

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

PLAINTIFF JOHN W. FERRON, by and through his undersigned counsel, hereby submits his Reply Memorandum in Support of Motion to Strike 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).

I. INTRODUCTION AND RELEVANT PROCEDURAL HISTORY

This case arises from Plaintiff’s claims against Defendants VC E-Commerce, Inc. and OptinRealBig.com, LLC, and an 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 (“Defendant” or “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 opposing 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 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. For these reasons, Plaintiff filed his Motion to Strike the Richter Affidavit on November 13, 2006. (Document No. 45)

On December 7, 2006, Defendant filed its Memorandum in Opposition to Plaintiff’s Motion to Strike (“Defendant’s Memorandum”). (Document No. 50-1) Defendant’s Memorandum implausibly asserts that: (1) Fed. R. Civ. P. 56 does not require that an Affidavit be signed by the affiant; and (2) Mr. Richter, as General Counsel for OptIn, has personal knowledge about the content of the approximately 2,700 email messages sent to Plaintiff by or on behalf of OptIn. (See generally Defendant’s Memorandum.) However, Defendant is wrong on both points.

II. LAW AND ARGUMENT

A. Fed. R. Civ. P. 56 Requires That An Affidavit, Submitted To Oppose A Summary Judgment Motion, Be Signed By The Affiant.

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. *Wright v. Asset Acceptance Corp.*, Case No. C-3-97-375, unreported, 1999 U.S. Dist. LEXIS 20675 at *18 (S.D. Ohio Jan. 3, 2000)(Attachment 1 to Plaintiff’s Motion to Strike, Document No. 45).

In Defendant's Memorandum, Defendant argues that Fed. R. Civ. P. 56 does not require an affiant to sign his affidavit. (Defendant's Memorandum, p. 2) Importantly, however, Defendant neglects to cite any legal authority to support its claim.

To the contrary, the federal courts have consistently held that an affidavit submitted to oppose a summary judgment motion must be in a proper, admissible form. Clearly, an affidavit that is not signed by the affiant does not qualify as proper, admissible evidence under Fed. R. Civ. P. 56. As the United States Court of Appeals recently explained, in *Nassif Ins. Agency, Inc. v. Civic Prop. & Cas. Co.*, Case No. 03-2618, unreported, 2005 U.S. App. LEXIS 5085 at *8-*9 (6th Cir. Mar. 30, 2005)(copy attached at Attachment 1):

“Unsigned affidavits do not comply with Fed. R. Civ. P. 56(e). See *DeBruyne v. Equitable Life Assurance Soc’y*, 920 F.2d 457, 471 (7th Cir. 199); *Mason v. Clark*, 920 F.2d 493, 495 (8th Cir. 199); *Wright v. Asset Acceptance Corp.*, 1999 U.S. Dist. LEXIS 20675, No. C-3-97-375, 2000 WL 33216031, at *5 (S.D. Ohio 2000) (“it is axiomatic that an ‘affidavit’ which is unsigned and not notarized cannot qualify as proper Rule 56 evidence.”).” (Emphasis added.)

Similarly, this Court recently explained that, because an affiant's unsigned affidavit is not “sworn,” its does not qualify as proper evidence under Fed. R. Civ. P. 56. As the Honorable James L. Graham explained:

“An unsworn or unsigned affidavit cannot be used to oppose a motion for summary judgment. *Nassif Ins. Agency, Inc. v. Civic Prop. & Cas. Co.*, 2005 U.S. App. LEXIS 5085, NO. 03-2618, 2005 WL 712578 at *3 (6th Cir. March 30, 2005); *Pollock v. Pollock*, 154 F.3d 601, 612 n. 20 (6th Cir. 1998). Although an unsworn affidavit may qualify as an unsworn declaration under 28 U.S.C. §1746, such affidavits must be signed, in writing, and dated, and must verify that its content is “true under penalty of perjury.” 28 U.S.C. §1746; *Pollock*, 154 F.3d at 612 n. 20. **Under the local rules of this court, affidavits which are not notarized or which contain an electronic signature instead of the actual signature of the affiant are not properly signed, and therefore are not proper evidence under Rule 56.** See *Watson v. City of*

Mason, 2005 U.S. Dist. LEXIS 27116, No. C1-04-283, 2005 WL 3018690 at *9-10 (S.D. Ohio Nov. 9, 2005); S.D. Ohio Local Rule 1.1(e); Electronic Filing Policies and Procedures Manual, Rule C, Signatures.” (Emphasis added.)

Weems v. City of Columbus, Case No. 2:05-cv-87, unreported, 2006 U.S. Dist. LEXIS 65204 at *8 (S.D. Ohio Sept. 13, 2006)(copy attached at Attachment 2). See also *Roy v. USDA*, 115 Fed. Appx. 198 (5th Cir. 2004)(“**Because an unsigned affidavit is not competent summary evidence pursuant to Rule 56(e) of the Federal Rules of Civil Procedure, the Court will not consider it for purposes of de novo review.** Fed. R. Civ. P. 56(e); *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 192 (5th Cir. 1991).”)(Emphasis added.); *Sellers v. Henman*, 41 F.3d 1100, 1101 (7th Cir. 1994)(“**One of the defendants’ key affidavits was unsigned and hence unsworn, and therefore did not comply with Rule 56(e);** cf. *DeBruyne v. Equitable Life Assurance Society*, 920 F.2d 457, 471 (7th Cir. 1990), so we do not understand the district court’s refusal to strike it.”)(Emphasis added.)

Here, the Richter Affidavit was not signed by the affiant, Steve Richter. Rather, it apparently was signed by someone named “Judy Descel.” (Document No. 41, Attachment 1) Therefore, as the foregoing federal case law makes clear, the Richter Affidavit is unsworn, and improper evidence under Fed. R. Civ. P. 56. Thus, the Richter Affidavit must be stricken and disregarded by the Court in its entirety.

B. The Richter Affidavit Fails to Allege Sufficient Facts to Establish that Mr. Richter 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).

As noted above, Plaintiff respectfully submits that the Richter Affidavit must be entirely stricken and disregarded by the Court because it is unsworn. However, even if the Court were to accept and consider the substance of the Richter Affidavit, Paragraph 7 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) By this averment, the affiant attempts to speak both to the nature of information contained within the more than 2,700 emails that Defendant OptIn sent to Plaintiff and to OptIn’s intent in sending each of them. However, the Richter Affidavit utterly fails to establish that Mr. Richter possesses personal knowledge of these facts.

Defendant’s Memorandum contends that the Richter Affidavit sufficiently avers facts demonstrating Mr. Richter’s *personal knowledge* of OptIn’s intent in sending the emails because Mr. Richter is the President and General Counsel for OptIn. (Defendant’s Memorandum, p. 4) This contention is absurd.

The Richter Affidavit does not contain any facts to establish that Mr. Richter has personal knowledge of OptIn’s intent in transmitting over 2,700 email messages to Plaintiff. For instance, the Richter Affidavit does not state that Mr. Richter sends commercial email messages on behalf of OptIn. Nor does the Richter Affidavit allege that Mr. Richter directs others to send commercial email messages on behalf of OptIn. Therefore, the Richter Affidavit utterly fails to establish Mr.

Richter's personal knowledge or competence to testify concerning the matters to which he attested in Paragraph 7. (See generally the Richter Affidavit, Document No. 41, Attachment 1.) As such, the Richter Affidavit, even if it had been properly executed, fails to adduce admissible evidence in this regard.

The Richter Affidavit completely 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 sent to Plaintiff, the contents of which clearly violate Ohio Revised Code Chapter 1345 and the consumer 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 in Plaintiff's Motion to Strike and this Reply, Plaintiff respectfully submits that the Court should strike and disregard the Richter Affidavit.

Respectfully submitted,

s/ Lisa A. Wafer

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CERTIFICATE OF SERVICE

The undersigned certifies that on December 20, 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