

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

JOHN W. FERRON,	:	
	:	
Plaintiff,	:	Civil Action No. 2:07CV 01193
	:	
vs.	:	Judge Sargus
	:	
E360Insight, LLC, <i>et al.</i> ,	:	Magistrate Judge King
	:	
Defendants.	:	

**PLAINTIFF’S MEMORANDUM IN OPPOSITION  
TO MOTION OF DEFENDANTS TO DISMISS COMPLAINT (Doc. 5)**

PLAINTIFF JOHN W. FERRON, by and through his undersigned counsel, tenders his Memorandum in Opposition to Motion of Defendants to Dismiss Complaint (Doc. 5).

**I. INTRODUCTION.**

Defendants filed their *Motion to Dismiss* (Doc. 5) predicated on the argument that this Court lacks personal jurisdiction over Defendants pursuant to Fed.R.Civ.P. 12(B)(2). Defendants E360Insight, LLC (“E360”) and David Linhardt (“Linhardt”) are engaged in the business of transmitting large numbers of commercial email messages to consumers. Plaintiff’s claims in this case are based upon Defendants’ commercial email activities which directed about 900 commercial email messages to Plaintiff in Ohio. Plaintiff’s Complaint alleges that Defendants’ commercial email messages violate the provisions of the Ohio Consumer Sales Practices Act, (“CSPA”), Ohio Revised Code §§ 1345.01, *et. seq.*, and the Ohio Electronic Mail Advertisement Act, (“EMAA”), Ohio Revised Code §§ 2307.64, *et seq.* Defendants’ email records demonstrate that they knew that Plaintiff’s address was in Ohio. Since the tortious activities of which Plaintiff complains (the transmission of commercial emails) were initiated by Defendants and purposely directed to Plaintiff,

a known resident of the State of Ohio, Defendants' arguments of lack of personal jurisdiction must fail.

## **II. FACTUAL BASIS FOR PERSONAL JURISDICTION.**

Plaintiff adopts by reference, as is fully rewritten herein, his affidavit attached hereto which is captioned "Affidavit of John W. Ferron in Support of Memorandum in Opposition to Defendants Motion to Dismiss Complaint (Doc. 5)," ("JWF Aff"). Plaintiff is, and at all times relevant to the claims at issue was, a resident of the State of Ohio. JWF Aff. at ¶3. He received about 900 unsolicited commercial emails in a seemingly continuous and systematic manner from Defendants. *Id.* at ¶4. Defendants' emails were delivered to Plaintiff through his computers and servers, which were located, maintained and operated in the State of Ohio. *Id.* at ¶5. Plaintiff contends that Defendants' activities, in transmitting and directing Defendants' emails to him in the State of Ohio, violate the CSPA and EMLA. *Id.* at ¶7. On or about June of 2007, an authorized representative and agent of the Defendants admitted to Plaintiff that Defendants associated Plaintiff's email addresses with Plaintiff's residential address at 6262 Deeside Drive, Dublin, Ohio 43017. *Id.* at ¶8.

As part of the limited jurisdictional discovery that was conducted by the Plaintiff, Defendants E360 and Linhardt joined in a single response to Plaintiff's discovery requests propounded as to the jurisdictional issues. While Defendants' combined discovery responses were non-responsive in most instances, some facts were provided that demonstrate a factual basis to support personal jurisdiction in this case. Defendants disclosed that they do business using the internet names of e360Insight.com and e360data.com. See Ex. 1, Def.s' Ans. to Int. #2. Defendants' failed, however, to identify the internet businesses owned and/or operated by them as "Discount Accessories," "Bargaindepot.net," and "Bargainshoppecorp.com", which were identified by Linhardt in ¶¶ 19 and 21 of his August 30, 2006 affidavit, attached hereto as Exhibit 2. The

significance of this factual omission in these proceedings is not insignificant. Defendants, through bargaindepot.com, market and sell consumer goods including Ohio State College Football accessories. See Exhibit 3.

Defendants' discovery responses also demonstrate that they maintain over 120 million email addresses in their database. See Ex. 1, Def.s' Ans. to Int. #9. As part of the jurisdictional discovery responses, Defendants refused to provide the number of email address records contained within their databases that have a state field code for Ohio. See Ex. 1, Def.s' Ans. to Int. #10. Instead, Defendants claimed that an email address in and of itself does not identify the state within which its recipient is located. *Id.* However, Linhardt acknowledges that he posts messages to the internet newsgroup known as "news.admin.net-abuse.net." See Ex. 1, Def.s' Ans. to Int. #2, and documents E360-1 and E360-2, attached thereto. In one such post, dated September 21, 2006, Linhardt explained that his email database maintains email addresses for the United States and not the United Kingdom. See Exhibit 4.

The United States Census Bureau stated, in its annual estimate for 2006, that the United States population was about 299.4 million persons, with 11.5 million of them residing in Ohio. See Exhibit 5. Stated another way, about 3.8% of the country's population resides in Ohio. Based upon 120 million email addresses maintained by the Defendants in their email database, the population distribution would indicate that approximately 4.56 million of those email addresses are registered to residents of Ohio. That would indicate that the Defendants are sending emails to more than one third of Ohio's residents.

Defendants' discovery response to the effect that they do not associate an email address with the recipient's state are disingenuous at best, given the statements that appear on their website at e360data.com. See Exhibit 7, at p.1 ("100% of our prospects have full name, postal address, email

address and phone numbers enabling true multi-channel direct marketing”). There E360 claims its services and databases provide a multi-channel method for marketing including – web, email, direct mail and telemarketing. See Exhibit 6<sup>1</sup>. In fact, E360 claims to provide over 350 demographics, lifestyle and behavioral variables available on every customer lead. *Id.* Additionally, they boast over 165 targeted lists for direct mail and telemarketing campaigns. *Id.* One sample list of several appearing in Exhibit 7 includes “Contributors to Religious Organizations.” See Exhibit 7, p. 17. The information for that single list indicates that there are 4,862,623 records and each record includes the target customer’s email address, postal address and phone number, complete with over 300 demographic, lifestyle and behavioral elements. *Id.* These statements appearing on Defendants’ web pages demonstrate that their activities are targeted directly to potential customers’ households – even as to their household income and presence of children. *Id.* Defendants’ activities are not synonymous with the simple maintenance of a website that people might visit, nor do they merely serve as a listing in a phone book that people may seek out for additional information.

Defendants also produced as part of the limited jurisdictional discovery their Strongmail *Business Manager End User Guide* (“Manual”), which describes the functionality of the software Defendants use to deploy their commercial email marketing messages. See Ex. 1, Def.s’ Ans. to Req. for Prod. #9. The Manual illustrates, on page 8 at figure 3, the capability of showing each record by name, email address, gender, city, state, income, political party, education, and age for each email address within the system. See Exhibit 8, numbered p.8. On page 48, the Manual explains how the target recipients for a particular mailing can be selected, based upon selection criteria and filtering. *Id.*, at numbered p. 48. Linhardt is the president of both E360 and Bargain Depot Enterprises. See Decl. of Linhardt attached hereto as Exhibit 9, at ¶1. Linhardt states that

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<sup>1</sup> Federal courts recognize that a court may take judicial notice of the information which appears on a corporation’s website. See *Enterprise Rent-A-Car Company v. U-Haul Intern., Inc.*, 327 F. Supp. 2d 1032 (E.D. Mo. 2004).

their email lists are used to market their client's goods and services. *Id.* at ¶17.

However, Linhardt is more than a mere owner or stakeholder in E360. The "About Us" web page at e360data.com describes Linhardt's position and responsibilities. See Exhibit 10. That web page states in pertinent part:

As a founder of e360Insight, LLC, David's [Linhardt's] responsibilities include overall strategic direction and management of e360's business operations. E360's operating businesses include e360Insight, an integrated direct marketing solutions provider, e360data, a consumer-focused permission data company and BargainDepot Enterprises, an e-commerce company. David's responsibilities extend to all key operational areas including sales, customer service, technology development and product development.

See *Id.* Additionally, in Linhardt's August 30, 2006, affidavit he describes the effect of the spam black-listings imposed upon him and his e360 companies (e360Insight, LLC; Discount Accessories; Ravinia Hosting Company, LLC; and BargainDepot.net), as causing "our sending of commercial email messages to cease. Thus we are unable to realize revenue from our business." Exhibit 2, at ¶30-33. Clearly, Linhardt is responsible for the business decisions of E360, including the operations of sending the commercial email messages. *Id.*

The November 16, 2007 affidavit of Linhardt clearly states that Linhardt is responsible for overseeing the day-to-day operations of the company. See Linhardt Aff. attached to Def.s' Motion to Dismiss, at ¶1. Linhardt does not deny that the commercial email messages are specifically targeted to their intended recipient. While Linhardt affirmatively states that the company's website does not specifically market to Ohio residents, he does not deny that Defendants target Ohio residents through their commercial email messages. *Id.* at ¶3. Linhardt does not claim that he was not involved in the creation or maintenance of the databases in which the email addresses are maintained. Nor does he deny that E360's databases maintain a field code for the state of residence of the consumers whose email addresses are stored in their databases. Nor does he deny that

Defendants have the ability to filter out email addresses that are associated with consumers who have postal addresses in the State of Ohio, or deny that the purpose of the commercial email messages sent by Defendants is to contact the consumer directly and initiate a response.

In sum, Linhardt's affirmative representations in ¶5 of his Nov. 16, 2007 affidavit are controverted by the facts recited above, including the JWF Aff. and the Exhibits attached thereto, as well as the content of the web pages at e360data.com which indicate that postal address and demographic data are maintained for each email address.

### **III. LAW AND ARGUMENT.**

#### **A. PLAINTIFF NEED ONLY MAKE A PRIMA FACIE SHOWING TO SUPPORT PERSONAL JURISDICTION.**

When a district court rules on a jurisdictional motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(2), in the absence of an evidentiary hearing, the court must consider the pleadings and affidavits in a light most favorable to the plaintiff. *Compuserve, Inc. v. Patterson*, 89 F.3d 1257, 1262, (6<sup>th</sup> Cir. 1996) (internal citations omitted). To overcome the motion to dismiss the plaintiff need only demonstrate a *prima facie* showing of jurisdiction. *Id.* The court should not weigh the disputed factual allegations. *Id.* Instead the court must resolve all factual disputes in favor of the plaintiff as the non-moving party. Dismissal is proper only if all the specific facts which the plaintiff alleges as a whole fail to state a prima facie case for jurisdiction.

#### **B. THIS COURT MUST APPLY OHIO JURISDICTIONAL LAW.**

In a diversity case, such as the case *sub judice*, the federal district court “must apply the law of the forum state to determine whether it may exercise jurisdiction over the person of the non-resident defendant.” *Theunissen v. Matthew*, 935 F.2d 1454, 1459 (6<sup>th</sup> Cir. 1991); see also, *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 721 (6<sup>th</sup> Cir.2000). This application of state law in support of personal jurisdiction is subject to the constitutional limits of due process. *Cole v. Mileti*,

133 F.3d 433 (6<sup>th</sup> Cir. 1998). Ohio’s law long-arm statute is codified at R.C. § 2703.382, and states in pertinent part:

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

(1) Transacting any business in this state;

(2) Contracting to supply services or goods in this state;

\* \* \*

(4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

\* \* \*

(6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;

\* \* \*

See, R.C. § 2307.382.

**1. PERSONAL JURISDICTION OVER DEFENDANTS EXISTS UNDER R.C. 2307.382(A)(1).**

With regard to R.C. § 2307.382(A)(1), the Ohio Supreme Court has explained that the “term ‘transacting’ as utilized in the phrase ‘[t]ransacting any business’ encompasses “‘to carry on business’” and “ ‘to have dealings,’” and is “ ‘broader \*\*\* than the word “contract”’.” *Goldstein v. Christiansen* (1994), 70 Ohio St.3d 232, 236 (quoting *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.* (1990), 53 Ohio St.3d 73, 75). Thus, contrary to Defendants’ argument, there is no requirement under R.C. § 2307.382(A)(1) that an actual “transaction have been consummated.” In fact, under R.C. § 1345.01(A), one of the statutory provisions at issue in the Plaintiff’s complaint defines “consumer transaction” to include “a sale,\*\*\* award by chance, or other transfer of an item

of goods, a service, \*\*\* to an individual for purposes that are primarily personal, family, or household, **or a solicitation to supply of these things.**” See, R.C. § 1345.01(A). As such, the mere solicitation of a sale or award of a consumer good constitutes a transaction. Ohio law does not require any physical presence of the defendant in the State of Ohio to find personal jurisdiction. See, *Kentucky Oaks Mall, supra*; see, also, *Ucker v. Taylor* (1991), 72 Ohio App.3d 777. It is also noteworthy that the definition of “supplier” in R.C. 1345.01(C) means a “seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or **soliciting** consumer transactions.” See, R.C. § 1345.01(C) (emphasis added).

Plaintiff submits that Defendants transacted business in Ohio through their transmission of commercial email messages to recipients in Ohio, including Plaintiff. Through these commercial emails, Defendants solicited the sale and advertisement of many consumer products offered by well known Ohio companies, including Bath & Body Works, Big Lots, JoAnn Fabrics, Procter & Gamble and Wendy’s. These facts support a finding that Defendants are engaged in advertising activities in the State of Ohio, and as a consequence transact business in Ohio pursuant to R.C. § 2307.382(A)(1).

**2. PERSONAL JURISDICTION OVER DEFENDANTS EXISTS UNDER R.C. § 2307.382(A)(2).**

Subsection (A)(2) permits jurisdiction where the defendant has contracted to supply services or goods in this state. Plaintiff submits that Defendants’ email marketing services were supplied within the State of Ohio. Exhibit 9 demonstrated that “e360 and BDE [BargainDepot.net] on behalf of their clients use the mail lists they have compiled to market their client’s goods and services.” See, Exhibit 9, at ¶17; see also Exhibit 2, at ¶¶30-32 (as to the existence of Defendants’ contracts for email services). Defendants send email solicitations on behalf of Bath & Body Works, Big Lots, JoAnn Fabrics, Procter & Gamble and Wendy’s. These Ohio entities are national corporations that

rely upon national marketing campaigns and efforts to reach their prospective customers. While Defendants refused provide their customer contracts as part of the limited jurisdictional discovery, these Ohio clientele were identified by Plaintiff through his review of the products advertised in the commercial email messages sent to him by Defendant. See, JWF Aff. at ¶ 9. The existence of these contractual relationships for email advertising services (as evidenced by the circumstantial evidence of the existence of the numerous emails) which have culminated in commercial email messages entering Ohio satisfy R.C. § 2307.382(A)(2). See, *United States v. Bland*, 653 F.2d 989, 996 (5th Cir. Unit A Aug.1981) (criminal case) (“circumstantial evidence is to be treated no differently than direct evidence”).

**3. PERSONAL JURISDICTION OVER DEFENDANTS EXISTS UNDER R.C. § 2307.382(A)(4) AND/OR R.C. § 2307.382(A)(6).**

Subsection (A)(4) permits jurisdiction where a defendant has caused a tortious injury in this state by an act or omission outside the state if he regularly does or solicits business, or engages in any other persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered in this state. Plaintiff’s claims in this case include claims arising under the CSPA. This court in *Ferron v. Search Cactus, LLC*, No. 2:06-cv-327, 2007 WL 1792332 (S.D.E.D. Ohio, 2007) (Frost, J.), recognized that claims arising under the CSPA constitute tort claims. *Search Cactus*, 2007 WL 1792332, at \*2 (citing *Grayson v. Cadillac Builders, Inc.*, No. 68551, 1995 Ohio App. LEXIS 3954, at \*9, n.1 (Ohio Ct.App. Sept. 14, 1995). Plaintiff’s claims are predicated upon Defendants’ transmission of about 900 emails to Plaintiff containing misrepresentations and/or omissions that constitute violations under the CSPA. Defendants’ regular solicitation of business, and course of conduct in transmitting hundreds of emails, each of which violates the CSPA, permits this court to find that Defendants fall within the jurisdictional provisions of R.C. § 2307.382(A)(4).

Subection (A)(6) permits jurisdiction where the defendant causes tortious injury in this state to any person by an act outside the state committed with the purpose of inuring persons, when he might reasonably have expected that some person would be injured thereby in this state. Applying the same rationale as set forth above for R.C. § 2307.382(A)(4), Defendants' email transmissions serve as a basis to find jurisdiction under R.C. § 2307.382(A)(6). The Defendants directed the commercial email messages to Plaintiff in Ohio, for the purpose of conveying their false statements and omissions to Plaintiff. Accordingly, the Court must find jurisdiction.

**C. DEFENDANTS' CONTACTS WITH OHIO ARE SUBSTANTIAL AND THE EXERCISE OF LONG-ARM JURISDICTION DOES NOT VIOLATE DUE PROCESS.**

Over an extended period of time, Defendants transmitted about 900 commercial email messages to Plaintiff. This type of contact is substantial. The Supreme Court recognized that personal jurisdiction over a non-resident defendant would be proper provided the defendant possessed certain minimum contacts with the forum state. See, *Internatl. Shoe Co. v. Washington* (1945), 326 U.S. 310, 316, 66 S.Ct. 154. In 1985, the Supreme Court expounded upon its prior decisions and held that the relevant inquiry is whether the defendant purposely availed himself of minimum contacts in the forum state such that he or she should reasonably anticipate being hailed into court there. *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 474, 105 S.Ct. 2174. The Sixth Circuit has explained that the due process analysis requires: (1) that the defendant engaged in activities that purposely availed the defendant to the forum state; (2) the cause of action at issue must have arisen from those activities; and (3) the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant fundamentally fair. See, *Nationwide Mut. Ins. v. Tryg Int'l Ins. Co.*, 91 F.3d 790, 794 (6<sup>th</sup> Cir. 1996).

Contrary to Defendants' arguments, Plaintiff's claims do not arise from Defendants' activities in the maintenance of their interactive/active website. Instead, Plaintiffs' claims are directed at the approximate 900 unsolicited commercial email messages that Defendants sent to Plaintiff. This distinction is important because email messages differ markedly from websites. A website operator does not select its visitors to the website, however, a commercial emailer can pick and choose to whom its emails will be sent. See generally *Am. Libraries Ass'n v. Pataki*, 969 F.Supp. 160 (S.D.N.Y.1997). Nonetheless, courts across the country find that operation of an active or interactive website through which the defendant transacts business, for example selling goods or services, will create personal jurisdiction. See *Neomedia Technologies, Inc. v. Airclic, Inc.*, No. 04 C 566, 2004 WL 848181, at \*3 (N.D.Ill. Apr.16, 2004 (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp 1119, 1123-24 (W.D.Pa., 1997)).

**1. DEFENDANTS PURPOSELY AVOIDED THEMSELVES TO THE STATE OF OHIO BY SENDING COMMERCIAL EMAILS TO RESIDENTS IN THE STATE OF OHIO – THE FIRST PRONG IS MET.**

In *Search Cactus*, supra., the Hon. Judge Frost determined that the defendants' activities in soliciting business in Ohio through emails resulted in the defendants being subject to Ohio law. See, *Search Cactus*, 2007 WL 1792332, \*5. See also, *Lowdon v. PTY Ltd. v. Westminster Ceramics, LLC*, 534 F.Supp.1354, 1359 (N.D. Ga., 2008) (email communications are a sufficient basis to support a finding of personal jurisdiction). The Sixth Circuit has explained that *Burger King Corp.* has naturally expanded personal jurisdiction to cover transmission of e-mail and the use of the internet. See, *Rice v. Karsch*, 154 Fed.Appx 454, 467 (6<sup>th</sup> Cir. 2005), citing *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 511 (D.C. Cir 2002) (“ ‘Cyberspace’ \*\*\* is not some mystical incantation capable of warding off the jurisdiction of courts built from brick and mortar.”); accord *ALS Scan Inc. v. Digital Service Consultants, Inc.* 293 F.3d 707, 714 (4<sup>th</sup> Cir. 2002) (state

may exercise personal jurisdiction over defendant who electronically directs activity towards a state with the manifested intent of engaging in business or other interactions there, and the activity creates a cognizable cause of action).

Defendants argue that they did not purposely avail themselves to Ohio residents since the email addresses do not denote a geographical location. First, Plaintiff has already demonstrated that Defendants associated his email address with his physical address in Ohio. Second, even in the absence of such proof, “courts have sensibly recognized that a spammer may not avoid personal jurisdiction by ‘simply pleading ignorance of where [] [email] servers were located,’ nor by pleading ignorance of the email recipient’s location.” See *Aitken v. Communications Workers of America*, 496 F.Supp.2d 653, 660 (E.D. Va., 2007) (quoting *Verizon Online Services v. Ralsky*, 203 F.Supp.2d 601, 611-20 (E.D. Va., 2002)).

Defendants’ argument that they do not know where the email communication will be read was considered and rejected by the Court of Special Appeals of Maryland in *MaryCLE, LLC v. First Choice Internet, Inc.* (2006), 166 Md.App. 481, 890 A.2d 818. The court in *MaryCLE* explained:

We also reject [the mass-emailer] First Choice's claim that jurisdiction is not proper because, even if it knew where the recipients reside, it had no idea where the emails would be opened. This allegation has little more validity than one who contends he is not guilty of homicide when he shoots a rifle into a crowd of people without picking a specific target, and someone dies. See *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F.Supp. 456, 469 n. 27 (D.Mass.1997)(likening the sending of advertisements via the Internet to a gunman “repeatedly firing a shotgun into a crowd across the state line, not aiming at anyone in particular, but knowing nonetheless that harm in the forum state may be caused by its actions outside it”).

\* \* \*

*Digital Equip.*, 960 F.Supp. at 469 (emphasis added). First Choice's purpose in sending commercial emails was likewise the targeting of its email recipients, who included Maryland residents.

In sum, First Choice cannot plead lack of purposeful availment because the “nature” of the Internet does not allow it to know the geographic location of its email

recipients. See *Verizon Online*, 203 F.Supp.2d at 620. Rather, when considering the “nature” of First Choice's contacts, our focus should be on the fact that the emails are communications specifically and deliberately designed to convince the recipients to engage the services of First Choice and to promote the products of its customers. Although First Choice did not deliberately select Maryland or any other state in particular as its target, it **knew** that the solicitation would go to Maryland residents. Its broad solicitation of business “instantiates the purpose that makes the connection more than an ‘attenuated nexus,’ ” and thus it should be subject to jurisdiction “wherever its email[s] were received.” Fenn, 103 P.3d at 162 (citations omitted).

*MaryCLE, LLC*, 166 Md.App. at 508-509, 890 A.2d at 834-35.

Defendants also argue that they did not purposefully avail themselves to Ohio since their contacts with Plaintiff and Ohio were merely fortuitous and attenuated. Defendants’ argument in this regard can be rejected under a proper analysis of “foreseeability” under *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980); and *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 112, 107 S.Ct. 1026, 1032, 94 L.Ed.2d 92 (1987). The *MaryCLE* court opined on this issue and found jurisdiction in the case of a mass emailer. The court stated:

First Choice's emails did not merely “find [their] way” into Maryland the way a car, sold in one state by the defendant, might find its way to another because the **plaintiff** drove it into another state. See *Id.* Rather, First Choice **directly** caused the emails to be sent to Maryland, among other states. It is thus reasonable for First Choice to expect to answer for those emails in Maryland, or any other state to which they were sent. See *Fenn*, 103 P.3d at 162; *Internet Doorway*, 138 F.Supp.2d at 776.

The Court of Appeals has explained that there is a difference between a merchant who purposefully “sends a product” into another jurisdiction and one that simply receives business from another state. In *Camelback Ski Corp. v. Behning*, 312 Md. 330, 340-41, 539 A.2d 1107, cert. denied, 488 U.S. 849, 109 S.Ct. 130, 102 L.Ed.2d 103 (1988)(“Camelback II”), the Court elaborated:

[A] significant difference exists between regularly placing goods into a stream of commerce with knowledge they will be sold in another state on the one hand, and knowingly accepting the economic benefits brought by interstate customers on the other hand. Ordinarily, one who **purposefully sends a product into another jurisdiction for purposes of sale may reasonably expect to be haled into court in that State** if the product proves to be defective and causes injury there. In addition to having caused a direct

injury within the forum State, **that manufacturer or distributor has purposefully availed himself of the laws of the forum State that regulate and facilitate such commercial activity.** The same cannot be said of the fixed-site merchant who is simply aware that a portion of his income regularly is derived from the patronage of customers coming from other states ... Although he may cause an indirect impact on the forum State by injuring one of its residents, he causes no direct injury in the State, and does not avail himself of the protection or assistance of its laws. (Emphasis added.)

The Court in *Camelback II* concluded that jurisdiction was not proper. See *Id.* at 343, 539 A.2d 1107. The defendant in *Camelback II*, however, was a “fixed-site” ski resort whose limited contacts with Maryland included mailing brochures to Maryland ski shops upon the request of the Maryland shops. FN23 See *Id.* at 341, 539 A.2d 1107. In contrast, First Choice reached out to other jurisdictions, including Maryland, by sending their uninvited advertisements there.FN24

Additionally, unlike *Camelback II* and *World-Wide Volkswagen*, **the emails themselves were the product.** First Choice made its money by the very act of identifying email account holders nationwide, and transmitting emails from one state to residents of other states, including Maryland. Without the information identifying email addresses and transmittal to those addresses, First Choice **had no product.** In contrast, *Camelback's* product was a ski resort located in Pennsylvania, and *World-Wide Volkswagen's* product was a car sold to a New York customer in New York, and **driven by the customer** to Oklahoma, the forum in which the plaintiff tried to sue for injuries allegedly caused by a defect in the car.

*MaryCLE, LLC*, 166 Md.App. at 506-508, 890 A.2d at 833 - 834 (Md.App.,2006). Similarly, the targeting and transmission of Defendants’ emails did not fortuitously find their way into Ohio by the actions of others, the Defendants directed the emails into Plaintiff’s inbox.

The Supreme Court has indicated that the “quality and nature” of Defendants’ contacts are important in assessing purposeful availment. *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240 (1958). With regard to this case the nature and quality of the more than 900 commercial email messages to Plaintiff are significant in their own right. However, the Court should not lose sight of the 120 million email addresses that Defendants utilize to send hundreds of millions of emails nationwide as well as millions into the state of Ohio. Defendants’ actions in this case are direct and purposeful. They are akin to drafting a letter and placing it in the United States mail addressed to a

particular recipient. See *Internet Doorway v. Parks*, 138 F.Supp.2d 773, 776 (S.D. Miss.2001). While the method of distribution is different, the purpose of directing a particular message to a particular addressee remains the same. *Id.* The sender, not the addressee, controls both the substance of the communication, as well as the method and timing of delivery. The same cannot be said as to passive postings on a website or phone book listings.

Based upon the commercial email message identification numbers attached to the emails received by Plaintiff between November 25, 2006 and December 24, 2006, it appears as though Defendants were emailing approximately 25 billion emails per month; over 300 billion emails per year. The nature and quality of these contacts demonstrates that Defendants “had to have been aware that the e-mail would be received and opened in numerous for a \*\*\*.” See *Internet Doorway*, 138 F.Supp.2d at 779. “By sending e-mail solicitations to the far reaches of the earth for pecuniary gain, one does so at her own peril, and cannot then claim that it is not reasonably foreseeable that she will be haled into court in a distant jurisdiction to answer for the ramifications of that solicitation.” *MaryCLE*, 166 Md.App. 481-504 (citing *Internet Doorway*, 138 F.3d 779-780). Defendants, through their unilateral action of mass emailing solicitations for their business clients, have created personal jurisdiction in this case.

Under the “effects test,” the Supreme Court held that a tortfeasor’s conduct directed at a forum state, which the tortfeasor reasonably knows the effects of which will be felt by the victim in the forum state, necessarily anticipates being haled into the forum state to answer for his actions. *Calder v. Jones*, 465 U.S. 783, 789-790, 104 S.Ct. 1482 (1984). Courts applying *Calder* regularly hold that communications sent into a forum which constitute a tort within the receiving forum give rise to purposeful availment by the sender. See *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 213 (5th Cir.1999) (A defendant's transmission of a communication into the forum state is sufficient to

be considered purposeful availment if the content of that communication gives rise to an intentional tort cause of action.); *Long v. Grafton Executive Search, LLC*, 263 F.Supp.2d 1085, 1089 (N.D.Tex. 2003)(defendant sent defamatory email to employment agency in Texas); *Zidon v. Pickrell*, 344 F.Supp.2d 624, 632 (D.N.D.2004) (defendant particularly and directly targeted North Dakota with, inter alia, emails); *First Act, Inc. v. Brook Mays Music Co.*, 311 F.Supp.2d 258, 261-63 (D.Mass.2004)(defendant sent bulk email to 8,000 addresses, of which 60 addresses belonged to recipients with Massachusetts mailing addresses according to mailing list defendant maintained and controlled); see also, *Brown v. Flower Indus., Inc.*, 688 F.2d 328-332-3 (5<sup>th</sup> Cir. 1982) (a single act can create personal jurisdiction if that act gives rise to the claim asserted). Applying the effects test to the transmission of emails into the forum state the court in *MaryCLE* stated:

First Choice is aware that by sending potentially false and misleading emails, any injuries caused by those emails would be felt in the state in which they were received, rather than the state from which they were sent. See *Verizon Online*, 203 F.Supp.2d at 617-18, 621-22.

*MaryCLE*, 166 Md. App. at 513, 890 A.2d at 837.

In *MaryCLE* the court found purposeful availment by the defendant when it was alleged that 83 false and misleading emails were transmitted into the State of Maryland. In the present case, the defendants' actions resulted in almost 900 false and misleading email messages being directed to the plaintiff in Ohio. Since these communications in substance violate the CSPA and/or the EMAA, Defendants' conduct is tortious and the "effects test" supports a finding of purposeful availment and personal jurisdiction.

The foregoing analysis demonstrates that Defendants' actions in targeting over 900 emails supports a prima facie showing by the plaintiff which wholly satisfies the first prong – purposeful availment as described in *Nationwide, supra*.

**2. PLAINTIFF'S CLAIMS ARISE FROM DEFENDANTS' EMAIL ACTIVITIES DIRECTED INTO OHIO – THE SECOND PRONG IS MET.**

“If a defendant's contacts with the forum state are related to the operative facts of the controversy, then an action will be deemed to have arisen from those contacts.” *CompuServe, Inc.*, 89 F.3d at 1267 (6th Cir.1996). Plaintiff’s claims under the CSPA and EMLA are based upon the almost 900 commercial emails sent by Defendants to Plaintiff, including their misrepresentations and omissions in failing to comply with Ohio law. It is upon these violations that Plaintiff seeks redress of his legal rights through the court. Clearly, Plaintiff has set forth *prima facie* facts that satisfy the second prong as described in *Nationwide, supra*.

**3. THE ACTS OF DEFENDANT OR CONSEQUENCES CAUSED BY DEFENDANTS HAVE A SUBSTANTIAL CONNECTION WITH OHIO, MAKING THE EXERCISE OF JURISDICTION REASONABLE – THE THIRD PRONG IS MET.**

Having demonstrated that the first two prongs in *Nationwide, supra*, have been satisfied, Plaintiff need only show that the exercise of jurisdiction in this case would be reasonable or not offend “traditional notions of fair play and substantial justice.” *Asahi Metals Indus. Co.*, 480 U.S. at 113. Thus, once it has been demonstrated that Defendants purposefully directed their email activities at the plaintiff in Ohio, then burden is placed upon the defendants to “present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.” *Burger King Corp.*, 471 U.S. at 477. Defendants made no attempt to show any burden that would make jurisdiction unreasonable.

Ohio’s interest in adjudicating the legal issue is a significant factor which may support a finding that the exercise of jurisdiction is reasonable. See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201 (1957); see also, *Kulko v. California Superior Court*, 436 U.S. 84, 92, 98 S.Ct. 1690, 1697; *Shaffer v. Heitner*, 433 U.S. 186, 208, 97 S.Ct. 2569, 2581 (1977); *Mullane*

v. *Central Hanover Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 657 (1950). The *MaryCLE* court addressed the state of Maryland's interest related to false and misleading emails sent into the state.

First Choice contends that the burden on it to comply with MCEMA is too great because there is no way to know where the emails will be received. It disputes *MaryCLE*'s contention that it can discover the location of the email recipient by looking up the domain name registrant's address on searches such as the one available on [www.networksolutions.com](http://www.networksolutions.com), explaining that in cases where the domain is a common one, such as "hotmail," it is impossible to figure out where an individual recipient of an email would be located.

We reject First Choice's argument for two reasons. First, while it might be impossible to determine the location of an email recipient in cases of common domain names such as "hotmail," in this case that is not true. *MaryCLE* has demonstrated that a search on [www.networksolutions.com](http://www.networksolutions.com) indicates that "maryland-state-resident.com" is, unsurprisingly, registered in Maryland.

Second, we reject First Choice's approach to analyzing the "burden" imposed on it. The burden of complying with MCEMA is to disseminate truthful, non-deceptive emails; it is **not** to determine the location of email recipients. See *Washington v. Heckel*, 143 Wash.2d 824, 24 P.3d 404, 411, *cert. denied*, 534 U.S. 997, 122 S.Ct. 467, 151 L.Ed.2d 383 (2001) (discussed *infra* in Section II). First Choice remains free to send emails into Maryland so long as it does not violate the truth requirements of MCEMA. This is not a great burden to meet. First Choice attempts to distract us from the real burden here—sending only truth—by arguing that it is impossible to determine residency or location of receipt. "This focus on the burden of *non* compliance" misses the point. See *Id.* at 411; see also *Ferguson v. Friendfinders, Inc.*, 94 Cal.App.4th 1255, 1265, 115 Cal.Rptr.2d 258 (Cal.Ct.App.2002) (rejecting argument that burden imposed by [Unsolicited Commercial Email] statute to determine residency is too great; concluding that real burden is to comply with statute's substantive terms).

\* \* \*

Turning to Maryland's interest in adjudicating this dispute, we observe that MCEMA was passed largely because the financial and social burden of UCE on Maryland consumers is great. Maryland certainly has an interest in protecting its consumers, not only from the costs associated with UCE proliferation, but also from becoming the victims of fraud and schemes initiated by false and misleading email. *Cf. Verizon Online*, 203 F.Supp.2d at 621-22 ("Virginia has a strong interest in resolving this dispute because it involves a Virginia resident and Virginia law. Indeed, Virginia recently enacted [a computer crime statute] to specifically address the conduct Defendants are accused of committing"); *Heckel*, 24 P.3d at 411 (state has a legitimate interest in creating a penalty for sending false and misleading spam to its residents).

Additionally, as the State of Maryland and the United States Internet Service Provider Association (“US ISPA”) point out in the amici briefs filed in this case, the financial costs of spam and UCE are great.<sup>FN25</sup> To this effect, a recent University of Maryland study concluded that deleting unwanted email costs nearly \$22 billion annually in lost productivity. See National Survey Finds 22.9 Million Hours a Week Wasted on Spam, ([http:// www.rhsmith.umd.edu/ntrs/](http://www.rhsmith.umd.edu/ntrs/))(last visited Jan. 16, 2006). Congress has similarly concluded that “spam would cost corporations over \$113 billion by 2007.” S.Rep. No. 108-102 (2003), <http://www.thomas.loc.gov/cgi-bin/cpquery/T? & report=sr102 & dbname108/> (last visited Jan. 16, 2006). The costs associated with spam or UCE can largely be explained by the time and effort that must be expended to delete it. Each unwanted email that a recipient attempts to respond to “instantly becomes three separate e-mail messages (and additional computer log entries)[.]” *Heckel*, 24 P.3d at 410 n. 8.

*MaryCLE*, 166 Md.App. at 510-12, 890 A.2d at 835-36.

Ohio has a strong interest in adjudicating claims that arise in Ohio that are founded upon violations of the CSPA and EMLA. Ohio has an interest in providing Plaintiff, as a citizen of this state, with a forum for redress. The emails at issue were delivered to Plaintiff in Ohio; thus, the evidence of the violations is present in the forum. The mere fact that Defendants may need to travel to the courthouse does not rise to a level of constitutional unfairness in the context of the exercise of personal jurisdiction. See *McGee, supra*, 355 U.S. at 224. Ultimately, Ohio has an overriding interest in protecting its residents (consumers and businesses alike), from false and misleading commercial email communications. For these reasons, this court should find that plaintiff has met the third prong in *Nationwide*.

**D. PERSONAL JURISDICTION OVER LINHARDT IS PROPER.**

The Supreme Court previously rejected the notion that employees who act in an official capacity are somehow shielded from suit in their individual capacity. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13, 104 S.Ct. 1473, 1482 (1984). This court has already held, (contrary to Defendants’ arguments), that liability imposed upon a corporate director, officer, or employee of a corporation related to acts or omissions in which they participate is separate and distinct from

liability sought through “piercing the corporate veil.” See *Search Cactus, supra.*, 2007 WL 179332 at \*3 (Frost, J.). Judge Frost explained: “the OCSPA, without changing the existing common law of tort, creates a tort that imposes personal liability on corporate officers for violations of the statute ‘performed by them in their corporate capacities.’” *Id.*, 2007 WL 179332 at \*2 (quoting *Grayson, supra*, 2007 WL 1792332, at \*2). He further explained in his opinion that there was no requirement that the plaintiff “invoke the *Belvedere* elements” to establish personal liability of a company officer that oversaw distribution of the emails which are alleged to violate the CSPA. *Id.*, 2007 WL 179332, at \*2-4. Judge Frost’s determination in *Search Cactus* is dispositive of this issue in favor of Plaintiff. See also *MaryCLE*, 166 Md. App. at 529-30 (Corporate officers and agents cannot escape personal liability for tortious violations of a consumer protection statute committed by the corporation merely because they were not “hand on” at every step of the way; their liability may arise solely from their operational decisions which led to the transmission of mass emails).

Linhardt’s own affidavit filed in support of the motion to dismiss states that he is “responsible for overseeing the day-to-day operations of the company.” See Linhardt Aff. attached to Def.s’ Motion to Dismiss at ¶1. See also, Exhibits 9, and 2, at ¶¶30-33. Nowhere does Linhardt affirmatively state that he did not approve the content or transmission of the emails at issue. This court is left with the allegations of Plaintiff’s complaint, which affirmatively states that the “Defendants,” including Linhardt, committed the acts complained of by Plaintiff in his complaint. These facts are a sufficient basis to create a *prima facie* showing of personal liability upon Linhardt. Therefore, jurisdiction is proper over Linhardt.

#### **IV. CONCLUSION.**

Plaintiff having demonstrated a *prima facie* case for personal jurisdiction, respectfully submits that this Court must **DENY** Defendants’ Motion to Dismiss (Doc. 5).

Respectfully submitted,

/s/ Kevin E. Humphreys

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on April 22, 2008, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all Trial Attorneys of Record for all Defendants in this matter.

/s/ Kevin E. Humphreys

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