

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

JOHN W. FERRON,	:	CASE NO. 2:06-CV-0322
	:	
Plaintiff,	:	JUDGE FROST
	:	MAGISTRATE JUDGE ABEL
v.	:	
	:	
VC E-COMMERCE SOLUTIONS, INC.,	:	
et al.	:	
	:	
Defendants.	:	
	:	

**DEFENDANT OPTINREALBIG.COM'S RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION TO COMPEL DISCOVERY AND FOR SANCTIONS AGAINST
DEFENDANT OPTINREALBIG.COM**

Now comes Defendant OptInRealBig.com ("OptIn") and in reply to Plaintiff's Motion to Compel Discovery and for Sanctions Against Defendant OptIn states as follows:

Despite Plaintiff's claims to the contrary, OptIn has provided ample evidence that requiring Scott and Steve Richter to travel to Columbus, Ohio, for depositions would work an overwhelming burden on the Richters as well as OptIn. Accordingly, and for the following reasons, their failure to appear for depositions is substantially justified. Therefore, this Court should require the taking of those depositions in Colorado, and should deny Plaintiff's Motion to Compel and for Sanctions.

First, as OptIn stated in its Motion to Quash Plaintiff's Subpoena and Motion for Protective Order, both the Richters and OptIn are based in Colorado, halfway across the country from Ohio. Common sense dictates that such a trip burdens the individual forced to make it. Additionally, Steve and Scott Richter are executives at OptIn, and

integral to the company's operation. Plaintiff's Response ignores the important role played by executives in a company. Requiring the Richters to travel to Ohio would force the Richters and OptIn to needlessly expend the time and money necessary for such a trip, and would negatively impact OptIn's business operations. This can be avoided simply by deposing the Richters in Colorado.

In fact, Plaintiff's counsel already plans to conduct depositions of four other OptIn employees for this case by telephone. See Exhibit A, attached. On October 12, 2006, Plaintiff's counsel requested depositions of OptIn employees Jaz Pester, Laura Cruz, Joey Kemp, and Caryn Stoll. Eleven days later, on October 23, 2006, defense counsel advised Plaintiff as to the earliest availability of the witnesses and counsel. Thereafter, the depositions were reasonably and amicably scheduled for November 27, 2006. On November 9, 2006, Plaintiff's counsel confirmed that the depositions would be conducted telephonically, with the witnesses to appear at a court reporting firm of Plaintiff's choosing in Denver, Colorado. There is simply no justifiable reason the same cannot be conducted for the Richters.

Second, Plaintiff incorrectly asserts that this Court's Order in the companion case, *Ferron v. Search Cactus*, does not apply to this matter. That Order, issued by this same Court, required the deposition of a corporate executive take place in the county of his residence or the county in which he works. Plaintiff points out differences between that case and ours which are not mentioned anywhere in the Order, concerning facts upon which this Court did not rely in issuing that decision. Instead, the Order in *Search Cactus* cites the Fifth Circuit case of *Salter v. UpJohn Co.*, 593 F.2d 649 (5th Cir. 1979) for the proposition that a corporate officer is ordinarily deposed in the corporation's

principal place of business. The Order simply recognized the inequity of requiring a corporate officer to travel so far from his home and business for a deposition at Plaintiff's convenience. Moreover, despite Plaintiff's objections to the Magistrate's decision, this Court affirmed the decision requiring Plaintiff to conduct the deposition the corporate officer of Search Cactus in Michigan. See Exhibit B, attached. Certainly the same principles of equity apply in this case.

Third, the Richters face the potential of being deposed numerous times regarding this same matter. Recently, Plaintiff filed an unopposed motion for extension of time to amend the pleadings or add parties, which this Court granted. See Exhibit C, attached. It is clear Plaintiff intends to bring other parties into this case, and moving forward with depositions before these unknown parties have been joined almost certainly will result in duplicative discovery. It is more than reasonable to expect these newly added parties will want to depose those involved in this case, including the Richters. Rather than subject the Richters to depositions from countless unknown parties, a better course is to allow Plaintiff to amend his complaint, and move forward with this discovery thereafter.

Fourth, OptIn was recently named as an additional defendant in *Ferron v. Search Cactus*, Case No. 2:06-cv-327, referenced above and currently pending before this Court. That case involves issues that are identical to this action, and it is clear Plaintiff intends to depose the Richters in both matters. See Exhibit B, attached in support of Defendant's Motion to Quash and Motion for Protective Order. However, there is absolutely no justification for Plaintiff deposing the same individuals multiple times regarding the exact same conduct. Again, a better course is to conduct these depositions at one time, and in the presence of all interested parties.

Another problem with Plaintiff's Response is his allegation that OptIn waited until the last minute to object to the Richters' depositions. This is simply not true. As far back as August 14, 2006, OptIn's counsel notified Plaintiff that OptIn would not be prepared for these depositions until it had a fair opportunity to review the more than 62,000 emails produced by Plaintiff.¹ See Exhibit B, attached in support of Defendant's Motion to Quash and Motion for Protective Order. Following that correspondence, Plaintiff made no effort at all to work with OptIn toward a mutually agreeable time and place for the depositions of the Richters. Instead, Plaintiff unilaterally noticed the depositions for a time and place convenient only to them, without input from OptIn and its counsel.

OptIn also takes issue with Plaintiff's allegation that OptIn is "stonewalling" by seeking this Protective Order. There is no basis for this allegation. Throughout the discovery process, OptIn has made a good faith effort to cooperate with Plaintiff's requests. Any delay in the discovery process is a result of Plaintiff's own machinations. Plaintiff produced over 62,000 e-mails to Defendants that were received by Plaintiff on August 7, 2006. As can be expected, this resulted in OptIn expending considerable time and expense to analyze each e-mail. Additionally, OptIn is not attempting to prohibit the depositions of Scott and Steve Richter from being conducted. Rather, OptIn simply asks that discovery be had on terms that are fair and agreeable to all parties, not just the Plaintiff.

¹ It is worth noting that a large number of these emails are entirely unrelated to OptIn. Unfortunately, OptIn is forced to sift through these emails in preparation for defending its case. Plaintiff's insistence on producing so many unnecessary documents during discovery only lengthens the time needed for OptIn to fairly and properly prepare its case.

Finally, Plaintiff's displeasure with the timing of OptIn's Motion is irrelevant. As Plaintiff surely is aware, OptIn was entitled to seek this Court's protection regarding the Richters' depositions up to and until the time those depositions were to be conducted. Defense counsel timely objected to the scheduling of the depositions, and requested that they be rescheduled when Plaintiff's counsel unilaterally noticed the depositions in Ohio for a date and time that was convenient only to her.

All of the above reasons demonstrate that OptIn's Motion for a Protective Order was substantially justified. Accordingly, sanctions are not appropriate in this case. Instead, this Honorable Court should Order the depositions of Scott and Steve Richter be had in Colorado, not Ohio, and at a time after Plaintiff has added all necessary parties.

Respectfully Submitted,

/s/ Christina J. Marshall

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CERTIFICATE OF SERVICE

The foregoing was served via the court's electronic filing system on this 15th day of November, 2006 upon:

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/s/ Christina J. Marshall
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