

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

JOHN W. FERRON,	:	
	:	
Plaintiff,	:	Case No.: 2:07 cv 01193
	:	
v.	:	Judge Sargus
	:	
E360INSIGHT, LLC, et al.	:	Magistrate Judge King
	:	
Defendants.	:	

**DEFENDANTS, E360INSIGHT, LLC AND DAVID LINHARDT’S REPLY TO
PLAINTIFF’S MEMORANDUM IN OPPOSITION DEFENDANT’S MOTION TO
DISMISS**

I. Introduction

A. Plaintiff Makes False Assumptions of Fact to Bolster His Argument for Jurisdiction.

Plaintiff’s Memorandum in Opposition to Motion of Defendants to Dismiss Complaint is wrought with factual misstatements, junk science, and incorrect application of the law. Such controverted facts should not be construed in Plaintiff’s favor.

1. *Neither E360Insight, LLC nor David Linhardt own The Web Sites Cited by Plaintiff*

First, Plaintiff asserts that e360Insight.com and e360data.com own and/or operate internet businesses known as “Discount Accessories,” “BargainDepot.net,” and “Bargainshoppecorp.com” (doc. 19, at 2). Plaintiff then makes an extraordinary leap to the conclusion that since the Bargaindepot.net website includes memorabilia for fans and alumni of Ohio State University, it – and apparently defendants e360Insight, and Linhardt - target Ohio residents. Bargaindepot.net is not owned by e360Insight or Linhardt but, in fact, is owned and

operated by a company called Bargain Depot Enterprises, LLC. which is a client of e360Insight.com (See Affidavit of David Linhardt, attached and referenced herein as “Linhardt Aff., at 4”).¹ Bargaindepot.net is no longer an active website.²

E360data.com is no longer active and is not a defendant in this case. E360data.com was not a list manager, but instead sold targeted list rental products for direct mail (Linhardt Aff., at 5).³ Approximately 95% of all of the business for e360data.com was direct mail; not electronic mail (Linhardt Aff., at 5), and none of the emails at issue in this case originated from e360data.com lists (Linhardt Aff. at 9, 11). While Plaintiff goes to great lengths to use e360data.com rate cards as evidence that Defendants target Ohio (doc. 19, at 4 and 8-9), such rate cards are irrelevant to the case at bar. There has been no allegation or support for the proposition that e360data.com has any affiliation with Ohio.⁴ Most importantly, E360data.com is not listed as a defendant in this case and Plaintiff has produced no evidence that it sent any mail to Ohio at any time.

Plaintiff also argues that because Defendant e360Insight’s software user manual contains information on how to target recipients by a number of dynamics, including state of residence, jurisdiction exists (doc. 19, at 4). However, e360Insight.com does not utilize its software to target or gather information pursuant to demographics (Linhardt Aff. at 5-7). Attached as Exhibit 1 is a screenshot from e360Insight’s email deployment system reflecting that the only fields in the email system are user identification, email address, and first name (*see* Exhibit 1, *see*

¹ Contained in Mr. Linhardt’s Affidavit is clarification of the August, 2006, Affidavit relied upon by Plaintiff.

² This can be seen by accessing www.bargaindepot.net through an internet search engine.

³ While e360data.com may have included email lists at one time, it did not send email to Plaintiff.

⁴ Plaintiff references the “About us” web page at e360data.com (doc. 19, Ex 10). However, the header and footer for Exhibit 10 show that Plaintiff retrieved the information from web.archive.org. e360data does not have an active website (Linhardt Aff., at 5).

also Linhardt Aff., at 5-7). These fields do not contain sufficient information to specify a recipient's physical location and, therefore, it can be difficult or impossible to identify where a recipient lives. See, *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, 355-56 (4th Cir. 2006).

Contrary to Plaintiff's misstatements, (*see doc. 19, at 5*), Linhardt does deny that either he or e360Insight.com do any of the following:

- (1) target Ohio residents through commercial email messages;
- (2) e360's email deployment system maintains a field code for state of residence.

(Linhardt Aff., at 7,12).

Plaintiff inappropriately relies on a letter sent to him confirming that his email and registration information were removed from the email list to support his allegation that e360Insight knowingly targets and/or transmits commercial electronic mail to consumers in Ohio (doc. 19-2). However, the letter sent to Plaintiff contains field data that was obtained from the list owner who has contracted with e360Insight to manage its email list after Ferron sent Mr. Linhardt a letter threatening a lawsuit (Linhardt Aff., at 7). E360Insight does not collect or maintain this information in its email list and the client only gathers the information when an email recipient like Plaintiff actually registers to receive email messages from that client (Linhardt Aff., at 8).⁵

B. Plaintiff's Attempted Expert Testimony Should Be Stricken

Of all the misstatements made by Plaintiff, the most glaring is Mr. Ferron's sworn testimony that he has determined the number of emails sent by e360Insight to Ohio residents

⁵ This point will be expounded upon further to explain that it is Plaintiff's own actions that create the emails at issue in the case.

(Ferron Aff., at 11). First, the data used is from a dead website for a Targeted List rental division for direct mail; not email (Linhardt Aff., at 9). The Targeted List Rental business previously provided on e360data.com is not operational and e360data.com is not a defendant in this case. More striking is the extrapolation of this information with no scientific basis.

Mr. Ferron has not presented himself as an expert in opt-in based email; as a computer expert, or as a statistician qualified to espouse testimony regarding analysis of email data. Yet, the testimony within his affidavit relative to his analysis of the emails constitutes attempted expert testimony. Expert testimony should only be admitted if the reasoning or methodology underlying the testimony is scientifically valid. *Miller v. Bike Athletic Co.*, (1998), 80 Ohio St. 3d 607, 611, 1998 Ohio 178, 687 N.E.2d 735, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 125L. Ed. 2d 469, 113 S. Ct. 2786. In determining the reliability, the court should consider several factors “(1) whether the theory or technique has been tested, (2) whether it has been subjected to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology has gained general acceptance.” *Id.*

Here, Plaintiff fails to present a technique for his conclusion that over 833 million emails are sent by Defendants every day (Ferron Aff., at 11). Nor does Plaintiff discuss whether such methodology is subject to peer review, or whether there is a known or potential rate of error. Plaintiff’s most blatant failing is that he did not proffer any credentials for the Court to analyze his qualifications. *See, e.g. Benton v. Ford Motor Co.*, 492 F. Supp.2d 874 (S. D. OH 2004). Thus Plaintiff’s testimony must be stricken for its utter failure to meet the *Daubert* principals.

The truth is that Defendant’s email deployment system is incapable of sending the amount of emails sworn to by Plaintiff (Linhardt Aff., at 9). Based on the system capacity

provided by E360Insight's email mailing system, it would be physically impossible for E360Insight to send anywhere near 833 million email messages per day as stated by Plaintiff.

In addition, Defendants do not own the lists or the content of any emails it sends on behalf of its clients (Linhardt Aff., at 3). E360Insight is simply a conduit for information similar to an Internet Service Provider ("ISP"), an on-line source such as Craig's List, or a newspaper like *The Columbus Dispatch*. Moreover, a review of the emails submitted by Plaintiff reflects that E360Insight is not referenced anywhere in any email.⁶ None of the email messages provided by Plaintiff advertise or promote any products or services provided by e360Insight. In fact, each and every hyperlink contained in the emails submitted by Plaintiff redirects the user to E360's client websites and not to websites owned by e360Insight. Therefore, neither e360Insight nor Dave Linhardt "send" any commercial emails whatsoever, as previously stated (*See* Section II,B(1), *infra*).

II. Law and Argument

A. Factual Issues Must Be Resolved In Favor of Defendants

Plaintiff relies on *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1263 (6th Cir. 1996), to assert that all factual disputes must be resolved in favor of Plaintiffs (doc. 19, at 6 (*citing CompuServ*, 89 F.3d 1257)). However, only uncontroverted facts are resolved in favor of Plaintiff. *Long v. Grafton Executive Search, LLC*, 263 F.Supp.2d 1085, 1089 (N.D. Ohio 2003)(emphasis added). As set forth above, all facts are controverted in this case and thus, none of them should be resolved in Plaintiff's favor. Additionally, Plaintiff has concocted information about which he has no independent knowledge. Factual disputes raised with no basis should be

⁶ CANSPAM provides for limited enforcement against third parties and such are not liable for CANSPAM violations. Controlling the Assault and Non-proliferation of Pornographic and Unsolicited Commercial Email (2004), Subpart B, Section 6.

resolved in favor of Defendants. Finally, since discovery was allowed in this case, that discovery should be the focus of analysis – *i.e.* whether the discovery – not Plaintiff’s opinion – satisfies jurisdictional prerequisites. Because *CompuServ* involves jurisdictional issues where no discovery was allowed, it should not control. Additionally, the Sixth Circuit was clear that *CompuServ* was limited to its specific facts. *Id.*

B. The Defendants did not Personally Avail Themselves in Ohio

The purposeful availment requirement is the “sine qua non of in personam jurisdiction.” *Southern Machine v. Mohasco Industries, Inc.*, 401 F.2d 374, 381-82. The requirement is satisfied when the defendant’s contacts with the forum state “proximately result from actions by the defendant himself that create a “substantial connection” with the forum State,” and when the defendant’s conduct and connection with the forum are such that he “should reasonably anticipate being haled into court there.” *CompuServe, supra*, 89 F.3d at 1263. This requirement ensures that a defendant is not haled into a jurisdiction based on random, fortuitous or attenuated contacts, or as the result of unilateral activity of another party or a third person. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

1. Neither Defendant is a “Sender” of the Emails

Neither E360Insight, LLC nor David Linhardt send commercial email messages according to federal definition of commercial email sender. The federal law governing the transmission of commercial email messages cited in Plaintiff’s complaint is known as the “Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003,” or the “CAN- SPAM Act of 2003”. CAN-SPAM Act of 2003 defines the SENDER of a commercial email message as follows.

“(16) SENDER.—

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

(16 CFR Part 316 [Project No. R411008] RIN 3084-AA96.)

Neither e360Insight or Dave Linhardt meet the definition of a SENDER for any of the email messages submitted by Plaintiff in this case. None of the email messages provided by Plaintiff contain links that resolve to e360insight.com or to websites owned by e360Insight. In fact, e360Insight does not send any email messages whatsoever that would meet the definition of SENDER. e360 does provide email messaging services for it’s clients, but never to promote its own products or services. While it may be true that e360Insight’s clients are SENDERS, e360Insight itself is not.

In addition, Dave Linhardt is not the SENDER of the email messages provided by Plaintiff. Further, Dave Linhardt has not sent any commercial email messages of any kind on behalf of himself (Linhardt Aff., at 3). Any involvement Dave Linhardt has had in the transmission of any commercial email messages is simply on behalf of e360Insight, who is not a SENDER of email messages either. Dave Linhardt has not sent any commercial email messages at any time that promote products of services that he provides as an individual.

2. *Defendants Did Not Target Ohio Residents*

Here, Plaintiff contends that because defendant e360Insight’s software user manual allows for targeting email recipients by state code, defendants must have targeted Ohio.

Plaintiff’s first contention is false as proven by the Affidavit of David Linhardt (Linhardt Aff., at

7,12) and further by Exhibit 1 (attached). Plaintiff argues – again incorrectly – that defendant e360Insight solicits Ohio customers to supply goods or services (doc. 19, at 7-8). However, Exhibit 1 reflects no geocoding or postal coding but simply includes an email address and a first name. Thus, it is impossible for Defendant to “target” Ohio consumers when there is no information within its email deployment system to do so (Linhardt Aff., at 6,8).

Defendant E360Insight does not keep track of geographic information within its email lists. Defendants do not target Ohio recipients. Also, neither E360Insight nor Dave Linhardt use commercial email messages to promote their products and services and are therefore not senders of any commercial email messages. In fact, e360Insight does not provide goods and the only services it provides are list management services. Additionally, the emails mailed by Defendant E360Insight on behalf of its clients and pursuant to their instruction (*See* Linhardt Aff., at 12) contain “national advertisements.” “[n]ational advertisements including those on the Internet that do not specifically target [a specific state] are insufficient to subject a defendant to jurisdiction...” *Neomedia, Inc. v. Airclie, Inc.*, 2004 U.S. Dis. LEXIS 6634 (N.D. Ill. April 15, 2004), at headnote 12.

Based upon these controverted facts, the reliable evidence establishes that Defendants do not target Ohio residents.

3. *Application of the Effects Test is Inappropriate*

Next, Plaintiff argues that because defendants allegedly sent numerous emails, they must have known that some emails would reach Ohio. Plaintiff’s second contention has been rejected by Ohio courts and further, is based upon “expert” opinion of attorney John Ferron whose opinion is so far off-base as to be laughable. In *Delta Marine Group, Inc. v. The Kee Group, Inc.*, 2007 U.S. Dist. LEXIS 80878 (N.D. Ohio, 2007), the Court rejected the notion that

the defendant “had to know” that certain infringing materials on its website came from Plaintiff, an Ohio company, and that the use of such materials by the defendant would cause harm to Plaintiff in Ohio. *Id* at *9. As a result the Court concluded that a “substantial connection” between Defendant and the State of Ohio was lacking. Like *Delta*, this case involves defendants who do not have the necessary “substantial connection” with Ohio. Plaintiff relies upon the “effects test” to argue Defendant committed an intentional act knowing that Plaintiff would be injured. The “effects test” is narrowly interpreted by the Sixth Circuit. *Scott’s Co. v. Aventis, S.A.*, 145 Fed. Appx. 109, 113 n.1 (6th Cir. 2005). “The mere allegation that the plaintiff feels the effects of the defendants’ tortious conduct in the forum because the plaintiff is located there is insufficient to satisfy *Calder*.⁷ *IMO Industries, Inc. v. Kiekart AG*, 155 F.3d 254, 265-66 (3d Cir. 1998). Without actual contact with the State of Ohio, purposeful availment is not present. *Delta Marine, supra*, at *11 (citing *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174, 1177-78 (6th Cir. 1992)).

4. *Defendants Have Not and Do Not Transact Business in Ohio*

Next, Plaintiff argues that because the emails themselves contain references to several Ohio-based companies, defendants are subject to the jurisdiction of this Court. . In *Neomedia Technologies, Inc. v. Airclie, Inc.*, 2004 U.S. Dis. LEXIS 6634 (N.D. Ill. April 15, 2004), the Court addressed a similar argument relative to jurisdictional analysis and determined that the defendant had insufficient contacts with the forum to subject the defendant to jurisdiction. In *Neomedia*, Plaintiff argued that Defendant’s interactive website specifically targeted Illinois because Illinois residents could access the website and that it contained a hyperlink to a firm that allegedly sold an infringing product to an Illinois resident. *Neomedia*, at *3-4. The Court

⁷ Referencing *Calder v. Jones*, 465 U.S. 783 (1984).

determined that while there were some connections between the defendant and the forum, they still were not subject to the jurisdiction of Illinois. “Federal Circuit jurisprudence draws a line between doing business in a forum and doing business with a company that does business in the forum.” *Neomedia*, at *19 (citing *Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1361 (Fed. Cir. 1998)). In the case at bar, the connection between defendants and the companies allegedly based in Ohio is even more tenuous. e360 is a list manager who mails information for its list clients (Linhardt Aff., at 3).⁸ If one of e360’s clients decides to give away Crest toothpaste by going to a drugstore, purchasing the item, and giving it away as a gift, it does not create a relationship between that client and the manufacturer of the toothpaste. It certainly does not create a relationship between E360Insight and the manufacturer. E360Insight does not have contracts or otherwise transact business with any Ohio company (Linhardt Aff., at 13). As such, Plaintiff’s argument on this issue must fail.

5. *Defendant Has a Passive Website*

As in *Neomedia*, an analysis pursuant to *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D. Pa 1997) results in a finding of no jurisdiction. Per *Zippo, supra*, the Sixth Circuit analyzes internet use along a spectrum of conduct. On one end, personal jurisdiction is proper because the Defendant clearly transacts business over the internet. At the other end of the spectrum, the defendant has a passive website that provides information. *Bath & body Works, Inc. v. Walmart Stores, Inv.*, 2000 U.S. Dist. LEXIS 20168, 2000 WL 1810478 (S.D. Ohio Sept. 12, 2000), at *8. Although Plaintiff infers that Defendant e360Insight.com is an interactive website (doc. 19, at 11), it is not. E360Insight.com, LLC is merely a list manager who mails information on behalf of its clients, none of whom reside in Ohio. Defendants do not sell goods

⁸ It is not an advertiser or supplier subject to the Ohio Consumer Sales Practices Act, R.C. 1345.02 *et. seq*

or services in Ohio. (Linhardt Aff., at 13). An analysis of the emails submitted to the Court by Plaintiff shows that no hyperlink in any email redirects the email recipient to E360Insight.com.⁹ The only interaction an email recipient has with E360Insight is by way of an unsubscribe link that E360Insight sets up specifically for its clients to ensure that email recipients can easily remove their email addresses from E360's clients' lists. (Linhardt Aff., at 3,11).

6. *Ohio's Long-Arm Statute Cannot Reach Defendants.*

This case is similar to *RL Lipton Distributing Co. v. Dribeck Importers, Inc.*, 811 F.2d 967 (6th Cir. 1987) wherein the Defendant had no offices or employees in Ohio, accepted no orders from Ohio, and made no deliveries to Ohio. *Id.* at 968. Its only contacts with Ohio were promotional mailings and one or two visits by its out of state sales representatives. *Id.* at 970. Here, all defendant has done is issue promotional mailings in electronic form. No orders can be made through Defendant's website (Linhardt Aff., at 14). In fact, the only services e360Insight provides are to clients not located in Ohio (Linhardt Aff., at 14). When looking to the quality of the contacts at issue – random emails from a large listserv – there simply is not enough to establish jurisdiction.

C. The Claims Do Not Arise From Defendant's Activities

The cause of action at issue here does not arise from activities of Defendants, but instead arises out of the unilateral actions of the Plaintiff. Plaintiff has authorized Defendants' clients to send him emails – in other words – they are not unsolicited. In order for Plaintiff to be on any electronic mail list, he must have registered with one of Defendants' clients authorizing them to send electronic mail to Plaintiff. Referring to Exhibit 19-2 it is evident that Mr. Ferron registered

⁹ A "hyperlink" is an electronic link providing direct access from one distinctively marked place in a hypertext or hypermedia document to another in the same or a different document. For example, www.bargaindepot.net is a hyperlink such that if the reader clicked on the url, he or she would be directed to that webpage.

with at least one of those clients. Upon request to be removed, Linhardt contacted the client to obtain the registration information for Mr. Ferron's email addresses. (Linhardt Aff., at 15). The information contained in Exhibit 19-2 was not information maintained on its email list or even known by Linhardt prior to obtaining the information from its client (Linhardt Aff., at 8,15). However, the information in doc. 19-2 reflects an IP address belonging to Mr. Ferron's computer, a correct email address, and a correct home address for Mr. Ferron. There is no technology which would allow for Defendants or clients of e360Insight to obtain all of that information accurately without Mr. Ferron providing it to the client while registering to receive promotional emails (Linhardt Aff., at 8). Therefore, Mr. Ferron actually solicited the emails in this case, barring application of the CSPA or the EMMA to such emails.¹⁰ Plaintiff's affidavit does not contain any statement denying that he had signed up to receive emails from clients of e360Insight.com, LLC. An out of state defendant cannot be subjected to jurisdiction in another state due to the unilateral actions of the Plaintiff. *Mahler v. Startari*, 142 Fed. Appx. 839, 842 (6th Cir. 2005). Neither Defendant purposefully availed themselves of the benefits and protections of Ohio law because it was Plaintiff who lured Defendants' clients into believing that he wished to receive email advertisements from them. Such passive availment of Ohio opportunities does not create the requisite "substantial connection" with Ohio. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462-474-75 (1985) (personal jurisdiction proper only when defendant himself created "substantial connection"). Defendants have only fortuitous contacts with Ohio that are the result of Ferron's unilateral activities, including his own registration with

¹⁰ While the Court cannot weight the possibility of success on the merits in analyzing a Motion to Dismiss based upon personal jurisdiction, it can make a determination as to whether Plaintiff has a legally cognizable claim. *Illustro Systems International, LLC v. Int'l Business Machines Corp.*, 2007 U.S. Dist. LEXIS 33324 (N.D. Tex. May 4, 2007).

clients of defendant e360Insight. (Linhardt Affidavit, at 8,15). This belies the relevance of *Maryland CLE, LLC v. First Choice Internet, Inc.*, 166 Md. App. 481, 890 A.2d 818 (2006) – relied upon heavily by the Plaintiff - which involved “unsolicited” emails. Additionally, the act itself of sending unsolicited bulk email is not, in and of itself, sufficient to establish jurisdiction. *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348 (4th Cir. 2006).

D. There is No Substantial Connection With Ohio.

The vague allegations made by Plaintiff in his complaint, coupled with his misstatements of fact and misinterpretations of law are not enough to meet either the “purposeful availment” or the “arising from” standards. Even if they were, the facts of this case make it unreasonable to exercise jurisdiction over these defendants.

Ohio absolutely has an interest in protecting consumers from fraudulent activity. Yet, no fraud has been alleged by Plaintiff in his complaint. Ohio, of course, has an interest in enforcing its laws; yet, there is absolutely no evidence showing that defendants intended or even knew that they were sending emails through their email deployment system to Ohio residents.¹¹

Defendants do not compile or gather the emails, but merely coordinate mailings for their clients who do (Linhardt Affidavit, at 3). Since Defendants did not target Ohio, and did not transact business with Ohio, and neither owns no Ohio property, it is simply not reasonable to hale defendants into Court in Ohio to answer a Plaintiff who asked to receive the messages in the first place. Moreover, because of the limited amount of information kept by e360Insight.com, LLC,

¹¹ Congress enacted The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C.S. 7704 to govern the sending of commercial email messages. Congress has determined that because e-mail addresses do not specify recipients’ physical locations, it can be difficult or impossible to identify where they live and hence, to determine the state laws that apply. *Id.* 7701(a)(11).

it did not know it was sending electronic mail to Ohio. *Omega World Travel*, 469 F.3d at 355-56.

E. There is No Jurisdiction over Linhardt

There is no jurisdiction over Linhardt for several reasons. First, Linhardt himself has no ties with Ohio; owns no property in Ohio, conducts no business in Ohio, and has never knowingly transacted business with any company in Ohio (doc. 9). Second, the only manner in which Linhardt could be subject to this Court's jurisdiction for acts complained of by Plaintiff would be through e360Insight, LLC. For the reasons stated *supra*, this Court does not have either general or specific jurisdiction over e360Insight, LLC. Linhardt does not own e360Insight, LLC and while he is in charge of overseeing day to day operations, he is not in charge of coordinating his clients's marketing efforts. There is no uncontroverted allegation that should be resolved in favor of Plaintiff with regard to Linhardt's participation in sending emails.

Plaintiff's complaint is insufficient to establish jurisdiction over Linhardt. Plaintiff's complaint merely states "At all times relevant hereto, each Defendant has been a supplier as defined in RC 1345.01(C)." (doc.4, at para. 4). The Sixth Circuit recently admonished Plaintiff for this type of allegation stating that "[a] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment]' to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do" (*Ferron v. Zoomego, et. al.*)(citing *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 1964-65 (2007))(holding that Plaintiff failed to meet the basic pleading requirements of Rule 8(a)(2)). The Court further opined, that the notice pleading requirements of Rule 8(a)(2) 'still require[] a 'showing, rather than a blanket assertion of entitlement to relief.'" *Id.*, at 3 (attached). As in *Zoomego*, all Plaintiff has done is make a bare assertion that Linhardt is a "supplier." These allegations are not sufficient to create

jurisdiction. Moreover, in looking to federal law specifically intended to address the sending of commercial email messages, Linhardt does not fit the definition of a “sender.” (*See* Argument, *infra*, II, B(1)). Looking to state law, Linhardt does not fit the definition of supplier because even if he were hitting the “send” button himself, which he is not, he is merely a conduit for those who are advertisers and suppliers under Ohio law. To buy into Plaintiff’s argument that Linhardt is a supplier, this Court would also have to agree that companies like Yellow Book and Ameritech are responsible for each and every advertisement placed in their publications.¹²

Plaintiff erroneously asserts that Linhardt “does not deny that Defendants target Ohio residents through their commercial email messages” and that “Linhardt does not claim that he was not involved in the creation or maintenance of the databases in which the email addresses are maintained.” (doc. 19, at 5-6). Linhardt does deny these things. (*See*, Linhardt Aff., generally). Moreover, even if Linhardt created or maintained the databases in which the email addresses are housed, which he did not (Linhardt Aff., at 3,12,14), it still would not create jurisdiction in Ohio over Linhardt. There is nothing within Plaintiff’s Complaint or Memorandum in Opposition that makes that connection. Plaintiff relies upon *Ferron v. Search Cactus*, Case No. 06-CV-327 (S.D. Ohio)(Frost, J.) for the proposition that Linhardt is liable as a participant in the sending of the emails in this case. Reliance on that order, is misplaced. In *Search Cactus*, the Court relied upon prior deposition testimony of Aaron Weitzman, an officer of the defendant company, who admitted that he “approved” the content of some emails at issue in that case. Based upon that testimony, the Court determined that Weitzman was a participant in the sending of some of the emails in the case. Here, based upon the allegations in Plaintiff’s

¹² There is an exception to 1345.02 for “publishers” under which these types of publications are excepted from liability and while defendants here likely fall under this same exception, the Motion currently before the Court is based only on personal jurisdictional arguments.

complaint, controverted by Linhardt's sworn testimony, the Court cannot label Linhardt a participant in the sending of the emails, particularly since federal law does not define Linhardt as a "sender." Linhardt did not create the email address list, did not create the content of any email, and is not an advertiser or supplier.

Finally, Plaintiff cannot create jurisdiction over Linhardt by arguing general tort principles. Plaintiff improperly relies upon *Ferron v. Search Cactus, LLC*, No. 2:06-CV-327 (Frost, J) to assert that CSPA claims are tort claims within the meaning of RC 2307.382(A)(4) and that based upon certain tort law, officers can be held personally liable for his or her own acts. Defendant in the Search Cactus case argued that Plaintiff's claims should be treated as "fraud" claims since the CSPA involves misrepresentations. Based upon that interpretation, the defendant in Search Cactus argued that the only way to reach individual officers of Search Cactus was by meeting the well-established elements for corporate veil-piercing set forth in *Belvedere Condominium Unit Owners Association, Inc. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274 (1993). While the Search Cactus court initially determined that fraud was not an essential element under the CSPA, its decision was watered down by a subsequent decision by the same Judge in *Ferron v. Media Breakaway*, case No.: 2:06-CV-322 (Frost, J) (attached) in which the Court humbly admits that it may have been mistaken in its determination that the CSPA claims are tortious, rather than fraudulent. While this may address substantive issues inappropriate for the Court's analysis for jurisdictional purposes, the Court is entitled to consider whether Plaintiff presents a legally cognizable claim over Linhardt. See, *Illustro Systems, supra*, 2007 U.S. Dist. LEXIS 33324. A review of the complaint reflects merely conclusory statements of law which the Plaintiff has failed to substantiate in its Memorandum in Opposition.

F. The EMLA is Inapplicable to either Defendant

Because neither defendant meets the definition of “sender,” and because neither is an “advertiser” the EMLA is inapplicable to either. Linhardt’s affidavit affirms that E360Insight, LLC is merely a conduit of information (Linhardt Aff., at 3, 12) and meets the definition of an email service provider. R.C. 2307.64 defines an electronic mail service provider as “any person that is an intermediary in sending and receiving electronic mail and that provides to users of electronic mail services the ability to send or receive electronic mail.” R.C. 2307.64(A)(5). The definition of “Electronic mail service provider” includes an internet service provider. *Id.* The statute specifically exempts electronic mail service providers from liability for sending advertisements violative of the EMLA. R.C. 2307.64(D). Based upon the controverted facts, Plaintiff has failed to state a legally cognizable claim against either defendant under the EMLA. *See, Illustro Systems International, LLC v. Int’l Business Machines Corp.*, 2007 U.S. Dist. LEXIS 33324 (N.D. Tex. May 4, 2007)(Court may determine whether a plaintiff has set forth a legally cognizable claim in analyzing personal jurisdiction).

III. Conclusion

For the foregoing reasons, Defendants’ Motion to Dismiss should be granted. Additionally, the overwhelming amount of factual misstatements, junk science, incorrect application of the law and information showing that whatever email messages were received by Mr. Ferron where sent upon his request, calls into question the true motivations behind his complaint. Therefore, defendants also pray that this Court will grant sanctions against Plaintiff,

including an award of attorney's fees and costs associated with defending against Plaintiff's complaint.

Respectfully Submitted,

/s/Karen S. Hockstad
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CERTIFICATE OF SERVICE

This undersigned certifies that a true and accurate copy of the foregoing was served upon Lisa Wafer and Jessica Fallon, Ferron & Associates, 580 North Fourth Street, Suite 450, Columbus, Ohio 43215 and Kevin Humphreys, The Brunner Firm, 545 E. Town Street, Columbus, Ohio 43215 via the Court's electronic filing system on May 19, 2008.

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