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

JOHN W. FERRON,	)	CASE NO. 2:06 CV 322
	)	
Plaintiff,	)	JUDGE FROST
	)	MAGISTRATE JUDGE ABEL
v.	)	
	)	
VC E-COMMERCE SOLUTIONS, INC., Et al.	)	**DEFENDANT OPTINREALBIG.COM, LLC'S RESPONSE IN OPPOSITION TO PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT**
	)	
Defendants.	)	
	)	

NOW COMES Defendant, OptInRealBig.com, LLC, and by and through undersigned counsel, and respectfully submits this Memorandum in Opposition to the Plaintiff's Partial Motion for Summary Judgment as to Plaintiff's First Cause of Action. As set forth in detail below, Plaintiff has failed to set forth the absence of a genuine issue of fact as to all necessary elements of his first cause of action, and is therefore not entitled to summary judgment as a matter of law. The facts, law and argument in support of this Memorandum are more fully set forth in their Brief in Support, attached hereto and fully incorporated by reference herein.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Statement of Facts

A. Introduction

On May 1, 2006, Plaintiff John Ferron filed a Complaint against Defendant VC E-Commerce Solutions, Inc., OptInRealBig.com, LLC (hereinafter "OptIn"), and Doe Nos. 1-20, alleging that he received e-mail messages from one or both named Defendants, in addition to the other Doe Defendants, which constituted an unfair and/or deceptive act or practice in the State of Ohio. (Plaintiff's Complaint, ¶6.) Plaintiff filed his First Amended Complaint on June 8, 2006, specifically asserting that each of the e-mail messages: 1) constitute a "consumer transaction" as defined by Ohio Revised Code (O.R.C.) § 1345.01(A), and 2) represent a "knowing" violation of O.R.C. §1345.02 by one or more of the Defendants. (Plaintiff's First Amended Complaint, ¶¶13-17.)

On July 20, 2006, this Court conducted its first pretrial conference for this matter, and on August 8, 2006, issued a Revised Scheduling Order instructing the parties to complete discovery on or before June 15, 2007, and to file all dispositive motions on or before July 16, 2007. Since then, Plaintiff has inundated this Court with numerous discovery motions in a tumultuous effort to create the appearance of a discovery dispute.

It should be self-evident from Plaintiff's instant filing of his Motion for Summary Judgment, that his claims of insufficient or inadequate responses from Defendants were baseless. Plaintiff plainly asserts to be possession of sufficient evidence, from "the facts developed thus far," which would entitle him to summary judgment in his favor.

However, as set forth in detail below, Plaintiff has failed to establish the absence of a genuine issue of material fact. Further, Defendant OptIn is without the benefit of having sufficient time to conduct discovery into the matter, which does not conclude for another seven months. Therefore, Plaintiff is not entitled to summary judgment, and for the reasons which follow, Defendant OptIn respectfully requests that Plaintiff's motion must be DENIED.

B. Brief Description of Online Marketing

As a preliminary matter, a brief description of online marketing is warranted. The general concept of marketing has been defined as a set of processes for "creating, communicating and delivering value to customers."[1] Online marketing is not simply marketing on the Internet; it encompasses multiple forms of information management, including public relations, customer service, and sales. Through the use of such tools as pay per click advertising, banner ads, e-mails and search engine marketing, businesses now have the capability of reaching large numbers of potential customers in a much more efficient, focused and cost-effective manner.

Unlike traditional forms of media advertising, the Internet can be used for marketing research (to identify potential customers' needs and wants), optimize resource allocation (by anticipating which customers can access information and make purchases), and achieve greater overall customer satisfaction.[2]

Commercial e-mail advertisements, such as the ones that are the subject of this case, are sent to individuals who have purposefully elected to receive those e-mail messages. The subscription process is simple: by going to a company's website or

[1] American Marketing Association, 2006.
[2] Smith, P.R. and Chaffey, D., "eMarketing eXcellence: at the heart of eBusiness." Butterworth Heinemann, Oxford, UK, 2001.

landing page and providing an e-mail address, a person can receive commercial e-mail advertisements. At any time and at no cost, a person may "unsubscribe" to discontinue receiving the advertisements. The unsubscription process is just as simple: the person can either click a link asking to unsubscribe, or send a letter to the postal address in the e-mail. (See Affidavit of Steven Richter, attached hereto as Exhibit A.)

C. Disputed Issues of Fact and Law

1. Plaintiff John Ferron Does Not Qualify As A Consumer

As Plaintiff admits through his Memorandum in Support and attached affidavit, he uses the e-mail addresses of "jferron@ferronlaw.com" and "jferron@columbus.rr.com" for both work and personal matters. (*See* Affidavit of Ferron, attached as an exhibit in support of Plaintiff's Motion for Summary Judgment, hereinafter referred to as "Affidavit of Ferron".) As he further admits, both e-mail addresses were used to receive commercial advertisements. *Id.* Further, Plaintiff provided a listing of 1,844 e-mail messages which he believes were sent to him by OptIn.[3] As this Court can plainly see from that listing, 41 pages contain a listing of e-mails sent to Plaintiff's work account at "jferron@ferronlaw.com" and only 9 pages contain a listing of e-mails sent to Plaintiff's home account at "jferron@columbus.rr.com".

Based on this information Plaintiff has failed to demonstrate that he qualifies as a "consumer" or engaged in a "consumer transaction," as those terms are defined by O.R.C. §1345.01. To the extent that Plaintiff predominantly used a business e-mail account to receive advertisements, and a home account to conduct business activity,

[3] Plaintiff asks this Court to rely solely on Plaintiff's Affidavit and Internet research of registered domain names to assert that OptIn sent the referenced e-mail advertisements. He offers no evidence by way of pleadings, depositions, answers to interrogatories, or admissions that someone from OptIn sent the advertisements. He also provides no information as to the individual or company responsible for drafting the language and content of that advertisement.

none of the e-mail messages would not qualify as a consumer transaction under the Ohio Consumer Sales Practices Act.

The Consumer Sales Practices Act prohibits unfair or deceptive acts, O.R.C. §1345.02, and unconscionable acts or practices, O.R.C. §1345.03, in consumer transactions. O.R.C. §1345.01 provides, in pertinent part, as follows:

> (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 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.
>
> (B) "Person" includes an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or other legal entity.
>
> (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.

A consumer transaction typically involves a natural person who obtains or is solicited to obtain an item of goods, a service, or an intangible primarily for personal, family, or household purposes. *Ostrander v. Andrew*, 2000 WL 697453, Ohio App. 9 Dist., 2000, unreported. In instances where a plaintiff claims a business product was used for some personal purposes, the Consumer Sales Practices Act will still not apply

by definition where it was not primarily for personal or household use. *Ostrander, supra; Barazzotto v. Intelligent Systems, Inc.* (1987), 40 Ohio App.3d 117, 121.

The vast majority of the 62,388 e-mails messages produced in this case, of which Plaintiff claims only 1,844 are the subject of this motion, were sent to Plaintiff's work e-mail account. The record is factually devoid of any evidence that he used his work and home e-mail accounts for "primarily personal, family or household" use. A jury could reasonably determine that Plaintiff, as a practicing attorney in the Columbus, Ohio area and managing partner of his law firm, used his work e-mail account for primarily business purposes. Moreover, a jury could also reasonably find that Plaintiff's use of his home e-mail account, which he admitted using to conduct work, was also for primarily business purposes.

Since there remains a genuine issue of material fact as to whether Plaintiff qualifies as a "consumer" and engaged in a "consumer transaction" as those terms are defined by O.R.C. §1345.01, Plaintiff is not entitled to summary judgment as a matter of law.

2. <u>There Is No Evidence Plaintiff Was Deceived By An E-Mail Advertisement</u>

Even if this Court were to assume that Plaintiff were a consumer, solely for purposes of this Motion, Plaintiff has still failed to set forth evidence to establish that he was deceived. To the contrary, Plaintiff is an educated person who voluntarily subscribed to receive the e-mail advertisements. Moreover, Plaintiff is able, in detail, to specify the content of the advertisements, locate the applicable link to obtain the "Terms and Conditions" of the particular advertising campaign, read and understand the meaning of those Terms and Conditions. (See Affidavit of Ferron.)

The purpose of the Ohio Consumer Sales Practices Act is to protect consumers from suppliers who act deceptively. *Rice v. Ohio Lottery Commission* (1999), 96 Ohio Misc. 2d 25, 30. Whether an act is deceptive is a question of fact that requires consideration of the totality of circumstances. *Knoth v. Prime Time Marketing Mgmt., Inc.* (2004), 2004 Ohio 2426, *5. *Swiger v. Terminix* (1995), 1995 WL 396467, *5. It is a test of fairness. *Knoth*, *supra* at *5; *Funk v. Montgomery AMC/Jeep/Renault* (1990), 66 Ohio App.3d 815, 823. The analysis turns largely on whether the consumer in question reasonably viewed the act or statement as one that was unfair or deceptive. *Knoth, supra* at *12-13. Thus, there are both subjective and objective components to the analysis. *Id.*

Additionally, some courts have adjusted the standard by stating that an act is deceptive only if it has the "likelihood of inducing in the mind of the consumer a belief which is not in accord with the facts." *Rice*, 96 Ohio Misc.2d at 30; *Funk*, 66 Ohio App.3d at 823; *Thompson v. Jim Dixon Lincoln Mercury* (1983), 1983 WL 4353, *1; see also *Thomas v. Sun Furniture and Appliance Co.* (1987), 61 Ohio App.2d 78, 82. Accordingly, "the place to look to determine the presence of deception is the state of mind of the consumer and not the intent of the supplier." *Thompson, supra* at 1; see also *Frey v. Vin Devers, Inc*. (1992), 80 Ohio App.3d 1, 6.

Furthermore, O.R.C. §1345.02(C) provides that a court shall give "due consideration and great weight" to the orders, rules and guides of Section 45(a)(1) of the Federal Trade Commission Act, as amended, as well as judicial interpretations of the same. O.R.C. §1345.02(C) (2006). §45(n) states that an act or practice is unfair only if it is "likely to cause substantial injury to consumers which is not reasonably

avoidable by consumers themselves." 15 U.S.C. §45(n) (2006); see also *Swiger, supra* at 5.

In *Rice v. Ohio Lottery Commission.* 96 Ohio Misc. 2d 25, the plaintiff won nearly $7 million playing the Ohio Lottery. *Id*. at 27. Rather than receive annual payments, the plaintiff opted for a lump sum. *Id.* Acting under its legal authority, the lottery commission paid the plaintiff the "present cash value" of his award, which was less than the value of the jackpot. *Id.* Consequently, the plaintiff brought suit alleging both breach of contract and violation of the Ohio Consumer Sales Practices Act. *Id.*

When considering the Consumer Sales Practices Claim, the court noted that an act is deceptive only when it has the likelihood of inducing in the consumer's mind a belief that is not supported by the facts. *Id.* at 30. In that case, the plaintiff knew the terms of the contract with the commission. He was aware of the jackpot payout amount when he elected to receive the lump sum payment, and the court held that the commission's policy, which led to a different payout based on the consumer's selection, was not deceptive. *Id.* at 30-31.

In the case at hand, it is evident that Plaintiff was and is aware of the Terms and Conditions applied to the advertising campaigns. In addition, he was able to obtain, read and understand the contents of those Terms and Conditions. (Affidavit of Ferron.)

Therefore, a genuine issue of material fact remains. A jury could reasonably determine that Plaintiff understood the advertisements to contain Terms and Conditions, knew how to obtain, read, and understand those conditions, and at no point relied on those statements to his detriment. Plaintiff is therefore not entitled to summary judgment as a matter of law.

3. Plaintiff Has Failed to Mitigate And Has Unclean Hands

Plaintiff has established that he subscribed to receive commercial advertisements to his work and home e-mail accounts. As previously stated, Plaintiff offers no evidence to establish that he was deceived by the advertisements, that he relied to his detriment on the statements contained therein, or that he suffered any damages as a result.

The Plaintiff also chose not to "unsubscribe" from receiving the advertisements. The unsubscribe process equally as simple as the subscription process, and merely requires that the person either click a link asking to unsubscribe, or send a letter to the postal address in the e-mail. To this date, OptIn has never received an "unsubscription" request from either of Plaintiff's e-mail accounts. (Exhibit A. See also, Defendant OptInRealBig.Com, LLC's Responses to Plaintiff's First Request for Production of Documents, attached hereto as Exhibit B.)

The "clean hands doctrine" of equity requires that whenever a party takes the initiative to set in motion the judicial machinery to obtain some remedy but has violated good faith by his prior-related conduct, the court will deny the remedy. *Bean v. Bean* (1983), 14 Ohio App.3d 358, 363-364. The maxim, "he who comes into equity must come with clean hands," requires only that the plaintiff must not be guilty of reprehensible conduct with respect to the subject matter of his suit. *Kinner v. Lake Shore & Michigan S. Ry. Co.* (1904), 69 Ohio St. 339, paragraph one of the syllabus; *Goldberger v. Bexley Properties* (1983), 5 Ohio St.3d 82, 85; *Hempy v. Green* (May 31, 1990), Franklin App. No. 89 AP-1369, unreported, 1990 WL 72607.

In this case, Plaintiff has failed to come into this Court with clean hands. He subscribed to receive commercial advertisements through his e-mail accounts and then over the course of several months, amassed a quantity of several thousand from various online marketers. Plaintiff failed to complete an unsubscription request, but retained those e-mail messages for the sole purpose of filing this lawsuit. The e-mail messages are now the subject of his complaint, for which he seeks this Court to provide him with a remedy. The determination of whether Plaintiff is entitled to relief is a fact in dispute, and summary judgment should not be awarded.

4. O.R.C. §1345.01 through 1345.13 Do Not Apply To Publishers

Plaintiff has failed to establish that the Ohio Consumer Sales Practices Act even applies in this case. OptIn provides online marketing services to various businesses, assisting those clients in the advertisement and dissemination of information regarding their products and services through the Internet. (Exhibit A.) To the extent Plaintiff may make the argument that OptIn is required to identify those businesses, such information is confidential or proprietary business information, the disclosure of which would cause substantial competitive and economic harm to OptIn. (See Defendant OptInRealBig.com, LLC's Responses to Plaintiff's First Set of Interrogatories, attached hereto as Exhibit C.) Moreover, it is Plaintiff's burden, in moving for summary judgment, to establish the absence of a genuine issue of fact as to each essential element of his claim. Plaintiff has failed to provide this Court with any evidence that OptIn actually sells the product or services contained within the advertisements.

O.R.C. §1345.12 provides as follows:

1345.12 Application of laws

> Sections 1345.01 to 1345.13 of the Revised Code do not apply to:
>
> (A) An act or practice required or specifically permitted by or under federal law, or by or under other sections of the Revised Code, except as provided in division (B) of section 1345.11 of the Revised Code;
>
> (B) A publisher, broadcaster, printer, or other person engaged in the dissemination of information or the reproduction of printed or pictorial matter insofar as the information or matter has been disseminated or reproduced on behalf of others without knowledge that it violated sections 1345.01 to 1345.13 of the Revised Code;
>
> (C) Claims for personal injury or death.

Therefore, to the extent that OptIn is a publisher, broadcaster or business engaged in the dissemination of information, or the reproduction of printed or pictorial matter on behalf of others, the Ohio Consumer Sales Practices Act does not apply.

II. Law and Argument

A. <u>Standard of Review</u>

Federal Rule of Civil Procedure 56 governs motions for summary judgment. The Rule states in pertinent part:

> The judgment sought shall be rendered forthwith 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 judgment as a matter of law.

If the moving party has satisfied its initial burden, it is the burden of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e). The nonmoving party has an affirmative duty to direct the Court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. The evidence must be viewed in the light most

favorable to the nonmoving party. *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

The Ohio Consumer Sales Practices Act forbids suppliers to engage in unfair or deceptive acts or practices relating to consumer transactions. O.R.C. §1345.02(A). As discussed above, O.R.C. §1345.01(A) defines the term "consumer transaction," explaining that it encompasses "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."

The Consumer Sales Practices Act provides a private cause of action, permitting consumers to seek relief against suppliers who have violated the act. §O.R.C. §1345.09. In order to be entitled to such relief, an individual must, at the very least, qualify as a "consumer" within the meaning of the Act, which is defined as those persons "who engag[e] in a consumer transaction with a supplier." R.C. 1345.01(D).

In this case, Plaintiff concludes that the commercial advertisements were consumer transactions and are deceptive, pursuant to O.R.C. §1345.02 and several provisions of the Ohio Administrative Code. O.R.C. §1345.02 provides:

> 1345.02 Unfair or deceptive acts or practices
>
> (A) 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.

> (B) Without limiting the scope of division (A) of this section, the act or practice of a supplier in representing any of the following is deceptive:
>
> (1) That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have;
>
> (2) That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not;
>
> (3) That the subject of a consumer transaction is new, or unused, if it is not;
>
> (4) That the subject of a consumer transaction is available to the consumer for a reason that does not exist;
>
> (5) That the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not, except that the act of a supplier in furnishing similar merchandise of equal or greater value as a good faith substitute does not violate this section;
>
> (6) That the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;
>
> (7) That replacement or repair is needed, if it is not;
>
> (8) That a specific price advantage exists, if it does not;
>
> (9) That the supplier has a sponsorship, approval, or affiliation that the supplier does not have;
>
> (10) That a consumer transaction involves or does not involve a warranty, a disclaimer of warranties or other rights, remedies, or obligations if the representation is false.

With respect to each of these provisions, and those listed under the Ohio Administrative Code, an essential element necessary to establish Plaintiff's claim is the existence of a "consumer transaction." However, Plaintiff has failed to establish any facts to support his claim that the e-mail messages he received through his work e-mail

account, and even his home e-mail account which was used to conduct business, was primarily for personal, family, or household use. When viewing Plaintiff's self-serving assertion and the e-mail messages presented to this Court in the light most favorable to OptIn, there remains a genuine issue of material fact as to this essential element of Plaintiff's claim.

Furthermore, a genuine issue of material fact remains for the jury as to whether the statements contained in the advertisements were likely to cause substantial injury to the Plaintiff, and were not reasonably avoidable. *Swiger, supra.* The Plaintiff chose not to "unsubscribe" from receiving the advertisements, a process equally as simple as the subscription process. Rather, he subscribed to receive the advertisements, amassed a quantity of several thousand from various online marketers, chose not to unsubscribe, and then retained those e-mail messages for the sole purpose of filing this lawsuit. The Plaintiff has unclean hands coming into this lawsuit, should not be entitled to relief.

Finally, to the extent that OptIn is a publisher, broadcaster or business engaged in the dissemination of information, or the reproduction of printed or pictorial matter on behalf of others, the Ohio Consumer Sales Practices Act does not apply. O.R.C. §1345.12.

Based on the evidence presented to this Court, there remain outstanding and genuine issues of fact in dispute. Summary judgment is not appropriate. Plaintiff has failed to establish his burden to show the absence of a genuine issue of material fact as to the essential elements of his claims, and demonstrate that he is entitled to judgment as a matter of law.

III. Conclusion

For the forgoing reasons OptInRealBig.com, LLC respectfully requests that this Honorable Court DENY Plaintiff's Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing was served via the court's electronic filing system on this

1st day of November, 2006 upon:

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/s/ Christina J. Marshall
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