

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>DEFENDANTS' RESPONSE IN</u>
Et al.	)	<u>OPPOSITION TO PLAINTIFF'S</u>
	)	<u>OBJECTIONS TO MAGISTRATE</u>
Defendants.	)	<u>JUDGE'S JANUARY 26, 2006, AND</u>
	)	<u>CONCURRENT REQUEST FOR</u>
	)	<u>RECONSIDERATION OF ORDER TO</u>
	)	<u>PAY COSTS</u>

NOW COMES Defendants, VC E-Commerce Solutions, Inc. and OptInRealBig.com, LLC, n/k/a Media Breakaway, LLC ("OptIn"), by and through undersigned counsel, and respectfully submits this Memorandum in Opposition to Plaintiff's Objections to the Magistrate Judge's January 26, 2007 Order (Doc. No. 60). The Order requires Plaintiff to conduct the depositions of OptIn representatives, Steven Richter and Scott Richter, in Colorado, as well as suggests the parties enter discussions regarding the feasibility of taking the depositions once for use in this case and in *Ferron v. Search Cactus*, et al. Plaintiff's reliance upon *Thomas v. Betts Corp.*, *v. Hosea Project Movers* is inconsequential to any reconsideration of the Order. Furthermore, Plaintiff cannot overcome the ample evidence that requiring these witnesses to travel to Columbus, Ohio, for depositions would work an overwhelming burden on the Richters as well as OptIn.

In addition to opposing Plaintiff's Motion, Defendants makes their own request for reconsideration of the decision within the same Order that Defendants should pay

Plaintiff for costs incurred by scheduling the depositions of Steven Richter and Scott Richter on October 2 and 3, 2006. Plaintiff was well-aware of Defendants stance on the timing of these depositions, but unilaterally scheduled them anyway. Defendants' handling of Plaintiff's decision does not merit payment of costs, if any, associated with these depositions.

Therefore, Defendants oppose Plaintiff's objections such that the request for reconsideration should be denied. Defendants also request reconsideration and reversal of the portion of the Order requiring Defendants to pay costs associated with scheduling the depositions of Steven Richter and Scott Richter. The facts, law and argument in support of this Memorandum are more fully set forth in the attached Brief in Support, fully incorporated by reference herein.

Respectfully submitted,
Sutter, O'Connell & Farchione Co., LPA

/s/ Christina J. Marshall
Christina J. Marshall (0069963)
1301 East 9th Street
3600 Erieview Tower
Cleveland, Ohio 44114
Phone: (216) 928-2200
E-mail: cmarshall@sutter-law.com

Counsel for Defendants

BRIEF IN SUPPORT

I. PLAINTIFF'S REQUEST FOR RECONSIDERATION SHOULD BE DENIED

In an attempt to justify reconsideration of the Magistrate Judge's January 26, 2007 Order, Plaintiff suggests a United States District Court for the Western District of Tennessee decision offers guidance to reverse the Order and require the Richters to be deposed in Columbus, Ohio. See, *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). In *Thomas*, the Western District was faced with a discovery dispute regarding whether depositions of corporate representatives should take place in Covington, Kentucky, defendants principle place of business, or in Memphis, Tennessee, at the offices of plaintiff's counsel. *Id.* at *2. The court ultimately ordered the representatives to appear for deposition in Memphis, but for reasons conveniently left out of Plaintiff's Motion that make *Thomas* wholly distinguishable from this case.

Plaintiff only argues the first three factors considered by the *Thomas* court. However, it is the remaining factors that demonstrate Plaintiff's request for reconsideration should be denied. In *Thomas*, the defendant already agreed to travel to Nashville for depositions, which the court viewed as acquiescing to travel for the depositions in general. *Id.* at *5. The Defendants in this matter have never made such an agreement.

Similarly, the *Thomas* court considered the parties relationship when it ordered the representative to present to plaintiff's counsels offices in Memphis for deposition. However, unlike the parties in this matter, the *Thomas* parties had entered into a

contractual relationship requiring litigation, and, according to the court, discovery, to occur in Tennessee. *Id.* at *5. There is no such contract or venue agreement between the parties in this matter. Plaintiff only had the litigious serendipity of allegedly receiving an email from Defendants while in Columbus, Ohio.

Likewise, the *Thomas* court also considered whether the defendant had filed permissive counter-claim. *Id.* at *4, citing *Rapoca Energy Co. v. AMCI Export Corp.*, 199 F.R.D. 191, 193. As a final element justifying the *Thomas* courts decision, the defendant had indeed voluntarily filed a permissive counter-claim in the Western District of Tennessee. Defendants in this matter have not taken such action against Plaintiff.

Finally, the distance involved between the two deposition sites in *Thomas* is far less than in this case. The *Thomas* court was deciding between Kentucky and Tennessee. These are adjacent states with a traveling distance that is hardly comparable to the continental divide between Colorado and Ohio. No matter how supportive Plaintiff believes *Thomas* is to reconsideration, he cannot genuinely suggest the travel burdens between that case and this matter are the same.

Overall, Plaintiff's reliance on *Thomas* does nothing to overcome the presumption that "the deposition of a corporate should occur at the corporation's principle place of business." *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979). Any merit to the location of the parties' counsel in Ohio, the number of corporate representatives to be deposed, and the likelihood for the *possibility* of a discovery dispute is still seriously outweighed by the factors discussed above. Perhaps this is the reason Plaintiff chose not to address them in their Motion. Nevertheless, this Court

should deny Plaintiff's Motion for Reconsideration. The depositions of Steven and Scott Richter should proceed in Colorado, and the parties should follow the instructions of the Magistrate and discuss the feasibility of taking the depositions only once for use in this case and in *Ferron v. Search Cactus*.

II. RECONSIDERATION OF THE ORDER TO PAY COSTS IS APPROPRIATE

In addition to requesting denial of Plaintiff's Motion, Defendants request reconsideration of the portion of the Order requiring payment of costs. Despite Plaintiff's arguments regarding the depositions of the Richters, it was Plaintiff who unilaterally scheduled the depositions over Defendants' objections. Defendant also filed a Motion to Quash the depositions, which provided ample notification of Defendants unwillingness to conduct the depositions in Ohio. Plaintiff created this discovery dispute by refusing to cooperate and ignoring the unreasonableness of the timing and location of the requested depositions. Therefore, the Order for payment of costs should be reconsidered and reversed before Plaintiff is permitted to benefit from dispute they created.

III. CONCLUSION

In accordance with all of the foregoing, in addition to the attached exhibits in support, Defendants respectfully request the Court to deny Plaintiff's request for reconsideration of the January 26, 2006 Order, and concurrently request reversal of the Magistrate Judge's decision for Defendants to pay Plaintiff costs incurred.

Respectfully submitted,
Sutter, O'Connell & Farchione Co., LPA

/s/ Christina J. Marshall

Christina J. Marshall (0069963)
1301 East 9th Street
3600 Erieview Tower
Cleveland, Ohio 44114
Phone: (216) 928-2200
E-mail: cmarshall@sutter-law.com

Counsel for Defendants

CERTIFICATE OF SERVICE

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

5nd day of February 2007 upon:

Lisa A. Wafer
Ferron & Associates, LPA
580 North Fourth Street, Suite 450
Columbus, Ohio 43215

/s/ Christina J. Marshall
CHRISTINA J. MARSHALL (0069963)
Sutter, O'Connell & Farchione