

**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 MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT**

NOW COMES PLAINTIFF JOHN W. FERRON, by and through his undersigned counsel, pursuant to Federal Rule of Civil Procedure 15(a), and hereby moves this Court for an Order granting him leave to file a Second Amended Complaint in this case so that Plaintiff may assert additional claims against Defendants under Ohio Revised Code Section 2307.64(B)(1).

The reasons why the Court should grant this Motion are set forth in detail in the attached Memorandum in Support of Motion, and the attachments to it. For the Court’s convenience, Plaintiff’s proposed Second Amended Complaint is attached hereto at Attachment 1.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION AND RELEVANT PROCEDURAL HISTORY

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.

Since the time Plaintiff filed his First Amended Complaint in this case on June 8, 2006, Plaintiff has continued to study the evidence available to him. Specifically, Plaintiff has continued to search and review the commercial email messages Defendants and others have sent to him, and determined that Defendants have sent to Plaintiff thousands of email messages that do not state clearly and conspicuously within the body of the email message the sender's name and complete residence or business address and the electronic mail address of the person transmitting the electronic mail advertisement, as is plainly required by Ohio Revised Code Section 2307.64(B)(1).¹ (Ferron Aff. ¶¶3-4)²

¹ Ohio Revised Code Section 2307.64(B)(1) provides:

(B) (1) Except as otherwise provided in division (B)(3) of this section, a person that transmits or causes to be transmitted to a recipient an electronic mail

Based upon the foregoing information, Plaintiff respectfully submits that he should be granted leave to file his Seconded Amended Complaint, Attachment 1, which states claims against Defendants for their violations of Ohio Revised Code Section 2307.64(B)(1).

II. LAW AND ARGUMENT

A. Federal Rule of Civil Procedure 15(a) Provides for the Free Amendment of Pleadings Where, as Here, Justice Requires and Such Amendment is Timely, in Good Faith and Does Not Unfairly Prejudice the Opposing Party.

Federal Rule of Civil Procedure 15(a) provides, in pertinent part, that:

“[A] party may amend the pleading party’s pleading only by leave of court or by written consent of the adverse party; and **leave shall be freely given when justice so requires.**” (Emphasis added.)

The Civil Rules provide for liberal amendment of pleadings in order to ensure that cases are decided on the merits. As the Supreme Court stated in *Foman v. Davis*, 371 U.S. 178, 183 (1962):

“Rule 15 (a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), paras. 15.08, 15.10. **If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.** In the absence of any apparent or declared reason -- such as undue delay,

advertisement shall clearly and conspicuously provide to the recipient, within the body of the electronic mail advertisement, both of the following:

(a) The person’s name and complete residence or business address and the electronic mail address of the person transmitting the electronic mail advertisement;

(b) A notice that the recipient may decline to receive from the person transmitting or causing to be transmitted the electronic mail advertisement any additional electronic mail advertisements and a detailed procedure for declining to receive any additional electronic mail advertisements at no cost. The notice shall be of the same size of type as the majority of the text of the message and shall not require that the recipient provide any information other than the receiving address.

² References herein to (“Ferron Aff. ¶ ”) shall refer to the Affidavit of Plaintiff John W. Ferron, attached hereto at Attachment 2.

bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be 'freely given.'" (Emphasis added.)

See also Champagne v. Equitable Life Assurance Co., 849 F.2d 608(6th Cir. 1988), table decision, App. No. 01-6118, unreported, 1988 U.S. App. LEXIS 8578(June 21, 1988) at *9 (“[A]lthough this court reviews denials of leave to amend only for abuse of discretion, it should be emphasized that the case law in this Circuit manifests ‘liberality in allowing amendments to a complaint.’” *Id.* [*Janikowski v. Bendix Corp.*, 823 F.2d 945, 951 (6th Cir. 1987) (quoting *Moore*, 790 F.2d at 562); *see also Marks v. Shell Oil Co.*, 830 F.2d 68, 69 (6th Cir. 1987)].”)(Emphasis added.)(Copy attached at Attachment 3.)

B. Plaintiff Has Claims Against Defendants Under the Ohio Electronic Mail Advertisements Act, R.C. 2307.64, et seq.

Thousands of the email messages that Defendant VC, Defendant Opt and/or one or more of the DOE Defendants have sent or caused to be sent to Plaintiff fail to include in the body of the message a clear and conspicuous recitation of the sender’s name and complete residence or business address and the electronic mail address of the person transmitting the electronic mail advertisement. Each such email message transmitted to Plaintiff constitutes one or more violations by Defendant VC, Defendant Opt and/or one or more of the DOE Defendants of Ohio Revised Code §2307.64(B)(1), which requires that the sender of an email message include accurate information identifying the sender.

Pursuant to R.C. §2307.64(E)(1), a plaintiff may recover statutory damages of \$100 per violation from any defendant that violates violation of R.C. §2307.64(B)(1). The plaintiff may also recover his reasonable attorney’s fees, court costs and other costs of bringing this action, pursuant to R.C. §2307.64(E)(2).

Based upon the foregoing, Plaintiff respectfully submits that he should be granted leave to file his Second Amended Complaint. Plaintiff does not seek to file his amended pleading in bad faith or for purposes of undue delay. There being a complete absence of any bad faith or delay on Plaintiff's part, the Court should grant Plaintiff leave to file his Second Amended Complaint.

III. CONCLUSION

For the reasons set forth herein, Plaintiff respectfully requests that the Court grant Plaintiff leave to file his Second Amended Complaint.

Respectfully submitted,

s/ Lisa A. Wafer

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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
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