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

JOHN W. FERRON	:	
Plaintiff,	:	
vs.	:	**Case No. 07-CV-1193**
E360Insight, LLC, *et al*.,	:	**Judge Sargus**
Defendants.	:	**Magistrate King**

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants hereby move the Court for an Order granting Summary Judgment in their favor as to all allegations set forth in the Complaint pursuant to Fed. R. Civ. Proc. 56(C). The bases for Defendants' Motion are set forth in the Memorandum in Support attached hereto.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In this action, Plaintiff seeks to recover over Three Million Dollars in statutory damages under the Ohio Consumer Sales Practices Act ("CSPA") and the Electronic Mail Advertising Act ("EMAA") based on the mere receipt of various mass marketing emails that Plaintiff and his law firm actively solicited for the purpose of filing this lawsuit and inflating Plaintiff's potential damages. Plaintiff, John W. Ferron, is an attorney practicing law in Columbus Ohio who has, over the past several years, brought many lawsuits in State and Federal Court on his own behalf and on behalf of others pursuant to the CSPA. A list of his CSPA lawsuits is attached hereto as Exhibit A.

Courts in Ohio have sternly criticized Plaintiff's pattern of filing these frivolous consumer protection lawsuits and unabashed practice of soliciting the very transactions complained of in those cases. Last year, an Ohio appellate court sanctioned Plaintiff in an action asserting claims under the CSPA, chastised Plaintiff and his stand-in client for "purposely" engaging in the credit card transactions giving rise to the CSPA claims in that case, and cited as "particularly disturbing" the fact that Plaintiff, "an attorney, licensed to practice in this state and sworn as an Officer of the Court, would facilitate this type of exploitative litigation to the detriment of the defendant, the court system, and the practice of law in general." *Burdge v. Supervalu Holdings, Inc.*, 2007 Ohio 1318 (Ohio App. 1st Dist. 2007) (attached)**.** This year, a Delaware Court held that Plaintiff and his firm "have based their practice upon seeking out and prosecuting potential violations of Ohio Consumer Sales Practices Act. This is evidenced by the fact that a significant number of the cases relied upon by the Plaintiff were cases in which the

Plaintiff was either the movant or counsel representing the movant in a CSPA case." *See* Exhibit B, attached hereto, at 14-15.

As Ohio courts have recognized, Plaintiff's frivolous tactics are wholly at odds with the purposes and requirements of the Ohio Consumer Sales Practices Act. Plaintiff should not be rewarded for his bad faith conduct in this case. Adding to this frivolity is the fact that neither Defendant provides the services or goods advertised in any email, never created any of the emails, and was not the sender of the emails in question. Defendants are exempt from liability under both the CSPA and EMAA, and federal law further preempts the EMAA.

II. STATEMENT OF FACTS

A. Procedural History

In December, 2007, Plaintiff Ferron sued Defendants in Franklin County Common Pleas Court for the alleged receipt of emails sent to him. The case was removed and recently, the Court denied Defendants' Motion to Dismiss based on personal jurisdiction (doc. 36). The Complaint alleges violations of R.C. 1345.02(A) by, using the word "free" in email advertisements, among other things. Plaintiff also seeks declaratory relief that Defendants failed to comply with the requirements of R.C. 2307.64(B)(1), better known as the EMAA.

B. The Emails at Issue

Plaintiff produced a diskette to Defendants during jurisdictional discovery containing approximately 882 emails that he claims were received by him and which he claims were sent by or on behalf of Defendants. David Linhardt reviewed each and every email contained on the diskette (Linhardt Aff., at 3). Every email produced was sent to the email address jferron@ferronlaw.com. (Linhardt Aff., at 4). Plaintiff claims that each email contains several violations of the CSPA. He requests this Court to award him damages of $200 for each

violation of each and every email he claims was sent to him by or on behalf of Defendants. Yet, analysis of the emails by Mr. Linhardt reflects that of the 882 emails submitted during discovery, only 37 contained the word "free" and only 68 more contained the word "complimentary." Plaintiff only opened 66 messages and clicked on the hyperlink only 16 times. (*See* Exhibit C). This is significant because without clicking on a hyperlink, Plaintiff cannot verify to where the hyperlink directed him. Where the hyperlink directs him reflects the real sender of the email (Linhardt Aff., at 5). Moreover, Defendants have all contact information for Plaintiff in their data base, including Plaintiff's IP address (Linhardt Aff., at 6; *see* Exhibit D). This is concrete evidence that Plaintiff made a request to be put on a "subscriber" list for at least one of the Defendants' clients (Linhardt Aff., at 6).

Further, Linhardt's review of the emails reflects that neither e360Insight, LLC, nor Linhardt were the "sender" of any email messages submitted by Plaintiff. (Linhardt Aff., at 8). Linhardt relies on the generally accepted definition of "sender" as defined in the ''Controlling the Assault of Non- Solicited Pornography and Marketing Act of 2003,'' better known as "CAN-SPAM." In paragraph (16)(A), CAN-SPAM states that the term "sender," when used with respect to a commercial electronic mail message, means a person who initiates such a message <u>and</u> whose product, service, or Internet web site is advertised or promoted by the message." (emphasis added). The products or services promoted in the email messages are not products or services provided by either defendant. (Linhardt Aff., at 7). Neither defendant has ever sent email messages to any of Plaintiff's email addresses promoting either defendants' products or services. (Linhardt Aff., at 7,8). E360 is a publisher and list manager of third-party lists. (Linhardt Aff.,, at 8) It provides advertising services to its clients and is similar to a newspaper or magazine publisher. (Linhardt Aff., at 8). E360's advertisers pay to send their advertisement

to e360's managed list to promote their products and services. (Linhardt Aff., at 8). There is no basis for finding Linhardt to be a sender either as he has not sent emails for his own benefit to anyone, including defendant. (Linhardt Aff., at 7).

III. LAW AND ARGUMENT

A. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P.* 56(c). In considering a motion for summary judgment, the district court must construe the evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). "A dispute over a material fact is not considered 'genuine' unless a reasonable jury could return a verdict for the nonmoving party." *Shamaeizadeh v. Cunigan*, 338 F.3d 535, 544 (6th Cir. 2003).

As set forth below, Defendants are entitled to judgment in their favor as a matter of law.

B. Defendants are Exempt from the CSPA

In Plaintiff's First and Second Causes of Action, Plaintiff alleges violations of the CSPA arguing that the defendants committed "unfair and deceptive acts or practices" pursuant to Ohio Rev. Code §1345.02(A) and further defined by Ohio Admin. Code §§109:4-3-04 and 109:4-3-06. (doc. 3, at 15). Plaintiff claims that the defendants violated the CSPA by creating or sending e-mail advertisements that improperly use the word "free" or improperly refer to a "prize."

However, Ohio Rev. Code §1345.12 provides an exemption for publishers and/or disseminators so long as they are without knowledge that the published information violates the CSPA. R.C. §1345.12 provides an exemption for "[a]ny publisher, broadcaster, printer or other person engaged in the dissemination of information…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…"

Defendant e360Insight, LLC, is a publisher. Like a newspaper or magazine, e360Insight collects opt-in subscriptions from individuals who wish to receive email messages. (Linhardt Aff., at 8). E360Insight then sells advertising services to companies who wish to promote their products and services (Linhardt Aff., at 8). E360Insight is simply the middle-man or conduit between a defined audience of opt-in members and the advertisers who are lawfully promoting their products and services. (Linhardt Aff., at 8). E360Insight's publications consist of a series of free email newsletters sent to its subscribers upon their request, until the subscriber cancels the subscription through a simple one-click removal mechanism. E360Insight does not generate the message content contained in the advertising message. (Linhardt Aff., at 8-11). It obtains the advertising content from its advertisers similar to a newspaper or magazine. (Linhardt Aff., at 8-11).

Neither E360Insight, LLC nor David Linhardt meet the definition of "sender" as defined by CAN-SPAM, either. CAN-SPAM defines the SENDER of a commercial email message as follows.

"(16) SENDER.—
(A) IN GENERAL.-... the term ''sender'', when used with respect to a commercial electronic mail message, means a person who initiates such a message <u>and whose product, service, or Internet web site is advertised or promoted by the message</u>. This definition was reaffirmed and clarified by the FTC in their recently adopted Definitions and Implementation Under the CAN-SPAM Act.

(16 CFR Part 316 [Project No. R411008] RIN 3084-AA96.)(emphasis added). None of the email messages provided by Plaintiff contain links that resolve to e360insight.com or to websites owned by e360Insight (Linhardt Aff., at 10). e360Insight does provide email messaging services for it's clients, but never to promote its own products or services (Linhardt Aff., at 8). Further, Dave Linhardt has not sent any commercial email messages of any kind on behalf of himself (Linhardt Aff., at 8-11). Dave Linhardt has not sent any commercial email messages at any time that promote products of services that he provides as an individual (Linhardt Aff., at 8-11).

Attached is the Affidavit of David Linhardt which confirms that both he and E360Insight, LLC are merely disseminators and/or publishers exempt pursuant to R.C. §1345.12 and further, that he was unaware of any email advertisement which violated sections 1345.01 to 1345.13 of the Ohio Revised Code. E360Insight, LLC, did nothing more than disseminate information on behalf of others and, in fact, that was E360Insight's business (Linhardt Aff., at 8). As a publisher or disseminator, with no knowledge that any email advertisement violated the CSPA, defendants are entitled to exemption from the CSPA. Moreover, the CAN-SPAM definition of sender should pre-empt state statutes on this issue.

C. Defendants Are Entitled to Judgment as a Matter of Law Under the CSPA

1. Plaintiff is Not a "Consumer"

Even if Defendants are not exempt as publishers and or disseminators, Plaintiff's claims should be dismissed because Plaintiff is not a "consumer" protected by the CSPA. Consumer law "has its own internal coherence, based upon assumptions about how consumers and producers act in the marketplace. It recognizes that most of the terms in the typical consumer contract are not individually negotiated, and are often offered on a 'take-it-or-leave-it' basis. It accepts the notion that consumers will often not understand terms drafted by producers or, if they

do understand them, they do not understand the risks that they present. Finally, it understands that consumers will frequently transact under a 'veil of ignorance' which will often require the mandatory disclosure of information by the producer or retailer to the consumer." (Anderson's Ohio Consumer Law Manual, § 1.1, pp. 2-3). The CSPA was enacted "as a protective measure to ensure that information and bargaining disparities did not permit deceptive or unconscionable practices to prevail in the marketplace." *Id.*, § 3.3, pp. 64-65. Such disparities are notably absent here.

The CSPA exists to protect consumers, and Plaintiff's role in that system is to represent injured parties, not to represent (disingenuously) that he is an injured party. The legal framework was not established to give attorneys like Plaintiff a new business model (professional plaintiff) or profit center (extorting businesses with the threat of statutory damages & attorneys fees). Consistent with the policies underlying Ohio's consumer laws, only a "consumer" within the meaning of the Consumer CSPA can assert a private cause of action under the CSPA. *See* O.R.C. § 1345.09.

In turn, the CSPA defines a "consumer" as "a person ***who engages in a commercial transaction*** with a supplier." O.R.C. § 1345.01(D)(emphasis added). "Consumer transaction" is defined in the CSPA as "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." O.R.C. § 1345.01(A). (emphasis added). Here, Plaintiff signed up to receive email advertisements from Defendants' clients. He used those emails – <u>not</u> for household or personal use, but to file lawsuit after lawsuit raking in hundreds of thousands of dollars for he and his law firm. This Plaintiff is not a consumer, and the emails sent to him were not consumer transactions. Plaintiff's claims

under the CSPA must be dismissed because Plaintiff cannot establish – as he must – that he is a "consumer" who has engaged in a "consumer transaction" within the meaning of the CSPA, for each of the reasons set forth below.

(a) *The Emails Were Not Made For "Purposes That Are Primarily Personal, Family, or Household"*

The emails at issue here do not give rise to a "consumer transaction" because Plaintiff's overriding purpose in soliciting, receiving and reviewing the emails was not "for purposes that are primarily personal, family, or household." *See* O.R.C. § 1345.01(A). It is necessary to consider the *plaintiff's* primary purpose in connection with an alleged transaction, rather than the generic nature of the goods or services at issue. *See., e.g. Lesco v. Toyota of Bedford, Inc*., 2005 Ohio 6724, (attached); *see also* Anderson's Ohio Consumer Law Manual, Section 3.3, p. 58 ("The wording of the Ohio statute, unlike that of statutes from some other states, indicates that the court should look to the actual use by the individual, rather than the typical use of the goods or services in deciding whether there is a consumer transaction.").

Here, dispositive evidence establishes that Plaintiff's primary purpose in soliciting and reviewing the emails in question was to manufacture grounds for a lawsuit and generate statutory "damages"– an unabashedly commercial purpose that falls squarely outside the ambit of the CSPA. Indeed, Plaintiff is a sophisticated attorney with a longstanding pattern of filing baseless consumer protection lawsuits based on contrived and pre-meditated "transactions" like those at issue here. During the past five years alone, Plaintiff Ferron has filed a multitude of separate cases asserting claims under the CSPA..

Plaintiff and his law firm have been severely criticized by courts in Ohio for their practice of deliberately engaging in transactions for the sole purpose of filing lawsuits and inflating potential damages. In 2007, the First District ***imposed sanctions*** against Ferron &

Associates when affirming the dismissal of various claims asserted under the CSPA, finding that the plaintiff "did not present any reasonable question for review on this appeal and his attorney had no good ground to support the filing of the appeal, much less the complaint." *Burdge v. Supervalu Holdings, Inc.*, 2007 WL 865483 (Ohio App. 1st Dist. 2007).

In awarding sanctions against Plaintiff's firm, the court in *Supervalu Holdings* noted: "***We are offended by the contrived nature of this frivolous action***, which has wasted much time, paper, and other resources to the prejudice of legitimate disputes between parties, especially those involving the consumer protection laws of Ohio." *Id.* (emphasis supplied). In particular, the court chastised the plaintiff's "***calculated behavior in returning to the offending establishment*** 12 times," concluding that ***"[t]he facts as pleaded in the complaint in this and the other cases indicate that Burdge purposely made purchases at stores*** that were printing his expiration date on his receipt ***in order to recoup statutory damages*** totaling at least $12,800. Burdge's . . .actions demonstrate that he attempted to reap a profit from this activity." *Id.* .

Judge Hendon's concurring opinion in *Supervalu Holdings* is particularly instructive on the question of Plaintiff's "purpose" with respect to the challenged emails:

> Without question, the nature of this lawsuit is one contrived to "ambush" the defendant under the color of the Ohio Consumer Sales Practices Act, which seeks to protect Ohio's consumers from injury due to unfair practices by unscrupulous businesses. In this case, Burdge cannot claim that he was injured in any way, lest why would he return to the "offending" retailer multiple times over a short period of time? ***The only conclusion is that he was building his claim, with an eye toward statutory damages. A truly reasonable consumer would avoid repeated transactions with a retailer believed to be actually violating the law!***
>
> ***What is particularly disturbing about the contrived nature of this frivolous action . . . is that . . . an attorney, licensed to practice in this state and sworn as an Officer of the Court, would facilitate this type of exploitive litigation to the detriment of the defendant, the court system, and the practice of law in general***.

As in *Supervalu* and the numerous other cases in which Plaintiff has filed CSPA claims, the emails at issue here plainly were sought out for the primary purpose of filing a lawsuit and increasing potential statutory damages. Earlier this year, Judge Krueger of the Delaware County Common Pleas Court awarded sanctions to Video Professor, Inc, due to Plaintiff's frivolous conduct in yet another CSPA case. *See, Ferron v. Video Professor, Inc*. (Del. Cty. Ohio) (2008) (Exhibit B), wherein the Court specifically found that Plaintiff's commercial law practice concentrates on seeking out and prosecuting CSPA claims. Exhibit A is further evidence of this. Such calculated conduct is inimical to the purposes of the Consumer Sales Practice Act and conclusively establishes that Plaintiff is not a "consumer" who received the emails in question for purposes that are "primarily personal, household or family." Instead, Plaintiff's conduct with respect to these emails (as in numerous other frivolous consumer protection cases filed by Plaintiff and his firm) makes crystal clear that the sole purpose of the emails from Plaintiff's perspective was to file this lawsuit and claim millions in statutory "damages." Because Plaintiff's purpose with respect to the challenged emails was purely commercial, he cannot establish that these emails constitute a "consumer transaction" under the CSPA.

(b) *The Alleged Email Transactions Were Not With An "Individual"*

Likewise, Plaintiff cannot establish that the alleged email transactions were made with an "individual" within the meaning of the CSPA. It is well-settled that a transaction with a business or professional entity is not a "consumer transaction" under the CSPA, which extends solely to transactions with "an individual". Plaintiff Ferron is well aware of this requirement because three separate courts have dismissed CSPA claims filed by his law firm (including in a case in which Ferron & Associates was itself the plaintiff) because the transactions at issue were directed to a law firm which is not an "individual" within the meaning of the CSPA. *See Ferron*

& Assoc., LPA v. U.S. Four, Inc., 2005 Ohio 6963, *Yavitch & Palmer Co., L.P.A. v. U.S. Four, Inc.*, 2006 Ohio 4780 (Ohio App. 10th Dist. 2006); *Culbreath v. Golding Enter., LLC*, 2006 Ohio 2606 (Ohio App. 10th Dist. 2006).[1] Plaintiff apparently hopes to circumvent this requirement by filing the lawsuit in his own name, rather than in the name of his law firm. This calculated decision in no way changes the fact that the "transactions" in this case were orchestrated by Plaintiff in his professional capacity, for the benefit of his law firm. In fact, each email produced by Plaintiff in this case was sent to jferron@ferronlaw.com. (Linhardt Aff., at 4). The asserted transactions were for all practical purposes made with a law firm – not an "individual" – and therefore do not constitute "consumer transactions" under the CSPA. To hold otherwise would permit Plaintiff and his law firm to frustrate the purposes of the CSPA.

(c) *The Emails Are Not "Transactions" Because They Are Entirely One-Sided*

Plaintiff cannot establish that the emails at issue in this case are "transactions" because these emails were entirely one-sided. As Ohio courts have recognized, a "consumer transaction" by definition requires some bilateral conduct by the parties to the alleged transaction, and does not encompass a purely one-sided action . *See, e.g. Riley v. Supervalue Holdings, Inc.*, 2005 Ohio 6996 (Hamilton Cty. 2006) (attached); *see also Dawson v. Blockbuster, Inc.*, 2006 Ohio 1240 (Cuyahoga Cty. 2006) (attached).

Here, the evidence establishes that the Plaintiff in this case clicked on less than two percent of the hyperlinks in all of the emails. (Linhardt Aff., at 5). Because Plaintiff has not taken any action whatsoever with respect to the vast majority of emails at issue in this case, these emails cannot constitute a "consumer transaction" within the meaning of the CSPA.

(d) *The Emails Constitute Mass Marketing Which Does Not Constitute a "Solicitation"*

[1] Here, each and every email produced by Plaintiff shows that his law firm email account was used to

The emails at issue in this case are part of a national "mass marketing" campaign which does not constitute a "consumer transaction" within the meaning of the CSPA. (Linhardt Aff., at 9). As was recently held in *Eisenberg v. Anheuser-Busch, Inc*., 2006 U.S. Dist. LEXIS 4058 (N.D. Ohio 2006), "[m]ass advertising and marketing efforts do not rise to the level of personal solicitation and do not constitute a 'consumer transaction' for purposes of the CSPA" because they "do not create the same risk of undue pressure or intimidation as do acts of direct solicitation, and they are not as intrusive." As in *Eisenberg*, Defendants' clients' mass marketing campaign created no "undue pressure or intimidation," and required "no immediate response or reaction." Like other mass market media — but unlike more direct forms of personal solicitation such as telephone or in person solicitations — emails can be easily ignored (and apparently were ignored by the Plaintiff in this case). Accordingly, the emails do not constitute a "solicitation" under the CSPA.

For the foregoing reasons, Plaintiff's claims under the CSPA must fail as he is not a consumer and the emails are not consumer transactions.

2. **Defendants did not "Commit" the Alleged Deceptive Practices At Issue**

Revised Code Section 1345.02 imposes liability only upon a supplier that "*commits* an unfair or deceptive act or practice." O.R.C. § 1345.02(A) (emphasis supplied) In order to establish that defendants "committed" the allegedly deceptive email marketing practices at issue here, Plaintiff must prove, at a minimum, that defendants were responsible for the content of the emails at issue, as well as the transmission of those emails to the Plaintiff. *See, e.g. Sauvey v. Brondes Ford*, 2003 Ohio App. LEXIS 2791 (attached). The emails at issue in this case were not created by or sent for the benefit of either Linhardt or E360Insight, LLC (Linhardt Aff., at 10).

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solicit the emails. (Linhardt Aff., at 4).

As such, there is no evidence that these Defendants "committed" the allegedly deceptive practices complained of here.

For the foregoing reasons, Plaintiff's claims under the CSPA must fail because Defendants did not commit acts or practices violative of the CSPA.

C. <u>E360 Cannot Be Liable Under the EMAA</u>

Likewise, Defendants are not liable under the Electronic Mail Advertising Act, R.C. § 2307.64(B)(1), better known as the EMAA. The EMAA provides:

> "a person that transmits or causes to be transmitted to a recipient an electronic mail advertisement shall clearly and conspicuously provide to the recipient, within the body of the electronic mail advertisement … [t]he person's name and complete residence or business address and the electronic mail address of the person transmitting the electronic mail advertisement …" Under the EMAA, a "'[r]ecipient' means a person who receives an electronic mail advertisement at … [a] receiving address ordinarily accessed from a computer located within the state." Ohio Rev. Code § 2307.64(A)(10)(b).

Plaintiff's complaint alleges that "[m]any of the email messages that 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 electronic mail address of the person transmitting the electronic mail advertisement." E360 does nothing more than maintain a database for its clients who direct E360 as to which ads to run on its list serve (Linhardt Aff., at 11). Thus, E360 has no obligation to provide its name and address in any email Plaintiff received. The only entity that must do so is the person that transmits the email. Based upon the clear language in the statute, defendants are not the senders or transmitters. This is further bolstered by the preemptive effect of CAN-SPAM has on the definition of "Sender." See Argument, *supra*.

D. <u>The EMAA is Pre-empted by CAN-SPAM</u>

Even if the EMAA were applicable, it is preempted by CAN-SPAM. The preemption provision of CAN-SPAM provides:

> 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).

The CAN-SPAM Act was designed to strike a balance between permitting a legitimate and efficient means of commercial advertising and the need to curb its abuse. *Omega World Travel, Inc. v. Mummagraphics, Inc*., 469 F.3d 348 (4th Cir. 2006). It was also designed to create a national standard for email advertisements. *Id.* For preemption not to exist, the email advertisement in question requires a showing of intentional and misleading falsity. *Id*. Because neither defendant in this case created any of the email advertisements (Linhardt Aff., at 10) and because Linhardt did not know that any content or format in which any email was sent violated the CSPA or the EMAA (Linhardt Aff., at 10), Plaintiff cannot prove intentional or misleading falsity in this case. *See, e.g. Ferron v. Echostar Sattellite, LLC, et. al.* (Case No. 2:06-cv-00453), Opinion and Order dated September 24, 2008 (doc. 295)(Watson, J.)(attached).

Further, all of the emails in question fail to meet the requirements set forth in R.C. §2307.64(B)(1). Each email submitted contains a valid physical address and working unsubscribe links (Linhardt Aff., at 12). Furthermore, Plaintiff **did** consent or has agreed to as a condition of service to received the electronic email advertisements" by voluntarily signing up to receive the email messages. Because defendants have the correct contact information from Plaintiff in the database it manages, including his IP address, Ferron must have signed up to

receive emails from some of defendant e360's clients (Linhardt Aff., at 6,13, 15). This further evidences Mr. Ferron's consent to receive the emails at issue.

E. Plaintiff's Claims are Barred By His Own Bad Faith Actions

The Cause of Action at issue here does not arise from activities of Defendants, but instead arises out of the unilateral actions of the Plaintiff. Plaintiff has authorized Defendants' clients to send him emails – in other words – they are not unsolicited. In order for Plaintiff to be on any electronic mail list, he must have registered with one of Defendants' clients authorizing them to send electronic mail to Plaintiff. (Linhardt Aff., at 6, 13,15). Referring to Exhibit D it is evident that Mr. Ferron registered with at least one of those clients. Upon request to be removed, Linhardt contacted the client to obtain the registration information for Mr. Ferron's email addresses. (Linhardt Aff., at 15). The information contained in Exhibit D was not information maintained on its email list or even known by Linhardt prior to obtaining the information from its client (Linhardt Aff., at 6,15). However, the information in Exhibit D reflects an IP address belonging to Mr. Ferron's computer, a correct email address, and a correct home address for Mr. Ferron. There is no technology which would allow for Defendants or clients of e360Insight to obtain all of that information without Mr. Ferron providing it to the client while registering to receive promotional emails (Linhardt Aff., at 13). Therefore, Mr. Ferron actually solicited the emails in this case, barring application of the CSPA or the EMAA to such emails.

F. Plaintiff is Not Entitled To Multiple Recoveries For The Same Practice

Even if Plaintiff could somehow establish that his claims are legitimate consumer claims for which he is entitled to damages, (and for the reasons described above, he cannot), he can recover statutory damages of $200 for each allegedly deceptive "practice." Revised Code Section 1345.02 precludes deceptive "acts ***or practices***". (emphasis supplied) Likewise, Section

1345.09 allows a consumer to collect statutory damages in an amount of $200 "where the violation was an act ***or practice*** declared to be deceptive." (emphasis added) Here, Plaintiff is challenging Defendants' mass email marketing ***practice***, not individual "acts."

Significantly, Plaintiff has not attempted to establish "deception" on an email-by-email basis , instead alleging blanket assertions about all 882 emails. (doc. 1, at ¶¶16 and 17). Thus, it would be improper to permit Plaintiff to recover statutory damages on a per email (or per "act") basis, given that Plaintiff's claims against Defendants challenge broad "practices" not individual acts. Likewise, Plaintiff's contention that he somehow can recover statutory damages for multiple violations for each of the 882 emails at issue in this case should be squarely rejected. Ohio courts repeatedly have held that when a single act or transaction results in multiple violations, recovery is limited to $200 in statutory damages. *See, e.g., Eckman v. Columbia Oldsmobile*, Inc. 65 Ohio App. 3d 719 (Ohio App. 1st Dist. 1989); *Couto v. Gibson*, 1992 Ohio App. LEXIS 756 (Ohio App. 4th Dist. 1992); *Ferrari v. Howard*, 2002 Ohio 3539 (Ohio App. 8th Dist. 2002). Because each of the alleged violations of the CSPA asserted by Plaintiff arise from the same emails, Plaintiff at most can recover actual or statutory damages with respect to each allegedly deceptive *practice* and not with respect to each alleged violation arising from the same practice.

IV. CONCLUSION

Based upon the foregoing, Defendants request this Court to Grant Summary Judgment in their Favor. Defendants also seek an award of attorney's fees and costs in defending this action under Civil Rule 11 and R.C.§2323.51.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing was served upon Lisa Wafer, Esq., FERRON & ASSOCIATES, 580 North Fourth Street, Suite 450, Columbus, Ohio 43215 and Kevin Humphreys, 545 E. Town Street, Columbus, Ohio 43215 via the Court's electronic delivery system this 20th day of October, 2008.

/s/Karen S. Hockstad
Karen S. Hockstad (0061308)