking as directed, or after clicking other hyperlinks allowing the consumer to "skip" the survey questions, the consumer's computer's Internet browser is eventually directed to a web page that reveals – finally – that the email recipient must purchase multiple consumer goods or services from various "sponsors" before the consumer will actually receive from OptIn the "FREE" item or prize mentioned in OptIn's email message. (Ferron Aff. ¶18; *see, e.g.*, Exhibit BB) OptIn's "sponsors" are familiar

companies offering their familiar consumer goods and services, such as coffee, online movies, satellite television services, and CD and DVD clubs, to name just a few. (Ferron Aff. ¶18; Exhibits A, B and C) Images representing OptIn's sponsors' offers are published on several web pages, and are accompanied by brief descriptions of the consumer goods or services being offered; however, these brief descriptions do not reveal all of the terms or conditions of the sponsors' offers, particularly the cost of any of the sponsors' goods or services offered. (Ferron Aff. ¶18; *see, e.g.*, Exhibits AA and BB) The email recipient only learns the details of each sponsors' offer, including its cost to the consumer, by clicking on an offer which, in turn, directs the recipient to the sponsor's own website and the details of its offer. (Ferron Aff. ¶19)

Ultimately, the consumer learns that he or she is required to purchase between **six** and **nine** different offers from the sponsors in order to receive the "FREE" item or prize described in OptIn's initial email message. (Ferron Aff. ¶19) For many years, this has been referred to as the "catch." The email recipient **finally** learns the **details** of the "catch" behind OptIn's initial "FREE" item or prize email only **after**:

- (1) reading OptIn's initial commercial email message;
- (2) visiting OptIn's client's landing page and providing his or her email address;
- (3) visiting OptIn's client's second website page and providing "shipping information" consisting of his or her address and other personal information;
- (4) participating in a multiple-page "survey";
- (5) reviewing many brief descriptions of many OptIn sponsors' offers of consumer goods and services; and
- (6) finally clicking on the hyperlinks to between six and nine different sponsors' websites and reading the details of each offer.

(Ferron Aff. ¶19) Moreover, a consumer receiving OptIn's emails does not learn the "catch" until after he or she has devoted several minutes of his or her valuable time, and provided detailed personal information to OptIn and its unidentified clients. (Ferron Aff. ¶20)

Plaintiff asserts that Defendant OptIn, by its commercial email messages and the websites to which they are hyperlinked, has committed numerous deceptive and unfair acts and practices in violation of the Consumer Sales Practices Act ("CSPA"), R.C. 1345.01, *et seq.* Plaintiff also asserts that OptIn has repeatedly violated the CSPA by conducting business in Ohio without ever having properly registered with the Ohio Secretary of State, as is required. Based upon the foregoing undisputed facts, and the applicable law, Plaintiff respectfully submits that he is entitled to summary judgment in his favor on his First Cause of Action against Defendant OptInRealBig.com.

Although OptIn's palpably misleading and deceptive advertising methods are undoubtedly the result of a carefully-devised marketing strategy and an obvious attempt to mislead and deceive millions of consumers into believing that they will receive "FREE" items and prizes, neither motive nor intent is an element of any of Plaintiff's claims. Plaintiff is only required to establish that OptIn's advertisements fail to comply with Ohio's consumer protection laws and that it has not properly registered to do business in Ohio, and Plaintiff respectfully submits that he has amply done so here.

III. LAW AND ARGUMENT

A. The Summary Judgment Standard.

The Sixth Circuit Court of Appeals recently articulated the standard applicable to summary judgment motions in *Mas One Limited Partnership v. U.S.*, 390 F.3d 427 (6th Cir. 2004):

“Summary judgment is proper where there exists no genuine issue of material fact and one party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the district court must construe the evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1996). The central issue is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).”

Furthermore, Fed. R. Civ. P. 56(c) provides that a party is entitled to summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993); *Osborn v. Ashland County Bd. of Alcohol, Drug Addiction & Mental Health Servs.*, 979 F.2d 1131, 1133 (6th Cir. 1992).

The party moving for summary judgment bears the burden of showing that there are no genuine issues of material fact in the case at issue. *LaPointe* at 378. Conversely, the nonmoving party must present “significant probative evidence” to demonstrate that “there is [more than] some metaphysical doubt as to the material facts” in order to prevent summary disposition of the case. *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 339-40 (6th Cir. 1993). “The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1310 (6th Cir. 1989).

Because the material facts are not in dispute, and the law clearly establishes that Defendant OptIn’s advertising practices violate the Consumer Sales Practices Act and its

advertising regulations as a matter of law, Plaintiff is entitled to summary judgment on his First Cause of Action against Defendant OptInRealBig.com.

B. The Consumer Sales Practices Act and Ohio's Advertising Regulations.

The Consumer Sales Practices Act ("CSPA"), R.C. §1345.01, *et seq.*, which became effective on July 14, 1972, was the first comprehensive consumer protection law enacted in Ohio. The CSPA affects the substantive law of fraud, deception and unconscionability relevant to consumer transactions. Buckley, *Recent Consumer Protection Legislation in Ohio*, 22 Cleve. St. L. Rev. 393, 395-396 (1973). The CSPA provides for individual consumer remedies, class action remedies, publicly enforced remedies, and for remedies that combine individual and public elements, establishing a Consumer Protection Division within the Commerce Department to administer the Act and authorizing the Attorney General to initiate public enforcement proceedings. *Buckley, supra* at 396.

The CSPA is remedial legislation and, as such, should be accorded a liberal construction. *Brown v. Lancaster Chrysler-Plymouth, Inc.*, 4 O.O. 3d 70, 71 (C.P. 1976); *Liggins v. May Co.*, 53 Ohio Misc. 21, 23, 7 O.O. 3d 164, 166, 373 N.E. 2d 404, 405 (C.P. 1977); *Brown v. Market Development, Inc.*, 41 Ohio Misc. 57, 63, 68 O.O. 2d 276, 280, 322 N.E. 2d 367, 371 (C.P. 1974); R.C. §1.11.

R.C. §1345.02(A) provides as follows:

"No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction."⁷

⁷ R.C. §1345.01 provides the following pertinent definitions:

As used in sections 1345.01 to 1345.13 of the Revised Code:

(A) "Consumer transaction" means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. "Consumer transaction" does not

The CSPA authorizes the Ohio Attorney General to adopt, amend and repeal substantive rules defining with reasonable specificity acts or practices that violate R.C. §1345.02 and §1345.03. R.C. §1345.05(B)(2). Accordingly, pursuant to the authority granted under R.C. §1345.05(B)(2) and R.C. Chapter 119, substantive rules have been adopted by the Attorney General in order to implement the prohibition against unfair or deceptive sales practices of R.C. §1345.02(A) with these rules detailing deceptive acts or practices in connection with consumer transactions. *Simpson v. Smith*, 34 Ohio Misc. 2d 7, 9-10, 517 N.E. 2d 276, 278-279 (M.C. 1987); see, also, *Riley v. Enterprise Furniture Co.*, 54 Ohio Misc. 1, 7 O.O. 3d 271, 375 N.E. 2d 821 (M.C. 1977); *Weaver v. J. C. Penney Co.*, 53 Ohio App. 2d 165, 6 O.O. 3d 270, 372 N.E. 2d 633 (1977); *Clayton v. McCary*, 426 F. Supp. 248 (N.D. Ohio 1976).

These substantive rules are to be liberally construed and applied to promote their purposes and policies, with such purposes and policies being to: (a) define with reasonable specificity the acts and practices of suppliers that violate R.C. §1345.02 or §1345.03 in regard to “consumer transactions” with “consumers”; (b) protect consumers from suppliers who engage in referral selling, commit deceptive acts or practices, or commit unconscionable acts or practices; and (c) encourage the development of fair consumer sales practices. See Ohio Administrative Code (“O.A.C.”) §109:4-3-01(A).

include transactions between persons, defined in sections 4905.03 and 5725.01 of the Revised Code, and their customers; transactions between certified public accountants or public accountants and their clients; transactions between attorneys, physicians, or dentists and their clients or patients; and transactions between veterinarians and their patients that pertain to medical treatment but not ancillary services.

* * *

(C) “Supplier” means a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer.

(D) “Consumer” means a person who engages in a consumer transaction with a supplier.

There are several substantive rules, promulgated by the Attorney General pursuant to the Attorney General's rule-making authority, which directly relate to Plaintiff's claims against Defendant. O.A.C. §109:4-3-02, which is entitled "**Exclusions and limitations in advertisements**", provides, in pertinent part:

(A)(1) It is a deceptive act or practice in connection with a consumer transaction for a supplier, in the sale or offering for sale of goods or services, to make any offer in written or printed advertising or promotional literature without stating clearly and conspicuously in close proximity to the words stating the offer any material exclusions, reservations, limitations, modifications, or conditions. Disclosure shall be easily legible to anyone reading the advertising or promotional literature and shall be sufficiently specific so as to leave no reasonable probability that the terms of the offer might be misunderstood.

* * *

(C) A statement of exclusions, reservations, limitations, modifications, or conditions which appears in a footnote to an advertisement to which reference is made in the advertisement by an asterisk or other symbol placed next to the offer being limited is not in close proximity to the words stating the offer.

O.A.C. §109:4-3-04, which is entitled "**Use of word 'free' etc.**", provides, in pertinent part, as follows:

“(A) It shall be a deceptive act or practice in connection with a consumer transaction for a supplier to use the word ‘free’ or other words of similar import or meaning, except in conformity with this rule. It is the express intent of this rule to prohibit the practice of advertising or offering goods or services as ‘free’ when in fact the cost of the ‘free’ offer is passed on to the consumer by raising the regular (base) price of the goods or services that must be purchased in connection with the ‘free’ offer. In the absence of such a base price a ‘free’ offer is in reality a single price for the combination of goods or services offered and the fiction that any portion of the offer is ‘free’ is inherently deceptive.

“(B) For the purposes of this rule, all references to the word ‘free’ shall include within that term all other words of similar import and meaning. Representative of the word or words to which this rule is

applicable would be the following: 'Free;' 'Buy 1, Get 1 Free;' '2 for 1 Sale;' '50% Off with Purchase of 2.' Offers of 'free' items of goods or services which may be deceptive for failure to meet the provisions of this rule may not be corrected by the substitution, for the word 'free' of such similar words and terms as 'gift,' 'given without charge,' 'bonus,' or other words and terms which tend to convey to the consuming public the impression that an item of goods or services is 'free.'

“(C) When using the word ‘free’ in a consumer transaction, all the terms, conditions, and obligations upon which receipt and retention of the ‘free’ goods or services are contingent shall be set forth clearly and conspicuously at the outset of the offer. Terms, conditions, and obligations of the offer must be printed in a type size half as large as the word ‘free,’ and all of the terms, conditions, and obligations should appear in close conjunction with the offer of ‘free’ goods or services. Disclosure of the terms of the offer set forth in a footnote of an advertisement to which reference is made by an asterisk or other symbol placed next to the offer is not regarded as making disclosure at the outset.”

O.A.C. §109:4-3-06, which is entitled “Prizes”, provides, in pertinent part, as follows:

(A) It shall be a deceptive act or practice in connection with a consumer transaction for a supplier to in any way notify any consumer or prospective consumer that the consumer has

(1) Won a prize or will receive anything of value, or

(2) Been selected, or is eligible, to win a prize or receive anything of value, if the receipt of the prize or thing of value is conditioned upon the consumer's listening to or observing a sales promotional effort or entering into a consumer transaction, unless the supplier clearly and conspicuously discloses, at the time of notification of the prize, that an attempt will be made to induce the consumer or prospective consumer to undertake a monetary obligation irrespective of whether that obligation constitutes a consumer transaction. The supplier must further disclose the market value of the prize or thing of value, that the prize or thing of value could not benefit the consumer or prospective consumer without the expenditure of the consumer's or prospective consumer's time or transportation expense, or that a salesperson will be visiting the consumer's or prospective consumer's residence, if such is the case.

(B) A statement to the effect that the consumer or prospective

consumer must observe or listen to a “demonstration” or promotional effort in connection with a consumer transaction does not satisfy the requirements of this rule, unless the consumer or prospective consumer is told that the purpose of the demonstration is to induce the consumer or prospective consumer to undertake a monetary obligation irrespective of whether that obligation constitutes a consumer transaction.

* * *

(D) It shall be a deceptive act or practice in connection with a consumer transaction for a supplier to in any way notify any consumer or prospective consumer that the consumer has:

(1) Won a prize or will receive anything of value, if such is not the case; or

(2) Been selected, or is eligible, to win a prize or receive anything of value, if the receipt of the prize or thing of value is conditioned upon the payment of a service charge, handling charge, mailing charge, or other similar charge; or

(3) Been selected, or is eligible, to win a prize or receive anything of value unless the supplier clearly and conspicuously discloses to the consumer any and all conditions necessary to win the prize or receive anything of value.

C. **OptIn’s Emails and the Websites to Which the Emails Hyperlink Violate the Advertising Regulations Set Forth in the Ohio Administrative Code in Several Different Ways, and Each Such Violation Constitutes a Separate and Distinct Unfair or Deceptive Act or Practice in Violation of the CSPA.**

Over the course of the past year or so, Defendant OptIn has transmitted 1,844 commercial email messages to Plaintiff each of which advises him – albeit falsely – that he will receive some prize or “FREE” item of significant value, such as a “FREE” \$500 gift card or a “FREE” \$1,800 grocery shopping spree. However the truth is that **none** of the items touted in Defendant OptIn’s many email messages is actually **free** to the consumer receiving the email message. Rather, in order to receive the “free” items offered by OptIn’s emails and the websites to which they hyperlink, Plaintiff was actually required first to provide his personal information, including his

home address, home telephone number and birth date, then to participate in a consumer “survey”, and finally to purchase between six and nine different consumer goods or services from OptIn’s sponsors.

Thus, OptIn’s email messages do not disclose properly all of the conditions the consumer must meet in order to receive the “FREE” goods and services offered. Each email: (1) fails to disclose all of the terms of OptIn’s offers clearly and conspicuously at the outset, as is required; and (2) uses the word “FREE” or its equivalent in describing OptIn’s offer of consumer goods or services without properly disclosing all of the required terms and conditions of the offer, which is prohibited. The websites to which OptIn’s emails hyperlink repeat and magnify these errors. Thus, each of the 1,844 OptIn emails and the websites to which OptIn’s emails hyperlink violate Ohio’s advertising regulations in several significant ways, and each such violation constitutes a violation of the CSPA.

1. OptIn’s Emails and the Websites to Which they Hyperlink Violate O.A.C. §109:4-3-02.

O.A.C. §109:4-3-02, which is entitled “**Exclusions and limitations in advertisements**”, provides, in pertinent part:

(A)(1) **It is a deceptive act or practice in connection with a consumer transaction for a supplier, in the sale or offering for sale of goods or services, to make any offer in written or printed advertising or promotional literature without stating clearly and conspicuously in close proximity to the words stating the offer any material exclusions, reservations, limitations, modifications, or conditions.** Disclosure shall be easily legible to anyone reading the advertising or promotional literature and shall be sufficiently specific so as to leave no reasonable probability that the terms of the offer might be misunderstood.

* * *

(C) A statement of exclusions, reservations, limitations, modifications, or conditions which appears in a footnote to an advertisement to which reference is made in the advertisement by an asterisk or other symbol placed next to the offer being limited is not in close proximity to the words stating the offer.
(Emphasis added)

This regulation describes a reasonable requirement of any consumer advertisement: All of the “material exclusions, reservations, limitations, modifications, or conditions” of a supplier’s offer must be stated “clearly and conspicuously in close proximity to the words stating the offer.” The regulation also requires that the supplier’s “disclosure” be in “close proximity to the words stating the offer”, “easily legible”, and “sufficiently specific so as to leave no reasonable probability that the terms of the offer might be misunderstood.”

The OptIn emails and corresponding websites at issue clearly violate O.A.C. §109:4-3-02 in at least two significant ways. First, OptIn’s emails do not disclose “clearly and conspicuously in close proximity to the words stating the offer” the “material limitation” that the consumer must purchase between six and nine different consumer goods or services in order to receive the “free” goods and services advertised. Second, OptIn’s emails do not provide a disclosure that is “easily legible” and “sufficiently specific so as to leave no reasonable probability that the terms of the offer might be misunderstood.” In fact, they give no indication at all that the consumer’s receipt of the “free” item or prize is conditioned upon the consumer agreeing to purchase between six and nine other consumer goods or services from OptIn’s sponsors.

The website landing pages to which OptIn’s emails are hyperlinked also violate this regulation because they reiterate – falsely – that the consumer will receive the “free” item or prize described in OptIn’s email message. In fact, none of the linked website landing pages discloses the “material condition” that the consumer must first purchase between six and nine different consumer items from various OptIn sponsors before actually receiving the “free” item

or prize. In fact, full disclosure of all of the conditions of OptIn's "free" offers never even occurs unless or until the consumer takes it upon himself or herself to visit and read the fine print of each website's "Terms and Conditions" pages and then he or she also visits the websites of between six and nine of OptIn's sponsors to review the terms of each of their offers of consumer goods and services.

The websites' second pages also violate O.A.C. §109:4-3-02. The next web page to which the consumer is directed, after providing his or her email address on each website's landing page and clicking as directed, invariably restates the "free" offer in congratulatory terms and fraudulently requests various personal information from the consumer – his or her full name, home address, home telephone number, gender and date of birth – because this information is purportedly needed in order to "ship" the "free" item or prize to the consumer. However, as with each website landing page, the second pages do not disclose the material "condition" that the consumer must first purchase between six and nine different consumer items from various sponsors before actually receiving the "free" item. Again, full disclosure of all of the conditions of OptIn's "free" offers never even occurs unless or until the consumer takes it upon himself or herself to visit and read the fine print of each website's "Terms and Conditions" page and also visits the websites of between six and nine of OptIn's sponsors to review the terms of each of their offers of consumer goods and services.

Thus, for each OptIn email message, and its corresponding web pages, OptIn has violated O.A.C. §109:4-3-02 in multiple ways.

2. OptIn's Emails and the Websites to Which they Hyperlink Violate O.A.C. §109:4-3-04.

"Free" has historically been recognized as something of a *magic* word in consumer advertising. It catches the consumer's attention. It raises the consumer's expectations. Most

importantly, it gets the advertisement and the advertiser noticed by the consumer. As the Federal Trade Commission's regulations state:

“The offer of ‘Free’ merchandise or service is a promotional device frequently used to attract customers. Providing such merchandise or service with the purchase of some other article or service has often been found to be a useful and valuable marketing tool. *** Because the purchasing public continually searches for the best buy, and regards the offer of ‘Free’ merchandise or service to be a special bargain, all such offers must be made with extreme care so as to avoid any possibility that consumers will be misled or deceived.”

16 C.F.R. §251.1(a)(1)-(2). This is no doubt why the Ohio Attorney General has promulgated special rules regarding the use of the term “free” in consumer advertisements several decades ago.

O.A.C. §109:4-3-04, which is entitled “Use of word ‘free’ etc.”, provides, in pertinent part, as follows:

“(A) **It shall be a deceptive act or practice in connection with a consumer transaction for a supplier to use the word ‘free’ or other words of similar import or meaning, except in conformity with this rule.** It is the express intent of this rule to prohibit the practice of advertising or offering goods or services as ‘free’ when in fact the cost of the ‘free’ offer is passed on to the consumer by raising the regular (base) price of the goods or services that must be purchased in connection with the ‘free’ offer. In the absence of such a base price a ‘free’ offer is in reality a single price for the combination of goods or services offered and the fiction that any portion of the offer is ‘free’ is inherently deceptive.

“(B) For the purposes of this rule, all references to the word ‘free’ shall include within that term all other words of similar import and meaning. Representative of the word or words to which this rule is applicable would be the following: ‘Free;’ ‘Buy 1, Get 1 Free;’ ‘2 for 1 Sale;’ ‘50% Off with Purchase of 2.’ **Offers of ‘free’ items of goods or services which may be deceptive for failure to meet the provisions of this rule may not be corrected by the substitution, for the word ‘free’ of such similar words and terms as ‘gift,’ ‘given without charge,’ ‘bonus,’ or other words**

and terms which tend to convey to the consuming public the impression that an item of goods or services is ‘free.’

“(C) When using the word ‘free’ in a consumer transaction, all the terms, conditions, and obligations upon which receipt and retention of the ‘free’ goods or services are contingent shall be set forth clearly and conspicuously at the outset of the offer. Terms, conditions, and obligations of the offer must be printed in a type size half as large as the word ‘free,’ and all of the terms, conditions, and obligations should appear in close conjunction with the offer of ‘free’ goods or services. Disclosure of the terms of the offer set forth in a footnote of an advertisement to which reference is made by an asterisk or other symbol placed next to the offer is not regarded as making disclosure at the outset.” (Emphasis added.)

This regulation is similar to, but more specific than, O.A.C. §109:4-3-02. Whereas O.A.C. §109:4-3-02 requires that all of the “material exclusions, reservations, limitations, modifications, or conditions” of any written offer be stated “clearly and conspicuously in close proximity to the words stating the offer” within the advertisement, O.A.C. §109:4-3-04 applies to advertisements in which the word “free” (or a similar word) is used. O.A.C. §109:4-3-04 applies when the word “free” (or a similar word) is used in a supplier’s advertisement. This regulation requires that all of the terms of the “free” offer: (1) be set forth clearly and conspicuously at the outset of the offer; (2) be printed in a type size at least half as large as the word “free”; and (3) appear in close conjunction with the offer of “free” item.

OptIn’s advertisements violate O.A.C. §109:4-3-04 in several significant ways. First, none of the thousands of OptIn emails touting a “free” consumer item or prize sets forth “all the terms, conditions, and obligations upon which receipt and retention of the ‘free’ goods or services are contingent ... clearly and conspicuously at the outset of the offer.” O.A.C. §109:4-3-02(C).

Second, the website landing pages to which OptIn's emails are hyperlinked also violate O.A.C. §109:4-3-02(C). They all restate that the consumer will receive the "free" item described in the OptIn email messages that directed the consumer to the websites. However the landing pages do not disclose "all the terms, conditions, and obligations upon which receipt and retention of the 'free' goods or services are contingent ... clearly and conspicuously at the outset of the offer." In fact, as noted previously, full disclosure of all of the conditions of OptIn's "free" offers never even occurs unless or until the consumer has taken it upon himself or herself to visit and read the fine print of each "Terms and Conditions" web page and also visited the websites of between six and nine of OptIn's sponsors' websites to review the terms of each of their offers. Also, because the "fine print" is clearly smaller than that one-half the size of the typeface in which the word "free" is printed in the emails, the "Terms and Conditions" do not comply with the regulation.

Third, the second pages of the websites linked to OptIn's emails also violate O.A.C. §109:4-3-04(C). The second pages – the website page on which the consumer lands after providing his or her email address on the landing pages and clicking as directed – restate the "free" offer in congratulatory terms and fraudulently request various personal information from the consumer – his or her full name, home address, home telephone number, gender and date of birth – because it is *purportedly* needed for the shipment of the "free" item or prize to the consumer. However, as is the case with the websites' landing pages, the websites' second pages do not disclose "all the terms, conditions, and obligations upon which receipt and retention of the 'free' goods or services are contingent", especially the fact that the consumer must first purchase between six and nine different consumer items from OptIn's sponsors before actually receiving

the “free” item or prize. Moreover, the disclosure of terms obviously does not occur “clearly and conspicuously at the outset of the offer.”

Thus, for each OptIn email message and its corresponding web pages, Defendant OptIn has violated O.A.C. §109:4-3-04 in several significant ways.

3. OptIn’s Emails and the Websites to Which they Hyperlink Violate O.A.C. §109:4-3-11(D)(3).

O.A.C. §109:4-3-06, which is entitled “Prizes”, provides, in pertinent part, as follows:

* * *

(D) It shall be a deceptive act or practice in connection with a consumer transaction for a supplier to in any way notify any consumer or prospective consumer that the consumer has:

* * *

(3) Been selected, or is eligible, to win a prize or receive anything of value unless the supplier clearly and conspicuously discloses to the consumer any and all conditions necessary to win the prize or receive anything of value.

O.A.C. §109:4-3-11 pertains to consumer transactions in which the supplier notifies a consumer that he or she has either won or is eligible to win a prize or something of value. OptIn’s emails all violate O.A.C. §109:4-3-11 in several regards. First, none of the thousands of OptIn emails advising Plaintiff that he will receive a “free” consumer item “clearly and conspicuously discloses to the consumer any and all conditions necessary to win the prize or receive anything of value.” O.A.C. §109:4-3-11(D)(3). Thus, in each OptIn email message, Defendant has violated O.A.C. §109:4-3-11(D)(3).

Second, the website landing pages to which OptIn’s “prize” emails are hyperlinked also violate O.A.C. §109:4-3-11(D)(3). They all restate that the consumer will receive the “prize” described in the OptIn email messages that directed the consumer to the websites. However, the

landing pages do not “clearly and conspicuously disclose[] to the consumer any and all conditions necessary to win the prize or receive anything of value.” In fact, as noted previously, full disclosure of all of the conditions of OptIn’s “prize” offers never even occurs unless or until the consumer has taken it upon himself or herself to visit and read the fine print of each “Terms and Conditions” web page and also visited the websites of between six and nine of OptIn’s sponsors’ websites to review the terms of each of their offers.

Third, the second pages of the websites linked to OptIn’s “prize” emails also violate O.A.C. §109:4-3-11(D)(3). The second pages of these websites restate the “prize” offer in congratulatory terms and fraudulently request various personal information from the consumer – his or her full name, home address, home telephone number, gender and date of birth – because it is *purportedly* needed for the shipment of the “prize” to the consumer. However, as is the case with the landing pages of these websites, the websites’ second pages do not disclose “clearly and conspicuously ... any and all conditions necessary to win the prize or receive anything of value”, especially the fact that the consumer must first purchase between six and nine different consumer items from OptIn’s sponsors before actually receiving the “prize”.

Thus, for each OptIn email message and its corresponding web pages, Defendant OptIn has violated O.A.C. §109:4-3-11(D)(3) in several significant ways.

D. OptIn Has Repeatedly Violated the CSPA by Conducting Business in Ohio Without Having Properly Registered with the Ohio Secretary of State.

In his Complaint, Plaintiff also asserts that Defendant OptIn has repeatedly violated the CSPA by conducting business in Ohio over an extended period without having properly registered with the Ohio Secretary of State, as is required of out-of-state businesses. (Complaint ¶11) In its Answer, OptIn denied this allegation. (Answer ¶11) However, this fact is undeniably true, as OptInRealBig.com, LLC has never registered with the Ohio Secretary of State to do

business in Ohio. (Ferron Aff. ¶47; Exhibit II, Attachment 35) Accordingly, upon the undisputed facts and the applicable law, Plaintiff respectfully submits that he is entitled to summary judgment in his favor on his claim that OptIn has committed an unfair or deceptive practice in violation of the CSPA by doing business in Ohio without having first properly registered to do so with the Ohio Secretary of State.

Foreign limited liability companies doing business in Ohio are required to register with the Ohio Attorney General. R.C. §1705.54(A). Also, it is an unfair or deceptive practice for a foreign business entity to conduct business in Ohio without having properly registered with the Ohio Secretary of State. *State, ex rel. Brown v. Gem Collectors International, Ltd.*, Franklin C.P. No. 81CV-09-4788, OAG PIF# 499 (April 6, 1983) (copy attached at Attachment 36), makes this point of law clear.

Based upon the undisputed facts and the applicable law, Plaintiff respectfully submits that he is entitled to summary judgment in his favor on his claims that Defendant repeatedly violated the CSPA by conducting business in Ohio by transmitting its email advertisements to Plaintiff and other Ohio consumers without ever having properly registered to do business in Ohio with the Ohio Secretary of State, as is required.

IV. CONCLUSION

Because the material facts are not in dispute, and the law clearly establishes that Defendant OptIn's thousands of commercial emails messages to Plaintiff and the website pages to which the emails hyperlink violate the Consumer Sales Practices Act and its advertising regulations as a matter of law in multiple ways, Plaintiff is entitled to summary judgment on his First Cause of Action against Defendant OptInRealBig.com, LLC. Plaintiff is also entitled to summary judgment in his favor on his claims that Defendant repeatedly violated the CSPA by

conducting business in Ohio by transmitting its email advertisements to Plaintiff in Ohio without ever having properly registered to do business in Ohio with the Ohio Secretary of State.

Respectfully submitted,

s/ Lisa A. Wafer

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 11, 2006, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to Christina Marshall, Trial Attorney of Record for all Defendants in this matter.

/s/ Lisa A. Wafer

Lisa A. Wafer, Trial Attorney

Oh. Sup. Ct. Reg. No. 0074034