

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

John W. Ferron, :
 :
 Plaintiff, : Case No. 2:06-cv-322
 :
 v. : Judge Frost
 :
 VC E-Commerce Solutions Inc., *et al.*, : Magistrate Judge Abel
 :
 Defendants. :

Order

Plaintiff John W. Ferron brings this action alleging that Defendants violated the Ohio Consumer Sales Practices Act, O.R.C §1345.02(A) by sending him a large number emails that do not comply with the act's provisions. This matter is before the Magistrate Judge on Plaintiff's September 19, 2006 motion to compel and for sanctions (doc. 23) and his October 11, 2006 motion to compel (doc. 31).

I. Facts

In his complaint, Plaintiff alleges that Defendants, acting in concert, transmitted over 1,600 email messages to Plaintiff's internet account. (Compl. ¶8). Plaintiff further contends that Defendants sent these email messages in knowing violation of O.R.C §1345.02. (Compl. ¶9). He seeks damages for each violation of O.R.C §1345.02(A), reasonable attorney's fees and costs, and the Court's declaratory judgment in his favor. (Compl. ¶¶10-15).

The Pretrial Order set the date for mandatory disclosures as August 20, 2006. On September 5, 2006, this Court entered an Order that denied Defendants' motion for an extension of time in which to respond to Plaintiff's First Set of Interrogatories, and ordered Defendants to respond to the interrogatories by September 6, 2006. If Defendants believed they needed additional time to respond fully to the interrogatories, they were ordered to submit affidavits setting out factually what they had done to identify the emails containing the information needed to respond to the interrogatories on or before September 11, 2006. Plaintiff asserts, and Defendants do not dispute, that Defendant OptInRealBig.com did not respond to Plaintiff's First Set of Interrogatories until September 25, 2006 and Defendants VC E-Commerce, Inc. did not respond until September 28, 2006.

II. Discussion

Plaintiff asks the Court to compel Defendants to make their Rule 26(a) mandatory disclosures, stating that despite the deadline for the disclosures being long past, Defendants have failed to make them. Plaintiff also asserts that Defendants failed to respond to his First Set of Interrogatories until September 25 and 28, 2006, despite being specifically ordered by the Court to respond by September 6, 2006. Further, Plaintiff argues in his October 11, 2006 motion to compel that once Defendants finally did respond to his First Set of Interrogatories, their responses were inadequate and filled with improper objections and evasive answers. Plaintiff claims that he is prejudiced by Defendants' failure to timely respond to his First Set of Interrogatories

because they were meant to identify the Defendants who are currently listed as "John Doe." Because of Defendants' failure to timely make their mandatory disclosures and to respond to Plaintiff's First Set of Interrogatories, Plaintiff argues that the Court should award him the reasonable attorney's fees he spent in connection with his September 19, 2006 motion to compel as a sanction under Rule 37(4)(A).

Defendants responded to Plaintiff's September 19, 2006 motion to compel and for sanctions but failed to respond to his October 11, 2006 motion to compel.

Defendants argue that they were not afforded sufficient time to review the 62, 338 email messages given to them by Plaintiff on August 8, 2006. Further, Defendants state that, as of October 10, 2006, they have responded to all of Plaintiff's discovery requests.

Defendants claim that their failure to timely respond to Plaintiff's First Set of Interrogatories has not caused him any material prejudice. They support this contention by stating that Plaintiff must have been able to identify the "Doe" Defendants as he has filed separate actions against several other entities. Defendants further state that if Plaintiff truly felt prejudiced by an inability to identify other "Doe" Defendants before the November 1, 2006 deadline for joinder, then he should have simply filed a motion to extend that deadline, rather than a motion to compel. Finally, Defendants claim that since Plaintiff has filed a motion for summary judgment, then it is "clear that Plaintiff believes he is already in possession of the evidence needed to obtain judgment against the named Defendants," and thus, he must already have the information that the First Set of Interrogatories was designed to obtain.

III. Analysis

A. Rule 26(a)(1) Disclosures

The parties to a lawsuit are required under Fed. R. Civ. P. 26(a)(1) to make certain mandatory disclosures, including the names of individuals likely to have discoverable information, a description of documents that the parties intend to use to support their claims or defenses, and a computation of damages. Defendants do not dispute Plaintiff's assertion that they have failed to make these mandatory disclosures, despite the August 20, 2006 deadline set in the Pretrial Order for such disclosures. Defendants are ORDERED to make initial disclosures in accordance with the provisions of Fed. R. Civ. P. 26(a)(1) within eleven (11) days of the date of this Order.

B. Plaintiff's First Set of Interrogatories

The Court on September 5, 2006 made an Order requiring Defendants to provide answers to Plaintiff's First Set of Interrogatories by September 6, 2006. Defendants failed to do so. Further, they offer no reasonable explanation in their memorandum contra to Plaintiff's motion to compel and for sanctions as to why they failed to timely respond. They did state that the volume of the email made it too difficult to make a timely response, however, this Court has previously rejected this argument when denying Defendants' motion for extension of time to respond to Plaintiff's First Set of Interrogatories.

1. Interrogatories No. 1-3

Interrogatories No. 1-3 listed addresses and names and asked the Defendants to provide identifying information. Defendants gave responses to several of the subparts in Interrogatories No. 1-3, but state that they do not know the remaining information that plaintiff seeks in these interrogatories. The Court cannot compel Defendants to provide information that it does not have. Defendants are, however, obligated to respond honestly and completely to discovery requests, and failure to do so will result in sanctions. *Bratka v. Anheuser-Busch*, 164 F.R.D. 448, 463 (S.D. Oh. 1995). If Defendants possess any additional information responsive to Interrogatories Nos. 1-3 not included in their responses, they must supplement those responses within eleven (11) days of the date of this Order.

2. Interrogatory No. 4

If a party fails to timely respond to the opposing party's interrogatories through answer or objection, then the Court may deem that party has "waived any objections that it otherwise might have been entitled to assert." *Bailey v. Container Corp. of Am.*, 1985 U.S. Dist. LEXIS 23897 at *5 (S.D. Ohio 1985). Defendants have made several objections in their responses to Plaintiff's First Set of Interrogatories, however, as these objections were served in an untimely manner and in disregard of an Order of this Court, Defendants are deemed to have waived these objections. Thus, Defendants are ORDERED to fully respond to Interrogatory No. 4. within eleven (11) days of the date of this Order.

C. Sanctions

In cases where a party fails to comply with the disclosure requirements of Fed. R. Civ. P. 26(a), Rule 37 (c)(1) allows the Court to impose the sanction of the reasonable attorney's fees incurred by a party moving to compel disclosure, unless the nondisclosing party has substantial justification for the failure to disclose. *See Bailey*, 1985 U.S. Dist. LEXIS 23897 at *5. Here, Defendants have not shown substantial justification for their failure to respond to Plaintiff's First Set of Interrogatories until September 25, and 28, 2006. Defendants are ORDERED to pay Plaintiff reasonable attorney's fees of \$150 for briefing these motions.

IV. Conclusion

For the reasons stated above, Plaintiff John W. Ferron's September 19, 2006 motion to compel discovery and for sanctions (doc.23) is GRANTED. Further, Plaintiff's October 11, 2006 motion to compel is GRANTED to the extent that it seeks responses to Interrogatory No. 4, but DENIED to the extent that it seeks to compel Defendants to provide responses to questions about which they have no knowledge.

Under the provisions of 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P., and Eastern Division Order No. 91-3, pt. F, 5, either party may, within ten (10) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by the District Judge. The motion must specifically designate the Order, or part thereof, in question and the basis for any objection thereto. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or

contrary to law.

s/Mark R. Abel
United States Magistrate Judge