

**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 MOTION FOR ENLARGEMENT OF TIME  
TO FILE MOTIONS SEEKING LEAVE TO  
AMEND THE PLEADINGS OR ADD PARTIES**

PLAINTIFF JOHN W. FERRON, by and through his undersigned counsel, hereby respectfully moves that the Court issue an Order enlarging the time period during which the parties may file motions seeking leave to amend the pleadings or add parties until thirty days after Defendants supplement their answers to Plaintiff’s Second Set of Interrogatories, which were served upon Defendants more than seven months ago, on August 4, 2006.<sup>1</sup>

The reasons why the Court should grant this Motion are set forth in detail in the following Memorandum in Support of Motion, and the attachments to it.

Respectfully submitted,

/s/ Lisa A. Wafer  
 Ohio Bar No. 0074034  
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 Trial Attorney for Plaintiff  
 FERRON & ASSOCIATES

<sup>1</sup> Pursuant to S.D. Ohio Civ. R. 7.3(a), on March 2, 2007, Plaintiff’s counsel sent an email message to Defendants’ counsel inquiring whether Defendants intended to oppose this Motion. That same day, Defendants’ counsel advised that she could not make any representations about Defendants’ position with respect to this Motion. Therefore, Plaintiff does not know if Defendants will oppose this Motion. See the Affidavit of Attorney Lisa A. Wafer at ¶3, cited herein as “Wafer Aff. ¶3,” attached hereto at Attachment 1.

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**MEMORANDUM IN SUPPORT OF MOTION**

**I. INTRODUCTION AND RELEVANT PROCEDURAL BACKGROUND**

This case involves Plaintiff's claims against Defendants VC E-Commerce, Inc. ("VC") and OptInRealBig.com, LLC ("OptIn") (collectively "Defendants") and an unknown number of unidentified "Doe" Defendants over their transmission of hundreds of commercial email messages to Plaintiff each of which violates the Ohio Consumer Sales Practices Act ("CSPA"), R.C. §1345.01, *et seq.*, and its corresponding advertising regulations in multiple ways.

Through no fault of his own, and despite his diligence in pursuing relevant discovery from Defendants, Plaintiff is again left with no other recourse but to seek an extension from the Court of the current deadline for seeking leave to amend his Complaint, so that Plaintiff might obtain needed discovery from Defendants to enable him to identify the "Doe" Defendants and name them as new parties defendant to this case.

**A. Relevant Facts Relating to Plaintiff's First Motion for Enlargement, Filed October 31, 2006**

Due to several unresolved discovery motions pending before the Court as of October 31, 2006,<sup>2</sup> Plaintiff requested an enlargement of time in which to seek leave to amend the pleadings to add additional parties in this case. (Document No. 39) Plaintiff requested that enlargement of time because Plaintiff's pending discovery motions addressed Defendants' utter failure to produce information to Plaintiff that would enable him to identify the "Doe" Defendants and name them in an amended version of the Complaint. (See generally Document Nos. 23, 31 and 38.)

Plaintiff's Motion for Enlargement, which was unopposed by Defendants, was granted by the Court on November 2, 2006. (Document No. 42) The Court's November 2, 2006 Order extended the deadline by which parties may seek leave to amend the pleadings to additional parties would be extended until thirty days after the Court ruled on Plaintiff's pending discovery motions, and Defendants timely provided any and all discovery responses to Plaintiff, as the Court might direct. (See November 2, 2006 Order, Document No. 42.)

On January 23, 2007, the Court granted two of Plaintiff's pending Motions to Compel. (Document Nos. 23 and 31) The January 23, 2007 Order required that Defendants make their Initial Rule 26 disclosures – which Defendants had theretofore completely failed and refused to do in accordance with the Court's Preliminary Pretrial Order, Document No. 14. (See January 23, 2007 Order, p. 4, Document No. 58.) The January 23, 2007 Order also required Defendants to promptly supplement their answers to Plaintiffs' First Set of Interrogatories,<sup>3</sup> and provide truthful and complete answers to them. (See January 23, 2007 Order, p. 4, Document No. 58.)

On February 2, 2007, Defendants supplemented their answers to Plaintiff's First Set of Interrogatories and served their Rule 26 disclosures. (See Document Nos. 69 and 70.) That

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<sup>2</sup> See Document Nos. 23, 31 and 38.

<sup>3</sup> Plaintiff's First Set of Interrogatories asked for information regarding recurring names and addresses appearing within many of the emails Defendants sent to Plaintiff. (See Plaintiff's Motion to Compel, Document No. 31.)

meant that, pursuant to the Court's November 2, 2006 Order (Document No. 42), the parties were required to seek leave to amend their pleadings to add parties by no later than March 5, 2007.

However, as more fully explained below, Defendants persist in their refusal to provide Plaintiff relevant information that he properly requested long ago. As a result, Plaintiff still has not obtained information from Defendants – which he first requested on August 4, 2006 – that would enable him to identify the “Doe” Defendants and move for leave to add them in an amended version of his Complaint.

**B. Relevant Facts Relating to Plaintiff's Second Motion for Enlargement**

On August 4, 2006, more than seven months ago, Plaintiff served upon Defendants his Second Set of Interrogatories (“Plaintiff's Second Interrogatories”). (Wafer Aff. ¶3; see also Plaintiff's Second Interrogatories, Attachment 2)<sup>4</sup> Thus, pursuant to Fed. R. Civ. P. 33, Defendants' answers to Plaintiff's Second Interrogatories were due to be served by no later than September 6, 2006, almost six months ago.

Plaintiff's Second Interrogatories properly asked Defendants questions about the email messages that Plaintiff has received, and which Plaintiff forwarded to Defendants on a USB “thumb” drive. Plaintiff's Second Interrogatories clearly and appropriately asked Defendants to identify which of the emails on the USB “thumb” drive they had sent to Plaintiff, and to identify all other individuals and/or entities on whose behalf the emails were sent to Plaintiff. (Wafer Aff. ¶3; see also Plaintiff's Second Interrogatories, Attachment 2)

Plaintiff properly sought, and still seeks, discovery of this information for two important reasons. First, because Defendants have generally denied sending any email solicitations to

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<sup>4</sup> See the Affidavit of Attorney Lisa A. Wafer, cited herein as (“Wafer Aff. ¶\_\_”), attached hereto at Attachment 1.

Plaintiff,<sup>5</sup> Plaintiff has specifically asked Defendants to identify which of the emails on the USB “thumb” drive they did send to Plaintiff in order to obtain their specific admissions and/or denials relating to the emails at issue in this case.

Second, Plaintiff properly asked Defendants to identify those individuals and entities on whose behalf they sent any emails to Plaintiff, in order for Plaintiff to identify any others who are properly regarded as “suppliers” under the CSPA, who Plaintiff may name as new parties defendant in this case. As noted above, Plaintiff’s Complaint names several “Doe” Defendants – other unknown persons who, or entities that, might have participated in the transmittal of the commercial email messages at issue to Plaintiff or benefited from their transmittal. Because these unidentified individuals and/or entities obviously have “some connection,” either directly or indirectly, to the email solicitations, they may qualify as “suppliers” under the CSPA, and be appropriately named as parties defendant in this case.<sup>6</sup> Therefore, Plaintiff clearly is entitled to discover the identities of these individuals and/or entities. However, notwithstanding the clearly discoverable nature of this information, Defendants’ answers to Plaintiff’s Second Interrogatories assert several boilerplate objections, and Defendants flatly refused to answer any of Plaintiff’s Second Interrogatories.

Then, almost three weeks after Defendants’ answers to Plaintiff’s Second Interrogatories were due on September 25, 2006, OptIn served its untimely answers to Plaintiff’s Second Interrogatories. (Wafer Aff. ¶4; see also OptIn’s Answers to Plaintiff’s Second Interrogatories,

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<sup>5</sup> See Plaintiff’s First Amended Complaint ¶¶11-12, Document No. 8; OptIn’s Answer ¶¶11-12, Document No. 9-1; VC’s Answer ¶¶11-12, Document No. 10-1.

<sup>6</sup> See R.C. §1345.01(C)(defining “supplier” as “a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, **whether or not the person deals directly with the consumer.**”) (Emphasis added.); see also *Gamer v. Borcharding Buick*, 84 Ohio App.3d 61, OAG PIF# 1541 (1st Dist. 1992)(Attachment 3); *Carter v. Taylor*, 1999 Ohio App. LEXIS 6097, OAG PIF# 1868 (4th Dist. 1999)(Attachment 4); *Lump v. Best Door*, 2002 Ohio 1389, 2002 Ohio App. LEXIS 1381, OAG PIF# 2078 (3rd Dist. 2002)(Attachment 5); and *Minor v. Jayco*, 1999 Ohio App. LEXIS 3944, OAG PIF# 1872 (6th Dist. 1999)(Attachment 6).

Attachment 7) Then, on September 28, 2006, VC served its untimely answers to Plaintiff's Second Interrogatories. (Wafer Aff. ¶5; see also VC's Answers to Plaintiff's Second Interrogatories, Attachment 8)

However, OptIn refused to answer any of the Plaintiff's Second Interrogatories, asserting objections upon grounds that the Interrogatories are "overly broad, unduly burdensome, and seek information neither relevant nor reasonably calculated to lead to the discovery of admissible evidence." (Wafer Aff. ¶4; see also OptIn's answers to Plaintiff's Second Interrogatories, Attachment 7) OptIn noted that it would supplement its responses to Plaintiff's Second Interrogatories after having a reasonable time to review the email messages produced by Plaintiff. *Id.*

Similarly, VC refused to answer Plaintiff's Second Interrogatories, noting virtually identical objections to those asserted by OptIn, noting that the Interrogatories are "overly broad, unduly burdensome, and seek information neither relevant nor reasonably calculated to lead to the discovery of admissible evidence." (Wafer Aff. ¶5; see also VC's Answers to Plaintiff's Second Interrogatories, Attachment 8) VC also stated that it would supplement its responses after having a reasonable time to review the email messages produced by Plaintiff. *Id.*

Due to the volume of email at issue in this case, Plaintiff did not immediately require Defendants to supplement their answers to Plaintiff's Second Interrogatories. Rather, Plaintiff allowed Defendants a reasonable opportunity to review the emails that Plaintiff had produced to Defendants along with Plaintiff's Second Interrogatories. (Wafer Aff. ¶6) However, as of the date of this Motion, Defendants have failed to supplement any of their previous answers to Plaintiff's Second Interrogatories, and have failed to identify a single individual or entity who sent the emails or on whose behalf the emails at issue were sent to Plaintiff. (Wafer Aff. ¶7)

Reasonably believing that six months was more than sufficient time for Defendants to review the emails at issue in the case, and pursuant to S.D. Ohio Civ. R. 47.01, Plaintiff's counsel sent Defendants' counsel a letter on February 20, 2007 asking that Defendants promptly supplement their answers to Plaintiff's Second Interrogatories. (Wafer Aff. ¶8; see also February 20, 2007 letter to Attorney Marshall, Attachment 9)

On March 1, 2007, the parties participated in an informal telephone conference with Magistrate Judge Abel regarding the March 15, 2007 mediation scheduled in this matter. (Wafer Aff. ¶9) During that telephone conference, Defendants' counsel asked Magistrate Abel to cancel the mediation because, counsel claimed, Defendants were still reviewing the Plaintiff's emails, contained on the thumb drive served upon them on August 4, 2006, more than seven months ago, and still could not fully evaluate Defendants' potential liability. (Wafer Aff. ¶10) Plaintiff's counsel advised Magistrate Abel that Plaintiff was ready, willing and able to participate in the March 15, 2006 mediation conference. (Wafer Aff. ¶11) Nonetheless, Magistrate Abel reluctantly cancelled the mediation at Defendants' request. (Wafer Aff. ¶12)

Based upon Defendants' counsels' claim that Defendants are still – seven months after receiving Plaintiff's email – reviewing the emails Plaintiff provided to Defendant, Plaintiff's counsel raised concerns to Magistrate Abel regarding the upcoming deadline for the parties to seek leave to amend their pleadings to name additional parties, and the fact that Defendants had never supplemented their obviously-deficient answers to Plaintiff's Second set of Interrogatories. (Wafer Aff. ¶13) Plaintiff's counsel also inquired of Defendants' counsel whether Defendants had reviewed any of the emails at all. *Id.* In response to Plaintiff's inquiry and a similar one of the Magistrate Judge, Defendants' counsel stated that Defendants would likely be able to supplement their responses to Plaintiff's Second Set of Interrogatories by the end of March,

2007. (Wafer Aff. ¶14) As a result, the Magistrate Judge asked that Plaintiff not file another motion to compel discovery at this time. (Wafer Aff ¶15) Rather, the Magistrate Judge suggested that Plaintiff file a motion with the Court seeking another extension of time to seek leave to add new parties in this case, and explain to the Court the current status of discovery and why the extension is being requested. (Wafer Aff. ¶16)

Thus, in accordance with the Magistrate Judge's request, Plaintiff respectfully moves that the Court issue an Order enlarging the time period during which the parties may seek leave to amend the pleadings to add parties until thirty days after Defendants supplement their answers to Plaintiff's Second Set of Interrogatories.

## II. LAW AND ARGUMENT

Rule 6(b) of the Federal Rules of Civil Procedure governs requests for enlargement of time, and provides as follows:

“Enlargement. (b) When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, **the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order**, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d), and (e), and 60(b), except to the extent and under the conditions stated in them.” (Emphasis added.)

In interpreting Fed. R. Civ. P. 6(b), the federal courts have held that where, as here, the request for enlargement of time is made before the deadline to take action, the request may be granted merely upon the movant's demonstration of a reason for the request. *Shaw v. Monroe*, 20 Fed. Appx. 563, 565-566 (7<sup>th</sup> Cir. 2001); *Allen v. Murph*, 194 F.3d 722, footnote 3 (6<sup>th</sup> Cir. 1999).

As noted above, Plaintiff's Second Interrogatories ask Defendants to identify those persons and/or companies on whose behalf the emails were sent to Plaintiff. (Wafer Aff. ¶3; see also Plaintiff's Second Interrogatories, Attachment 2) Plaintiff properly seeks discovery of this information to identify those persons or entities on whose behalf they sent emails to Plaintiff, to locate other "suppliers" under the CSPA who may be properly named as parties defendant in this case. Unless and until Defendants comply with Plaintiff's discovery requests, Plaintiff cannot identify the other parties to be named in his Complaint and, therefore, he cannot seek leave of the Court to amend his Complaint naming these new parties defendant.

For these reasons, Plaintiff respectfully submits that he has demonstrated proper "cause" for his request for an extension of the deadline by which he must seek leave of the Court to amend the pleadings to add parties.

### III. CONCLUSION

For the reasons set forth herein, Plaintiff respectfully submits that this Motion should be granted in its entirety.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on March 5, 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 Defendants in this matter.

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