

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

John W. Ferron, :  
 :  
 Plaintiff, : Case No. 2:06-cv-322  
 :  
 v. : Judge Frost  
 :  
 VC E-Commerce Solutions Inc., *et al.*, : Magistrate Judge Abel  
 :  
 Defendants. :

## Order

Plaintiff John W. Ferron brings this action alleging that Defendants violated the Ohio Consumer Sales Practices Act, (OCSPA) O.R.C §1345.02(A) by sending him a large number of emails that do not comply with the act's provisions. This matter is before the Magistrate Judge on Defendant VCE Commerce Solutions Inc's motion and amended motion for leave to file additional interrogatories on Plaintiff (docs. 56-57) as well as Defendant OptInRealBig.com's motion for leave to file additional interrogatories on Plaintiff (doc. 55). Although Defendants filed their motions separately, each motion was virtually identical. Thus, their motions will be treated as one for the purpose of this Order.

### I. Arguments of the Parties

Defendants seek permission to propound interrogatories in addition to the initial set served by them on January 5, 2007. They argue that additional interrogatories are

necessary to narrow the issues in the case, to prepare affirmative defenses, and to find out specific information with regards to the individual emails that Plaintiff claims are a violation of OCSPA.

Plaintiff alleges that Defendant's motions are governed by S.D. Local Rule 37.2, which requires that before a party submits a discovery motion to the Court that the party to first attempt to resolve a dispute extrajudicially and then submit a certification of counsel that speaks to unsuccessful attempts to resolve the issue. He contends as Defendants have not complied with the above requirements, their motions cannot be granted. Further, Plaintiff states that Defendants' failure to describe with any sort of specificity what additional interrogatories they wish to propound renders their request too vague to be granted.

Defendants reply that Plaintiff has erroneously applied S.D. Local Rule 37.2 to this situation when it is actually governed by Fed. R. Civ. P. 33. Defendants contend that S.D. Local Rule 37.2 explicitly covers protective orders and motions to compel. However, they state that their motion is simply a request under Fed. R. Civ. P. 33 to propound additional interrogatories, and further state that the rule allows them to obtain this leave by the Court or by agreement with opposing counsel. Thus, they argue that there is no requirement that they first attempt to reach extrajudicial agreement with Plaintiff before coming to the Court. Defendants also state that the only inquiry relevant here is whether the additional interrogatories are unreasonably cumulative or duplicative, obtainable from a more convenient source, unreasonably

burdensome, or should have been obtained through prior discovery. Finally, Defendants state that the information that they will seek with their additional interrogatories relates to whether “each of the [e-mails allegedly attributable to Defendants] was unsolicited, what actions, if any, Plaintiff took upon receipt of the e-mail, including whether he attempted to unsubscribe from the mailing list, and what damages, if any, Plaintiff experienced with respect to the individual e-mail.” (Defs. Reply p. 6). Further, the interrogatories will attempt to ascertain whether any member of Plaintiff’s law firm have discoverable information.

## II. Discussion

Fed. R. Civ. P. 33 states that “leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2).” Under Rule 26(b)(2)(i) the court may limit discovery that is unreasonably cumulative, duplicative, or “obtainable from some other source that is more convenient, less burdensome, or less expensive . . . .” The court may also consider whether the “burden or expense of the proposed discovery, outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, a party’s resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.” Rule 26(b)(2)(iii), Fed. R. Civ. P.

Here, Defendants have stated that their additional interrogatories will seek to discover whether the emails in question were unsolicited, whether Plaintiff attempted to unsubscribe, what other action he took with regard to the email, and his allegation of

damages. However, Defendants have failed to provide either Plaintiff or the Court with the proposed additional interrogatories. The limit established by Rule 33 was premised on the idea that some litigants had abusively served an unreasonable number of interrogatories. It forces a litigant to limit interrogatories to those that will elicit information essential to resolve key contested factual issues. When litigants seek more than 25 interrogatories, they must demonstrate that some specific number of interrogatories greater than 25 is necessary if they are to obtain information important to the resolution of material disputed fact issues. I cannot make that determination on the present record. At a minimum, I need the interrogatories already served, Plaintiff's answers to them, and the proposed additional interrogatories.

Accordingly, it is ORDERED that Defendants may serve up to 15 additional interrogatories on Plaintiff. If Plaintiff does not believe that Defendants meet the Rule 33 standard for serving more than 25 interrogatories, Plaintiff's counsel should advise Defendants' counsel within 11 days of having been served with the additional interrogatories of that objection. Counsel should then attempt to informally resolve the dispute. Failing to do so, Defendants may move for leave to serve more than 25 interrogatories.

### **III. Conclusion**

For the reasons stated above, Defendants' motions for leave to file additional interrogatories on Plaintiff (docs. 55-57) are GRANTED.

Under the provisions of 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P., and

Eastern Division Order No. 91-3, pt. F, 5, either party may, within ten (10) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by the District Judge. The motion must specifically designate the Order, or part thereof, in question and the basis for any objection thereto. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

s/Mark R. Abel  
United States Magistrate Judge