

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
)	
vs.)	MAGISTRATE JUDGE ABEL
)	
VC E-COMMERCE SOLUTIONS, INC., et al.)	
)	
Defendants.)	

**JOINT OPPOSITION OF DEFENDANTS, VC E-COMMERCE SOLUTIONS, INC. AND
OPTINREALBIG.COM, LLC, TO PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND
AMENDED COMPLAINT**

Now come Defendants, **VC E-Commerce Solutions, Inc. and Optinrealbig.com, LLC**, by and through counsel and submit their Joint Opposition to Plaintiff's Motion for Leave to File Second Amended Complaint. Plaintiff's attempt to amend for purposes of adding a new claim to this matter is patently unfair and incredibly prejudicial to these Defendants. For these reasons, which are more fully explained in the attached Memorandum in Support, Defendants VC E-Commerce Solutions, Inc. and Optinrealbig.com, LLC each request that this Honorable Court deny Plaintiff's request for leave to file a second amended complaint.

Respectfully Submitted,
SUTTER, O'CONNELL & FARCHIONE

/s/ Christina J. Marshall
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MEMORANDUM IN SUPPORT

I. Background

On May 1, 2006, Plaintiff filed a Complaint against Defendants VC E-Commerce Solutions, Inc. and Optinrealbig.com, LLC ("Defendants") that alleged each Defendant violated the Consumer Sales Practices Act. (Doc. No. 2) The specific allegations were that these Defendants knowingly violated Ohio Revised Code Section 1345.02 with regard to the use of the word "free" in email allegedly sent to Plaintiff.

On June 8, 2006, prior to the filing of Defendants' Answer, Plaintiff filed an Amended Complaint which clarified new allegations against the Defendants in support of the original Consumer Sales Practices Act claims. (Doc. No. 8). The new assertions made reference to alleged Ohio Administrative Code violations pertaining to corporate registration with the Ohio Secretary of State. Defendants respectively filed their Answers to the Amended Complaint on June 21, 2006. In furtherance of these claims, Plaintiff produced more than 62,000 documents purportedly representing violations the statute.

On March 5, 2007, approximately ten month after originally commencing this action, Plaintiff requests leave of this Court to file a Second Amended Complaint. (Doc. No. 81). The new Complaint underlying the request for leave asserts an entirely new and distinct claim against Defendants under Ohio Revised Code 2307.64(B)(1), Ohio's Electronic Mail Advertisement Statute. The new claims carry the potential for additional damages beyond those allowed by Plaintiff's original claim, but still rely upon the content of the emails to support an alleged violation.

The statute pertaining to Plaintiff's attempted new claim was enacted well before Plaintiff filed the original Complaint. Plaintiff could have asserted this new claim in the original or amended Complaints previously filed with this Court. Allowing Plaintiff to now assert this alternative theory of recovery after the production of more than 62,000 emails will cause undue prejudice to Defendants from which there is no recovery. Therefore, as more fully explained

below, this Court should exercise its discretion to deny Plaintiff's leave to amend his pleading.

II. Law and Argument

Plaintiff's Motion for Leave blindly relies upon Civ. R. 15(a) for the presumption that leave to file an amended Complaint pursuant to Civ. R. 15(a) shall be freely given when justice so requires. This is improper. Plaintiff's request ignores controlling law holding the practice of adding new claims through an Amended Complaint does not receive such liberal approval. Furthermore, it is well-established that prejudice created from the addition of new claims is a legitimate base for denial of a leave to amend. See, *Duchon v. Cajon Company*, 791 F.2d 43 (6th Cir. 1986), citing *Forman v. Davis*, 371 U.S. 178 (1962) and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971).

The seminal case on these issues within the Sixth Circuit is *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968 (6th Cir.1973), *cert. denied*, 416 U.S. 939, 94 S.Ct. 1942, 40 L.Ed.2d 290 (1974). In *Troxel*, the trial court denied plaintiff's request to amend its pleadings to assert a new alternative theory of recovery based upon applicable Sixth Circuit law. The Court affirmed this decision. In reaching this holding, the Court recognized that there was no reason the plaintiff could not have presented the alternative theory in its first Complaint. *Id.* at 971. In essence, the Court established that although Rule 15(a) indicates that leave to amend shall be freely granted, a party must act with due diligence if it intends to take advantage of the Rule's liberality. *U.S. v. Midwest Suspension and Brake*, 49 F.3d 1197 (6th Cir. 1995).

Further, the *Troxel* court also recognized a trial court must take into account any prejudice that the party opposing the motion to amend would suffer if the new alternative claim were permitted. See, *Zenith v. Hazeltine*, *supra*. The Court determined there was "obvious" prejudice because the defendant was already forced to vigorously defend against one theory. *Troxel*, 489 F.2d at 971. Ultimately, the Court found that under these circumstances the trial court would have been justified in concluding that the time and expense associated with the new theory, with the possibility for additional discovery, "would be manifestly unfair and unduly

prejudicial. *Id.*

Plaintiff's current request for leave to amend is no different from the circumstances presented in *Troxel*. Plaintiff is seeking damages for emails he allegedly received from the Defendants. Even the most remedial due diligence would have revealed the potential application of remedies from a statute clearly labeled as "Electronic Mail Advertisement." Plaintiff could have easily presented this alternative theory for recovery in either the original or First Amended Complaint. For Plaintiff to suggest otherwise is disingenuous. The "body of the email messages" has been at issue since the onset of this litigation. As such, Plaintiff could have easily asserted a claim under Ohio Revised Code Section 1345.02 and 2307.64. Since it is patently apparent that Plaintiff failed to exercise this due diligence, he should not be afforded the free application of Civ. R. 15(a).

Similarly, the prejudice Defendant would suffer from amending the Complaint is as obvious as that in *Troxel*. Defendants have spent an enormous amount of time and expense examining the more than 62,000 emails produced by Plaintiff in order to defend themselves against Plaintiff's existing theory. If the Complaint were amended to include the new alternative theory, Defendant would be forced to repeat the entire process. This is patently unfair and prejudicial considering Plaintiff could have established its alternative Ohio Revised Code Section 2307.64(B)(1) claim in previous pleadings which were filed approximately ten months ago. Therefore, coupled with the lack of due diligence, the potential for undue prejudice outweighs any arguable "justice" Plaintiff relies upon to invoke Civ. R. 15(a).

III. Conclusion

For the reasons stated herein, Defendants VC E-Commerce Solutions, Inc. and Optinrealbig.com, LLC each request that this Honorable Court deny Plaintiff's request for leave to file a Second Amended Complaint.

Respectfully Submitted,

SUTTER, O'CONNELL & FARCHIONE

/s/ Christina J. Marshall

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CERTIFICATE OF SERVICE

A copy of the foregoing was sent via the Court's ECF Filing System on this 26th
day of March, 2007 upon:

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