

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

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO
DEFENDANTS’ MOTION TO RECONSIDER SANCTIONS**

PLAINTIFF JOHN W. FERRON, by and through the undersigned counsel, hereby respectfully submits his Memorandum in Opposition to Defendants’ Motion to Reconsider Sanctions (hereinafter “Defendants’ Motion”) (Document No. 66).

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”) for sending commercial email messages to Plaintiff that violate the Ohio Consumer Sales Practices Act (“CSPA”), R.C. §1345.01, *et seq.*, in multiple 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) initial 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 Defendants 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)

On January 23, 2007, the Magistrate Judge granted Plaintiff's first Motion to Compel (filed September 19, 2006) and ordered Defendants to make their mandatory Rule 26(a) disclosures. (See Plaintiff's Motion to Compel, Document 23; see also January 23, 2007 Order, Document No. 58.) In addition, the Magistrate Judge granted Plaintiff's request for sanctions, but awarded Plaintiff only \$150 as sanctions for Defendants' dilatory discovery conduct.¹ (January 23, 2007 Order, p. 6, Document No. 58) Defendants' Motion seeks reconsideration of the Magistrate's ruling in this respect. (Document No. 66)

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;² 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, Defendants did not serve their Rule 26(a) disclosures upon Plaintiff in a timely manner. (Wafer Aff. ¶4)

¹ Because the Magistrate Judge's award of only \$150 as sanctions is not based upon any evidence of Plaintiff's attorney's fees and does not reflect an award of Plaintiff's reasonable attorney's fees incurred in preparing his Motion to Compel, Plaintiff has formally objected to the Magistrate Judge's ruling in this respect. (Document No. 62)

² 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.

On September 14, 2006, in a good faith effort to obtain Defendants' disclosures, Plaintiff's counsel sent an email message to Defendants' counsel, noting that Defendants had not made their disclosures within the time 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 completely 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)

As noted above, on January 23, 2007, the Magistrate Judge issued his Order granting Plaintiff's Motion to Compel and for Sanctions, ordering Defendants to prepare and serve their Initial Disclosures under Rule 26(a) within eleven days. The Magistrate Judge also ordered Defendants to pay sanctions to Plaintiff in the amount of \$150. (January 23, 2007 Order, p. 6, Document No. 58) Defendants object to the Magistrate Judge's Order because it imposes sanctions upon Defendants. (See generally Defendant's Motion, Document No. 66.)

However, for the reasons discussed herein, Plaintiff respectfully submits that the Magistrate Judge's January 23, 2007 Order properly determined that Defendants should be sanctioned for their dilatory discovery conduct. (Document No. 58)

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 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)

Nonetheless, Defendants brazenly try to point the finger of blame at Plaintiff, while whining about the voluminous number emails produced by Plaintiff in discovery in this case. (Defendants’ Motion, p. 3) Defendants attempt to argue that, because of the large volume of emails at issue, they could not timely make their Initial Disclosures. *Id.* This is absurd.

Regardless of the volume of emails produced *by Plaintiff* in connection with discovery in this case, Defendants flagrantly violated Rule 26 of the Federal Rules of Civil Procedure in regard to its own *initial* disclosures. It is clear that these emails had absolutely no bearing on Defendants’ Initial Disclosures because Defendants’ recently-filed Disclosures do not even mention Plaintiff’s emails specifically. (See Document Nos. 69 and 70.) Moreover, as the Magistrate Judge correctly noted:

“[Defendants] did state that the volume of the e-mail 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.”

(Jan. 23, 2007 Order, p. 4, Document No. 58)

Where, as here, there was absolutely no justification for Defendants’ refusal to make their Disclosures pursuant to Fed. R. Civ. P. 26(a)(1)(A), Plaintiff respectfully submits that an award

of sanctions by the Court is mandatory. See Fed. R. Civ. P. 37; see also *Vaughn v. City of Lebanon*, 18 Fed. Appx. 252 (6th Cir. 2001). Therefore, the Magistrate Judge's January 23, 2007 Order properly determined that Defendants should be sanctioned for their dilatory discovery conduct. (Document No. 58)

IV. CONCLUSION

For these reasons discussed herein, Plaintiff respectfully submits the Magistrate Judge's January 23, 2007 Order is not clearly erroneous or contrary to law insofar as it determined that sanctions should be imposed against Defendants.

Respectfully submitted,

s/ Lisa A. Wafer
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CERTIFICATE OF SERVICE

The undersigned certifies that on February 7, 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