

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**JOHN W. FERRON,**

**Plaintiff,**

**vs.**

**MEDIA BREAKAWAY, LLC, *ET AL.*,**

**Defendants.**

**CASE NO. 2:06-CV-322**

**JUDGE GREGORY L. FROST,**

**MAGISTRATE MARK R. ABEL**

**ORAL ARGUMENT REQUESTED**

**DEFENDANT MEDIA BREAKAWAY, LLC'S MOTION TO DISMISS COUNT TWO  
OF PLAINTIFF'S SECOND AMENDED COMPLAINT**

Defendant Media Breakaway, LLC, ("Media Breakaway") by and through its undersigned counsel, hereby moves to dismiss Count Two of Plaintiff John W. Ferron's ("Plaintiff's") Second Amended Complaint For Money Damages, Declaratory Judgment And Injunctive Relief pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b). As discussed more fully in the Memorandum in Support herein, Count Two should be dismissed because federal law preempts it or, alternatively, Plaintiff fails to plead Count Two with the required particularity. So that the parties may address any questions the Court may have in more detail, Media Breakaway respectfully requests oral argument on this motion.

Respectfully submitted,

/s/ Ky E. Kirby

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## **MEMORANDUM IN SUPPORT**

### **INTRODUCTION**

Plaintiff Ferron originally filed a complaint in this matter in May 2006 against defendants VC E-Commerce Solutions, Inc., Media Breakaway, LLC, and 20 John Doe defendants, asserting claims under Ohio's Consumer Sales Practices Act (CSPA). Doc. No. 2. On June 8, 2006, Ferron amended his complaint to include claims regarding multiple e-mail addresses held by him and to remove specific reference to the number of e-mails on which he based his claims. Doc. No. 8. On December 18, 2007, Plaintiff filed his Second Amended Complaint, naming 50 new defendants and asserting a new cause of action in Count Two thereof. Doc. No. 126.

In Count Two, Ferron alleges violations of the Ohio Electronic Mail Advertisements Act (EMAA), specifically Ohio Rev. Code § 2307.64(B)(1). 2nd Am. Compl. at ¶¶ 66-68. According to Ferron, the e-mails he received failed to comply with Ohio law because they omitted, or did not contain, clear and conspicuous contact information for their senders or contained fictitious names regarding their senders. *Id.* However, Congress specifically superseded such state laws when it passed the Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM") in 2003. Alternatively, if Count Two is not found preempted, Ferron has failed to plead his claims in accordance with Rule 9(b). For these reasons, Media Breakaway respectfully requests that the Court dismiss Count Two.

### **LEGAL STANDARD**

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain allegations regarding all material elements of the alleged offense(s). *Meizbov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005). In assessing the motion, a court must view the allegations in the complaint in the light most favorable to the Plaintiff, accepting all well-pleaded facts as true. *Johnson v. City*

of *Detroit*, 446 F.3d 614, 618 (6th Cir. 2006); *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). However, “conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.” *Meizbov*, 411 F.3d at 716. Ultimately, the Complaint must “plead enough facts to state a claim to relief that is plausible on its face”, i.e., “the factual allegations . . . must be enough to raise a right to relief above the speculative level.” *Estate of Mikinah Smith v. Hamilton County Dep't of Job & Family Servs.*, No. 1:06-cv-362, slip op., 2007 WL 2572184, at \*3 (S.D. Ohio Aug. 31, 2007) (internal quotations omitted), citing *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007);<sup>1</sup> *Chabria v. EDO Western Corp.*, No. 2:06-cv-543, slip op., 2007 WL 3113326, at \*4 (S.D. Ohio Oct. 22, 2007); *Sibley v. Putt*, NO. 1:06-CV-074, slip op., 2007 WL 2840392, at \*1 (S.D. Ohio Sep. 27, 2007); *Miller v. Javitch, Block & Rathbone*, No. 1:06-CV-828, slip op., 2007 WL 2815452, at \*1 (S.D. Ohio Sep. 25, 2007).

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<sup>1</sup> Since the *Twombly* ruling in May 2007 there has been speculation as to its applicability beyond the antitrust context. Any confusion is resolved in the *Twombly* opinion itself; the *Twombly* Court scrutinized the Rule 8 pleading standard generally, not just the Sherman Act. See *Twombly*, 127 S.Ct. at 1964-65 (“applying these general [Rule 8] standards to a [Sherman Act] §1 claim”). Additionally, the Circuit Court of Appeals for the Sixth Circuit, among other Circuit courts, has adopted and applied the *Twombly* analysis to non-antitrust claims. *Assoc. of Cleveland Firefighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007) (equal protection challenge to city charter) (citing *Twombly*: “[t]he Supreme Court has recently clarified the law with respect to what a plaintiff must plead in order to survive a Rule 12(b)(6) motion”); see, also, *E.E.O.C. v. Concentra Health Servs.*, 469 F.3d 773 (7th Cir. 2007) (equal employment discrimination); *Watts v. Florida Int'l Univ.*, 495 F.3d 1289 (11th Cir. 2007) (violation of First Amendment rights); *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 at note 2 (2d Cir. 2007) (securities fraud) (“We have declined to read *Twombly*'s flexible ‘plausibility standard’ as relating only to antitrust cases”).

## ARGUMENT

### **I. COUNT TWO IS PREEMPTED BY THE CONTROLLING THE ASSAULT OF NON-SOLICITED PORNOGRAPHY AND MARKETING ACT OF 2003**

Ferron's claims under the EMAA, specifically Ohio Rev. Code § 2307.64(B), are preempted by federal law and should be dismissed. In 2003, Congress enacted legislation regulating transmission of commercial email, the Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM"). *See* 15 U.S.C. §§ 7701 *et seq.* CAN-SPAM regulates "commercial electronic mail messages," defined as e-mails with the primary purpose of advertising or promoting a commercial product or service. 15 U.S.C. § 7702(2)(A). It explicitly preempts similar state laws:

*This chapter supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.*

15 U.S.C. § 7707(b)(1) (emphasis added).

Examining CAN-SPAM's text and underlying Congressional purpose,<sup>2</sup> it is clear that CAN-SPAM preempts § 2307.64(B) and Ferron's claims thereunder. Generally, the EMAA regulates "electronic mail advertisements," defined as electronic mail containing "a message or material intended to cause the sale of realty, goods, or services." Ohio Rev. Stat. Ann. § 2307.64(A), § 4931.75(A)(1). Thus, the EMAA regulates "commercial electronic mail messages" and falls within the ambit of CAN-SPAM preemption as a whole. Furthermore, CAN-SPAM's savings clause does not apply to § 2307.64(B) because CAN-SPAM only

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<sup>2</sup> Statutory text and congressional purpose must both be examined in determining the scope of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, at 485-486 (1996) (setting forth methods for interpreting statutory provisions that expressly pre-empt state law). A third consideration is the presumption that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* However, this presumption is not at issue here because, as discussed below, Congress authored CAN-SPAM to avoid impinging on states' police powers and courts have interpreted it as such.

preserves state prohibitions of “falsity or deception.” 15 U.S.C. § 7707(b). Federal courts have held that this clause requires that state statutes regulate more than immaterial falsity or “bare error” to survive preemption; state laws must address material misrepresentations and operate “in the vein of tort.” *Omega World Travel v. Mummagraphics, Inc.*, 469 F.3d 348, 353-54 (4th Cir. 2006); *see also Gordon v. Virtumundo, Inc.*, No. 06-0204, 2007 WL 1459395, at \*11-12 (W.D. Wash. May 15, 2007). These courts’ holdings align with Congress’s stated intent in adopting CAN-SPAM:

[A] State law requiring some or all commercial e-mail to carry specific types of labels, or to follow a certain format or contain specified content would be preempted. By contrast, a State law prohibiting fraudulent or deceptive headers, subject lines, or content in commercial e-mail would not be preempted.

S. Rep. No. 108-102, at 21 (2003), *as reprinted in* 2004 U.S.C.C.A.N. 2348, 2365. Congress intended to supersede an ineffective patchwork of state laws and “left states room only to extend their traditional fraud prohibitions to the realm of commercial emails.” *See* 15 U.S.C. §7701(a)(11); *Kleffman v. Vonage Holdings Corp.*, No. CV 07-2406GAFJWJX, 2007 WL 1518650, at \*3 (emphasis added) (citing S. Rep. No. 108-102, at 21-22). Therefore, to avoid preemption, Ferron’s claims must be based on a statute designed to prevent fraud or other tortious deception, not a statute designed to prevent omission or technical falsity regarding sender contact information or identity. The text of the EMAA, a review of Ohio legislative history, and federal court precedent all indicate that Ferron’s claims under § 2307.64(B) are preempted.

**A. § 2307.64(B) does not regulate fraud.**

Section § 2307.64(B) is preempted because its purpose is not to prohibit fraud. Under Ohio law, the elements of fraud are (1) a representation or concealment of a fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such

utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance. *Foster v. D.B.S. Collection Agency*, 463 F. Supp. 2d 783, 810 (S.D. Ohio 2006); *Klott v. Associates Real Estate*, 322 N.E.2d 690, 692 (Ohio Ct. App. 1974). Ferron alleges violations of an EMAA provision which states:

A person that transmits or causes to be transmitted to a recipient an electronic mail advertisement shall clearly and conspicuously provide . . . [t]he person's name and complete residence or business address and the electronic mail address of the person transmitting the electronic mail advertisement.

Ohio Rev. Stat. Ann. § 2307.64(B)(1); 2nd Am. Compl. at ¶ 67. Violations of this provision are technical in nature and lack the indicia of fraud. Most notably, a violation of § 2307.64(B) does not require any falsity; a violation can arise from simple omission of contact information. *See id.* Plaintiff's own pleading bears this out, alleging that many of the e-mails he received merely "fail to include," *i.e.*, omit, the sender information required by the Ohio Code. 2nd Am. Compl. at ¶67.

**B. The legislative history of the EMAA supports CAN-SPAM preemption.**

Further review of the EMAA's text and history illustrate that § 2307.64(B)'s purpose is not to regulate material misrepresentations. The operative terms in § 2307.64(B)'s requirement to provide sender name and address information in the body of an e-mail are "clearly," "conspicuously," and "complete." Its purpose was to require that senders of unsolicited e-mails provide to the recipients information that will enable them to identify who sent the e-mail and how the sender may be contacted. *See Ohio Legislative Service Commission, Final Analysis: Am. Sub. S.B. 8, 124th General Assembly (As Passed by the General Assembly)*, at 2 (November 1, 2002), <http://www.lsc.state.oh.us/analyses124/02-sb8.pdf> (accessed 1/3/08)

(describing the EMAA as “enact[ing] requirements that focus on the transmission of *unsolicited* ‘electronic mail advertisements.’”) (emphasis added). Thus, § 2307.64(B) mandates specific form and content in precisely the manner that Congress sought to preempt with CAN-SPAM. S. Rep. No. 108-102, at 21. Furthermore, the Ohio General Assembly chose to proscribe the falsification of originating e-mail addresses and other routing information through criminal penalties in Ohio Rev. Code §§ 2307.64(H) and 2913.31, not via civil actions under § 2307.64(B). Ohio Legislative Service Commission, Final Analysis at 4. Section 2307.64(B) thus regulates neither fraud nor tortious deception. It is entirely separate even from regulation of falsity under the EMAA. *See* Ohio Rev. Stat. Ann. § 2307.64(H). CAN-SPAM thus preempts any claims thereunder as a matter of law.

**C. Other federal courts have held that CAN-SPAM preempts state statutes similar to § 2307.64(B)**

In *Omega World Travel v. Mummagraphics, Inc.*, the United States Court of Appeals for the Fourth Circuit found that an Oklahoma e-mail statute which imposed strict liability for inaccuracies was preempted by CAN-SPAM. 469 F.3d 348, 353, 355-56 (4th Cir. 2006) (affirming district court finding of preemption, noting that “the [statute’s] language seems to reach beyond common law fraud or deceit”).<sup>3</sup> Similarly, § 2307.64(B) of the EMAA regulates inaccuracies or incompleteness and imposes strict liability for violations. A law creates “strict liability” when an offense thereunder occurs without requiring an unlawful mental state, such as “intentionally” or “willfully,” and without consideration of potential mitigating circumstances. *See Chotin Transp., Inc. v. U.S.*, 819 F.2d 1342, 1349 (6th Cir. 1987) (discussing federal civil

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<sup>3</sup> The Oklahoma statute in question stated, in pertinent part: “It shall be unlawful for a person to initiate an electronic message that the sender knows, or has reason to know: 1) Misrepresents any information in identifying the point of origin or the transmission path of the electronic mail message; 2) Does not contain information identifying the point of origin or the transmission path of the electronic mail message; or 3) Contains false, malicious, or misleading information which purposely or negligently injures a person.” Okla. Stat. tit. 15, §776.1A; *Omega World Travel*, 469 F.3d at 353.

statute which imposed strict liability because “the penalty . . . attach[es] to the offending act without regard to the question of willfulness or intent, and without regard to the question of mistake or innocence”); *State v. Schlossler*, 681 N.E.2d 911, 914 (Ohio 1997) (finding imposition of strict liability where offense required no specific culpable mental state). Section 2307.64(B) imposes liability without regard to whether the violation occurred intentionally or willfully and, thus, imposes strict liability. Additionally, §2307.64(B) plainly extends to regulation of inaccuracies in e-mail sender information because it mandates “completeness” of that information.

The text of the EMLA, its legislative history, and federal court precedent all indicate that CAN-SPAM preempts Ferron’s claims in Count Two. Notwithstanding Ferron’s mingling of the terms “false” and “fictitious” among his allegations, his theory of recovery is neither fraud nor tortious deception. Section 2307.64(B) instead mandates specific form and content in commercial e-mail. Count Two should therefore be dismissed as preempted by CAN-SPAM.

**II. ALTERNATIVELY, IF COUNT TWO IS NOT PREEMPTED, PLAINTIFF HAS FAILED TO PLEAD HIS CLAIMS WITH PARTICULARITY AS REQUIRED UNDER FED. R. CIV. P. 9(B)**

As discussed above, Plaintiff’s claims must sound in fraud to survive preemption. Thus, any portion of Count Two that is not preempted must conform with Rule 9(b) and be plead with sufficient particularity. However, Plaintiff has failed to meet this heightened pleading requirement and any surviving claims under Count Two should be dismissed on this alternative basis.

Rule 9(b) requires plaintiffs to plead claims involving fraud with particularity, regardless of whether a claim is based on state or federal law. *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1102 (9th Cir. 2003); *Minger v. Green*, 239 F.3d 793, 800 (6th Cir. 2001). Rule 9(b) states that:

In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

Fed. R. Civ. P. 9(b). This rule ensures fair notice to defendants, prevents unnecessary harm to their reputation, and discourages strike suits. *Advocacy Org. for Patients and Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315, 322 (6th Cir. 1999); *DiVittorio v. Equidyne Extractive Indus.*, 822 F.2d 1242, 1247 (2d Cir. 1987). This rule does not just apply to claims specifically labeled as “fraud”: “[T]he requirements of the rule apply to all cases where the gravamen of the claim is fraud even though the theory supporting the claim is not technically termed fraud.” *Frith v. Guardian Life Ins. Co. of America*, 9 F. Supp. 2d 734, 742 (S.D. Tex. 1998).

Ferron, therefore, must “at a minimum, . . . allege the time, place, and content of the alleged misrepresentation on which he . . . relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud.” *Advocacy Org.*, 176 F.3d at 322 (citing *Coffey v. Foamex L.P.*, 2 F.3d 157, 161-62 (6th Cir. 1993)). However, nowhere in the Second Amended Complaint does Ferron specifically plead any such facts. Ferron only broadly alleges that he received unidentified e-mail messages on unidentified days from unidentified sources and conclusorily denounces them as unlawful. Mr. Ferron does not allege the content of any e-mail (individually or collectively) on which he bases his EMAA claims against Media Breakaway, the date each e-mail was received, who created it, who sent it, and he does not attach any of the alleged e-mails to his Second Amended Complaint. Moreover, Ferron pleads only minimal facts to support that any actual deception has occurred at all; his *only* statement to this effect in Count Two is the conclusory allegation that “[i]n fact, many of Defendants’ email messages display a false or fictitious name of the sender.” 2nd Am. Compl. at ¶ 67. Furthermore, Ferron fails to allege any injury suffered as a result of the e-mails he received. Count Two therefore lacks any

of the specific facts required by Rule 9(b) and should be dismissed to the extent that it is not otherwise preempted.

**CONCLUSION**

Plaintiff has failed to adequately plead a valid cause of action against Media Breakaway in Count Two of the Second Amended Complaint. Ferron's claims are wholly preempted by federal statute; to any extent which they are not preempted, Ferron has failed to plead his claims with required particularity. For the reasons cited throughout this memorandum, Media Breakaway respectfully requests that the Court dismiss Ferron's claims against it in Count Two of the Second Amended Complaint for Money Damages, Declaratory Judgment, and Injunctive Relief.

Dated: January 7, 2008

/s/ Ky E. Kirby

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**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.

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