

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

E360INSIGHT, LLC,)	
)	
Plaintiff,)	Case No. 08 C 0340
)	
v.)	
)	
COMCAST CORPORATION,)	Judge Zagel
)	Magistrate Judge Mason
)	
Defendant.)	

**MEMORANDUM OF LAW IN SUPPORT OF COMCAST
CORPORATION'S MOTION FOR JUDGMENT ON THE PLEADINGS**

PRELIMINARY STATEMENT

Defendant, Comcast Corporation (“Comcast”), through its subsidiaries, is an Internet Service Provider (“ISP”).¹ Plaintiff is a spammer who refers to itself as a “internet marketing company,” and is in the business of sending email solicitations and advertisements to millions of Internet users, including many of Comcast’s subscribers.

Plaintiff’s business practices clog Comcast’s network and its subscribers’ inboxes. Comcast, like other ISPs, filters email flowing through its servers to manage the resources of its network and prevent objectionable emails from reaching its subscribers.

Through this lawsuit, Plaintiff seeks to hold Comcast liable for legally and effectively managing the amount of spam and junk mail received by its subscribers. Plaintiff advances four theories of liability for Comcast’s alleged blocking of Plaintiff’s emails: (1) tortious interference

¹ In its Complaint, Plaintiff repeatedly alleges that Defendant Comcast Corporation is an ISP. Thus, for purposes of this motion, Comcast will take Plaintiff’s allegations as true and ignore any technical inaccuracies as to Comcast’s corporate form in Plaintiff’s Complaint. Moreover, any inaccuracy is immaterial in that any Comcast entity that Plaintiff could allege has taken any action with respect to its e-mails would qualify as a provider of an “interactive computer service” that is entitled to immunity under the Communications Decency Act and other relevant laws, which are discussed fully below.

with prospective economic advantage under Illinois common law; (2) violation of the federal Computer Fraud and Abuse Act (“CFAA”); (3) infringement of Plaintiff’s free speech rights in violation of the First Amendment; and (4) deceptive or unfair practices under the Illinois Consumer Fraud Act (“ICFA”).

Plaintiff’s claims are barred by federal law which preempts such attempts to put spammers’ pecuniary interests above those of consumers and the ISPs who endeavor to protect them while effectively manage their networks. Under the Communications Decency Act of 1996 (“CDA”), 47 U.S.C. § 230, Comcast is immune from liability for its actions to block objectionable material like Plaintiff’s mass e-mails. Also, all of Plaintiff’s claims fail as a matter of law.

FACTS

Comcast, through its subsidiaries, is the country’s largest cable-based ISP. Comcast operates tens of millions of unique e-mail addresses on its e-mail servers. As is commonly known, a significant percentage of the e-mails sent to its subscribers are spam or otherwise objectionable.

Providing ISPs with legal tools to control the proliferation of unsolicited email has long been a federal legislative concern. Congress recognized the growing extent of the unsolicited e-mail problem in 2003, finding that “[u]nsolicited commercial electronic mail is currently estimated to account for over half of all electronic mail traffic ... and the volume continues to rise.” 15 U.S.C. § 7701(a)(2). Moreover, Congress recognized that “[t]he growth in unsolicited commercial electronic mail imposes significant monetary costs on providers of Internet access services, businesses, and educational and nonprofit institutions that carry and receive such mail,

as there is a finite volume of mail that such providers, businesses, and institutions can handle without further investment in infrastructure.” 15 U.S.C. § 7701(a)(6).

Congress has also acknowledged that “[t]he problems associated with the rapid growth and abuse of unsolicited commercial electronic mail cannot be solved by Federal legislation alone. The development and adoption of technological approaches ... will be necessary as well.” 15 U.S.C. § 7701(a)(12). To maintain the stability and reliability of its network, and to limit the amount of spam and otherwise objectionable e-mail messages that reach its customers’ mailboxes, Comcast has developed a proprietary and highly confidential system of software and programs that identify, filter, and block e-mail messages that have the characteristics of inappropriate or unsolicited commercial e-mails, or spam.

Federal law protects Comcast’s use of these technological tools to filter out objectionable emails like those sent by Plaintiff. Congress enacted the CDA “to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services,” 47 U.S.C. § 230(b)(3), and “to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.” 47 U.S.C. § 230(b)(4).

In furtherance of those goals, the so-called Good Samaritan provisions of the CDA, 47 U.S.C. § 230(c), protect ISPs like Comcast for actions taken to prevent access to objectionable content. Indeed, courts interpret the CDA’s immunity provision broadly, and have dismissed claims brought in “attempts to hold [d]efendants liable for decisions relating to the monitoring, screening, and deletion of content from their network.” *See, e.g., Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007) (granting motion to dismiss under Section 230).

ARGUMENT

I. Plaintiff is Entitled to Judgment on the Pleadings

This Court can dismiss Plaintiff's claims on the pleadings under Rule 12(c), which is subject to the same standard as a motion to dismiss under Rule 12(b)(6), and is often used as appropriate means of dismissing a case based on an affirmative defense. *See Chicago Lawyers Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681 (N.D. Ill. 2006) (granting Rule 12(c) motion for judgment on the pleadings based on defendant's Section 230 immunity) (citing *McCready v. eBay, Inc.*, 453 F. 3d 882 (7th Cir. 2006)). In addition, as discussed below, Plaintiff's Complaint fails to state a claim upon which relief can be granted. *See, e.g., Parker v. Google, Inc.*, 242 Fed. Appx. 833 (3d Cir. 2007) (affirming 12(b)(6) dismissal of state law claims based on defendant's Section 230 immunity); *Green v. America Online*, 318 F.3d 465 (3d Cir. 2003) (same); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532 (E.D. Va. 2003) (dismissing claims against ISP under Section 230).

This Court should dismiss each of Plaintiff's claims since the factual allegations are not sufficient "to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955, 1960 (May 21, 2007). Moreover, as noted by the Seventh Circuit, "if a plaintiff pleads facts which show he has no claim, then he has pled himself out of court." *McCready v. eBay, Inc.*, 453 F.3d 882, 888 (7th Cir. 2006) *citing* *Jefferson v. Ambroz*, 90 F.3d 1291, 1296 (7th Cir.1996). Here, not only has Plaintiff alleged causes of action that are deficient as a matter of law, Plaintiff has pleaded the very facts that demonstrate that Comcast is immune from Plaintiff's claims.

II. Comcast is Immune From Liability Under the Communications Decency Act

Plaintiff's Complaint repeatedly (and correctly) asserts that Comcast is an ISP. (Compl. ¶¶ 2, 5, 11.)² Section 230 immunizes an ISP for blocking objectionable material like Plaintiff's mass e-mails, and pre-empts all state law causes of action that are inconsistent with its provisions. Section 230(c) of the CDA, entitled "Protection for 'Good Samaritan' Blocking and Screening of Offensive Material," provides in pertinent part:

no provider or user of an interactive computer service shall be held liable on account of – (A) any action taken voluntarily in good faith to restrict access to or availability of material that the provider or user considers to be ... objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable ... the technical means to restrict access to material described in paragraph (1) [sic].

47 U.S.C. § 230(c)(2).³

The CDA also states that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this Section." 47 U.S.C. § 230(e).⁴ Thus, it is clear that Comcast is immune under Section 230 and that Plaintiff cannot maintain its state law claims arising out of Comcast's actions to identify and filter Plaintiff's e-mails that Comcast has deemed objectionable.

² It is beyond question that, as an ISP, Comcast qualifies as an "interactive computer service" under the CDA. The CDA defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access to multiple users to a computer server, including specifically a service or system that provides access to the Internet." 47 U.S.C. § 230(f)(2).

³ The original text of 47 U.S.C. § 230(c)(2)(B) refers to "paragraph (1)," but it appears that the reference should instead be to subparagraph (A).

⁴ In addition to the CDA's immunity provisions, various state statutes immunize ISPs for filtering and blocking objectionable e-mails. *See, e.g.*, the Illinois Electronic Mail Act, 815 ILCS 511/10(f) ("An electronic mail service provider may, upon its own initiative, block the receipt or transmission through its service of any unsolicited electronic mail advertisement that it reasonably believes is, or will be, sent in violation of this Section"); 815 ILCS 511/10(g) ("No electronic mail service provider may be held liable for any action voluntarily taken in good faith to block the receipt or transmission through its service of any unsolicited electronic mail advertisement which it reasonably believes is, or will be, sent in violation of this Section").

The Seventh Circuit, in addressing an ISP's liability for allowing content to be posted on its network, recognized in dicta that "[a] web host that *does* filter out offensive material is not liable to the censored customer." *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003) (affirming 12(b)(6) dismissal based on Section 230).

A. Plaintiff's Mass Emails Are "Objectionable" under the CDA

Given explicit Congressional intent, it is clear that spam or unsolicited or bulk e-mails may be deemed "objectionable" by an ISP. Indeed, numerous courts have found immunity for entities who provide products or services intended to identify or block bulk unauthorized commercial or otherwise objectionable e-mails. For example, in *Zango, Inc. v. Kaspersky Lab, Inc.*, a highly analogous case, a district court granted summary judgment for a defendant software provider against claims that it inappropriately designated plaintiff's software as potentially malicious, basing its ruling on the provider's immunity under Section 230. No. C07-0807-JCC, (W.D. Wash. Order Aug. 28, 2007).⁵ Importantly, in its order dismissing plaintiff's claims, the Court noted that Section 230(c)(2) "does not require that the material actually be objectionable; rather it affords protection for blocking material 'that the provider or user considers to be' objectionable." *Zango* at pp. 6-7. *See also, Optinrealbig.com, LLC v. Ironport Sys.*, 323 F. Supp. 2d 1037 (N.D. Cal. 2004) (holding that operator of SpamCop service, which collected and sent user complaints regarding spam e-mails to ISPs, was protected by Section 230 in action by bulk e-mail company); *Pallorium v. Jared*, No. G036124, 2007 WL 80995 at *7 (Cal. Ct. App. Jan. 11, 2007) (affirming Section 230 immunity for user who created filters to prevent objectionable e-mails from reaching his own servers and distributed block lists to others;

⁵ A copy of the court's order is attached as Exhibit 1.

“whether [defendant’s] filter was over-inclusive is irrelevant so long as he deemed the material to be ... otherwise objectionable”).

Here, Comcast performs the exact function contemplated by the CDA – restricting access to material it deems objectionable – and uses technical means very similar to those for which defendants have been immunized in the above-cited cases. Comcast uses numerous programs, software, and technologies to identify and filter e-mails that its highly developed systems deem objectionable. It is immaterial whether Comcast’s systems are over-inclusive or under-inclusive; by enacting the Good Samaritan provisions of the CDA, Congress sought to immunize ISPs for any technical measure adopted to filter or block content that is deemed objectionable.

B. Plaintiff’s Alleged CAN-SPAM Compliance is a Red Herring

In the Complaint, Plaintiff touts its alleged compliance with the Controlling the Assault of Non Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”), 15 U.S.C. § 7701 *et seq.* (See, e.g., Compl. ¶ 4.) CAN-SPAM is another tool available to ISPs to curb mass emailing, but it is not a shield to prevent the use of technologies to block emails deemed objectionable. The CAN-SPAM Act expressly provides that it has no effect on ISP policies to filter or block objectionable e-mails. Specifically, 15 U.S.C. § 7707 states that:

[n]othing in this Act shall be construed to have any effect on the lawfulness or unlawfulness, under any other provision of law, of the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail messages.

Thus, Plaintiff’s CAN-SPAM compliance is immaterial to Plaintiff’s claims.

Indeed, in a nearly identical case, the Fifth Circuit affirmed summary judgment for an ISP in a suit brought by a bulk commercial e-mailer who sent allegedly lawful e-mails that were blocked by the ISP. *White Buffalo Ventures, LLC v. University of Texas at Austin*, 420 F.3d 366, 372 (5th Cir. 2005) (CAN-SPAM “does not preclude [defendant] from using technological

devices [such as] spam filters to conserve server space and safeguard [its] time and resources.”). Thus, it is clear that Plaintiff’s claim of CAN-SPAM compliance do not require Comcast to pass Plaintiff’s e-mails through without scrutiny.

III. Even if Comcast is Not Immune Under the CDA, Each Count Fails to State a Claim Upon Which Relief Could Be Granted

A. Plaintiff Fails to Plead a Claim for Tortious Interference with Prospective Economic Advantage (Count I)

Plaintiff’s first claim, for “Tortious Interference with Prospective Economic Advantage,” must be dismissed because Plaintiff fails to identify a single business relationship with which Comcast allegedly interfered. The elements of tortious interference with prospective economic advantage are: (1) plaintiff must have a reasonable expectancy of a valid business relationship with a third party; (2) defendant must know of the prospective business relationship; (3) defendant must intentionally interfere with the prospective business relationship such that the prospective business relationship never materializes; and (4) the interference must damage the plaintiff. *Lynch Ford, Inc. v. Ford Motor Co., Inc.*, 957 F. Supp. 142, 146 (N.D. Ill. 1997); *see also Langlands v. De La Rue Sec. Print, Inc.*, No. 00 C 2913, 2000 WL 1141574, * 2 (N.D. Ill. Aug. 11, 2000) (dismissing claim for interference with prospective economic advantage because the business relationship was between the defendant and a third party, not plaintiff and a third party). As noted by the Court in *Lynch Ford*, which Plaintiff cites in Paragraph 26 of the Complaint, a plaintiff “must specifically identify a third party to which it had a potential business relationship.” 957 F. Supp. at 146 (dismissing claim and noting that allegations that defendant “interfered with [Plaintiff’s] ‘customers’ will not suffice, absent the specific identification of one of those customers.”).

Plaintiff variously refers to its business clients and Comcast’s subscribers as the interfered-with customers. In truth, Plaintiff does not allege that it is paid by Comcast

subscribers to send them emails. Plaintiff's customers are the "companies that wish to market their products or services using the internet." (Compl. ¶ 7.) Any alleged "prospective business relationships" with Comcast's subscribers are non-existent, or far too tenuous to be considered a "reasonable expectation of entering into a valid business relationship." *Langlands*, 2000 WL 11141574, at * 2. As the *Langlands* court noted, "[plaintiff] did not have a contractual or business relationship with [the third party]; only Defendant had a relationship with [the third party], who contracted to purchase goods from Defendant." *Id.* at *3. Because Plaintiff cannot actually identify any customers, it necessarily fails to allege, as required, that Comcast knew of any of these prospective business relationships, or that Comcast intentionally interfered with such relationships. The Complaint also is void of any allegation that Comcast's activities damaged Plaintiff's relationship with its real customers, that is the "companies that wish to market their products or services using the internet."

B. Plaintiff Fails to State a Claim for Violation of the Computer Fraud and Abuse Act (Count II)

Plaintiff alleges that Comcast has violated the Computer Fraud and Abuse Act ("CFAA"), specifically 18 U.S.C. § 1030(a)(5)(A)(i) and (iii). Subsection (i) applies to whoever "knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer." Subsection (iii) applies to anyone who "intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage."

Plaintiff's allegations are, essentially, that (a) Comcast has delayed the processing or transmittal of Plaintiff's e-mails sent to Comcast subscribers, which it improperly characterizes as a "denial of service attack," and (b) as a result of information provided by Comcast through its filtering and blocking of Plaintiff's e-mails, Plaintiff chooses to delete entries from its database

of e-mail addresses. It is clear from Plaintiff's pleadings that Plaintiff cannot establish either that Comcast has intentionally caused damage to Plaintiff's computers or database, or that Comcast accessed any of Plaintiff's allegedly protected computers.

Plaintiff's first allegation that Comcast violated the CFAA is essentially that Comcast, by "slowing process times of [Plaintiff's] e-mails by hours," or by delaying e-mails sent by Plaintiff, engaged in a "denial of service attack" on Plaintiff's computers. (Compl. ¶¶ 18, 40.) Plaintiff's self-serving characterization grossly misdescribes the operation of e-mail servers. It is obvious from the facts in the Complaint that, in sending e-mails to Comcast users, Plaintiff initiates contact with Comcast's servers, not *vice versa*. Comcast's servers merely respond to Plaintiff's requests. That Comcast, pursuant to its filtering technologies, has refused to process Plaintiff's e-mails, or that Plaintiff has not configured its servers to disconnect after periods of unsuccessful attempts to transmit, does not mean that Comcast has "accessed" Plaintiff's computers.

By way of analogy, Plaintiff's allegations can be compared to a telemarketer who calls a phone number and receives no answer. Instead of hanging up, however, the telemarketer stays on the line and allows the phone to ring and ring, then claims that the owner of the telephone number has damaged the telemarketer because he or she was unable to make any other calls during the time the phone continued to ring.

Plaintiff's second CFAA allegation is that it removes addresses from its database based on information received from Comcast in the course of Comcast's filtering activities. (Compl. ¶ 42.) Taking this to be true, it is clear that Plaintiff, not Comcast, has caused the alleged damage to Plaintiff's alleged databases of customer information because it, not Comcast, deletes entries from its own database. (Compl. ¶¶ 42, 43.) Nowhere does Plaintiff allege, as required, that Comcast accesses any of Plaintiff's alleged protected computers with respect to the maintenance

of its database. Moreover, given its claims that Comcast transmits “fraudulent” or “false” bounce data regarding inactive or non-existent accounts, (Compl. ¶¶ 24, 42), it is nonsensical that Plaintiff relies on such “fraudulent” information to irretrievably delete the e-mail addresses in question. In short, Plaintiff seeks to hold Comcast liable for Plaintiff’s actions taken in reliance (and, from its pleadings, continued reliance) on information it thinks is inaccurate.

C. Plaintiff’s First Amendment Claim (Count III) Fails as a Matter of Law

It is well-established that Comcast, as a private entity, cannot not be liable for violations of the First Amendment. The First Amendment does not provide a cause of action against private actors like Comcast; rather, the First Amendment is “a guarantee only against abridgment by government, federal or state.” *Hudgens v. NLRB*, 424 U.S. 507, 513, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976). As the Supreme Court has held, “the guarantees of free speech ... guard only against encroachment by the government and ‘erec[t] no shield against merely private conduct.’” *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 115 S.Ct. 2338, 2344, 132 L.Ed.2d 487 (1995) (citation omitted).

Plaintiff does not allege, nor could it, that Comcast is a state actor, that Comcast’s actions constitute state action, or that any of Comcast’s policies with respect to its email filtering and blocking are the result of any government involvement. Courts have repeatedly acknowledged that ISPs and search engines are not state actors. *See, e.g., Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532 (E.D. Va. 2003) (dismissing First Amendment claim on basis that ISP was not state actor); *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436 (E.D. Pa. 1996) (ISP was not a state actor); *Langdon v. Google Inc.*, 474 F. Supp. 2d 622 (E.D. Del. 2007) (internet search engine that refused to carry plaintiff’s advertisements is not a state actor). Accordingly, Plaintiff’s First Amendment claim must be dismissed.

D. Plaintiff's Claim for "Unfair Competition and Business Practices" (Count IV) Fails as a Matter of Law

Plaintiff alleges in conclusory fashion that Comcast somehow violated section 815 ILCS 505/2, the Illinois Consumer Fraud Act (the "ICFA"). (Compl. ¶¶ 55-62.) Plaintiff's allegations are vague, but appear to be that Comcast engaged in some form of "deceptive" or "unfair" trade practice by refusing its e-mails, but transmitting others' e-mails. (Compl. ¶¶ 58-59.)⁶ Plaintiff also alleges that Comcast violated its own policies by not delivering Plaintiff's mass e-mails to Comcast subscribers and that Comcast entered into agreements with other marketers permitting them to send similar e-mails. (Compl. ¶¶ 56-60.) Neither allegation, even if true, could be considered "deceptive" or "unfair" under Illinois law. Further, the ICFA only allows claims by non-consumers where there is a nexus between the Defendant's conduct and an injury to consumers. Consumer injury is entirely absent here, and Plaintiff cannot, therefore, bring a claim under the ICFA.

1. Plaintiff Does Not Allege a Deceptive Practice or Act by Comcast that Comcast Intended for Plaintiff to Rely On

To adequately plead a claim based on a deceptive practice or act under the Illinois Consumer Fraud Act, Plaintiff must allege "(1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; and (3) the occurrence of the deception during a course of conduct involving trade or commerce." *Robinson v. Toyota Motor Credit Corp.*, 201 Ill.2d 403, 417, 775 N.E.2d 951, 960 (Ill. 2002) (affirming dismissal of claims

⁶ 815 ILCS 505/2 provides in pertinent part:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact ... in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.

under the ICFA where plaintiff cannot identify an unfair or deceptive act); *see also Neff v. Capital Acquisitions & Mgmt*, 238 F. Supp. 2d 986, 994 (N.D. Ill. 2002) (dismissing claims brought by debtor under the ICFA); *Garett v. RentGrow, Inc.*, No. 04 C 8309, 2005 WL 1563162 (N.D. Ill. July 1, 2005) (granting motion to dismiss claims under the ICFA and applying *Robinson*). As discussed below, Plaintiff utterly fails to identify a deceptive act or practice by Comcast or allege that Comcast intended for Plaintiff to rely on such deception. (Compl. ¶¶ 55-62.)⁷ Plaintiff does not allege that he is a customer of Comcast's, nor a party to any contract with Comcast for any services. Therefore, Comcast owed absolutely no duty to Plaintiff, and Comcast made no representations to Plaintiff that could give rise to liability under the ICFA.

Plaintiff cannot turn its alleged compliance with Comcast's online policies into an unfair competition claim. To the contrary, the policies Plaintiff attached to the Complaint, and on which Plaintiff ostensibly relied, specifically permit Comcast to undertake the filtering of which Plaintiff complains and to refuse to transmit material it deems objectionable. For instance, the Comcast High-Speed Internet Acceptable Use Policy ("AUP") attached to the Complaint by Plaintiff states that "Comcast reserves the right, but not the obligation, to refuse to transmit or post and to remove or block any information or materials, in whole or in part, that it, *in its sole discretion, deems to be offensive, indecent, or otherwise inappropriate, regardless of whether*

⁷ Claims of fraud arising under the ICFA must meet the pleading requirements of Fed. R. Civ. P. 9(b) which requires Plaintiff plead "the who, what, when, where, and how; the first paragraph of any newspaper story." *Conditioned Ocular Enhancement, Inc. v. Bonaventura*, 458 F. Supp. 2d 704, 709 (N.D. Ill. 2006). Plaintiff's claim is that Comcast employed a "false pretense, false promise, or misrepresentation" in connection with its business practices – claims that clearly sound in fraud. (Compl. ¶ 55.) Accordingly, the Complaint "must be pled with the same particularity and specificity as that required under common law fraud." *Neff*, 238 F. Supp. 2d at 994; *Robinson*, 201 Ill.2d at 419, 775 N.E.2d at 961 ("The complaint must state with particularity and specificity the deceptive manner of defendant's acts or practices, and failure to make such averments requires the dismissal of the complaint.").

this material or its dissemination is unlawful.” (Ex. A, pp. 22-23) (emphasis added).⁸ Thus, Plaintiff’s pleading establishes that Comcast complied with its own policies in filtering or blocking Plaintiff’s e-mails.

2. Plaintiff Does Not Identify Any “Unfair” Conduct under the ICFA

Further, Plaintiff does not allege any conduct by Comcast that would be considered “unfair” under the ICFA. An activity or practice is “unfair” under the ICFA only if it “offends public policy,” is “immoral, unethical, oppressive, or unscrupulous,” or it “causes substantial injury to consumers.” *Robinson*, 201 Ill.2d at 418-19, 775 N.E.2d at 961 (citing *Fed. Trade Comm’n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 92 S.Ct. 898 (1972)). None of Comcast’s activities as alleged in the Complaint could be considered “unfair” under *Robinson*.

The only practices Plaintiff claims to be unfair are that Comcast allegedly refused to “deliver email sent by e360 while allowing its competitors to freely transmit email [to Comcast’s customers]” and that Comcast has allegedly made agreements with other email marketers to send or transmit email without interruption. (Compl. ¶¶ 59, 60.) Even assuming Plaintiff’s allegations to be true, there is nothing unfair about choosing not to do business with a particular company, let alone that it “offend(s) public policy,” is “immoral, unethical, oppressive, or unscrupulous,” or causes “substantial injury to consumers”; as such, Plaintiff’s claim must be dismissed.

3. Plaintiff is Not a Consumer and Has Not Alleged Consumer Injury

Plaintiff does not seek redress as a consumer of Comcast’s services. Because Plaintiff does not fall within the ICFA’s definition of “consumer,”⁹ its ability to maintain a claim turns on

⁸ The version of Comcast’s AUP attached by Plaintiff does not contain the date on which the policy was retrieved, and does not appear to be the most current version of Comcast’s policy. While Comcast’s current AUP contains highly similar provisions and language, for purposes of this motion, Comcast refers to the language that appears in the version of the AUP attached to the Complaint.

“whether plaintiff can plead and prove a nexus between the complained-of conduct and consumer protection; specifically, whether defendant's alleged wrongful [conduct was] addressed to the market generally or otherwise implicate[s] consumer protection concerns.” *Pace American, Inc. v. Elixir Inds.*, No. 06 C 4661, 2007 WL 495302, *4 (N.D. Ill Feb. 13, 2007) (granting motion to dismiss ICFA claim where complaint specifically sought recovery for injury to non-consumer plaintiff, not to consumers). Here, Plaintiff has not alleged injury to consumers; it seeks to recover for its own financial losses. Thus, Plaintiff cannot maintain its claim under the ICFA.

CONCLUSION

For all of the above mentioned reasons, Comcast respectfully requests that this Court grant its Motion and dismiss Plaintiff's Complaint in its entirety.

Dated: March 4, 2008

Respectfully submitted,

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⁹ 815 ILCS 505/1(e) defines a consumer as “any person who purchases or contracts for the purchase of merchandise not for resale in the ordinary course of his trade or business but for his use or that of a member of his household.”

CERTIFICATE OF SERVICE

I, Douglas N. Masters, hereby certify that I electronically filed the foregoing **MEMORANDUM OF LAW IN SUPPORT OF COMCAST CORPORATION'S MOTION FOR JUDGMENT ON THE PLEADINGS** with the Clerk of the Court for the Northern District of Illinois using the ECF System which will send notification to the registered participants of the ECF System as listed on the Court's Notice of Electronic Filing this 4th day of March, 2008.

/s/ Douglas N. Masters