

**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., <i>et</i>	:	Magistrate Judge Abel
<i>al.</i> ,	:	
	:	
Defendants.	:	

**PLAINTIFF’S OBJECTIONS TO THE MAGISTRATE JUDGE’S
JANUARY 23, 2007 ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFF’S MOTIONS TO COMPEL DISCOVERY**

PLAINTIFF JOHN W. FERRON, by and through the undersigned counsel, and pursuant to Federal Rule of Civil Procedure 72(a), hereby respectfully submits his formal objections to Magistrate Judge Abel’s January 23, 2007 Order (Document No. 58).

For the reasons set forth herein, Plaintiff respectfully submits that the Magistrate Judge erred in issuing the January 23, 2007 Order, which awarded Plaintiff only the nominal sum of \$150.00 as sanctions against Defendants, who failed to make their mandatory Initial Disclosures under Fed. R. Civ. P. 26(a). Plaintiff incurred significantly more in attorney’s fees and expenses in connection with the preparation of his Motion to Compel (Document No. 23), which was granted. Because an award of Plaintiff’s reasonable attorney’s fees as sanctions is mandatory under these circumstances, Plaintiff respectfully submits that the Magistrate’s ruling in this regard was erroneous and contrary to law.

I. INTRODUCTION

This case arises from Plaintiff’s claims against Defendants VC E-Commerce, Inc. (“VC”) and Media Breakaway, LLC f/k/a OptInRealBig.com, LLC (“OptIn”) (collectively

“Defendants”) and a still unknown number of still unidentified “Doe” Defendants for sending commercial email messages to Plaintiff that violate the Ohio Consumer Sales Practices Act (“CSPA”), R.C. §1345.01, *et seq.*, and its corresponding advertising regulations in numerous ways.

Due to Defendants’ outrageous dilatory conduct throughout discovery in this case, Plaintiff has been left with no other recourse but to prepare and file three, separate Motions to Compel Discovery in this case. On September 19, 2006, Plaintiff was forced to file his first Motion to Compel, which addressed Defendants’ complete failure to make their mandatory Rule 26(a) disclosures. (Document 23) Next, on October 11, 2006, Plaintiff had to prepare and file his second Motion to Compel Discovery, which pertained to Defendants’ failure to comply with the Court’s Order requiring them to respond to Plaintiff’s First Set of Interrogatories by September 6, 2006. (Document No. 31) Finally, on October 25, 2006, Plaintiff was obliged to prepare and file his third Motion to Compel, which addressed Defendants’ failure to appear for properly noticed depositions. (Document No. 38)¹

On January 23, 2007, the Magistrate Judge granted Plaintiff’s first Motion to Compel, which was filed September 19, 2006, and ordered Defendants to make their mandatory Rule 26(a) disclosures.² (See Plaintiff’s Motion to Compel, Document 23; see also January 23, 2007 Order, Document No. 58.) In his Motion to Compel, Plaintiff had also requested, as sanctions under Fed. R. Civ. P. 37(a)(4), an award of his reasonable attorney’s fees. (Document No. 23) However, while the Magistrate Judge granted Plaintiff’s request for sanctions, he only awarded

¹ Plaintiff’s October 25, 2006 Motion to Compel remains pending before the Court.

² The Magistrate Judge’s January 23, 2007 Order also granted, in part, and denied, in part, Plaintiff’s Motion to Compel, filed October 11, 2006, regarding the Defendants’ failure to respond to Plaintiff’s First Set of Interrogatories. (Document No. 58) Plaintiff does not object to the Magistrate’s ruling in this respect.

Plaintiff \$150.00 as sanctions for Defendants' dilatory discovery conduct. (January 23, 2007 Order, p. 6, Document No. 58)

Plaintiff respectfully submits that this sanction is not based on any evidence of Plaintiff's attorney's fees, does not reflect Plaintiff's actual attorney's fees incurred in preparing his Motion to Compel, and clearly is inadequate. *Id.* Accordingly, Plaintiff objects to the Magistrate's ruling in this respect and requests that the Court award Plaintiff his actual attorney's fees and expenses incurred in pursuing his meritorious motion.

II. RELEVANT PROCEDURAL BACKGROUND

On July 20, 2006, the Court presided over a Preliminary Pretrial Conference in this case, and thereafter issued a Preliminary Pretrial Order on July 21, 2006. (Document No. 14) The Preliminary Pretrial Order required the parties to exchange their Rule 26(a) disclosures by August 20, 2006. *Id.*

Plaintiff served his Rule 26(a) disclosures upon Defendants on August 18, 2006. (Wafer Aff. ¶3;³ see also August 18, 2006 letter from Attorney Wafer to Attorney Marshall, attached at Attachment 2 to Plaintiff's Motion to Compel, Document No. 23) However, to the present date, Defendants have never served their Rule 26(a) disclosures upon Plaintiff. (Wafer Aff. ¶4)

On September 14, 2006, in a good faith effort to obtain the Defendants' disclosures, Plaintiff's counsel sent an email message to Defendants' counsel, noting that Defendants had not made their disclosures within the deadline set forth in the Preliminary Pretrial Order. (Wafer Aff. ¶5; see also September 14, 2006 email from Attorney Wafer to Attorney Marshall, attached at Attachment 3 to Plaintiff's Motion to Compel, Document No. 23) After Defendant's counsel

³ See the Affidavit of Attorney Lisa A. Wafer, cited herein as "Wafer Aff. ¶", and attached to Plaintiff's Motion to Compel Discovery, filed September 19, 2006, Document No. 23, Attachment 1.

failed to respond to Plaintiff's counsel's email, Plaintiff filed his Motion to Compel and for Sanctions on September 19, 2006. (Document No. 23)

On January 23, 2007, the Magistrate Judge issued his Order granting Plaintiff's Motion to Compel and for Sanctions, ordering Defendants to produce their Initial Disclosures under Rule 26(a) within eleven days.⁴ As noted above, however, the Magistrate Judge ordered Defendants to pay sanctions to Plaintiff in the nominal amount of \$150.00. (January 23, 2007 Order, p. 6, Document No. 58) Plaintiff objects to the Magistrate Judge's Order in this respect.

III. LAW AND ARGUMENT

Fed. R. Civ. P. 37 governs the imposition of sanctions for a party's failure to make disclosures or cooperate in discovery, and provides in pertinent part:

“Rule 37. Failure to Make or Cooperate in Discovery; Sanctions Motion for Order Compelling Disclosure or Discovery. (a) A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

“(2) *Motion.*

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

“(4) *Expenses and Sanctions.*

(A) **If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees,** unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or

⁴ Plaintiff does not object to this portion of the Magistrate's Order.

objection was substantially justified, or that other circumstances make an award of expenses unjust.” (Emphasis added.)

The Sixth Circuit Court of Appeals has held that the sanctions provision of Rule 37 is **mandatory**. As the Court in *Vaughn v. City of Lebanon*, 18 Fed. Appx. 252 (6th Cir. 2001) explained:

“Courts have found that, absent a showing of ‘substantial justification’ or ‘harmless’ violation, **Rule 37(c)(1) requires a district court to impose a sanction for violation of the disclosure requirement.** See, e.g., *Bowe v. Consolidated Rail Corp.*, 2000 U.S. App. LEXIS 24866, No. 99-4091, 2000 WL 1434584, at *2 (6th Cir. Sept. 19, 2000) (unpublished) (**‘It is well-established by this Court and others that Rule 37(c)(1) mandates that a trial court shall sanction a party for discovery violations in connection with Rule 26 unless the violations were harmless or were substantially justified.’**) (citing *Salgado v. General Motors Corp.*, 150 F.3d 735, 742 & n.6 (7th Cir. 1998) (**holding that Rule 37(c)(1) puts teeth into Rule 26** and that ‘the district court acted well within its discretion when it decided to impose the sanction of precluding the witnesses from testifying’ since ‘the sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless’); *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1230 (7th Cir. 1996) (same); *Ames v. Van Dyne*, 1996 U.S. App. LEXIS 29700, No. 95-3376, 1996 WL 662899, at *4 (6th Cir. Nov. 13, 1996) (unpublished) (“Rule 37 is written in mandatory terms and ‘is designed to provide a strong inducement for disclosure of Rule 26(a) material.’”) (quoting *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156 (3d Cir. 1995))).” (Emphasis added.)

In the instant case, it is undisputed that Defendants utterly failed to fulfill their discovery and disclosure obligations under Fed. R. Civ. P. 26. As the Magistrate Judge correctly noted in his January 23, 2007 Order, Defendants’ refusal to produce this information lacked **any** justification. (January 23, 2007 Order, p. 6, Document No. 58)

Because there was no justification for Defendants’ refusal to make their Rule 26 disclosures, Plaintiff respectfully submits that the Court is obliged to award Plaintiff his

reasonable attorneys' fees and expenses incurred in preparing and filing his Motion to Compel. Here, the Magistrate Judge correctly determined that Plaintiff was entitled to sanctions under Fed. R. Civ. P. 37(a)(4), but then the Magistrate Judge inexplicably awarded Plaintiff sanctions in the nominal sum of \$150.00. This award is not based upon any evidence regarding Plaintiff's attorney's fees and expenses, and does not reflect Plaintiff's attorney's fees and expenses incurred in connection with preparing and filing his Motion to Compel. Because an award of Plaintiff's attorney's fees is mandatory in this circumstance, Plaintiff respectfully submits that the Court should overrule the Magistrate Judge's January 23, 2007 Order, and schedule an evidentiary hearing regarding the proper amount of reasonable attorney's fees and expenses to which Plaintiff is entitled under Fed. R. Civ. P. 37(a)(4).

IV. CONCLUSION

For the reasons set forth herein, Plaintiff respectfully submits that the Magistrate Judge's January 23, 2007 was erroneous and contrary to law. Therefore, Plaintiff urges the Court to overrule the January 23, 2007 Order, and schedule an evidentiary hearing regarding the proper amount of reasonable attorney's fees and expenses to which Plaintiff is entitled under Fed. R. Civ. P. 37(a)(4).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on January 29, 2007, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notice of such filing to all counsel of record.

/s/ Lisa A. Wafer
Lisa A. Wafer, Trial Attorney
Oh. Sup. Ct. Reg. No. 0074034