

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

**PLAINTIFF’S OBJECTIONS TO THE  
MAGISTRATE’S JANUARY 26, 2007 ORDER**

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 26, 2007 Order (Document No. 60).

For the reasons set forth herein, Plaintiff respectfully submits that the Magistrate Judge erred in issuing the January 26, 2007 Order, which prohibits Plaintiff from conducting the depositions of Defendant OptInRealBig.com, LLC’s corporate president and CEO in Ohio and, instead, requires Plaintiff to conduct the depositions in Colorado. For the following reasons, Plaintiff respectfully submits that the Court should overrule the January 26, 2007 Order in this respect.

**I. INTRODUCTION AND RELEVANT PROCEDURAL BACKGROUND**

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 hundreds and hundreds of commercial email messages to Plaintiff the contents of which violate of the Ohio Consumer Sales Practices Act (“CSPA”), R.C. §1345.01, *et seq.*, in multiple ways.

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 president, Steve Richter. The deposition notice called for these representatives of OptIn to appear for depositions on October 2 and 3, 2006, respectively. (Wafer Aff. ¶3<sup>1</sup>; see also August 15, 2006 Notice to Take Depositions, attached at Attachment 2 to Plaintiff's Motion to Compel, filed October 25, 2006, Document No. 38)

During the six weeks between August 15, 2006, the date on which Plaintiff served his deposition notice, and the last business day before the scheduled depositions, Friday, September 29, 2006, Defendants' counsel did not raise any objection to Plaintiff's deposition notice. (Wafer Aff. ¶4) Defendants' counsel also did not request that the depositions be rescheduled for another date. *Id.* Therefore, Plaintiff's reasonably anticipated that the depositions would proceed as noticed, and scheduled a court reporter to transcribe the witnesses' deposition testimony. (Wafer Aff. ¶5)

Then, on the even of the depositions, Defendants' counsel sent Plaintiff's counsel an email 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 at Attachment 3 to Plaintiff's Motion to Compel, filed October 25, 2006, Document No. 38) However, because Defendant's counsel had failed to raise any objection to these properly-noticed depositions in a timely fashion, Plaintiff's counsel declined to reschedule the depositions at the last minute. (Wafer Aff. ¶7)

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<sup>1</sup> See the Affidavit of Attorney Lisa A. Wafer, cited herein as "(Wafer Aff. ¶□)," attached to Plaintiff's Motion to Compel, filed October 25, 2006, Document No. 38.

On September 29, 2006, at 5:44 p.m., well after the close of business and the Court, Defendant filed its “Motion to Quash”, which sought the Court’s Order cancelling the depositions Plaintiff had noticed six weeks earlier. (Document No. 25)

On October 2, 2006, Scott Richter failed to appear for his deposition as noticed. (Wafer Aff. ¶8) Likewise, on October 3, 2006, Steve Richter failed to appear for his deposition as noticed. *Id.* Thus, on October 25, 2006, Plaintiff filed his Motion to Compel, which sought an Order compelling Defendant to produce Steve Richter and Scott Richter for depositions in Plaintiff’s counsel’s offices in Columbus, Ohio. (Document No. 38)

On January 26, 2007, Magistrate Judge Abel issued an Order denying Plaintiff’s Motion to Compel, and ruling that the depositions of OptIn’s president and CEO should be conducted in Colorado. Plaintiff objects to the Magistrate’s ruling in this respect, and urges the Court to overrule it.

## II. LAW AND ARGUMENT

The United States District Court for the Western District of Tennessee recently offered guidance about the factors to consider in determining where a deposition should occur. In *Thomas & Betts Corp v. Hosea Project Movers, LLC*, Case No. 02-2953-Ma/An., unreported, 2004 U.S. Dist. LEXIS 28657 (West. Dist. Tenn. 2004)(copy attached at Attachment 1), the court explained:

“[W]hen determining where the deposition should occur, the Court will examine [the following] factors \* \* \* : **the location of counsel for the parties in the forum district, the number of corporate representatives a party is seeking to depose, the likelihood of significant discovery disputes arising which would necessitate resolution by the forum court;** whether the persons sought to be deposed often engage in travel for business purposes; **the equities with regard to the nature of the claim and the parties’ relationship [\*\*\*; and] whether the defendant has filed a permissive counterclaim.**” (Emphasis added; internal citations omitted.)

*Id.* at \*3-4. The court in *Thomas & Betts* concluded, after weighing the foregoing factors, the forum of the lawsuit was the proper location for the corporate officers' depositions. *Id.* at \*5. Considering the facts present in this case in light of the factors set forth in *Thomas & Betts*, the depositions of Steve Richter and Scott Richter, OptIn's president and CEO, respectively, should be conducted in this Court's forum location of Columbus for several important reasons.

First, the offices of counsel for **both** Plaintiff and Defendants are located in Ohio, not Colorado. Thus, the first factor weighs heavily in favor of Plaintiff's position that these depositions should proceed in Columbus. Both parties will save the attorney travel time and related expenses if their attorneys are not required to travel to Colorado for the depositions.

Second, it is foreseeable, if not likely, that the Court will need to address a discovery dispute during these depositions. This is probable because Plaintiff has had to request Court intervention regarding several subject matters in discovery in this case.<sup>2</sup> Therefore, this factor also strongly favors the taking of the depositions in Columbus.

Under the *Thomas & Betts* analysis, another factor to be considered is whether the deponents normally travel to the judicial forum. The Court's January 26, 2007 Order makes no reference to this factor because Defendant submitted no evidence to the Court regarding this issue. Thus, Plaintiff submits that this factor neither supports nor weighs against Plaintiff's argument that these depositions should be conducted in Columbus.

Lastly, the parties' relationship must be considered. *Thomas & Betts, supra* at \*5. Here, many hundreds of commercial email messages were apparently transmitted by Defendant OptIn, or

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<sup>2</sup> 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. Two other motions to compel discovery have been filed with the Court, each addressing other instances of Defendants' improper stonewalling tactics, including: (1) Defendants' failure to make their mandatory Rule 26(a) disclosures; (2) Defendants' failure to comply with the Court's Order requiring that they respond to Plaintiff's First Set of Interrogatories by September 6, 2006, which Defendants failed to do; and (3) Defendants' refusal to non-evasively answer Plaintiff's First Set of Interrogatories. (See Document Nos. 23 and 31.)

on its behalf, to Ohio residents including Plaintiff. Defendant OptIn's solicitation of Ohio residents amply supports Plaintiff's argument that the depositions of Steve Richter and Scott Richter should occur in this forum, where Defendant OptIn has chosen to conduct business extensively.

Based on the foregoing, Plaintiff respectfully submits that the facts in this case weigh heavily in favor of requiring that Steve Richter and Scott Richter travel to Columbus for their depositions. See *Thomas & Betts, supra*; see also *Sugarhill Records, Ltd. v. Motown Record Corp.*, 105 F.R.D. 166 (S.D.N.Y. 1985) ("Corporate defendants are frequently deposed in places other than the location of the principal place of business, **especially in the forum, for the convenience of all parties and in the general interests of judicial economy.**") (Emphasis added.); *Sonitrol Distributing Corp. v. Security Controls, Inc.*, 113 F.R.D. 160, 160-161 (E.D. Mich. 1986) (requiring depositions of officers of plaintiff corporations to be taken in forum state); and *Society of Indep. Motion Pict. v. United Detroit Theater Co.*, 8 F.R.D. 453, 455 (E.D. Mich. 1948) (requiring depositions of officers of plaintiff corporations to be taken in forum state).

Thus, the Magistrate Judge's determination that OptIn's president and CEO should be deposed in Colorado should be overruled, and Steve Richter and Scott Richter should be ordered to appear for depositions in Columbus.

### III. **CONCLUSION**

For the reasons set forth herein, Plaintiff respectfully submits that the Magistrate Judge's January 26, 2007 Order was erroneous. Plaintiff urges the Court to overrule the January 26, 2007 Order, and require Steve Richter and Scott Richter to appear for depositions in Columbus.

Respectfully submitted,

s/ Lisa A. Wafer  
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**CERTIFICATE OF SERVICE**

The undersigned certifies that on February 2, 2007, 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  
Lisa A. Wafer, Trial Attorney  
Oh. Sup. Ct. Reg. No. 0074034