

**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 GREGORY L. FROST,
	⋮	
vs.	:	MAGISTRATE MARK R. ABEL
	⋮	
MEDIA BREAKAWAY, LLC, ET AL.,	:	JURY TRIAL DEMANDED
	⋮	
Defendants.	:	

**MEDIA BREAKAWAY, LLC’S ANSWER TO
COUNTS ONE AND THREE OF PLAINTIFF’S SECOND AMENDED COMPLAINT**

Defendant Media Breakaway, LLC (“Media Breakaway”), submits this Answer in response to Counts One and Three of Plaintiff John W. Ferron’s Second Amended Complaint for Money Damages, Declaratory Judgment, and Injunctive Relief.

The Parties

1. Media Breakaway lacks sufficient knowledge or information to form a belief as to the first sentence of this paragraph. Media Breakaway denies the allegation in the second sentence of this paragraph.

2. Media Breakaway admits that it was formerly known as OptInRealBig.com LLC, that it is formed under the laws of Nevada, and that its principal place of business is located at 1490 W. 121st Avenue, Suite 201, Westminster, Colorado, 80234. Media Breakaway denies the remaining allegation in this paragraph.

3. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a

response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

4. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

5. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

6. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

7. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

8. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

9. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

10. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

11. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

12. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

13. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

14. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a

response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

15. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

16. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

17. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

18. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

19. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

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23. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

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response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

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31. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

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33. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

34. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

35. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

36. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a

response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

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49. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

50. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

51. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

52. No response to this paragraph from Media Breakaway is necessary because this paragraph alleges facts about other defendants, not Media Breakaway. To the extent that a response is necessary, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

Jurisdiction and Venue

53. Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations of jurisdiction in this paragraph and therefore denies same.

54. Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

The Claims

55. Media Breakaway states that all court determinations that Plaintiff purports to cite and characterize in this paragraph speak for themselves and Media Breakaway denies the allegations in paragraph 55(a)-(c).

56. Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

57. Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

58. Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

59. Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in the first sentence of this paragraph and therefore denies same. Media Breakaway denies the allegation that each email message was a “consumer transaction” under the Ohio Revised Code.

60. Media Breakaway denies the allegations in this paragraph, including the allegations in each of sub-paragraphs (a) through (p).

COUNT ONE

(KNOWING VIOLATIONS OF OHIO REVISED CODE SECTION 1345.02)

61. Media Breakaway hereby incorporates by reference, as if fully re-stated herein, its responses to the allegations contained in paragraphs 1 through 60.

62. Media Breakaway denies the allegations in this paragraph as they pertain to Media Breakaway. Inasmuch as the allegations in this paragraph pertain to other defendants in this matter, no response from Media Breakaway is necessary; to the extent such a response is required, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

63. Media Breakaway denies the allegations in this paragraph as they pertain to Media Breakaway. Inasmuch as the allegations in this paragraph pertain to other defendants in this matter, no response from Media Breakaway is necessary; to the extent such a response is required, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

64. Media Breakaway denies the allegations in this paragraph as they pertain to Media Breakaway. Inasmuch as the allegations in this paragraph pertain to other defendants in this matter, no response from Media Breakaway is necessary; to the extent such a response is required, Media Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

65. Media Breakaway denies the allegations in this paragraph as they pertain to Media Breakaway and denies that Plaintiff is entitled to any relief from Media Breakaway. Inasmuch as the allegations in this paragraph pertain to other defendants in this matter, no response from Media Breakaway is necessary; to the extent such a response is required, Media

Breakaway lacks sufficient knowledge or information to form a belief as to the allegations in this paragraph and therefore denies same.

COUNT TWO

**(VIOLATIONS OF THE OHIO ELECTRONIC MAIL ADVERTISEMENTS ACT, OHIO
REVISED CODE SECTION 2307.64)**

66-68. This Count is the subject of Media Breakaway's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b) and responses to the allegations of this Count are therefore not required.

COUNT THREE

(DECLARATORY JUDGMENT)

69. Media Breakaway hereby incorporates by reference, as if fully re-stated herein, its foregoing responses to the allegations of the Second Amended Complaint.

70. Media Breakaway denies the allegations in this paragraph, including the allegations in each of the sub-paragraphs of paragraph 70 and denies that Plaintiff is entitled to declaratory judgment on any of the grounds asserted.

AFFIRMATIVE DEFENSES

Media Breakaway hereby asserts the following affirmative defenses to Plaintiff's claims:

1. The Second Amended Complaint fails to state a claim on which relief can be granted;
2. Plaintiff lacks standing to bring his claims;
3. Plaintiff's claims are barred, in whole or in part, by the doctrines of laches, waiver and estoppel;
4. Plaintiff is not a "consumer" and the e-mails that are the subject of his claims are not "consumer transactions," as those terms are defined in Ohio Revised Code § 1345.01(A);

5. Media Breakaway is a publisher without knowledge that is exempt from liability under the Ohio Consumer Sales Practices Act, as set forth in Ohio Revised Code § 1345.12;

6. Count Two is preempted by federal statute, in particular the Controlling the Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM”);

7. To the extent Count Two is not preempted, Plaintiff has failed to plead his claims thereunder with sufficient particularity as required by Fed. R. Civ. P. 9(b).

8. Plaintiff’s claims under Ohio Revised Code § 2307.64 are barred, in whole or in part, because one or more statutory exceptions to liability may apply, as set forth in Ohio Revised Code § 2307.64(B)(3);

9. Plaintiff’s claims are barred, in whole or in part, because Plaintiff failed to mitigate his damages and invited and/or accepted the e-mails about which he now complains;

10. The damages about which Plaintiff complains were caused, in whole or in part, by the conduct of Plaintiff himself, his agents, or other third parties over which Media Breakaway had no control and for which it has no responsibility or liability;

11. Plaintiff’s claims against Media Breakaway for failure to register with the Ohio Secretary of State and failure to register fictitious business names with the Ohio Secretary of State are barred, in whole or in part, because: (1) any such alleged failure to register is not actionable under the Ohio Consumer Sales Practices Act; and/or (2) there is no private right of action for such violations of the Ohio Revised Code.

12. Plaintiff’s claims against Media Breakaway for failure to register with the Ohio Secretary of State prior to doing business in Ohio are barred, in whole in part, because Media Breakaway is engaged only in interstate commerce and therefore exempt from registration pursuant to Ohio Revised Code § 1703.02; and

13. Media Breakaway reserves the right to modify or add other affirmative-defenses, cross-claims, and third-party claims when and if such defenses and/or claims are warranted.

PRAYER FOR RELIEF

WHEREFORE, Media Breakaway requests the following relief:

1. That Plaintiff's claims in the Second Amended Complaint against Media Breakaway be dismissed with prejudice and that Plaintiff receive no recovery from Media Breakaway;
2. That Plaintiff be ordered to pay Media Breakaway's reasonable costs and attorneys' fees to the extent provided by law; and
3. That the Court order such other relief in favor of Media Breakaway as it deems proper and just.

DEMAND FOR JURY TRIAL

Media Breakaway, LLC, hereby requests that a jury hear all of the issues so triable in this case.

Respectfully submitted,

/s/ Ky E. Kirby

Ky E. Kirby*

Jonathan S. Frankel*

David J. Prieto*

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Of Counsel for

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* Admitted Pro Hac Vice

Stephen D. Jones (0018066)

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Columbus, OH 43215

Telephone: 614.463.9770

Facsimile: 614.463.9792

E-mail: sjones@ralaw.com

Trial Attorney for

Media Breakaway, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served upon all attorneys of record in this matter via the Court's electronic filing system this 7th day of January, 2008.

/s/ Ky E. Kirby

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Media Breakaway, LLC