

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

JOHN W. FERRON,	:	
	:	
Plaintiff,	:	Case No. 2:08-cv-760
	:	
vs.	:	Judge Sargus
	:	
SUBSCRIBERBASE HOLDINGS, INC., <i>et</i>	:	Magistrate Judge Kemp
<i>al.</i> ,	:	
	:	
Defendants.	:	

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO
“DEFENDANTS’ MOTION TO DISMISS”**

PLAINTIFF JOHN W. FERRON, by and through the undersigned counsel, hereby respectfully submits his Memorandum in Opposition to “Defendants’ Motion to Dismiss Plaintiff’s Amended Complaint,” which was filed on August 12, 2008 (hereafter, “Defendants’ Motion”)(Document No. 11).

I. INTRODUCTION AND RELEVANT PROCEDURAL BACKGROUND

On July 2, 2008, Plaintiff filed his initial Complaint in this matter in the Franklin County Court of Common Pleas, asserting claims against Defendants Subscriberbase Holdings, Inc., Subscriberbase, Inc. and Consumer Research Corporation. Plaintiff alleges that Defendants transmitted to Plaintiff a number of commercial email messages that violate Ohio’s Consumer Sales Practices Act (“CSPA”), O.R.C. §1345.01, *et seq.*, and, more specifically, two of Ohio’s consumer advertising regulations, which are set forth in the Ohio Administrative Code (“O.A.C.”) at §§109:4-3-02 and 109:4-3-04. Plaintiff’s Complaint also alleges that Defendants’ commercial email messages violate the Ohio Electronic Mail Advertisements Act (“EMAA”), O.R.C. §2307.64, because they fail to include within the body of each 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. (See generally, Complaint, Document No. 3.)

On August 7, 2008, Defendants filed their Notice of Removal, and removed this action from state common pleas court to this Court. (Document No. 2) Thereafter, on August 12, 2008, Defendants filed their Motion to Dismiss Plaintiff's Complaint. (Document No. 8)

On August 29, 2008, Plaintiff filed his First Amended Complaint in this case, which mooted Defendants' August 12, 2008 Motion to Dismiss. (See Plaintiff's First Amended Complaint, Document No. 9.) Plaintiff's First Amended Complaint sets forth the factual allegations surrounding Plaintiff's claims with particularity, including: (1) which Defendant sent each email; (2) the email addresses of Plaintiff to which the emails were sent; (3) the date and time each email was sent to Plaintiff; (4) the content and purpose of each email; and (5) how each email violates Ohio law. (See generally, Plaintiff's First Amended Complaint, Document No. 9.)

On September 18, 2008, Defendants renewed their Motion to Dismiss as to Plaintiff's First Amended Complaint. (Defendants' Motion, Document No 11) Defendants' Motion argues that Plaintiff's claims should be dismissed for the following reasons: (1) Plaintiff's EMLAA claims are preempted by the federal CAN-SPAM Act; (2) Plaintiff's CSPA claims are preempted by the federal CAN-SPAM Act; (3) Plaintiff failed to plead properly his claim for intentional destruction of evidence; and (4) Plaintiff has failed to meet the pleading requirements of Fed. R. Civ. P. 9(b). (See generally, Defendants' Motion, Document No. 11.)

For the reasons set forth below, Plaintiff respectfully submits that Defendants' arguments lack merit and their Motion should be denied in its entirety.

II. LAW AND ARGUMENT

A. Standard Applicable to Fed. R. Civ. P. 12(b) Motion to Dismiss.

Fed. R. Civ. P. 12(b)(6) permits a defendant, by motion, to raise the defense of a plaintiff's "failure to state a claim upon which relief can be granted." A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) "should not be granted unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); see also *McLain v. Real Estate Bd., Inc.*, 444 U.S. 232, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980). The Court is authorized to grant a motion to dismiss under Fed. R. Civ. P. 12(b)(6) only where it is "clear that no relief can be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984).

All well-pleaded allegations must be taken as true and should be construed most favorably toward the non-movant. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); *Mayer v. Mylod*, 988 F.2d 635, 637 (6th Cir. 1993). This Court may not grant a motion to dismiss based on disbelief of a complaint's factual allegations. *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990). As such, a complaint should not be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) unless there is no law to support the claims made, the facts alleged are insufficient to state a claim, or there is an insurmountable bar on the face of the complaint. See *Marine Servs. Co. v. Evtac Mining*, Civil Action No. 2:01-cv-934, unreported, 2002 U.S. Dist. LEXIS 21539 (S.D. Ohio, September 20, 2002)(Attachment 1).

For the reasons discussed below, Plaintiff respectfully submits that Plaintiff's First Amended Complaint sufficiently pleads a plain statement of his claims, demonstrating that

Plaintiff is entitled to relief and provides fair notice of the nature of Plaintiff's claims. Therefore, Defendants' Motion should be denied.

B. Plaintiff's Claims Under the EMLA Are Not Preempted By Federal Law.

Defendants argue that the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM"), 15 U.S.C. §7701, *et seq.*, explicitly preempts Plaintiff's EMLA Claims. (Defendants' Motion, pp. 6-9, Document No. 11) However, this is incorrect. While CAN-SPAM explicitly preempts *some* state commercial email laws, its preemption is expressly *limited* and does not encompass state laws, such as the EMLA, which prohibit falsity or deception in any portion of a commercial email. CAN-SPAM's preemption provision states, in relevant part:

“(b) State law.

(1) In general. **This Act 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.**” (Emphasis added.)

See 15 U.S.C. §7707(b).

The EMLA, under which Plaintiff asserts his Second Count, provides in relevant part:

“(B)(1) Except as otherwise provided in division (B)(3) of this section, 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, both of the following:**

(a) **The person's name and complete residence or business address and the electronic mail address of the person transmitting the electronic mail advertisement ***.**” (Emphasis added.)

O.R.C. §2307.64. Accordingly, a plain reading of the EMLA makes clear that the Ohio Legislature intended to prohibit senders of “electronic mail advertisements” from **providing**

false or deceptive identifying information to recipients. This type of prohibition is in line with the Congressional intent behind CAN-SPAM and its preemptive authority:

“*** [A] **State law prohibiting** fraudulent or **deceptive** headers, subject lines, or **content** in commercial e-mail **would not be preempted.**” (Emphasis added.)

S. Rep. No. 108-102, at 21 (2003), as reprinted in 2004 U.S.C.C.A.N 2348, 2365.

Here, Defendants’ provision of false and deceptive information within their emails is the basis of Plaintiff’s EMAA claims. In pertinent part, Plaintiff’s First Amended Complaint avers as follows:

“The above-described Advertisements, which are the 330 Emails that Defendants have sent or caused to be sent to Plaintiff’s Email Accounts and Receiving Addresses, fail to include in the body of each 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. As such, each of the Advertisements and 330 Emails constitutes one or more violations by Defendants of R.C. §2307.64(B)(1).” (See Plaintiff’s First Amended Complaint ¶1699, Document No. 9.)

Thus, Count Two specifically raises an issue regarding the falsity of information within the emails at issue. That being the case, Plaintiff’s EMAA claims fall directly within the exemption provision of CAN-SPAM’s preemption clause. See 15 U.S.C. §7707(b); and *Gordon v. Virtumundo, Inc.*, Case No. 06-0204-JCC, unreported, 2007 U.S. Dist. LEXIS 35544 (W.D. Wash. May 15, 2007)(Attachment 2)(noting that “a **State law prohibiting fraudulent or deceptive** headers, subject lines, or **content in commercial e-mail** would **not** be preempted [by CAN-SPAM]”).(Emphasis added.)

Defendants’ Motion cites *Omega v. World Travel v. Mummographics, Inc.*, 469 F.3d 348, 353-354 (4th Cir. 2006), in support of its argument that Plaintiff’s claims are preempted by CAN-SPAM. (Defendants’ Motion, p. 8) However, Defendants’ reliance on this case is misplaced

because the facts and legal issues presented in *Omega* are readily distinguishable from those in the case at bar.

In *Omega, supra*, the Fourth Circuit Court of Appeals affirmed summary judgment in favor of the defendant, ruling that CAN-SPAM's preemption clause does not allow states to create **strict liability** for **inaccuracies** in commercial email. *Omega, supra* at 355-56. The issues presented in *Omega* are markedly different than those in the case at bar.

In the instant case, Plaintiff asserts state law claims under the EMLA, which does not create **strict liability** for **inaccuracies** in commercial emails. Rather, EMLA makes it improper for the senders of commercial email messages to misrepresent or conceal their true identities by requiring the senders to clearly and conspicuously provide, within the body of each email advertisement, the sender's full name, complete physical residential or business address, and the email address of the person transmitting the electronic mail advertisement. O.R.C. §2703.64(B). Thus, the holding in *Omega* is not instructive in this case.

In *Gordon v. Virtumundo, Inc., supra*, also cited by Defendants, the district court held that the plaintiff's state law claims were preempted by CAN-SPAM because the claims were not supported by evidence that the emails were false or misleading in any way:

“Indeed, as noted above, CEMA claims that allege ‘false and deceptive’ e-mail headers would fit into Congress’s savings clause. However, in the instant case, the Court has the benefit of extensive summary judgment briefing and a record that clarifies the nature of Plaintiff’s claims. **The claims in the instant case are not for ‘falsity or deception,’ and therefore they are preempted and must be DISMISSED.**” (Emphasis added.)

Gordon v. Virtumundo, Inc. at *40 (Attachment 2). As noted above, Plaintiff's Amended Complaint clearly alleges that Plaintiff's EMLA claims **are** based upon “**falsity or deception**”

in the emails sent by Defendants. (Plaintiff's First Amended Complaint at ¶1699, Document No. 9) Therefore, Plaintiff's EMLA claims are clearly not preempted by CAN-SPAM.¹

C. Plaintiff's CSPA Claims Are Not Preempted by Federal Law.

Defendants also argue that Plaintiff's claims under the CSPA are preempted by CAN-SPAM. (Defendants' Motion, pp. 9-10, Document No. 11) However, Defendants fail to cite a single provision of the EMLA or CSPA, or any case law, to support this contention. *Id.* The reason for this omission is simple: there is **no authority** supporting Defendants' argument.

In fact, the plain language of CAN-SPAM's preemption provision makes clear the fact that Plaintiff's CSPA claim is not the type of consumer protection law that Congress intended to preempt. CAN-SPAM's preemption provision states:

“(b) State law.

(1) In general. This Act 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.**” (Emphasis added.)

See 15 U.S.C. §7707(b).

Here, Plaintiff's CSPA claims are based on Defendants' violations of O.R.C. §1345.02, arising from Defendants' violations of the Ohio Administrative Code. Plaintiff's First Amended Complaint clearly sets forth this cause of action as follows:

1693. Plaintiff hereby incorporates, as if fully rewritten herein, all of the foregoing paragraphs.

¹ Plaintiff's research has uncovered only one decision in has discussed CAN-SPAM preemption with respect to Ohio's EMLA. In *Ferron v. Echostar Satellite, LLC et al.*, Case No. 2:06-cv- 00453, Judge Watson granted summary judgment in favor of a defendant on the basis that Plaintiff's EMLA claims were preempted by CAN-SPAM. However, Plaintiff respectfully submits that Judge Watson's Opinion and Order was erroneous for the reasons set forth above. Furthermore, Plaintiff notes that the United States Court of Appeals for the Sixth Circuit has yet to speak to the issue of whether CAN-SPAM preempts Ohio's EMLA.

1694. Each of the 330 Emails that Defendants or their authorized agent transmitted to Plaintiff constitutes one or more unfair and/or **deceptive** sales acts and/or practices in violation of R.C. §1345.02(A).

1695. Defendants' violations were "knowingly" committed, as Defendants knew they were engaging in the acts and practices described in the preceding paragraphs.

1696. The acts and practices of Defendants or their authorized agents described hereinabove are acts and practices that: (a) have previously been declared to be unfair and/or **deceptive** 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 Defendants complained of herein; or (b) violate the provisions of the O.A.C., including but not limited to §109:4-3-02, §109:4-3-04 and/or §109:4-3-06.

1697. Because Defendants knowingly violated R.C. §1345.02(A), Plaintiff is entitled to: (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 violation of R.C. §1345.02(A); and (b) an award of Plaintiff's reasonable attorney's fees and costs against each Defendants pursuant to R.C. §1345.09(F).

(Plaintiff's First Amended Complaint, pp. 433-435, Document No. 9)

O.R.C. §1345.02 provides:

"§1345.02. Unfair or **deceptive** consumer sales practices prohibited

(A) No supplier shall commit an unfair or **deceptive** act or practice in connection with a consumer transaction. Such an unfair or **deceptive** act or practice by a supplier violates this section whether it occurs before, during, or after the transaction." (Emphasis added.)

Applying the plain language of 15 U.S.C. §7707(b) to O.R.C. §1345.02(A), it is clear that the CSPA is not preempted by CAN-SPAM because the CSPA is a "statute, regulation, or rule [that] prohibits falsity or **deception** in any portion of a commercial electronic mail message or

information attached thereto.” See 15 U.S.C. §7707(b). Therefore, Defendants’ argument that Plaintiff’s CSPA claims are preempted by CAN-SPAM is erroneous, and must fail.

D. Plaintiff’s First Amended Complaint Properly States a Claim for Intentional Interference with or Destruction of Evidence.

Defendants assert that Plaintiff’s claims for destruction of evidence must fail because: (1) the claim is derivative of Plaintiff’s EMAA and CSPA claims and is, therefore, preempted; and (2) Plaintiff has failed to state a valid claim for destruction of evidence. (Defendants’ Motion, pp. 10-12, Document No. 11) Both of these arguments lack merit.

First, as noted above, neither Plaintiff’s EMAA claims nor his CSPA claims are preempted by the federal CAN-SPAM law. Therefore, he has been damaged because Defendants have destroyed evidence that proves these allegations, and he has stated a claim upon which relief can be granted.

Second, Plaintiff clearly has set forth all of the necessary elements for a claim of intentional interference with or destruction of evidence. Defendants assert that Plaintiff has somehow failed to state a valid claim “since he has failed to allege that Consumer Research destroyed the emails at issue.” (Defendants’ Motion, p. 12, Document No. 11) This red-herring argument is equally without merit.

In *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St.3d 28 (1993), the Ohio Supreme Court held:

“A cause of action exists in tort for interference with or destruction of evidence; the elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff’s case, (4) disruption of the plaintiff’s case, and (5) damages proximately caused by the defendant’s acts; (2b) such a claim should be recognized between the parties to the primary

action and against third parties; and (3) such a claim may be brought at the same time as the primary action.”

Id. at 29.

Given this holding, Plaintiff’s Complaint clearly and concisely states a claim for interference with and/or destruction of evidence. Plaintiff’s First Amended Complaint pleads the following allegations:

“1687. Defendants had actual knowledge of Plaintiff’s claims regarding Defendants’ emails since September, 2006.

1688. In September 2006, the graphic images within the emails at issue were fully visible as they were still being hosted on the websites to which the emails were hyperlinked.

1689. Since the time that Defendants gained actual knowledge about Plaintiff’s claims regarding Defendants’ emails, the graphic images within the sixty [sic] emails at issue in this case have ceased being hosted by the websites to which the emails were hyperlinked.

1690. Upon information and belief, Defendants willfully ceased hosting the websites to which the sixty [sic] emails at issue in this case were hyperlinked in order to disrupt Plaintiff’s claims against Defendants.

1691. Without all of the graphic images within the sixty [sic] emails at issue in this case, Plaintiff will not be able to establish all of his claims against Defendants.

1692. Therefore, Plaintiff has suffered damages as a proximate result of Defendants’ cessation of hosting the websites hyperlinked to the sixty emails at issue in this case.”

(Plaintiff’s First Amended Complaint, ¶¶1687-1692, Document No. 9) These paragraphs clearly and concisely set forth each element for a claim of interference with or destruction of evidence as set forth by *Smith v. Howard Johnson Co., Inc.*, *supra*. It is not necessary for Plaintiff to plead that Defendants destroyed the emails themselves; Plaintiff has alleged that Defendants have interfered with the evidence contained within the emails by failing to maintain the websites on

which the images displayed in the emails are hosted. Because of this, emails that previously contained images displaying and describing Defendants' deceptive consumer offers are no longer visible.

Defendants claim that Plaintiff's allegation that Defendants "willfully ceased hosting the websites to which the emails at issue in this case were hyperlinked" is insufficient because it is not an allegation that Defendants "willfully destroyed" evidence that his claim must fail. (Defendants' Motion, p. 12, Document No. 11) However, defendants miss the point – their **failure to maintain the websites that host the mages appearing in their unlawful emails is the interference with and/or destruction of evidence of which Plaintiff complains.** The evidence of Defendants' unlawful conduct that previously existed within the emails no longer exists, and this is because Defendants failed to maintain it, as the law requires.

Because all well-pleaded allegations must be taken as true, and be construed most favorably toward the non-movant, Plaintiff respectfully submits that his Complaint properly states a claim upon which relief can be granted and, therefore, Defendants' Motion should be denied in this regard. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Mayer v. Mylod*, 988 F.2d 635, 637 (6th Cir. 1993).

E. Plaintiff's First Amended Complaint Complies with the Requirements of Fed. R. Civ. P. 9(b).

Lastly, Defendants argue that Plaintiff has failed to meet the requirements set forth in Fed. R. Civ. P. 9(b) because he has pled several allegations "upon information and belief." (Defendants' Motion, pp. 13-14, Document No. 11) To support this argument, Defendants cite *U.S. ex rel. Bledsoe v. Community Health Sys., Inc.*, 501 F.3d 493, 51 (6th Cir. 2007), and

Sanderson v. HCA-The Healthcare Co., 447 F.3d 873, 878 (6th Cir. 2006).² However, Defendants’ reliance on these cases is misplaced because they are distinguishable from the case at bar.

However both *Bledsoe* and *Sanderson* deal with claims arising from violations of the federal False Claims Act (“FCA”). This distinction is important because, “pleading an actual false claim with particularity is an indispensable element of a complaint that alleges a FCA violation in compliance with Rule 9(b). A clear and unequivocal requirement that a relator allege specific false claims emerges from the conjunction of Rule 9(b) and the statutory text of the FCA.” *Bledsoe, supra* at 504. Because claims under the FCA have their own specific requirements, these cases are easily distinguishable from Plaintiff’s case, which asserts violations of Ohio’s consumer protection statute.

Furthermore, while it is true that the cases relied upon by Defendants discuss Fed. R. Civ. P. 9(b)’s interplay with the FCA, these cases also discuss the reasoning behind Fed. R. Civ. P. 9(b)’s requirements, which should also be considered by the Court. For instance, in *Bledsoe*, the U.S. Sixth Circuit Court of Appeals stated:

“Rule 9(b) is not to be read in isolation, but is to be interpreted in conjunction with Federal Rule of Civil Procedure 8. *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 679 (6th Cir. 1988) (“[T]he two rules must be read in harmony.”). **Rule 8 requires only “a short and plain statement of the claim” made by “simple, concise, and direct allegations.”** *Id.* Rule 8 is commonly understood to embody a regime of “notice pleading” where technical pleading requirements are rejected in favor of an approach designed to reach the merits of an action ***. **When read against the backdrop of Rule 8, it is clear that the purpose**

² Defendants also cite to the case of *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 489 (6th Cir. 1990), which is readily distinguishable from the case at bar. *Craighead* deals specifically with claims of churning under the federal Securities Exchange Act. The Appeals Court held that claims of churning could not be pled “upon information and belief” because a plaintiff must identify the securities involved and set forth a statement of facts that is sufficient to, at the very least, permit a rough ascertainment of either the turnover ratio or the percentage of the account value paid in commissions. *Id.* at 489-490.

of Rule 9 is not to reintroduce formalities to pleading, but is instead to provide defendants with a more specific form of notice as to the particulars of their alleged misconduct.”

(Emphasis added.)

See also *Scheetz et al. v. Consumer Research Corp.*, Case No. 2:07-cv-00207, Opinion and Order (S.D. Ohio June 23, 2008)(in order to meet the pleading requirements of Fed. R. Civ. P. 9(b), plaintiff must “allege specifically times, places, [and] contents *** of underlying fraud,” citing *Ullmo v. Gilmour Acad.*, 273 F.3d 671, 678 (6th Cir. 2001)).

In this case, Plaintiff’s Complaint amply meets these requirements. Specifically, the Complaint sets forth the following factual allegations with particularity: (1) which Defendant sent each email; (2) the email addresses of Plaintiff to which the emails were sent; (3) the date and time the emails were sent to Plaintiff; (4) the content and purpose of the commercial emails sent to Plaintiff; and (5) how each email violates the law. (See generally, Plaintiff’s First Amended Complaint, Document No. 9.)

Moreover, while it is true that the decisions in *Bledsoe* and *Sanderson* addressed the problems with pleading matters “upon information and belief” in the context of Fed. R. Civ. P. 9(b), both also acknowledged allegations of fraud may be based upon “information and belief,” as long as the complaint sets forth a factual basis for such belief. See *Sanderson, supra* at 878; *Bledsoe, supra* at 504. See also *U.S. ex rel. Thompson v. Columbus/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997)(“[w]here allegations are based on information and belief, the complaint must set forth a factual basis for such belief.”); *Neubronner v. Milken*, 6 F.3d 666, 671-672 (9th Cir. 1993)(“A pleading “is sufficient under Rule 9(b) if it identifies ‘the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations’...a plaintiff who makes allegations on information and belief must state the factual basis for the belief,”)

Here, Plaintiff's Complaint clearly sets forth: (1) who sent the emails (Plaintiff's First Amended Complaint, ¶¶2-4); (2) the individual and email addresses to which the emails were sent (Plaintiff's First Amended Complaint, ¶¶11-13); (3) the specific date on which each email was sent (see e.g. Plaintiff's First Amended Complaint, ¶¶16, 21, 26); (4) the specific item offered in each email advertisement (see e.g. Plaintiff's First Amended Complaint, ¶¶16, 21, 26); (5) the number of emails that violate the law (Plaintiff's First Amended Complaint, ¶¶1694, 1699); and (6) how each email violates the CSPA and the EMAA (see e.g. Plaintiff's First Amended Complaint, ¶¶17-20). Therefore, Plaintiff has, with great specificity, provided ample factual details to support his claims, and placed Defendants on sufficient notice as to the nature of his claims. Accordingly, Defendants' Motion should be denied.

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully submits that Defendants' Motion should be denied in its entirety.

Respectfully submitted,

/s/ Lisa A. Wafer

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 13, 2008, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notice of such filing to all counsel of record.

/s/ Lisa A. Wafer _____

Lisa A. Wafer