

**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 REPLY MEMORANDUM IN SUPPORT OF
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 submits his Reply Memorandum in Support of Motion for Summary Judgment as to Plaintiff’s First Cause of Action against Defendant OptInRealBig.com, LLC.

I. INTRODUCTION

In its Memorandum Opposing Plaintiff’s Motion for Summary Judgment as to his First Cause of Action (“Defendant’s Memorandum”), Defendant OptInRealBig.com, LLC (“OptIn”) essentially capitulates to Plaintiff’s description of the undisputed facts before the Court. Defendant OptIn makes no attempt to deny that its email messages and the web sites to which the emails are hyperlinked are false, misleading and deceptive. Rather, OptIn ventures several implausible defenses that it hopes will either bar Plaintiff’s claims or at least warrant a trial to determine their merit.

In opposing Plaintiff’s Motion, Defendant OptIn asserts four main arguments:

- (1) Plaintiff is not a “consumer” as defined in the Consumer Sales Practices Act (Defendant’s Memorandum, p. 4) Because Plaintiff is not a “consumer”, the 2,755 deceptive commercial email messages that Defendant has sent to Plaintiff, each of which falsely advises Plaintiff that he will receive some kind of “FREE” consumer good, are not “consumer transactions” as defined in the Consumer Sales Practices Act. (Defendant’s Memorandum, pp. 5-6)
- (2) Plaintiff was not actually deceived by the false offers of “FREE” consumer goods in the 2,755 commercial email messages that Defendant has sent to Plaintiff. (Defendant’s Memornadum, pp. 6-8)
- (3) Plaintiff has failed to mitigate his damages, and has “unclean hands,” because he has not “unsubscribed” from Defendant’s unsolicited emails. (Defendant’s Memorandum, pp. 9-10)
- (4) Defendant is exempt from claims under the CSPA because it is a “publisher” as defined in the CSPA. (Defendant’s Memorandum, pp. 10-11)

However, Plaintiff respectfully submits that none of Defendant OptIn’s arguments presents a valid bar to the Court’s entry of summary judgment in Plaintiff’s favor as to his First Cause of Action.

III. LAW AND ARGUMENT

A. Plaintiff is a Consumer as to Each of Defendant OptIn’s Thousands of Deceptive Advertisements.

In its Memorandum, Defendant OptIn argues that Plaintiff is not a “consumer” and that the thousands of email advertisements that it has sent to Plaintiff are not “consumer transactions” under the CSPA.

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 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.**” (Emphasis added)

Each of Defendant’s email messages is unquestionably a “solicitation” sent to an individual urging the purchase of “an item of goods, a service, a franchise, or an intangible *** for purposes that are primarily personal, family, or household.” Each email clearly advises the recipient that he will receive an item of goods that is “primarily personal, family, or household.” OptIn’s emails tout plasma TVs, cosmetics, gift cards for Subway, Wal-Mart, Starbucks, Nordstrom, Outback Steakhouse, Abercrombie, Target, Gucci, JC Penney, Toys-R-Us and many other major retailers and restaurants. (Ferron 2nd Supp. Aff. ¶4)¹ And in order to receive these “FREE” consumer items, the individual receiving the emails must first purchase consumer goods or services from several of OptIn’s sponsors, who offer for sale: cosmetics, movies on

¹ References herein to “Ferron 2nd Supp. Aff. ¶,” shall refer to the Second Supplement Affidavit of John W. Ferron, attached hereto at Attachment 1.

DVD, credit cards, gas cards, music CDs, neckties, Disney children's books, children's reading programs, personalized letters from Santa, colon cleansing products, magazine subscriptions, wrinkle cream, vacation travel, acne medicine, mortgages, weight loss programs, and menopause potions. (Ferron 2nd Supp. Aff. ¶4)

In fact, Defendant OptIn's marketing is obviously aimed toward consumers. On its web site, www.optinrealbig.com, under the "Our Lists" tab, OptIn boasts that it:

- **Possesses over 8 million online consumers** in its database;
- **Has lists available with a reach from 500,000 to up to 8 million online consumers**;
- Produces over 20 million page views per month on our clients' websites; and,
- Delivers an average of 350,000 individual website orders per month.

(Ferron 2nd Supp. Aff. ¶8; Exhibit F, Attachment 8) (Emphasis added.)

On another page of its web site, OptIn provides its "Media Kit", which provides an overview of its services.² The background voice in this multi-media presentation states:

"OptInRealBig offers Internet marketing solutions for businesses looking to strengthen their brand, increase sales and compete as a leader inside their industry.

We provide a host of Internet marketing capabilities, such as email, banners, list hosting and co-registration names, among others. With these tools, OptInRealBig can custom tailor your internet marketing programs to meet the specific needs of the client and help boost your revenue.

Email marketing with OptInRealBig allows companies to reach millions nationwide. On a cost per thousand basis, email services through OptInRealBig are more cost-effective than traditional print, radio or television advertising. More importantly, the number of

² Please see the CD-ROM containing this multi-media presentation, which Plaintiff has filed separately and manually with the Clerk of the Court as Document No. 46 pursuant to the Court's Order of November 13, 2006.

people who open your email message is tracked by our system in real time.

With the face of telemarketing changing, businesses will need to adapt with new, cost-effective ways to communicate with consumers. Internet marketing is direct, and reaches consumers quickly and effectively, while allowing you to assess the benefits immediately.

OptInRealBig is a legitimate Internet marketing source. They follow all FTC regulations and their products are not considered spam. In fact, they participated in the FTC spam regulation forums in Washington, D.C.

Getting started with an email campaign is easy. Clients can simply provide the creative graphics and email message, which OptInRealBig then formats for distribution to our database. Once the client approves the final format, the email is deployed to millions.

We pride ourselves in providing excellent customer service and our entire team is very knowledgeable. Providing our clients new ways to market is our specialty.

Visit www.OptInRealBig.com today to learn more about our company and the services we provide.

Take your business to the next level.”

(Ferron 2nd Supp. Aff. ¶12; Exhibits I; Exhibit J, Attachment 10)(Emphasis added.)

So, to recap the *indisputable evidence* concerning OptIn’s advertising practices: OptIn solicits sponsors for its email advertising services by emphasizing that it can reach “millions” of “consumers” quickly, effectively and at a low cost, OptIn intentionally directs its email messages to “millions” of “consumers” each day, OptIn’s emails advertise “FREE” *consumer* goods, and OptIn’s emails are hyperlinked to its sponsors’ websites, which offer for purchase even more *consumer* goods and services. Thus, Defendant OptIn’s thousands of commercial solicitations were clearly directed at *consumers*.

Defendant argues that Plaintiff is not a consumer because he received many of OptIn's emails through an email address provided by Plaintiff's law firm. However, Defendant fails to cite any authority for the proposition that Plaintiff forfeited his consumer status merely because OptIn chose to convey some of its deceptive advertisements to him through an email address his employer created for his use. In fact, at least one Ohio court has held to the contrary in explicitly finding that the ownership of, or payment for, the computer equipment through which a solicitation is received has absolutely no bearing upon the definition of "consumer" under the CSPA. See *Goldberg v. Empire Mortgage, et al.*, Franklin County, Ohio Common Pleas Case No. 04-CVH03-3435 (copy attached as Attachment 11).

Accordingly, which email address Plaintiff received email solicitations from OptIn is immaterial to his status as a "consumer" under the CSPA. To hold otherwise would clearly disregard the liberal construction that must be applied in interpreting the CSPA, a remedial law designed to protect consumers. See R.C. §1.11 ("**Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice.**")(Emphasis added.); see also *Einhorn v. Ford Motor Co.*, 48 Ohio St.3d 27, 29 (1990); *Celebrezze v. Hughes*, 18 Ohio St.3d 71 (1985); *Charlie's Dodge v. Celebrezze*, 72 Ohio App. 3d 744, 747 (1991); *State, ex rel. Celebrezze, v. Hughes*, 58 Ohio St.3d 273, 275 (1991); and *State, ex rel. Celebrezze, v. Hughes*, 58 Ohio St.3d 273, 275 (1991).

Furthermore, Plaintiff's status as a consumer is all the more compelling in light of the fact that not a single one of OptIn's commercial email messages to Plaintiff was addressed to Plaintiff's law firm (Ferron & Associates), or any other business entity. (See Attachments 1 -3 to Plaintiff's Motion for Partial Summary Judgment, Document No. 30.) To the contrary, many of OptIn's email messages are addressed to Plaintiff by his first or full name and/or his personal

email address. *Id.* Indeed, OptIn has failed to offer any evidence whatsoever that it offers goods or services to businesses.

Significantly, “consumer transaction” under the CPSA applies to solicitations when the goods or services offered are for “**purposes that are primarily personal, family, or household.**” R.C. §1345.01(A). (Emphasis added) Thus, the nature of the goods or services advertised by OptIn must be examined to ascertain whether they are the types of goods or services that are used *primarily* for personal, family or household use. Importantly, the CSPA does **not** exclude goods or services that might have some business use.

Here, OptIn’s email solicitations clearly advertise goods and services that are for “primarily personal, family, or household” use, such as cosmetics, movies on DVD, credit cards, gas cards, music CDs, neckties, Disney children’s books, children’s reading programs, personalized letters from Santa, colon cleansing products, magazine subscriptions, wrinkle cream, vacation travel, acne medicine, mortgages, weight loss programs, and menopause potions. (Ferron 2nd Supp. Aff. ¶4) Therefore, Plaintiff has demonstrated, beyond any serious dispute, that OptIn’s email solicitations concern “consumer transactions” under the CSPA and are directed at a very large group of consumers, which includes Plaintiff.

B. The CSPA Does Not Require Plaintiff to Prove He Was Actually Deceived by OptIn.

Defendant OptIn argues that Plaintiff was not actually deceived by the thousands of false and deceptive unsolicited commercial email messages that it has sent to Plaintiff and, therefore, Plaintiff’s claims must fail. This specious argument reveals Defendant’s obvious lack of understanding of the CSPA and what is required of a Plaintiff to establish a *prima facie* case regarding a supplier’s violation of Ohio’s advertising regulations.

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.”

As the Ohio Supreme Court’s recently stated in *Marrone v. Philip Morris USA, Inc.* (2006), 110 Ohio St. 3d 5; 2006 Ohio 2869 at ¶1:

“Ohio’s Consumer Sales Practices Act *** prohibits unfair, deceptive, and unconscionable practices in consumer sales transactions. *R.C. 1345.02* and *1345.03*. **A consumer has a cause of action and is entitled to relief for any violation of the CSPA. R.C. 1345.09.**” (Emphasis added)

R.C. §1345.09 provides, in pertinent part:

“For a violation of Chapter 1345. of the Revised Code, a consumer has a cause of action and is entitled to relief as follows:

* * *

(B) Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02 or 1345.03 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code, the consumer may rescind the transaction or recover, but not in a class action, three times the amount of his actual damages or two hundred dollars, whichever is greater, or recover damages or other appropriate relief in a class action under Civil Rule 23, as amended.”

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).

There are several substantive rules, promulgated by the Ohio Attorney General pursuant to the Attorney General’s rule-making authority, which directly relate to Plaintiff’s claims against Defendant.³ 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

³ In response to Plaintiff’s Motion for Partial Summary Judgment, which asserts that Defendant violated each of the following regulations thousands of times in several specific ways, Defendant never even attempted to refute Plaintiff’s claims.

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.”

Nowhere has it been held that a consumer, asserting CSPA claims based on a supplier’s violation of one or more of the foregoing Ohio’s consumer advertising regulations, must allege or prove that he was *actually deceived* by the supplier’s advertisement. The cases cited by OptIn in support of its argument are inapposite because none of them pertains to a CSPA claim that was based on the supplier’s violation of one or more of Ohio’s consumer advertising regulations. Each of the cases cited by Defendant pertains to a consumer’s general claim of deception under R.C. §1345.02 and, therefore, the consumer was appropriately required to demonstrate that he was actually deceived. However, there is no issue as to the deceptiveness of OptIn’s advertisements in the case at bar; the regulations clearly specify what constitutes a deceptive advertisement, and OptIn apparently concedes that its advertisements violate the regulations in the ways Plaintiff has noted.

C. Plaintiff’s Claims Are Not Barred by His Alleged Failure to Mitigate His Damages.

Defendant OptIn argues that Plaintiff’s claims are barred because he failed to mitigate his damages, which he could have done by “unsubscribing” to its emails. However, a plaintiff’s alleged failure to mitigate his damages is not an element of his cause of action; it is an affirmative defense to be alleged and proved by the defendant. *Young v. Frank’s Nursery & Crafts, Inc.*, 58 Ohio St. 3d 242, 244, 569 N.E.2d 1034 (1991); *Oliver v. C.M.H.A., Section 8*,

2002 Ohio 5830 (8th Dist. 2002).

The concept of mitigation is improper in the case *sub judice* because it has never been applied to a defendant's series of separate, intentional and wrongful acts. This represents a seemingly new form of mitigation that stands for the proposition that a plaintiff must presume that a defendant will commit intentional unlawful acts over and over again, and that he must take steps before the next act is committed by Defendant. This is a novel, and heretofore, unrecognized approach to the application of the doctrine mitigation.

Deceptive and misleading advertisements are prohibited by R.C. 1345.02(A) and the regulations set forth within Ohio's Administrative Code, including O.A.C. §109:4-3-02, O.A.C. §109:4-3-04 and O.A.C. §109:4-3-06. Each advertisement is a separate transaction or occurrence. Each is also independently actionable and, like the serial commission of torts, not the proper subject of the defense of mitigation. In a similar case involving an advertiser's violation of Ohio and federal junk fax laws, the court recently rejected the advertisers' argument that the plaintiff failed to mitigate his damages by failing to notify the advertiser that he did not wish to receive any more of its faxes. *Jemiola v. XYZ Corp.*, 126 Ohio Misc. 2d 68, 2003 Ohio 7321, 802 N.E.2d 745 (Cuyahoga C.P. Dec. 11, 2003)(Plaintiff has no obligation to mitigate damages, since amount of damages is mandatory and specifically set by statute; also, mitigation of damages would undermine legislative purpose by effectively rewarding wrongdoer.).

Plaintiff has not "unsubscribed" to any of the unsolicited commercial email messages that OptIn has sent to him because it has been his understanding for several years that: (a) an email recipient may unwittingly encourage even more unsolicited commercial email messages by clicking on the "unsubscribe" button in an email message; (b) by "unsubscribing" to an email, an email recipient may unwittingly enable others to use his computer for malicious purposes,

including the transmittal of unsolicited commercial email messages or viruses to third persons; and (c) viruses may be downloaded to the email recipient's computer when the "unsubscribe" button in an unsolicited commercial email message is clicked. (Ferron 2nd Supp. Aff. ¶¶9-11; Exhibit G, Attachment 8; Exhibit H, Attachment 9) For these same reasons, many authors advise consumers against using the unsubscribe links in the spam they receive. (See, e.g., Attachments 8 and 9)

Significantly, Defendant has not adduced any evidence that, had Plaintiff unsubscribed to its email messages, Defendant would have ceased to send its unlawful email messages to Plaintiff. More importantly, Defendant has failed to submit any authority for its claim that Plaintiff was somehow legally required to unsubscribe to OptIn's emails. The reason for this omission is simple – no such authority exists. Therefore, Defendant's "mitigation" argument must fail.

D. Plaintiff's Claims Are Not Barred by His Alleged Failure to Mitigate His Damages.

Defendant's argument that Plaintiff's claims are barred due to his "unclean hands" is similarly unavailing. "Unclean hands" is an equitable defense to a plaintiff's claim for equitable relief; it must be alleged and proved by the defendant. In this case, however, it was never alleged by OptIn in its Answer and, therefore, this defense was waived. *Cleveland Newspaper Guild, Local 1 v. Plain Dealer Pub. Co.*, 839 F.2d 1147 (6th Cir. 1988).

However, even if Defendant had asserted this defense in its Answer, it would have no application to Plaintiff's CSPA claims. "The concept of unclean hands may be employed by a court to deny injunctive relief where the party applying for such relief is guilty of conduct involving fraud, deceit, unconscionability, or bad faith related to the matter at issue to the detriment of the other party." *Performance Unlimited v. Questar Publishers, Inc.*, 52 F.3d 1373,

1383 (6th Cir. 1995) (quoting *Novus Franchising, Inc. v. Taylor*, 795 F. Supp. 122, 126 (M.D., Pa 1992)). ““The doctrine of unclean hands requires that the alleged misconduct on the part of the plaintiff relate directly to the transaction about which the plaintiff has made a complaint.”“ *Id.* (quoting *Dollar Systems, Inc. v. Avcar Leasing Sys., Inc.*, 890 F.2d 165, 173 (9th Cir. 1989)). The unclean hands doctrine can be applied only to conduct relating to the matter in litigation. *Northeast Women’s Center, Inc. v. McMonagle*, 868 F.2d 1342, 1355 (3rd Cir.) cert. denied, 493 U.S. 901, 107 L. Ed. 2d 210, 110 S. Ct. 261 (1989). The doctrine is not to be used as a “loose cannon” depriving a plaintiff of an equitable remedy to which it is otherwise entitled merely because it is guilty of unrelated misconduct. *American Hosp. Supply Corp. v. Hospital Prods., Ltd.*, 780 F.2d 589, 601 (7th Cir. 1986).

In its Memorandum, Defendant OptIn utterly fails to demonstrate how Plaintiff’s decision not to unsubscribe to Defendant’s thousands of fraudulent email advertisements could possibly amount to “fraud, deceit, unconscionability, or bad faith” on Plaintiff’s part. Although Defendant tries to argue that Plaintiff *subscribed* to Defendant’s emails, this claim is unsupported and, more importantly untrue. (Ferron 2nd Supp. Aff. ¶3) Even if it were true, it would not constitute a valid defense. No applicable statute, rule or court decision supports the notion that a supplier’s deceptive advertising practices are beyond legal reproach if the consumer willingly sought out the supplier’s advertisements or stood by and watched as the supplier continued its deceitful campaign. It was and remains Defendant’s obligation to conform its business practices to the law, not Plaintiff’s.

It should be noted that even the clarion call that the instant lawsuit should have been for Defendant has not caused it to modify its misleading advertising methods. Plaintiff has continued to receive deceptive email advertisements from Defendant long after it became aware

of this lawsuit. Attached, as Exhibit A (Attachment 2), is but one example of an email message that Plaintiff has received from Defendant recently, which falsely advises Plaintiff that he will receive a “FREE” \$250 Circuit City gift card. This October 30, 2006 email was sent to Plaintiff by Laura Cruz, an employee of Defendant. Moreover, the domain from which the email was sent to Plaintiff – www.asp060.com – is registered to Defendant OptIn. (Ferron 2nd Supp. Aff. ¶5)

The web site to which OptIn’s recent email advertisement is hyperlinked requires the consumer to purchase multiple consumer items in order to receive the Circuit City gift card. (Ferron 2nd Supp. Aff. ¶6; Exhibits B, C and D, Attachments 3, 4 and 5) Of course, the details of Defendant’s misleading email offer are not set forth clearly and conspicuously in the email itself, in close proximity to the offer and in a typeface at least half the size of the word “FREE.” Thus, despite the fact that Defendant has been specifically on notice about its unlawful advertising practices for several months, it continues to engage in the same form of deceptive advertising.

E. Defendant Cannot Avail Itself of the “Publisher” Defense Set Forth in R.C. 1345.12(B).

In its Memorandum, Defendant OptIn tries to argue that it is *exempt* from compliance with the CSPA because it is the mere “publisher” of the emails at issue. First, it must be noted that Defendant did not assert this defense in its Answer and, therefore, it waived this defense.

Second, Plaintiff notes that Defendant has failed to adduce proper evidence supporting its argument. Although Defendant attached an affidavit to its Memorandum, that affidavit was not signed by the affiant and does not set forth sufficient facts to establish that the affiant is competent to testify as to the conclusory allegations set forth in the affidavit pertaining to Defendant’s “publisher” defense. Accordingly, Plaintiff has recently moved for the Court to strike the affidavit. (Document No. 45)

Moreover, even if the Court were to consider the affidavit attached to Defendant's Memorandum as proper Rule 56 evidence, it is clear that Defendant's significant involvement in emails at issue is much greater than that of a mere "publisher" and, therefore, the defense is unavailable to OptIn. The "publisher" defense is set forth in R.C. §1345.12, which provides, in pertinent part:

"§ 1345.12. Exceptions to application of chapter.

Sections 1345.01 to 1345.13 of the Revised Code do not apply to:

* * *

(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;

* * *"

Thus, two elements must be met for this defense to apply: (1) the publisher must have disseminated the advertisement *on behalf of others*; and (2) the publisher must have disseminated the advertisements *without knowledge that it violated the CSPA*. Defendant clearly fails to establish either of these elements of the defense.

Defendant has not identified a single "other" on whose behalf it sent to Plaintiff a single one of the 2,755 commercial email messages at issue. Also, Defendant has known about the unlawfulness of its emails message since it was served with the Complaint in this matter. Yet it is continuing to transmit the same kinds of deceptive advertisements by email. Thus, Defendant clearly does not meet either of the two criteria for establishing the publisher defense.

Moreover it is clear that Defendant OptIn is much more than the mere publisher of its email messages. It is far from the nature of a true publisher that, like The Columbus Dispatch, simply receives inserts its customers' camera-ready advertisements into the Sunday edition of the newspaper it distributes in central Ohio. OptIn is much more involved in the email advertisements at issue.

As explained on the pages of OptIn's own web site, Defendant OptIn:

- **Possesses over 8 million online consumers** in its database;
- **Has lists available with a reach from 500,000 to up to 8 million online consumers**;
- Produces over 20 million page views per month on our clients' websites; and,
- Delivers an average of 350,000 individual website orders per month.

(Ferron 2nd Supp. Aff. ¶8; Exhibit F, Attachment 8)(Emphasis added.)

“OptInRealBig offers Internet marketing solutions for businesses looking to strengthen their brand, increase sales and compete as a leader inside their industry.

We provide a host of Internet marketing capabilities, such as email, banners, list hosting and co-registration names, among others. With these tools, **OptInRealBig can custom tailor your internet marketing programs to meet the specific needs of the client and help boost your revenue.**

Email marketing with OptInRealBig allows companies to reach millions nationwide. On a cost per thousand basis, email services through OptInRealBig are more cost-effective than traditional print, radio or television advertising. More importantly, **the number of people who open your email message is tracked by our system in real time.**

With the face of telemarketing changing, businesses will need to adapt with new, cost-effective ways to communicate with consumers. Internet marketing is direct, and reaches consumers

quickly and effectively, while allowing you to assess the benefits immediately.

OptInRealBig is a legitimate Internet marketing source. They follow all FTC regulations and their products are not considered spam. In fact, they participated in the FTC spam regulation forums in Washington, D.C.

Getting started with an email campaign is easy. **Clients can simply provide the creative graphics and email message, which OptInRealBig then formats for distribution to our database. Once the client approves the final format, the email is deployed to millions.**

We pride ourselves in providing excellent customer service and our entire team is very knowledgeable. Providing our clients new ways to market is our specialty.

Visit www.OptInRealBig.com today to learn more about our company and the services we provide.

Take your business to the next level.”

(Ferron 2nd Supp. Aff. ¶12; Exhibits I; Exhibit J, Attachment 10)(Emphasis added.)

Thus, OptIn’s involvement is much greater than that of a mere publisher. By providing the consumers’ email addresses, custom tailoring marketing programs, formatting all email advertisements, deploying them to millions of consumers on its own lists, tracking the number of consumers who receive and open the emails, and delivering more than 350,000 customer orders per month, OptIn more than meets the definition of “supplier” under the CSPA, which is defined as:

“(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.

Not only is OptIn “engaged in the business of effecting or soliciting consumer transactions”, according to its own web site it is solely responsible for delivering an average of 350,000 individual consumer orders per month.

IV. CONCLUSION

Based upon the foregoing undisputed facts and legal arguments, and those set forth in Plaintiff’s Motion for Partial Summary Judgment, Plaintiff respectfully submits that he is entitled to summary judgment as to his First Cause of Action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 15, 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