

**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.,	:	Magistrate Judge Abel
<i>et al.</i> ,	:	
	:	
Defendants.	:	

**PLAINTIFF JOHN W. FERRON’S MOTION TO COMPEL DISCOVERY AND
FOR SANCTIONS AGAINST DEFENDANT OPTINREALBIG.COM, LLC
PURSUANT TO FED. R. CIV. 37**

PLAINTIFF JOHN W. FERRON, by and through his undersigned counsel, hereby respectfully moves that the Court issue an Order compelling Defendant OptinRealBig.com, LLC to produce Steve Richter and Scott Richter to appear for depositions in Plaintiff’s counsel’s offices in Columbus, Ohio. Additionally, Plaintiff requests that he be awarded his reasonable attorney’s fees and costs incurred in connection with this Motion, pursuant to Fed. R. Civ. P. 37.

The reasons why the Court should grant this Motion are set forth in detail in the attached Combined Memorandum, and the attachments to it, which supports this Motion and opposes Defendant’s recently-filed “Motion to Quash.”

Respectfully submitted,

s/ Lisa A. Wafer _____
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COMBINED MEMORANDUM
IN SUPPORT OF PLAINTIFF JOHN W. FERRON'S MOTION TO COMPEL
DISCOVERY AND FOR SANCTIONS AGAINST DEFENDANT
OPTINREALBIG.COM, LLC PURSUANT TO FED. R. CIV. 37
AND
IN OPPOSITION TO DEFENDANTS' MOTION
TO QUASH PLAINTIFF'S NOTICE TO TAKE DEPOSITIONS

I. INTRODUCTION AND RELEVANT PROCEDURAL BACKGROUND

This case arises from Plaintiff's claims against Defendants VC E-Commerce, Inc. and OptinRealBig.com, LLC, and a number of still unidentified "Doe" 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.*

On August 15, 2006, Plaintiff served upon Defendants' counsel Plaintiff's Notice to Take Depositions, scheduling the depositions of Defendant OptInRealBig.com, LLC's ("Defendant" or "OptIn") CEO, Scott Richter, and its President, Steve Richter. The deposition notice called for these representatives of OptIn to appear for depositions on October 2, 2006 and October 3, 2006, respectively. (Wafer Aff. ¶3¹; see also August 15, 2006 Notice to Take Depositions, attached hereto at Attachment 2)

¹ See the Affidavit of Attorney Lisa A. Wafer, cited herein as "(Wafer Aff. ¶)," attached hereto at Attachment 1.

During the six weeks between the date on which Plaintiff served Plaintiff's Notice to Take Depositions, August 15, 2006, and the last business day before the scheduled depositions, Friday, September 29, 2006, Defendants' counsel raised absolutely **no** objection to Plaintiff's Notice to Take Depositions. (Wafer Aff. ¶4) Nor did Defendants' counsel request that the depositions be rescheduled for another date. *Id.* Therefore, Plaintiff's counsel reasonably anticipated that the depositions would proceed as noticed, and scheduled a court reporter to transcribe the witnesses' deposition testimony. (Wafer Aff. ¶5)

Then, for its latest discovery stonewalling tactic,² Defendants' counsel sent Plaintiff's counsel an email on September 29, 2006 requesting that the properly-noticed depositions be rescheduled. (Wafer Aff. ¶6; see also September 29, 2006 email from Attorney Marshall, attached hereto at Attachment 3) However, because Defendants' counsel had previously failed to raise any objection to these properly-noticed depositions, Plaintiff's counsel declined to reschedule the depositions at that late date. (Wafer Aff. ¶7)

On September 29, 2006, at 5:44 p.m., well after the close of business and the Court, Defendant filed its "Motion to Quash", which sought the Court's Order cancelling the depositions Plaintiff had noticed six weeks earlier. (Document No. 25)

On October 2, 2006, Scott Richter failed to appear for his deposition. (Wafer Aff. ¶8) Likewise, on October 3, 2006, Steve Richter failed to appear for his deposition. *Id.*

II. LAW AND ARGUMENT

A. Defendant's Representatives Should Be Ordered to Appear At Plaintiff's Counsel's Office for Their Depositions.

² Unfortunately, this Court should be all too familiar with Defendant's ongoing efforts to frustrate Plaintiff's efforts to obtain proper discovery in this case. At this time, two other motions to compel discovery are pending before this Court each of addresses other instances of Defendants' improper stonewalling tactics, including: (1) Defendants' failure to make their mandatory Rule 26(a) disclosures; (2) Defendants' failure to comply with the Court's Order requiring that they respond to Plaintiff's First Set of Interrogatories by September 6, 2006, which Defendants failed to do; and (3) Defendants' refusal to non-evasively answer Plaintiff's First Set of Interrogatories. (See Document Nos. 23 and 31.)

Fed. R. Civ. P. 30 governs the taking of depositions and provides, in pertinent part:

“Notice of Examination: General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone. (b)(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to, or included in, the notice.”

Under Fed. R. Civ. P. 37, a party’s failure to appear for a properly-notice deposition is conduct that must be sanctioned:

“Rule 37. Failure to Make or Cooperate in Discovery; Sanctions

Motion for Order Compelling Disclosure or Discovery. (a) A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows: *** (2) *Motion*. *** (B) **If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling answer, or a designation, or an order compelling inspection in accordance with the request.** The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. *** (4) *Expenses and Sanctions*. (A) **If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct**

necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust." (Emphasis added.)

In interpreting these Rules, the federal courts have consistently held that the failure to appear for a properly-noticed deposition is conduct that must be sanctioned unless the failure to so appear is substantially justified. *Mendoza Maldonado v. Thomas M. Cooley Law Sch.* (6th Cir. 2003), 65 Fed. Appx. 955; *Voit v. Jefferson County Sheriff's Dep't*, 31 Fed. Appx. 18 (6th Cir. 2002); *Reed v. Fulton County Gov't* (11th Cir. 2006), 170 Fed. Appx. 674; *Trevizo v. Adams* (10th Cir. 2005), 455 F.3d 1155.

Here, Defendant's representatives failed to appear for their properly-noticed depositions. (Wafer Aff. ¶8) And, for the reasons more fully set forth below, their failure to do so is not substantially justified. Therefore, Plaintiff respectfully submits that Defendant should be ordered to produce its representatives for their depositions at Plaintiff's counsel's office. In addition, because Defendant's failure to produce its representatives for their depositions was unjustified, Plaintiff submits that Defendant should be ordered to pay Plaintiff's reasonable attorney's fees and costs incurred in connection with this Motion.

B. Defendant's Representatives' Failure to Appear for Their Properly-Noticed Depositions Was Not Substantially Justified.

In an eleventh hour attempt to excuse its representatives' refusal to appear for their properly noticed depositions, Defendant filed its Motion to Quash at 5:44 p.m. on September 29, 2006. (Document No. 25) In its Motion, Defendant argues that its representatives should be deposed in Colorado. Defendant relies upon the Magistrate Judge's September 7, 2006 Order in

the case captioned *Ferron v. Search Cactus, LLC*, Civil Action No. 06-cv-327 (Document No. 13), which held that a corporate representative in another case should be deposed in Michigan. (See generally Defendant's Motion to Quash, Document No. 25.) However, the Magistrate Judge's Order in a different case is inapposite here.

The Magistrate Judge's Order, in *Ferron v. Search Cactus, LLC*, Civil Action No. 06-cv-327 (Document No. 13), was issued well before the deposition, after the parties conferred with the Court, and after the Court considered several factors, including the deponent's role in the company and whether the deponent ever traveled for business. In the instant case, Defendant waited for almost six weeks before filing its motion at the last moment, never made any attempt to confer with the Court before the deposition, and has submitted absolutely **no evidence** to suggest that it was unduly burdened by producing its representatives at Plaintiff's counsel's offices in Columbus for their depositions.

In the absence of such evidence, Defendant cannot rely upon the Magistrate Judge's discovery order in **another** case as justification for its complete failure to comply with Plaintiff's properly-issued Notice to Take Depositions. Accordingly, Plaintiff submits that Defendant's refusal to produce its representatives for their properly-noticed depositions was unjustified, and it should be required to produce its witnesses for depositions at Plaintiff's counsel's offices in Columbus.

III. CONCLUSION

For the reasons set forth herein, Plaintiff respectfully submits that his Motion to Compel Discovery and for Sanctions should be granted, and Defendant's "Motion to Quash" should be denied in its entirety.

Respectfully submitted,

s/ Lisa A. Wafer

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 25, 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