

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

JOHN W. FERRON,)	CASE NO. 2:06 CV 322
)	
Plaintiff,)	JUDGE FROST
)	MAGISTRATE JUDGE ABEL
v.)	
)	
VC E-COMMERCE SOLUTIONS, INC.,)	<u>DEFENDANT OPTINREALBIG.COM,</u>
et al.)	<u>LLC'S RESPONSE IN OPPOSITION</u>
)	<u>TO PLAINTIFF'S MOTION TO STRIKE</u>
Defendants.)	<u>THE AFFIDAVIT OF STEVEN RICHTER</u>
)	

NOW COMES Defendant, OptInRealBig.com, LLC, and respectfully requests this Court deny Plaintiff's Motion to Strike the Affidavit of Steven Richter. A Memorandum in Support is attached hereto.

Respectfully submitted,

Sutter, O'Connell & Farchione Co., LPA

/s/ Christina J. Marshall

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MEMORANDUM IN SUPPORT

I. Introduction

In support of its Motion for Summary Judgment, Defendant OptInRealBig.com attached the affidavit of its President and General Counsel, Steven Richter. Recently, Plaintiff took issue with that affidavit, filing a motion to strike the document. However, in his Motion to Strike the Affidavit of Steven Richter, Plaintiff fails to point out sufficient grounds for this Court to grant his request. Accordingly, this Court should deny Plaintiff's Motion and allow the affidavit in support of OptInRealBig.com's Motion for Summary Judgment.

II. Law and Argument

1. Mr. Richter's Affidavit Signature Satisfies Federal Rule 56

Plaintiff claims that Mr. Richter's signature by proxy, on his affidavit, does not satisfy Federal Civil Rule 56(e). However, this is not the case. Rule 56(e) states, in pertinent part:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

F.R.C.P. 56(e) (2006).

The rule says nothing about the actual signature of the affidavit. Instead, the Rule provides three simple criteria for an affidavit supporting a summary judgment motion. In this case, it is clear Mr. Richter's affidavit satisfies these requirements. The affidavit notes that Mr. Richter is both President and General Counsel to Defendant OptInRealBig.com. Additionally, he affirmatively states, in the document, that during the course of this litigation

he has reviewed tens of thousands of the emails which are the subject of this action. Thus, it is indisputable that Mr. Richter has extensive personal knowledge of OptInRealBig.com's business practices, as well as the issues underlying this lawsuit, and certainly is qualified to testify regarding these matters. Moreover, Plaintiff does not argue that the information contained in the affidavit would be inadmissible. Accordingly, Mr. Richter's first affidavit satisfies Rule 56, which makes no mention of a signature requirement.

Plaintiff's reliance on *Wright v. Asset Acceptance Corp.*, as support for the proposition that Mr. Richter was required to physically sign the affidavit, is misplaced. *Wright* considered an affidavit that was altogether unsigned and not notarized. 2000 WL 33216031, *5 (S.D. Ohio 2000). Our case is easily distinguishable, as Mr. Richter's affidavit was both signed and notarized. In fact, it was signed on Mr. Richter's behalf, with his knowledge, and at his direction. See Second Affidavit of Steven Richter, attached as Exhibit "A." Also, like Rule 56(e), *Wright* does not contain a requirement that the affiant himself physically sign the document. Thus, Mr. Richter's first affidavit violates neither Federal Rule 56 nor the case law Plaintiff cites in his Motion.

It also is worth noting that, at the time OptInRealBig.com filed its Motion for Summary Judgment, Mr. Richter was traveling abroad. See Ex. A. Therefore, he was unable to physically sign the affidavit, which document was needed for attachment to the Motion for Summary Judgment. However, he did prepare the document, review it, and direct his assistant to sign on his behalf. *Id.* Additionally, he gave such instruction with the intent that the proxy signature would carry the full weight of his own signature. *Id.* This was not done in an attempt to mislead the Court or delay this proceeding, but

rather because it was the only available way to complete the affidavit. Accordingly, the affidavit was proper, and this Honorable Court should deny Plaintiff's motion to strike it.

2. Mr. Richter's Affidavit is Based on Personal Knowledge

Plaintiff also argues that paragraph 7 of Mr. Richter's first affidavit is not based on personal knowledge. However, this argument is wholly without merit. The paragraph in question states as follows:

7. The company has never knowingly disseminated or reproduced information through the Internet, and specifically to Plaintiff John Ferron, in violation of Ohio Revised Code Sections 1345.01 to 1345.13.

See Ex. A.

Apparently, in his zeal to find points of contention, Plaintiff ignored the preceding paragraphs of the affidavit. A simple reading of those paragraphs demonstrates that: 1) Mr. Richter is the President and General Counsel of OptInRealBig.com; 2) he is responsible for company operations and therefore familiar with its business practices; 3) due to his position, he is familiar with the subject of this litigation; 4) his involvement in this case has included receipt and review of the many thousands of email messages upon which Plaintiff bases his claim; and 5) he has conducted an "exhaustive search" of OptInRealBig.com's records, in preparation for this case. *See Id.*

It is almost comical that Plaintiff would believe, after reading the entire affidavit, that Mr. Richter does not have personal knowledge sufficient to state that the company he operates has not knowingly violated Ohio law. Mr. Richter is not only the President of OptInRealBig.com, but, as an attorney, also serves as the company's General Counsel. If a company's President and General Counsel is not competent to testify as to the company's potential violation or compliance with applicable law, who might Plaintiff

suggest is so qualified? Mr. Richter's position, experience, and preparation for this case have given him ample personal knowledge of all the matters contained in his affidavit. See also *Den Norske Bank AS v. First Nat'l Bank of Boston* (1st Cir. 1996), 75 F.3d 49, 57 (suggesting that a person's background and qualifications are sufficient to support an affidavit discussing business or trade customs).

Plaintiff's claim that Mr. Richter's affidavit was conclusory also is without merit. In support of this allegation, Plaintiff cites another case that provides him with no support—*Mitchell v. Toledo Hospital*. In that case, the affidavit at issue was based on inadmissible hearsay and rumors. 964 F.2d 577, 584-85 (6th Cir. 1992). However, the issues addressed in *Mitchell* were nothing like those facing this Court today. In our case, Mr. Richter's affidavit contains testimony based on his own review of documents and investigation into company records. There is no reason to think these documents would be inadmissible at trial.

Moreover, the knowledge Mr. Richter gained during his investigation is of the opposite nature of rumors and hearsay—it is his own knowledge based on his own actions and experience. Thus, *Mitchell* provides Plaintiff no support. Accordingly, this Honorable Court should deny Plaintiff's Motion to Strike the Affidavit of Steven Richter, and allow the document to support OptInRealBig.com's Motion for Summary Judgment.

III. Conclusion

Plaintiff's Motion to Strike the Affidavit of Steven Richter is without merit. First, Mr. Richter's affidavit was signed and notarized, at his direction, and in compliance with the Federal Rules. Additionally, the information contained therein is undoubtedly within his personal knowledge as President and General Counsel of the company. Therefore, this

Honorable Court should deny Plaintiff's Motion, and allow the affidavit in support of OptInRealBig.com's Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing was served via the court's electronic filing system on this

7TH day of December, 2006 upon:

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/s/ Christina J. Marshall
CHRISTINA J. MARSHALL (0069963)
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