

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

JOHN W. FERRON,	:	
	:	
Plaintiff,	:	Civil Action No. 2:06-cv-322
	:	
vs.	:	Judge Frost
	:	
VC E-COMMERCE SOLUTIONS, INC., <i>et</i>	:	Magistrate Judge Abel
<i>al.</i> ,	:	
	:	
Defendants.	:	

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANTS’
MOTION FOR EXTENSION OF TIME TO PROVIDE RESPONSES
TO PLAINTIFF’S DISCOVERY REQUESTS**

PLAINTIFF JOHN W. FERRON, by and through the undersigned counsel, hereby respectfully submits his Memorandum in Opposition to Defendants’ Motion for Extension of Time to Provide Responses to Plaintiff’s Discovery Requests (hereinafter “Defendants’ Motion for Extension”).

For the reasons set forth below, Plaintiff respectfully submits that Defendants’ requested extension as to Plaintiff’s First Request for Production should be denied, and Defendants should be ordered to provide full and complete discovery responses immediately. Defendants’ request for an extension of time to respond to Plaintiff’s First and Second Sets of Interrogatories is premature, as these discovery requests were only served on August 1 and August 4, 2006, respectively. In the event that the Court were to grant Defendants’ request for an extension, Plaintiff respectfully requests that the extension be limited to no more than fourteen days and that the Court should extend by the same period of time the current deadline for Plaintiff to move for leave to add parties, which is November 1, 2006.

I. INTRODUCTION AND RELEVANT BACKGROUND

This case arises from Plaintiff's claims against Defendants for sending commercial email messages to Plaintiff, the contents of which contain multiple violations of the Ohio Consumer Sales Practices Act ("CSPA"), R.C. §1345.01, *et seq.* In particular, Plaintiff's Complaint asserts, among other things, that Defendants' email messages violate the CSPA because they deceptively use the word "free" in connection with commercial advertisements and falsely advise the recipient that he has won a prize or will receive something of value without also disclosing all of the required terms and conditions at the same time.

On July 18, 2006, Plaintiff served upon Defendants his First Requests for Production of Documents and Other Tangible Things ("Plaintiff's First Requests"), which primarily seeks records relating to the identity of Defendants' employees, agents and affiliates who participated in sending Plaintiff email advertisements between January 2005 and the present. (Wafer Aff. ¶3;¹ see also Plaintiff's First Requested attached hereto at Attachment 2) Contrary to the misleading claims in Defendants' Motion for Extension, **none** of Plaintiff's First Requests asks for information or records that would require Defendants to review the email messages possessed by Plaintiff. *Id.*

On July 21, 2006, the Court presided over a Preliminary Pretrial Conference, during which Magistrate Judge Abel ordered that, by August 4, 2006, Plaintiff produce to Defendants all of the email messages on which his claims in this case are based. (Wafer Aff. ¶4) Magistrate Judge Abel's instruction in this regard is memorialized in the Court's July 21, 2006 Preliminary Pretrial Order in this case (Document No. 14).

¹ References herein to ("Wafer Aff. ¶ _") shall refer to the Affidavit of Attorney Lisa A. Wafer, attached hereto at Attachment 1.

The purpose of this early exchange of information was so that Defendants could determine whether they sent the emails at issue in this case and develop their settlement posture. (Wafer Aff. ¶5) It is important to note that at **no** time during the Preliminary Pretrial Conference did Defendants' counsel state that Defendants' receipt of the emails Plaintiff possessed must precede Defendants' preparation of their formal responses to Plaintiff's First Requests. (Wafer Aff. ¶6)

On August 1, 2006, Plaintiff served upon Defendants his First Set of Interrogatories, which primarily asked Defendants to identify its affiliates who conduct business from specific addresses around the country. (Wafer Aff. ¶7; see also Plaintiff's First Set of Interrogatories attached hereto at Attachment 3) As is the case with Plaintiff's First Requests, **none** of Plaintiff's First Set of Interrogatories asks for any information or records that would require Defendants to review the email messages possessed by Plaintiff. *Id.*

In Defendants' Motion for Extension, Defendants suggest that Plaintiff did not timely produce his email messages. (Defendants' Motion for Extension, p. 2) However, Defendants' claim is grossly misleading, and fails to disclose all of the circumstances surrounding the timing of Plaintiff's production of his emails in this case. On July 24, 2006 – **almost two weeks before Plaintiff's emails were required to be produced** – Plaintiff's counsel sent Defendants' counsel an email message advising that Plaintiff was prepared to produce the emails so long as they could be produced as “confidential information” pursuant to a Stipulated Protective Order to be entered by the Court. Plaintiff indicated that he sought this protection due to the nature and content of many of the unsolicited commercial email messages he had received, which included many vulgar and obscene advertisements for sex-oriented products. (Wafer Aff. ¶8; see also July 24, 2006 email attached hereto at Attachment 4)

Defendants' counsel initially refused to agree to stipulate to the Court's adoption of Plaintiff's proposed protective order. It was not until August 4, 2006, when Plaintiff was prepared to file a Motion for Protective Order with the Court, that Defendants' counsel finally agreed to stipulate to the protective order. (Wafer Aff. ¶9; see also August 4, 2006 email attached hereto at Attachment 5) Later that same day, Plaintiff's counsel submitted the parties' proposed Stipulated Protective Order to the Court, which was promptly signed by Magistrate Judge Abel and filed with the Clerk of the Court. (Document No. 18)

Accordingly, on August 4, 2006 – in accordance with the deadlines set forth in the Court's Preliminary Pretrial Order – Plaintiff timely forwarded by overnight mail all of his commercial email messages to Defendants' counsel by means of a USB “thumb” drive. (Wafer Aff. ¶10) On the same date, Plaintiff also served his Second Set of Interrogatories to Defendants. (Wafer Aff. ¶11; see also Plaintiff's Second Set of Interrogatories attached hereto at Attachment 6)

Then, on August 16, 2006 – just one day before Defendants' formal responses to Plaintiff's First Requests were due – Defendants' counsel sent an email message to Plaintiff's counsel requesting a thirty-day extension of time to provide Defendants' responses to Plaintiff's discovery requests. (Wafer Aff. ¶12; see also August 16, 2006 email attached hereto at Attachment 7) Defendants' counsel did not offer any explanation for why Defendants thought they needed such an extension. *Id.*

In response to Defendants' counsel's August 16, 2006 email message, Plaintiff's counsel asked Defendants' counsel whether Defendants could produce some of the requested information and records at this time, and Plaintiff agreed to a fourteen-day extension as to the remainder of Defendants' responses. (Wafer Aff. ¶13; see also see also August 16, 2006, Attachment 7)

However, rather than answer Plaintiff's counsel's query candidly, Defendants' counsel tersely stated that her clients were "in the process of" gathering responses, and then requested a two-week extension of time to respond. *Id.* In response, Plaintiff's counsel then explained to Defendants' counsel that Plaintiff was reluctant to agree to an extension without receiving any explanation about why the extension was needed, and because Plaintiff has a very short time in which to identify and seek leave to add additional parties defendant in this case. *Id.* Defendants' counsel never extended the courtesy of a reply to the concerns raised by Plaintiff's counsel in her August 16, 2006 email message. (Wafer Aff. ¶14)

Then, on August 17, 2006 – the same day that Defendants' responses to Plaintiff's First Requests were due, and long before Defendants' answers to Plaintiff's First and Second Sets of Interrogatories are due – Defendants filed their Motion for Extension. Plaintiff respectfully submits that Defendants' Motion should be denied. Alternatively, Plaintiff respectfully submits that the Court should only grant a two-week extension to Defendants, and the Court should extend the deadline for seeking leave to add new parties defendant by a like period of time.

II. LAW AND ARGUMENT

Defendants' Motion for Extension seeks an extension of time to respond to Plaintiff's discovery requests pursuant to Fed. R. Civ. P. 6(b)(1), which provides:

“When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court **for cause shown** may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order...”
(Emphasis added.)

(Defendants' Motion for Extension, p. 1)

As Fed. R. Civ. P. 6(b) makes clear, an extension should only be granted upon “cause shown.” Otherwise, it is presumed that parties can respond to motions, pleadings and discovery requests within the time specified by the Civil Rules. See *Stone v. Jo-Ann Stores, Inc.*, 193 F.R.D. 514, 515-516 (N.D. Ohio 2000)(“The Plaintiff has not shown good cause why an enlargement of time should be granted to respond ** Plaintiff’s Counsel again should not have waited to the last possible moment to file his request. Because more than ten days have already elapsed since the due date of the Plaintiff’s response to the summary judgment motion, the Court finds that an additional enlargement of time to respond is inappropriate ...”)

In this case, Defendants falsely claim that they must review all email messages at issue in this case before responding to Plaintiff’s First Requests and Plaintiff’s First and Second Sets of Interrogatories. (Defendants’ Motion for Extension, pp. 1, 3-4) However, Defendants’ claim as to Plaintiff’s First Requests and First Set of Interrogatories is simply untrue because these discovery requests do not seek any information that would require such a review of the email. (Wafer Aff. ¶¶3, 7; see also Attachments 2 and 3) Instead, Plaintiff’s First Requests and Plaintiff’s First Set of Interrogatories seek information relating to the identity of Defendants’ employees, agents and affiliates responsible for sending email messages to Plaintiff – such information Defendants apparently wish to conceal from Plaintiff at this time. *Id.* Moreover, Defendants’ responses to Plaintiff’s First and Second Sets of Interrogatories are not even due until August 30 and September 3, 2006, respectively.

It is not surprising that Defendants’ Motion does not speak in specifics. This is obviously because its argument – that Plaintiff’s production of a large volume of email messages has slowed Defendants’ responses to Plaintiff’s discovery requests – is revealed to be a sham when

the true nature of Plaintiff's First Requests and First Set of Interrogatories is examined. In Plaintiff's First Requests, Plaintiff sought the following records from Defendants:

Request No. 1: Please produce any and all documents containing the identity of each of the principals in Defendant VC/Opt.

Request No. 2: Please produce any and all documents containing the identity of each of the owners in Defendant VC/Opt.

Request No. 3: Please produce any and all documents containing the identity of each of the officers in Defendant VC/Opt.

Request No. 4: Please produce any and all documents containing the identity of any and all employees, agents, independent contractors, subcontractors and/or third party entities that, since January 1, 2005, have transmitted any email messages to Plaintiff for or on behalf of Defendant VC/Opt.

Request No. 5: Please produce any and all documents pertaining to any communications between Defendant VC/Opt and any of its employees, agents, independent contractors, subcontractors and/or third party entities regarding Plaintiff or any emails sent to Plaintiff since January 1, 2005.

Request No. 6: Please produce any and any documents pertaining to Plaintiff's registration of the email address of jferron@ferronlaw.com with Defendant VC/Opt and any and all email messages Defendant VC/Opt, or anyone on Defendant VC/Opt's behalf, sent to Plaintiff prior to or subsequent to such registration.

Request No. 7: Please produce any and all records pertaining to each and every unsubscription request that Defendant VC/Opt has received from anyone, including Plaintiff, since January 1, 2005.

Request No. 8: Please produce any and all records pertaining to each and every complaint of any kind that Defendant VC/Opt has received since January 1, 2005 regarding its transmittal of advertisements by email to anyone.

Request No. 9: Please produce any and all documents pertaining to any survey of Defendant VC/Opt that, after January 1, 2005, Plaintiff began to answer but did not complete following his receipt of an email from Defendant VC/Opt or anyone else on its behalf.

Request No. 10: Please produce any and all documents pertaining to any survey of Defendant VC/Opt that, after October 31, 2005, Plaintiff completed following his receipt of an email from Defendant VC/Opt or anyone else on its behalf.

Request No. 11: Please produce any and all documents pertaining to the appearance of any and all web sites linked in each of the emails that Defendant VC/Opt or anyone on its behalf sent to Plaintiff after January 1, 2005.

Request No. 12: Please produce each of the emails that Defendant VC/Opt or anyone on its behalf sent to Plaintiff after January 1, 2005.

Request No. 13: Please produce any and all documents identifying any and all living persons who have registered with Defendant VC/Opt since January 1, 2005.

Request No. 14: Please produce any and all documents identifying any and all living persons to whom Defendant VC/Opt, or anyone on its behalf, has sent one or more free gifts since January 1, 2005.

Request No. 15: Please produce any and all documents identifying all business entities that have registered with Defendant VC/Opt since January 1, 2005.

Request No. 16: Please produce any and all documents identifying any and all business entities to which Defendant VC/Opt, or anyone on its behalf, has sent one or more free gifts since January 1, 2005.

Request No. 17: Please produce any and all documents relating to Defendant VC/Opt sharing Plaintiff's email address or other information with any other person or entity.

Request No. 18: Please produce any and all lists, including email lists, in Defendant VC/Opt's possession or control on which Plaintiff's email address of jferron@ferronlaw.com or other identifying information appears.

Request No. 19: Please produce any and all lists, including email lists, in Defendant VC/Opt's possession or control on which any of Plaintiff's email address of jferron@ferronlaw.com or other identifying information appeared at any time since January 1, 2005.

(Wafer Aff. ¶3; Attachment 2)

Not a single one of these requests requires either Defendant to review the email messages that Plaintiff produced on August 4, 2006. The same is true with respect to Plaintiff's First Set of Interrogatories to Defendants, which ask of Defendants:

Interrogatory No. 1: Please identify any and all persons and/or entities either residing at, or conducting business at or from, the following addresses between January 1, 2005 and the present date:

- (A) 3250 W. Big Beaver Road
Suite 144
Troy, MI 48084
- (B) 1779 N Congress Avenue
Suite 207
Boynton Beach, FL 33426-8205
- (C) 13900 Jog Road
Suite 203-251
Delray Beach, FL 33446
- (D) 1333 W 120th Avenue
Suite 101
Westminster, CO 80234
- (E) 9301 Peppercorn Place
Largo, MD 20774
- (F) 22647 Ventura Blvd.
Suite 258
Woodland Hills, CA 91364
- (G) 950 Walnut Bottom Road
Suite 15-212
Carlisle, PA 17013
- (H) 111 East 14th St.
#104
New York, NY 10003
- (I) 2533 N. Carson St.
Suite 6029

Carson City, NV 89706

(J) 4846 N. University Drive
#323
Lauderhill, FL 33351

(K) 160 International Parkway
Heathrow, FL 32746

(L) P.O. Box 3858
New Haven, CT 06525

(M) Osianderstr. 3
Nuernberg, 90443
Bavaria, Germany

(N) 707 W. 38th Street
#103
Erie, PA 16508

(O) 5023 W 120th Avenue
#175
Broomfield, CO 80020

(P) 1254 Davis Street
#225
San Landro, CA 94577

(Q) 2355 Fairview Avenue
Suite 345
Roseville, MN 55113

(R) 2637 N. Washington Blvd.
Suite 221
North Ogden, UT 84414

(S) 2 Wisconsin Circle
Suite 700
Chevy Chase, MD 20815

(T) 1894 Highway 50E
Suite #4
PMB 472
Carson City, NV 89701

(U) 499 East Sheridan St.

- #205
Dania Beach, FL 33004
- (V) 123 N. Congress Avenue
Suite 351
Boynton Beach, FL 33426
- (W) 244 Madison Avenue
#238
New York, NY 10016-2817
- (X) 999 Skyway Landing Rd.
Suite 200
San Carlos, CA 94070
- (Z) 707 W. 38th Street
#103
Erie, PA 16508
- (AA) 1344 Broadway
New York, NY 10001
- (BB) 303 Park Avenue South
Suite 1117
New York, NY 10010
- (CC) 4 Carmichael Street
#1470
Essex Junction, VT 05452
- (DD) 18565 Soledad Cyn Rd.
#117
Canyon Country, CA 91351
- (EE) 3439 N.E. Sandy Blvd.
#242
Portland, OR 97232
- (FF) 3818 Cedar Springs Road
#101-10
Dallas, TX 75219
- (GG) 5348 Vegas Drive
Suite 472
Las Vegas, NV 89108

- (HH) 23404 W. Lyons Avenue
Box 466
Newhall, CA 91321
- (II) P.O. Box 55246
Valencia, CA 91385
- (JJ) 427 E.17th Street
#142
Costa Mesa, CA 92627
- (KK) 975 Wayne Avenue
Box 204
Chambersburg, PA 17201
- (LL) P.O. Box 390520
Mountain View, CA 94039-0520
- (MM) 4001 Kennett Pike
#527
Greenville, DE 19807-2000

Interrogatory No. 2: Please identify the following persons:
(Footnote: If any of these names is not the name of an actual person, but rather is a fictitious name, please indicate that fact.)

- (A) Jaz Pester
- (B) Jazette Pester
- (C) Jazete Pester
- (D) Amanda Gomez
- (E) Joey Kemp
- (F) Caryn Stoll
- (G) Caryn Stolt
- (H) Laura Cruz
- (I) Sandy Henderson
- (J) Brian Murry

Interrogatory No. 3: Please identify any and all companies that have given Defendant permission to use their logos, brands, service marks, trademarks or names in commercial email messages sent by or on behalf of Defendant to Plaintiff in 2005 and/or 2006. *(Footnote: Plaintiff notes that the following companies' trademarks, service marks, brands and/or names appear in the commercial email messages sent by Defendant or on its behalf to Plaintiff in 2005 and 2006: Abercrombie, Amazon.com, Apple, Banana Republic, Best Buy, Bose, Bowflex,*

Burger King, Canon, Chili's, Circuit City, Coach, Coca-Cola, Dell, Disney, eBay, Gateway, Gucci, Home Depot, Kmart, Lowe's, MasterCard, McDonald's, Motorola, Nordstrom, Old Navy, Omaha Steaks, Outback Steakhouse, Overstock.com, Palm, Panasonic, Pepsi, Prada, Sam's Club, Sirius Radio, Sony, Starbucks, T-Mobile, Target, Toshiba, Toys R Us, TurboTax, Victoria's Secret, Visa, Wal-Mart and Wendy's.)

(Wafer Aff. ¶7; Attachment 3)

Once again, not a single one of these interrogatories requires either Defendant to review the email messages that Plaintiff produced on August 4, 2006.

The only discovery requests that Plaintiff has propounded to Defendants, and which require Defendants to review the email messages that Plaintiff produced to Defendants are found within Plaintiff's Second Set of Interrogatories to Defendants, to which answers are not yet even due until September 3, 2006. These interrogatories ask of Defendants:

Interrogatory No. 1: In regard to the email messages contained on the SanDisk Cruzer Micro 2.0G USB Drive that Plaintiff forwarded to counsel for Defendants simultaneously with this Second Set of Interrogatories, please identify by date, time and name of sender each email message that was sent to Plaintiff by Defendant VC, Defendant Opt, and/or some other person or entity on behalf of either Defendant VC or Defendant Opt.

Interrogatory No. 2: As to each email message identified in Defendant's answer to Interrogatory No. 1, please identify each and every person and/or entity who participated in developing or sending each email to Plaintiff.

Interrogatory No. 3: As to each email message identified in Defendant's answer to Interrogatory No. 1, please identify each and every person and/or entity who received any monetary compensation for the transmittal of such email to Plaintiff and/or Plaintiff's clicking on such email or any web site to which said email is linked, and identify the amount of such monetary compensation.

Interrogatory No. 4: As to each email message identified in Defendant's answer to Interrogatory No. 1, please indicate how many other email addresses to which the same email message was

also sent by Defendant VC, Defendant Opt, and/or some other person or entity on behalf of either Defendant VC or Defendant Opt.

Interrogatory No. 5: As to each email message identified in Defendant's answer to Interrogatory No. 1, please provide all email addresses to which the same email message was also sent by Defendant VC, Defendant Opt, and/or some other person or entity on behalf of either Defendant VC or Defendant Opt.

(Wafer Aff. ¶11; Attachment 6)

With respect to Plaintiff's Second Set of Interrogatories, Plaintiff submits that Defendants' complaints about the volume of email they must review in order to respond is insincere. Indeed, Defendant OPTINREALBIG.COM, LLC boasts on its website that it "possesses over 8 million online consumers in its database" and "produces over 20 million page views per month". (Wafer Aff. ¶15; see also Print Screen from the website of OPTINREALBIG.COM, LLC, attached hereto at Attachment 8) Thus, Defendants' technical capabilities are clearly such that they can efficiently review a large volume of electronic information. In fact, 62,000 email messages is miniscule in comparison to the normal volume of electronic output by Defendant OPTINREALBIG.COM, LLC in a typical month. *Id.* Thus, Defendants' complaint about the volume of email messages at issue in this case is anything but compelling.

In regard to the information and records sought by Plaintiff in his First Request for Production and First Set of Interrogatories, Plaintiff must obtain this information promptly in order to comply with the Court's Preliminary Pretrial Order, which requires motions seeking joinder of additional parties to be filed by November 1, 2006. (See Preliminary Pretrial Order, Document No. 14.) Therefore, Defendants' requested extension, if granted, would prejudice

Plaintiff by leaving him with very little time to review Defendants' discovery responses, identify additional parties defendant and seek leave of the Court to add them as parties in this case.

Because Defendants' requested extension lacks a good faith basis, and would result in prejudice to Plaintiff, Plaintiff respectfully submits that Defendants' request for an extension should be denied.

III. CONCLUSION

For the reasons set forth herein, Defendants' Motion for Extension should be denied, and Defendants should be ordered to immediately respond to Plaintiff's discovery requests.

Alternatively, in light of the Courts' Preliminary Pretrial Order which requires that motions to add parties be filed by November 1, 2006, in the event that the Court were to grant Defendants' requested extension, Plaintiff respectfully requests that the extension be limited to no more than fourteen days and that the deadline for Plaintiff to move for leave to add additional parties be extended for a like period of time.

Respectfully submitted,

s/ Lisa A. Wafer

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CERTIFICATE OF SERVICE

The undersigned certifies that on August 18, 2006, 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 Christina Marshall, Trial Attorney of Record for all Defendants in this matter.

/s/ Lisa A. Wafer
Lisa A. Wafer, Trial Attorney
Oh. Sup. Ct. Reg. No. 0074034