

**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	:	Magistrate Judge Abel
SOLUTIONS, INC., <i>et al.</i>	:	
	:	
Defendants.	:	

**SECOND AMENDED COMPLAINT FOR MONEY DAMAGES,  
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

**JURY DEMAND ENDORSED HEREON**

NOW COMES PLAINTIFF JOHN W. FERRON, by and through his undersigned counsel, and makes the following allegations and claims against Defendants.

**The Parties**

1. PLAINTIFF JOHN W. FERRON (“Plaintiff”) is a person who resides at the address indicated in the above caption, which is located in Delaware County, Ohio. At all times relevant hereto, Plaintiff has been a “consumer” as defined in Ohio Revised Code Section 1345.01(D).

2. DEFENDANT VC E-COMMERCE SOLUTIONS, INC. (“Defendant VC”), is a California corporation, reasonably believed to have its principal place of business located at 15360 Ventura Blvd., Suite 1750, Los Angeles, California 91403. At all times relevant hereto, Defendant has been a “supplier” as defined in Ohio Revised Code Section 1345.01(C).

3. DEFENDANT OPTINREALBIG.COM, LLC. (“Defendant Opt”), is a Nevada corporation, reasonably believed to have its principal place of business located at 1333 W. 120<sup>th</sup>

Avenue, Suite 101, Westminster, Colorado 80234. At all times relevant hereto, Defendant Opt has been a “supplier” as defined in Ohio Revised Code Section 1345.01(C).

4. Upon information and belief, DEFENDANT DOE NOS. 1 through 20 are persons or entities, whose identities and addresses are currently unknown but will be determined through the discovery process, and who acted in concert with Defendant VC and/or Defendant Opt, as described below, or on its behalf. Upon information and belief, and at all times relevant hereto, each Doe Defendant has been a “supplier” as defined in Ohio Revised Code Section 1345.01(C). Until such time as each individual Doe Defendant is identified, and named individually, all Doe Defendants shall be referenced herein in the collective.

#### **Jurisdiction and Venue**

5. This Court has original diversity jurisdiction over the parties and the claims asserted herein pursuant to 28 U.S.C. §1332 because there is complete diversity between Plaintiff and all parties Defendant, and the amount in controversy well exceeds \$75,000.00 in the aggregate.

6. Venue is proper because all or a substantial part of the events giving rise to the claims herein occurred within the Southern District of Ohio, Eastern Division, including Defendants’ knowing transmittal of hundreds of email messages to Plaintiff, who resides within the Southern District of Ohio, Eastern Division.

#### **The Claims**

7. Prior to the date of the events giving rise to Plaintiff’s claims, the following court determinations were available for public inspection and on file in the office of the Ohio Attorney General in its Public Inspection File (hereafter “PIF”):

- (a) PIF #1288, *State, ex rel. Fisher v. Cheeseman*, October 25, 1991 (supplier's failure to register fictitious name with Ohio Secretary of State is an unfair and deceptive act or practice);
- (b) PIF #499, *State, ex rel. Brown v. Gem Collectors International, Ltd.*, June 9, 1983 (out-of-state corporation's failure to register to with the Ohio Secretary of State to do business in Ohio is an unfair or deceptive act or practice); and
- (c) PIF #1485, *Gravson v. Cadillac Builders*, September 14, 1995 (corporate officer may be held personally liable for his or her own actions in violation of the Consumer Sales Practices Act if the officer took part in the commission of the act, specifically directed the particular act to be done, or participated or cooperated therein).

8. Prior to the date of the events giving rise to Plaintiff's claims, Ohio Administrative Code §109:4-3-04 and §109:4-3-06 were adopted pursuant to R.C. §1345.05(B)(2).

9. This Complaint and all of the claims asserted in it are subject to: (a) all court determinations that were on file in the Office of the Ohio Attorney General in its Public Inspection File as of the date of the acts of Defendants complained of herein, including the court determinations referenced above in Paragraph 7; and (b) all rules adopted under R.C. Section 1345.05(B)(2) prior to the date of the acts or practices of Defendants complained of herein, including Ohio Administrative Code §109:4-3-04 and §109:4-3-06.

10. Plaintiff has Internet email accounts that are maintained by and through Internet service providers located within the Southern District of Ohio, Eastern Division.

11. Upon information and belief, between January 1, 2005 and the present date, Defendant VC and/or Defendant Opt, and one or more of the Doe Defendants, acting in concert, transmitted hundreds of email messages that passed through the servers of his Internet service providers and were forwarded to Plaintiff's Internet email accounts, as Defendants intended. Each of these email messages is a "consumer transaction" as defined in Ohio Revised Code Section 1345.01(A).

12. Upon information and belief, in regard to each of the email messages described in the foregoing paragraph, Defendant VC and/or Defendant Opt, and one or more Doe Defendants, acting in concert, knowingly committed one or more unfair and/or deceptive acts or practices in violation of Ohio Revised Code Section 1345.02 by:

- (a) using the word "free" in a consumer transaction and failing to set forth clearly and conspicuously at the outset of the offer all of the terms, conditions and obligations upon which receipt and retention of the "free" goods or services are contingent;
- (b) using the word "free" in a consumer transaction and failing to print all terms, conditions, and obligations of the offer in a type size half as large as the word "free;"
- (c) using the word "free" in a consumer transaction and failing to print all terms, conditions, and obligations of the offer in close proximity with the offer of "free" goods or services;
- (d) notifying a consumer that he has won a prize or will receive anything of value, where the receipt of the prize or thing of value is conditioned upon the consumer's observing a sales promotional effort or entering into a consumer transaction, and failing to clearly and conspicuously disclose, at the time of

notification of the prize, that an attempt will be made to induce the consumer to undertake a monetary obligation irrespective of whether that obligation constitutes a consumer transaction;

- (e) notifying a consumer that he has been selected, or is eligible, to win a prize or receive anything of value, where the receipt of the prize or thing of value is conditioned upon the consumer's observing a sales promotional effort or entering into a consumer transaction, and failing to clearly and conspicuously disclose, at the time of notification of the prize, that an attempt will be made to induce the consumer to undertake a monetary obligation irrespective of whether that obligation constitutes a consumer transaction;
- (f) notifying a consumer that he has won a prize or will receive anything of value, where such is not the case;
- (g) notifying a consumer that he has been selected, or is eligible, to win a prize or receive anything of value and failing to clearly and conspicuously disclose to the consumer any and all conditions necessary to win the prize or receive anything of value;
- (h) notifying a consumer that he has won a prize or is eligible to receive something of value and failing to disclose, in the same size and style of print found in the notification, that an attempt will be made to induce the consumer to undertake a monetary obligation, or that the consumer will be required to observe a sales presentation;
- (i) notifying a consumer that he has won a prize or is eligible to receive something of value and failing to disclose, in the same size and style of print found in the

solicitation, the eligibility conditions that must be met in order to receive the prize;

- (j) notifying a consumer that he has won a prize or is eligible to receive something of value and failing to disclose the price reasonable consumers would pay for the prize if it were sold in the local market;
- (k) notifying the consumer that he has won a prize or is eligible to receive something of value and failing to disclose the name, address and telephone number of the business that is actually conducting and/or sponsoring the contest or giveaway program;
- (l) notifying the consumer that he has won a prize or is eligible to receive something of value and failing to disclose the odds or chances of winning the listed prize;
- (m) notifying the consumer that he has won a prize or is eligible to receive something of value and failing to clearly and conspicuously state all material exclusions, reservations, limitations, modifications, or conditions to the consumer's receipt of the prize;
- (n) notifying the consumer that he has won a prize or is eligible to receive something of value where the supplier does not intend to deliver the listed prize;
- (o) failing to register with the Ohio Secretary of State prior to doing business in Ohio; and
- (p) failing to register a fictitious business name with the Ohio Secretary of State prior to doing business in Ohio under such fictitious name.

**FIRST CAUSE OF ACTION**

**(KNOWING VIOLATIONS OF OHIO REVISED CODE SECTION 1345.02)**

13. Plaintiff hereby incorporates, as if fully rewritten herein, all of the foregoing paragraphs.

14. Each of the email messages that Defendant VC and/or Defendant Opt, and one or more DOE Defendants, transmitted to Plaintiff constitutes one or more unfair and/or deceptive sales acts and/or practices in violation of Ohio Revised Code Section 1345.02(A).

15. Defendants' violations were "knowingly" committed, as Defendants knew they were engaging in the acts and/or practices described in the preceding paragraphs.

16. The acts and practices of Defendant VC, Defendant Opt and one or more DOE Defendants described in the preceding paragraphs are acts and practices that have previously been declared to be deceptive and/or unconscionable acts or practices in violation of the CSPA by Ohio courts in judgments that were file in Public Information File of the Office of the Ohio Attorney General prior to the acts and practices of Defendant VC, Defendant Opt and one or more DOE Defendants complained of herein.

17. Because Defendant VC, Defendant Opt and one or more DOE Defendants knowingly violated Ohio Revised Code Section §1345.02(A), Plaintiff is entitled to: (a) an award of statutory damages against each Defendant in the amount of three times Plaintiff's actual damages or \$200, whichever is greater, for each violation of R.C. Section 1345.02(A); and (b) an award of Plaintiff's reasonable attorney's fees and costs against Defendant pursuant to R.C. Section 1345.09(F).

**SECOND CAUSE OF ACTION**

**(VIOLATIONS OF THE OHIO ELECTRONIC  
MAIL ADVERTISEMENTS ACT, R.C. §2307.64)**

18. Plaintiff hereby incorporates, as if fully rewritten herein, all of the foregoing paragraphs.

19. Many of the email messages that Defendant VC, Defendant Opt and/or one or more of the DOE Defendants have sent or caused to be sent to Plaintiff fail to include in the body of the message a clear and conspicuous recitation of the sender's truthful name and complete residence or business address and the electronic mail address of the person transmitting the electronic mail advertisement. In fact, many of Defendants' email messages display a false or fictitious name of the sender. Each such email message transmitted to Plaintiff constitutes one or more violations by Defendant VC, Defendant Opt and/or one or more of the DOE Defendants of Ohio Revised Code §2307.64(B)(1).

20. Because Defendant VC, Defendant Opt and/or one or more DOE Defendants violated Ohio Revised Code §2307.64(B)(1), Plaintiff is entitled to: (a) an award of statutory damages against Defendant VC, Defendant Opt and/or one or more DOE Defendants in the amount of \$100 for each violation of R.C. §2307.64(B)(1), pursuant to R.C. §2307.64(E)(1) and; (b) an award of Plaintiff's reasonable attorney's fees, court costs and other costs of bringing this action, pursuant to R.C. §2307.64(E)(2).

**THIRD CAUSE OF ACTION**  
**(DECLARATORY JUDGMENT)**

21. Plaintiff hereby incorporates, as if fully rewritten herein, all of the foregoing paragraphs.

22. Plaintiff respectfully submits that, under the circumstances presented in this case, he is entitled to the Court's entry of declaratory judgment in his favor, including this Court's declaration that it is an unfair and deceptive act and practice, and a violation of R.C. Section 1345.02(A), for a "supplier" to transmit an email message to a "consumer" in Ohio that constitutes a "consumer transaction" and:

- (a) uses the word “free” and fails to set forth clearly and conspicuously at the outset of the offer all of the terms, conditions and obligations upon which receipt and retention of the “free” goods or services are contingent;
- (b) uses the word “free” and fails to print all terms, conditions, and obligations of the offer in a type size half as large as the word “free;”
- (c) uses the word “free” and fails to print all terms, conditions, and obligations of the offer in close proximity with the offer of “free” goods or services;
- (d) notifies a consumer that he has won a prize or will receive anything of value, where the receipt of the prize or thing of value is conditioned upon the consumer’s observing a sales promotional effort or entering into a consumer transaction, and fails to clearly and conspicuously disclose, at the time of notification of the prize, that an attempt will be made to induce the consumer to undertake a monetary obligation irrespective of whether that obligation constitutes a consumer transaction;
- (e) notifies a consumer that he has been selected, or is eligible, to win a prize or receive anything of value, where the receipt of the prize or thing of value is conditioned upon the consumer’s observing a sales promotional effort or entering into a consumer transaction, and fails to clearly and conspicuously disclose, at the time of notification of the prize, that an attempt will be made to induce the consumer to undertake a monetary obligation irrespective of whether that obligation constitutes a consumer transaction;
- (f) notifies a consumer that he has won a prize or will receive anything of value, where such is not the case;

- (g) notifies a consumer that he has been selected, or is eligible, to win a prize or receive anything of value and fails to clearly and conspicuously disclose to the consumer any and all conditions necessary to win the prize or receive anything of value;
- (h) notifies a consumer that he has won a prize or is eligible to receive something of value and fails to disclose, in the same size and style of print found in the notification, that an attempt will be made to induce the consumer to undertake a monetary obligation, or that the consumer will be required to observe a sales presentation;
- (i) notifies a consumer that he has won a prize or is eligible to receive something of value and fails to disclose, in the same size and style of print found in the solicitation, the eligibility conditions that must be met in order to receive the prize;
- (j) notifies a consumer that he has won a prize or is eligible to receive something of value and fails to disclose the price reasonable consumers would pay for the prize if it were sold in the local market;
- (k) notifies the consumer that he has won a prize or is eligible to receive something of value and fails to disclose the name, address and telephone number of the business that is actually conducting and/or sponsoring the contest or giveaway program;
- (l) notifies the consumer that he has won a prize or is eligible to receive something of value and fails to disclose the odds or chances of winning the listed prize;

- (m) notifies the consumer that he has won a prize or is eligible to receive something of value and fails to clearly and conspicuously state all material exclusions, reservations, limitations, modifications, or conditions to the consumer's receipt of the prize;
- (q) notifies the consumer that he has won a prize or is eligible to receive something of value where the supplier does not intend to deliver the listed prize;
- (r) fails to register with the Ohio Secretary of State prior to doing business in Ohio;
- (s) fails to register a fictitious business name with the Ohio Secretary of State prior to doing business in Ohio under such fictitious name; and
- (t) fails to comply with R.C. §2307.64(B)(1) by failing to include in the body of the email message a clear and conspicuous recitation of the sender's name and complete residence or business address and the electronic mail address of the person transmitting the electronic mail advertisement.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff hereby prays for the following relief against Defendants as to his Causes of Action:

A. An award of statutory damages against Defendants in the amount of three times Plaintiff's actual damages or \$200, whichever is greater, for each of Defendants' violations of Ohio Revised Code Section 1345.02(A);

B. An award of statutory damages against Defendants in the amount of \$100 for each of Defendants' violations of Ohio Revised Code Section 2307.64(B)(1) pursuant to R.C. 2307(E)(1);

C. Declaratory judgment against Defendants in Plaintiff's favor, as requested hereinabove;

D. A permanent injunction prohibiting Defendants from transmitting any more email messages to any consumer in Ohio in violation of Ohio Revised Code Section 1345.02(A);

E. Pre- and post-judgment interest on all damages awarded;

F. An award of Plaintiff's reasonable attorneys' fees and costs, as allowed pursuant to Ohio Revised Code Section 1345.09(F); and

G. An award of Plaintiff's reasonable attorneys' fees, court costs and other costs of bringing this action, as allowed pursuant to Ohio Revised Code Section 2307.64(E)(2); and

H. All such other relief, legal and equitable, as permitted by law.

Respectfully submitted,

/s/ Lisa A. Wafer

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**JURY DEMAND**

Plaintiff demands a trial by jury on all claims so triable.

/s/ Lisa A. Wafer

Lisa A. Wafer, Trial Attorney

Oh. Sup. Ct. Reg. No. 0074034

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing pleading was served this \_\_\_ day of \_\_\_\_\_, 2007 upon the below-named counsel for Defendants, via regular first class U.S. mail:

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/s/ Lisa A. Wafer  
\_\_\_\_\_  
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