

**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 LEAVE TO FILE
SECOND AMENDED COMPLAINT**

NOW COMES PLAINTIFF JOHN W. FERRON, by and through his undersigned counsel, and pursuant to Federal Rule of Civil Procedure 15(a), hereby moves this Court for an Order granting him leave to file his Second Amended Complaint in this case so that Plaintiff may name new parties defendant, and assert newly-discovered claims against Defendants arising 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 arises from Plaintiff's claims against Defendants VC E-Commerce Solutions, Inc. ("VC") and Media Breakaway, LLC, formerly OptInRealBig.com, LLC ("MBA") (collectively "Defendants") for sending or causing to be sent a large volume 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 several ways. Plaintiff's Complaint also named unidentified "Doe" Defendants, which Plaintiff reasonably believed were responsible for the commercial emails at issue in this case.

When Plaintiff filed his First Amended Complaint in this case on June 8, 2006, he was able to identify with certainty only two parties responsible for the email messages at issue in this case, VC and MBA. (Ferron Aff. ¶3)¹ However, since that time, Plaintiff has conducted discovery in this case and continued to investigate the sources of the commercial email messages at issue that he has received since January 1, 2006. (Ferron Aff. ¶4)

¹ References herein to ("Ferron Aff. _") shall refer to the Affidavit of Plaintiff, John W. Ferron, attached hereto at Attachment 2.

Based upon the discovery responses recently obtained from MBA by Plaintiff, and the information Plaintiff has obtained through his continued investigation of the facts, Plaintiff has now identified many of the advertisers on whose behalf MBA's emails were sent. (Ferron Aff. ¶5) Plaintiff reasonably believes that each of the new parties defendant that is named in Plaintiff's proposed Second Amended Complaint (Attachment 1) has authorized or participated in the transmittal of one or more of the commercial email messages at issue in this case. (Ferron Aff. ¶5) Many of the email messages that 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. (Ferron Aff. ¶6)

Plaintiff has attempted to communicate directly with each of the potential new parties defendant identified by MBA in its discovery responses to determine whether they are appropriate parties defendant in this case. (Ferron Aff. ¶7) As of the date of this Motion, however, none of the potential new parties defendant has provided Plaintiff with any information suggesting they are not proper parties defendant in this case. (Ferron Aff. ¶8)

Therefore, Plaintiff respectfully submits that the following entities are at least partially responsible for sending the commercial email messages to Plaintiff that are the subject matter of this lawsuit: (1) ADTERACTIVE, INC.; (2) AZOOGLE.COM, Inc.; (3) BIG MARKET MEDIA, INC.; (4) EMAIL HELLO, INC.; (5) EMARKETMAKERS, INC.; (6) ENDAI WORLDWIDE, INC.; (7) GLISPA, LLC; (8) GLOBAL RESOURCE SYSTEMS CORPORATION; (9) GRATIS INTERNET INC.; (10) HI SPEED MEDIA, INC.; (11) ILEAD MEDIA, INC.; (12) INTELA, LLC; (13) LEADCLICK MEDIA, INC.; (14) MATE1.COM, INC.; (15) MEDUCE ENTERPRISES, LLC; (16) NEVER BLUE MEDIA INC.; (17) ONLINE

MEDIA PROMOTIONS, LLC; (18) RAPID RESPONSE MARKETING, LLC; (19) SINGLESNET INC.; (19) THEUSEFUL.COM; (20) UNIQUE LEADS.COM, INC.; (21) WEB CLIENTS.NET; (21) YF DIRECT, INC. C/O NETBLUE, INC.

Accordingly, Plaintiff respectfully submits that he should be granted leave to file his Second Amended Complaint (Attachment 1), which names these entities as new parties defendant in this matter.

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, 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)(“[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.)

B. Plaintiff’s Claims Against the New Parties Defendant.

Through discovery in this case, and Plaintiff’s continued research and investigation of the facts, Plaintiff has reasonably determined that the new parties defendant named in his proposed Second Amended Complaint have participated in the transmittal of many of the email messages at issue in this case to Plaintiff. (Ferron Aff. ¶¶5-8) Therefore, Plaintiff respectfully submits that he should be granted leave to file his Second Amended Complaint to add these new parties defendant to this case.

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

Furthermore, many of the email messages that Defendants have sent or caused to be sent to Plaintiff do not include, in the body of the messages, a clear and conspicuous recitation of the sender’s legal name, the sender’s complete residence or business address, and/or the electronic mail address of the person transmitting the electronic mail advertisement. (Ferron Aff. ¶6) However, each such email message transmitted to Plaintiff constitutes one or more violations of Ohio Revised Code §2307.64(B)(1), which requires the sender of an email message to include accurate information identifying the sender’s name, address and email address in the body of each email. R.C. §2307.64(B)(1) provides:

§ 2307.64. Electronic mail advertisements

(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 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;** *** (Emphasis added.)

Pursuant to R.C. §2307.64(E)(1), the recipient of an email advertisement that does not comply with R.C. §2307.64(B)(1) may recover statutory damages of \$100 per violation from any person who sent the email advertisement or caused it to be sent in violation of R.C. §2307.64(B)(1). The recipient of the email advertisement may also recover his reasonable attorney's fees, court costs and other costs of bringing the action pursuant to R.C. §2307.64(E)(2).

Plaintiff is asserting claims against Defendants under this statute at this time because he only recently learned of the existence of R.C. §2307.64, and its application to email advertisements sent to persons residing in Ohio.

Plaintiff does not seek to assert additional claims against Defendants, or to add new parties defendant, 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 to assert these additional claims against Defendants.

III. CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 15th day of October, 2007 the foregoing document was filed with the Clerk of Courts using the ECF system, which will send notice of such filing to all trial attorneys of record.

/s/ Lisa A. Wafer
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