

**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 JOHN W. FERRON’S MOTION TO STRIKE THE AFFIDAVIT
OF STEVE RICHTER, WHICH IS ATTACHED TO DEFENDANT
OPTINREALBIG.COM, LLC MEMORANDUM IN OPPOSITION TO
PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

PLAINTIFF JOHN W. FERRON, by and through his undersigned counsel, hereby respectfully moves that the Court strike and entirely disregard the Affidavit Steve Richter, which is attached as Attachment 1 to OptInRealBig.com, LLC Memorandum in Opposition to Plaintiff’s Motion for Partial Summary Judgment (Document No. 41).

The reasons why the Court should grant this Motion are set forth in detail in the attached Memorandum in Support of Motion.

Respectfully submitted,

s/ Lisa A. Wafer _____
Ohio Bar No. 0074034
LWafer@Ferronlaw.com
Trial Attorney for Plaintiff
FERRON & ASSOCIATES
A Legal Professional Association
580 North Fourth Street, Suite 450
Columbus, Ohio 43215-2125
(614) 228-5225, 228-3255 fax

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION AND RELEVANT FACTS

This case arises from Plaintiff's claims against Defendants VC E-Commerce, Inc. and OptinRealBig.com, LLC, and a unknown number of still unidentified "Doe" Defendants for sending commercial email messages to Plaintiff that contain multiple violations of the Ohio Consumer Sales Practices Act ("CSPA"), R.C. §1345.01, *et seq.*

On October 11, 2006, Plaintiff filed his Motion for Partial Summary Judgment against Defendant OptInRealBig.com, LLC ("OptIn"). (Document No. 30) On November 1, 2006, OptIn filed its Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment (Document No. 41), attached to which was the affidavit of Steve Richter (hereinafter "Richter Affidavit").

The Richter Affidavit purports to adduce evidence in support of Defendant OptIn's opposition to Plaintiff's Motion for Partial Summary Judgment

However, the Richter Affidavit is not proper evidence under Fed. R. Civ. P. 56(e) for two important reasons: (1) the Richter Affidavit obviously was not signed by the named affiant, Steve Richter; and (2) the Richter Affidavit does not establish that Mr. Richter possesses personal knowledge about the content of the almost more than 2,700 commercial email messages sent to Plaintiff by or on behalf of OptIn, or about the intent of the person or persons who sent them. Thus, for the reasons set forth in greater detail below, the Affidavit of Steve Richter must be stricken and entirely disregarded by the Court for purposes of resolving Plaintiff's Motion for Partial Summary Judgment.

II. LAW AND ARGUMENT

A. The Purported Affiant, Steve Richer, Did Not Sign the Affidavit.

While a party generally may oppose a motion for summary judgment by submitting affidavit testimony, it is well-settled that the affidavit must be in proper form in order to be considered under Fed. R. Civ. P. 56. As this Court stated in *Wright v. Asset Acceptance Corp.*, Case No. C-3-97-375, unreported, 1999 U.S. Dist. LEXIS 20675 at *18 (SD Ohio January 3, 2000)(Attachment 1):

“Also pending before the Court is a Motion to Strike (Doc. # 38), filed by the Plaintiff. In his Motion, the Plaintiff seeks to strike: (1) a purported purchase agreement between GE Capital and West Capital; and (2) an unsigned, unnotarized copy of an ‘affidavit’ from La Vonne Nelson, who appears to be an employee of GE Capital.

“The foregoing documents, and others, are attached to the Defendants' renewed Motion for Summary Judgment (Doc. # 36). The Defendants have provided the documents in an effort to establish their ownership of the Plaintiff's Value City debt. With respect to the purported affidavit, however, **it is axiomatic that an ‘affidavit’ which is unsigned and not notarized cannot qualify as proper Rule 56 evidence.** Consequently, the Plaintiff's Motion to Strike is sustained with respect to La Vonne Nelson's ‘affidavit.’” (Emphasis added.)

In the instant case, the Richter Affidavit was not signed by the affiant, Steve Richter. Rather, it was obviously signed by someone named “Judy Descel.” (Document No. 41, Attachment 1.) Therefore, the Richter Affidavit is not proper Rule 56 evidence, and must be stricken and disregarded by the Court in its entirety. *Wright, supra*.

B. The Richter Affidavit Fails to Allege Sufficient Facts to Establish that the Affiant Possesses Personal Knowledge Regarding the Content of OptIn's Commercial Email Messages to Plaintiff or the Intent of the Sender of those Email Messages.

Fed. R. Civ. P. 56 requires that affidavits opposing a motion for summary judgment must

“set forth such facts as would be admissible at trial.” Thus, the Sixth Circuit has held that conclusory affidavits cannot be used to create a question of fact. *Mitchell v. Toledo Hospital*, 964 F.2d 577, 584-585 (6th Cir. 1992). At the summary judgment stage, the Court may only consider affidavits that are based upon personal knowledge. *Brainard v. American Standard Life*, 432 F.3d 655, 667 (6th Cir. 2005). Where, as here, an affidavit fails to comply with Fed. R. Civ. P. 56(e), the Court may strike portions of the affidavit, or the affidavit in its entirety. *Id.* at 667.

As noted above, Plaintiff respectfully submits that the Richter Affidavit must be entirely stricken and disregarded by the Court because someone other than Steve Richter signed it. However, even if the Court were to accept and consider the substance of the Richter Affidavit, paragraph seven of the Richter Affidavit must be stricken because it avers facts of which Mr. Richter lacks personal knowledge. Paragraph 7 of the Richter Affidavit provides:

“The company [OptIn] has never knowingly disseminated or reproduced information through the Internet, and specifically to Plaintiff John Ferron, in violation of Ohio Revised Code Section 1345.01 to 1345.13.”

(Document No. 41, Attachment 1, ¶7) Thus, this paragraph purports to speak both to the nature of information contained with the emails that Defendant OptIn sent to Plaintiff and to OptIn’s intent in sending them. However, the Richter Affidavit does not contain any allegations that establish Mr. Richter’s knowledge or competence to testify concerning these matters. (See generally the Richter Affidavit, Document No. 41, Attachment 1.)

Therefore, the Richter Affidavit, even if it had been properly executed, fails to adduce admissible evidence on these points. The affidavit fails to establish that the affiant possesses the requisite personal knowledge to testify about the content or intent behind the more than 2,700 commercial email messages that OptIn has sent to Plaintiff, the contents of which clearly violate Ohio Revised Code Chapter 1345 and applicable advertising regulations found within the Ohio

Administrative Code. As a result, at minimum, Paragraph 7 of the Richter Affidavit must be stricken and disregarded by the Court for purposes of resolving Plaintiff's Motion for Partial Summary Judgment, even if the entire affidavit is not ordered stricken.

III. CONCLUSION

For the reasons set forth herein, Plaintiff respectfully submits that the Court should strike and disregard the Richter Affidavit.

Respectfully submitted,

s/ Lisa A. Wafer

Ohio Bar No. 0074034

LWafer@Ferronlaw.com

Trial Attorney for Plaintiff

FERRON & ASSOCIATES

A Legal Professional Association

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Columbus, Ohio 43215-2125

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 13, 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