

**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’S REPLY MEMORANDUM IN SUPPORT OF
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 submits his Reply Memorandum in Support of his Motion to Compel Defendant OptinRealBig.com, LLC to produce Scott Richter (its CEO) and Steve Richter (its President) for depositions in Plaintiff’s counsel’s offices in Columbus, Ohio.

I. INTRODUCTION

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 to Plaintiff's Motion, Document No. 38, at Attachment 2)

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, in the latest of a series of its delaying tactics in this case,² Defendant's counsel sent Plaintiff's counsel an email message 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 to Plaintiff's Motion, Document No. 38, at Attachment 3) However, because Defendants' counsel had failed to raise any objection to these properly-noticed depositions in a timely manner, Plaintiff's counsel declined to reschedule the depositions at the last minute. (Wafer Aff. ¶7)

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

¹ See the Affidavit of Attorney Lisa A. Wafer, cited herein as "(Wafer Aff. ¶_)," attached to Plaintiff's Motion, Document No. 38, at Attachment 1.

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, Plaintiff has two other motions to compel discovery pending before this Court, each of which addresses other instances of Defendants' improper stonewalling tactics, including: (1) Defendants' complete failure to make their mandatory Rule 26(a) disclosures; (2) Defendants' failure to comply in a timely manner with the Court's Order requiring Defendants to respond to Plaintiff's First Set of Interrogatories by September 6, 2006; and (3) Defendants' refusal to non-evasively answer Plaintiff's First Set of Interrogatories. (See Document Nos. 23 and 31.)

On October 2, 2006, Scott Richter failed to appear for his noticed deposition. (Wafer Aff. ¶8) Likewise, on October 3, 2006, Steve Richter failed to appear for his noticed deposition. *Id.* Therefore, on October 25, 2006, Plaintiff filed his Motion to Compel Defendant OptinRealBig.com, LLC to produce Steve Richter and Scott Richter for depositions in Plaintiff's counsel's offices in Columbus, Ohio ("Plaintiff's Motion"). (Document 38)

On November 15, 2006, Defendant filed its Memorandum in Opposition to Plaintiff's Motion ("Defendant's Memorandum"). (Document No. 48) In its Memorandum, 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), in which the magistrate judge ruled that the corporate representative of the defendant should be deposed in Michigan, where he works and resides. (Defendant's Memorandum, pp. 2-3)

However, for the reasons noted below and in Plaintiff's Motion to Compel, this Court, which is not bound by a magistrate judge's ruling in another case, and should compel Defendant OptInRealBig.com, LLC to produce Scott Richter and Steve Richter for depositions in Columbus.

II. LAW AND ARGUMENT

Defendant argues that its representatives should be deposed in Colorado. In making this argument, 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), in which the magistrate judge ruled that a representative of the defendant should be deposed in Michigan, where he resides and works. (Defendant's Memorandum, pp. 2-3)

However, the magistrate judge's ruling in that case has no application to the facts and circumstances presented in this case. 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 had considered several factors, including the deponent's role in the company and whether the deponent ever traveled for business.

In marked contrast, in the case at bar, Defendant waited nearly six weeks after Plaintiff served his deposition notice before filing its last minute "Motion to Quash". Significantly, Defendant never made any attempt to confer with the Court before the dates of the two noticed depositions, and Defendant has not submitted **any evidence** to suggest that it was unduly burdened by producing its representatives for depositions in Plaintiff's counsel's offices in Columbus.

During the November 27, 2006 deposition of one of Defendant's employees, Jazette Pester, Ms. Pester testified that the Richters regularly travel hundreds of miles away from Defendant's corporate office to attend trade shows. (Ferron Aff. ¶3)³ In fact, during the past year alone, one or both of the Richters have attended trade shows in New York, Las Vegas, San Francisco and Orlando. *Id.* Thus, Defendant's business regularly requires the Richters to travel from coast to coast.

In contrast, the magistrate judge's Order, in *Ferron v. Search Cactus, LLC*, Civil Action No. 06-cv-327, was based in large part on the deponent's claim that he did **not** travel out of state for business. (Document No. 13) Therefore, Defendant cannot rely upon the magistrate judge's discovery order entered in **another** case – where the facts are very much different from those presented herein – as justification for its complete failure to comply with Plaintiff's properly-

³ See the Affidavit of Plaintiff John W. Ferron, cited herein as "Ferron Aff. ¶1," attached hereto at Attachment 1.

issued deposition notice. Accordingly, Defendant should be required to produce its witnesses for depositions at Plaintiff's counsel's offices in Columbus.

Furthermore, because Defendant cannot justify its complete refusal to produce its representatives for their properly-noticed depositions, Defendant should be ordered to pay Plaintiff's reasonable attorney's fees and costs incurred in connection with this Motion. See Fed R. Civ. P. 30 and 37; *Mendoza Maldonado v. Thomas M. Cooley Law Sch.*, 65 Fed. Appx. 955 (6th Cir. 2003); *Voit v. Jefferson County Sheriff's Dep't*, 31 Fed. Appx. 18 (6th Cir. 2002); and *Reed v. Fulton County Gov't*, 170 Fed. Appx. 674 (11th Cir. 2006); *Trevizo v. Adams*, 455 F.3d 1155 (10th Cir. 2005).

III. CONCLUSION

For the reasons set forth in Plaintiff's Motion and this Reply, Plaintiff respectfully submits that his Motion to Compel Discovery and for Sanctions should be granted in its entirety.

Respectfully submitted,

/s/ Lisa A. Wafer
Ohio Bar No. 0074034
lwafer@ferronlaw.com
Trial Attorney for Plaintiff
FERRON & ASSOCIATES
A Legal Professional Association
580 North Fourth Street, Suite 450
Columbus, Ohio 43215-2125
(614) 228-5225, 228-3255 fax

CERTIFICATE OF SERVICE

The undersigned certifies that on November 28, 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
Ohio Bar No. 0074034