

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 of emails that do not comply with the act's provisions. This matter is before the Magistrate Judge on Defendant OptInRealBig.com's (OptIn) September 29, 2006 motion to quash Plaintiff's notice of deposition of Steven Richter and Scott Richter. (Doc. 25).

**Background.** On August 10, 2006, Plaintiff's counsel, Lisa Wafer, emailed Defendants' counsel, Christina Marshall, with several potential dates for deposing Steve Richter and Scott Richter, respectively the President and the CEO of OptIn, who are both located in Colorado. (Doc. 25, Exhibit B). On August 14, 2006, Ms. Marshall responded by rejecting the proffered dates and stated that she would "not agree to produce my clients for deposition until we have had an opportunity to review the emails you sent last week." *Id.* On August 15, 2006, Plaintiff served notice that

scheduled the depositions of Scott and Steven Richter for October 2 and 3, 2006 at Ms. Wafer's office in Columbus. (Wafer Aff. ¶3). Six weeks later, on September 29, 2006, the last business day before Scott Richter's noticed deposition, Ms. Marshall emailed Ms. Wafer to see if these depositions could be rescheduled, stating that they had not yet a chance to go through the emails. (Marshall Aff. ¶6; Wafer Aff. ¶6; Doc. 25, Exhibit B). Ms. Wafer, citing the late hour of the request, refused. (Wafer Aff. ¶7; Doc. 25, Exhibit B) Ms. Marshall then filed the motion currently before the Court. Both Scott and Steve Richter failed to attend their noticed depositions on October 2 and 3, 2006. (Wafer Aff. ¶8).

**Arguments of the Parties.** Defendant begins by stating that the notice of deposition of Scott and Steve Richter was improper because it was done without a subpoena. Defendant argues that requiring Steve and Scott Richter to attend the noticed depositions would be unduly burdensome for several reasons.

First, because Steve and Scott Richter both reside and work in Colorado, Defendant argues that traveling to Ohio for depositions will be an unnecessary expense in terms of both time and cost. Further, Defendant asserts that depositions of corporate officers are generally taken in the corporation's principal place of business, and states that Plaintiff has not advanced any good cause to deviate from this principle.

According to Defendant, both Steve and Scott Richter play an integral role in the operation of OptIn, and it would be a hardship for them to both travel away from the company. Also, Defendant states that Plaintiff agreed to depose four other Colorado-

based OptIn employees by telephone instead of requiring them to travel to Ohio and contends that Plaintiff has no legitimate reason to refuse to accommodate the Richters in the same manner.

Defendant states that in a similar case brought by the same Plaintiff, *Ferron v. Search Cactus*, No. 2:06-cv-327, this Court refused to order a Michigan defendant to travel to Ohio for his deposition. Defendant asserts that there is no reason to treat the Richters differently, especially as it alleges that the hardship of traveling to Ohio from Colorado is much greater than the hardship of traveling from Michigan to Ohio.

Next, Defendant notes that it has been recently added as a defendant in *Search Cactus*, and suggests that the Plaintiff more than likely will want to depose the Richters for that case as well. Defendant argues that it would be unduly burdensome to require the Richters to be subject to multiple depositions.

On October 25, 2006, Plaintiff filed his own separate motion to compel depositions and for sanctions (doc. 38) in response to Defendant's motion to quash. He argues that Defendant never voiced any objections to the noticed deposition date until the last business day before Scott Richter's deposition. He claims that an objection at this late hour is a "stonewalling" attempt by the Defendant to delay the depositions.

Further, Plaintiff claims that failure to attend a properly noticed deposition is conduct that must be sanctioned under Rule 37 unless Defendant can show that the failure to appear was substantially justified. Plaintiff claims that the Richters' failure to appear was not substantially justified. He argues that the Court's decision in *Ferron v.*

*Search Cactus* is distinguishable for several reasons. First, the deponent in that case objected to the location of the deposition well before it was to take place. Also, in that case, the parties participated in a telephone conference with Magistrate Abel regarding this issue where the deponent produced evidence of why requiring him to travel to Ohio for a deposition would be an undue burden, including evidence of his role in his company and whether he ever traveled for business. Plaintiff asserts that Defendant has failed to produce such evidence.

**Discussion.** Under Fed. R. Civ. P. 30(b)(1), a party seeking to depose a representative of a corporation that is a party to the action may do so simply by properly serving notice of the deposition—a subpoena is not required. *See Cadent LTD. V. 3M Unitek Corp.*, 232 F.R.D. 625 (C.D. Cal. 2005) (“[u]nder Rule 30(b)(1), it is well recognized that if the corporation is a *party*, *the notice compels it to produce* any officers, director or managing agent named in the deposition notice. It is not necessary to subpoenas such individual”)(emphasis in original, internal citations and quotations omitted). Further, if a representative fails to appear for a duly noticed deposition, the Court may subject them to sanctions under Rule 37. 8A, Wright, Miller & Marcus, *Federal Practice and Procedure, Civil Procedure: Civil 2d*, §2103 (2d ed. 1994).

Plaintiff contends that he intends to depose Scott and Steven Richter in their respective representative capacities as CEO and President of OptIn. Thus, he was not required to subpoena them as Defendant contends. Although a party may file a motion to quash at any time before they are required to produce discovery, that party may not

wait for the Court's ruling before complying with their particular discovery duty. Here, although Defendant is technically correct in its contention that it was within its rights to wait until the late afternoon of Friday, September 29, 2006 to file a motion to quash the October 2 and 3, 2006 depositions of Scott and Steve Richter, unless and until the Court granted the motion, these representatives were still required to attend their properly noticed depositions. Moreover, I expect counsel to treat one another with civility and consideration. Introductory Statement on Civility, S.D. Ohio Civ. R. These depositions were previously noticed for mid-August. Plaintiff's counsel agreed to reschedule them; and Defendant's counsel had six weeks notice of the October 1 and 2 dates. By waiting until the late afternoon of the last business day before the depositions, Defendant's counsel failed in her obligation to work cooperatively with opposing counsel to resolve disputes. This is especially true in light of my accessibility to talk with counsel and resolve disputes like this. S.D. Ohio Civ. R. 37.1. Because Scott Richter and Steve Richter failed to attend their duly noticed depositions and because Defendant's counsel failed in her duty to this Court to promptly act to resolve the dispute about where the depositions should be taken, it is ORDERED that Defendant OptIn pay the costs Plaintiff incurred. Plaintiff's counsel is DIRECTED to provide Defendant with a copy of the court reporter's fee for the duly noticed October 1 and 2, 2006 depositions. Defendant is ORDERED to reimburse Plaintiff for the expense within thirty (30) days of the date it receives a copy of the bill.

Depositions of corporate representatives are typically taken at the corporation's principal place of business. *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979). Here, Plaintiff has not shown any unique circumstances that would militate in favor of allowing them to depose the Richters in Ohio. However, because of Defendant's failure to object to this location until the last business day before the depositions were to take place, this fact does not provide substantial justification for their failure to attend their duly noticed deposition.

As Plaintiff has amended his complaint in *Ferron v. Search Cactus* to add OptIn as a defendant, Defendant's concern that its representatives will be subject to multiple depositions is justified. The parties should discuss the feasibility of taking Scott and Steven Richter's depositions only once, to be used for both cases. If the parties are unable to come to agreement on this matter, they should telephone my office at 614-719-3370 in order to set up a conference to discuss disputed issues.

**Conclusion.** Thus, Defendant's September 29, 2006 motion to quash Plaintiff's notice of deposition of Steven Richter and Scott Richter (doc. 25) and Plaintiff's October 25, 2006 motion to compel and for sanctions are both DENIED.

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