

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGE



ORIGINAL

In the matter of:)
Jerk, LLC, a limited liability company,)
Also d/b/a JERK.COM, and)
John Fanning,)
Individually and as a member of)
Jerk, LLC,)
Respondents.)

DOCKET NO. 9361

PUBLIC

AFFIDAVIT OF PETER F. CARR, II
IN OPPOSITION TO MOTION TO COMPEL DISCOVERY

I, Peter F. Carr, II, Esquire, upon my own personal knowledge, under oath hereby depose and state as follows:

1. I serve as counsel to Respondent John Fanning in the above-referenced matter. I make this Affidavit solely in opposition to the Commission's motion to compel discovery filed in this action on August 5, 2014.

2. Attached hereto at **Exhibit 1** is a true and accurate copy of the transcript of the deposition proceedings which occurred on July 29, 2014.

3. Attached hereto at **Exhibit 2** is a true and accurate copy of my letter to Complaint Counsel dated May 29, 2014.

4. Attached hereto at **Exhibit 3** is a true and accurate copy of an email exchange with Complaint Counsel dated August 5, 2014.

5. Attached hereto at **Exhibit 4** is a true and accurate copy of an email exchange with Complaint Counsel dated July 29, 2014.

6. Attached hereto at **Exhibit 5** is a true and accurate copy of an email exchange with Complaint Counsel dated July 30, 2014.

7. Attached hereto at **Exhibit 6** is a true and accurate copy of an email exchange with Complaint Counsel dated August 5, 2014.

8. Attached hereto at **Exhibit 7** is a true and accurate copy of an email communication from Complaint Counsel dated August 5, 2014.

SWORN TO AND SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY
THIS 12th DAY OF AUGUST, 2014.

/s/ Peter F. Carr, II
Peter F. Carr, II, Esquire

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2014, I caused a true and accurate copy of the foregoing to be served electronically through the FTC's e-filing system and I caused a true and accurate copy of the foregoing to be served as follows:

One electronic courtesy copy to the Office of the Secretary:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room H-159
Washington, DC 20580
Email: secretary@ftc.gov

One electronic copy to the Office of the Administrative Law Judge:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Avenue, N.E., Room H-110
Washington, DC 20580
Email: oalj@ftc.gov

One electronic copy to the Office of the Counsel for the Federal Trade Commission:

Sarah Schroeder
Yan Fang
Kerry O'Brien
Federal Trade Commission
901 Market Street, Suite 670
San Francisco, CA 94103
Email: sschroeder@ftc.gov
yfang@ftc.gov
kobrien@ftc.gov

One electronic copy to counsel for Jerk, LLC:

Maria Crimi Speth
Jaburg & Wilk, P.C.
3200 N. Central Ave., Suite 2000
Phoenix, AZ 85012
mcs@jaburgwilk.com

/s/ Peter F. Carr, II
Peter F. Carr, II
ECKERT, SEAMANS, CHERIN & MELLOTT, LLC
Two International Place, 16th Floor
Boston, MA 02110
617.342.6800
617.342.6899 (FAX)

Dated: August 12, 2014

EXHIBIT 1

In the Matter of:

Jerk, LLC, et al.

July 29, 2014
Statement on the Record

Condensed Transcript with Word Index



For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

Statement on the Record

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1 FEDERAL TRADE COMMISSION

2

3

4 In the Matter of *

5 Jerk, LLC, a limited liability *

6 company, also d/b/a JERK.COM, *

7 and John Fanning, individually * Docket No. 9361

8 and as a member of Jerk, LLC, *

9 Respondents *

10 * * * * *

11

12 Tuesday, July 29, 2014

13 Eckert Seamans

14 Cherin & Mellott, LLC

15 Two International Place

16 16th Floor

17 Boston, MA 02110

18

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21 The above-entitled matter came on for deposition,

22 pursuant to notice, at 9:00 AM.

23

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3

1 P R O C E E D I N G S

2 MS. MOELLER: Here begins

3 videotape No. 1 in the deposition of John

4 Fanning in the matter of Jerk, LLC,

5 Limited Liability Company also doing

6 business as Jerk.Com and John Fanning

7 individually and as a member of Jerk, LLC,

8 for the Federal Trade Commission in the

9 matter of docket No. 9361. Today's date

10 is July 29, 2014. The time on the video

11 monitor is 9:01 AM.

12 The video operator today is Dina

13 Moeller of For The Record. This video

14 deposition is taking place at Eckert

15 Seamans, Two International Place in

16 Boston, Massachusetts. This was noticed

17 by Sarah Schroeder of the FTC. The court

18 reporter today is Elaine Buckley of For

19 The Record.

20 Counsel, please identify yourselves

21 and state whom you represent.

22 MS. SCHROEDER: Sarah Schroeder

23 for the Federal Trade Commission.

24 MR. EDMONDSON: Eric Edmondson for

25 the Federal Trade Commission.

2

1 APPEARANCES:

2 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

3 Sarah Schroeder, Esq.

4 Eric Edmondson, Esq.

5 Federal Trade Commission

6 Western Region - San Francisco

7 901 Market Street

8 Suite 570

9 San Francisco, California 94103

10 (415) 848-5186

11 sschroeder@ftc.gov

12 ON BEHALF OF RESPONDENT (JOHN FANNING):

13 Peter F. Carr, II, Esq.

14 Eckert Seamans Cherin & Mellott, LLC

15 Two International Place

16 16th Floor

17 Boston, Massachusetts 02110

18 (617) 342-6857

19 pcarr@eckertseamans.com

20 ALSO PRESENT:

21 Dina Moeller

22 Fade to Black Productions

23

24

25

4

1 MR. CARR: Good morning. Peter

2 Carr with the law firm of Eckert Seamans

3 Cherin & Mellott, Boston, Massachusetts,

4 representing the witness John Fanning, the

5 respondent John Fanning.

6 MS. MOELLER: Normally we would

7 swear the witness in here.

8 MS. SCHROEDER: We are here for

9 the deposition of John W. Fanning.

10 Counsel for the Federal Trade Commission

11 served a deposition notice on Mr. Fanning

12 setting his deposition for July 29, 2014,

13 at 9:00 A.M. at Mr. Fanning's attorney's

14 office located at Two International Place,

15 16th Floor, Boston, Massachusetts.

16 Two FTC attorneys, myself and Eric

17 Edmondson, have flown from San Francisco

18 to be here for the deposition. Today is

19 July 29, 2014. The time is approximately

20 9:01 A.M. We are at Two International

21 Place, the 16th Floor, Boston,

22 Massachusetts.

23 John Fanning is not present for the

24 deposition. Complaint counsel received no

25 notice that he is ill or otherwise unable

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1 to attend his deposition.
 2 Now I believe Mr. Fanning's attorney
 3 has a comment he would like to make for
 4 the record.
 5 MR. CARR: Are you completed,
 6 counsel?
 7 MS. SCHROEDER: I might respond
 8 to what you say.
 9 MR. CARR: This is Attorney Peter
 10 Carr representing John Fanning in this
 11 action. I have been involved in this
 12 action on behalf of Mr. Fanning from the
 13 commencement.
 14 It is the case that the deposition was
 15 noticed for Mr. Fanning for today, July
 16 29, 2014. In fact it was a date that
 17 Mr. Fanning had proposed to the FTC to
 18 make himself available. I have also made
 19 my offices available for this deposition
 20 to take place today.
 21 It was always the intent and purpose
 22 of Mr. Fanning to appear today. He was
 23 prepared to appear today and testify under
 24 oath and answer the questions that were
 25 posed to him.

6

1 Yesterday I had communications with
 2 the Federal Trade Commission about
 3 potential resolution through a consent
 4 decree order without admission of
 5 liability.
 6 I contacted counsel for the FTC,
 7 Ms. Schroeder, advised her of the fact and
 8 then had further communications,
 9 substantive communications with FTC
 10 counsel Boris -- I don't recall Boris'
 11 last name, and I have my e-mail. I will
 12 get it in one second. The only reason I
 13 don't want to say Boris' last name is so I
 14 don't mess it up -- Attorney Kerry O'Brien
 15 and Boris Yankilovich yesterday evening.
 16 They were in San Francisco and I was in
 17 Boston. The conversation occurred by
 18 telephone somewhere approximately 5:30 in
 19 the evening Boston time.
 20 Again, prior to that substantive
 21 conversation I had sent communications to
 22 counsel about potential resolution and the
 23 effort to try to resolve the case on
 24 behalf of Mr. Fanning individually again
 25 making it crystal clear I did not

7

1 represent the company that is named the
 2 respondent in the case.
 3 During the course of those substantive
 4 conversations, particularly with Boris, I
 5 indicated to Boris that part of the intent
 6 or purpose of trying to reach a settlement
 7 in the case was to avoid the further cost
 8 and expense of litigation. It was not
 9 intended to delay or postpone or interfere
 10 with the deposition, however, that a
 11 deposition all day today would certainly
 12 increase the cost and expense and would
 13 co-militate against a settlement in the
 14 case.
 15 Boris said he understood that and so
 16 we reached generally terms in which we
 17 would adjourn the deposition and in part,
 18 at Boris' suggestion, that the deposition
 19 would be postponed for today, it would be
 20 adjourned for today provided that
 21 Mr. Fanning would agree to appear at a
 22 deposition on a future date at the end of
 23 August or the beginning of September in
 24 San Francisco if, in fact, the parties
 25 could not resolve the case through a

8

1 negotiated consent order.
 2 Boris also indicated that he had
 3 forwarded up the chain my proposed
 4 language to a substantive provision of the
 5 consent order, particularly Section 8
 6 about compliance monitoring, and that he
 7 was not able to obtain any feedback from
 8 higher-up management at the FTC at that
 9 point in time because the day was over, he
 10 was in San Francisco and they were in
 11 Washington but expected to have that
 12 commentary or comments to my comments back
 13 this morning early.
 14 It was further discussed that we would
 15 endeavor to reach agreement on language in
 16 the consent decree promptly, that we were
 17 not going to delay. I made it clear to
 18 Boris that I had not had any intent to
 19 delay or to prolong these proceedings in
 20 any way, if we couldn't find middle ground
 21 we would proceed. If we could we would
 22 resolve it.
 23 Based on that outline of the substance
 24 of an agreement, I obviously had to speak
 25 with my client to get his accord to the

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1 general terms which would be let's try to
2 negotiate a resolution, in the short term
3 adjourn the deposition. If we were not
4 able to, then we would reschedule it for
5 San Francisco in the end of August,
6 beginning of September.

7 In fact Boris indicated he would
8 follow up with an e-mail to me that had
9 some proposed dates at the end of August,
10 beginning of September, we would pick from
11 one of those dates.

12 I told him if my client was amenable
13 to that I would send an e-mail back
14 confirming, and he also indicated he would
15 send to me a revised draft of the consent
16 agreement to remove Jerk, LLC, because the
17 company would not be signing, it was just
18 Mr. Fanning individually. I spoke with my
19 client, ran through all the options and
20 received his consent to proceed according
21 to the lines that Boris had outlined.

22 I waited for the e-mail last evening,
23 did not get it. I checked my e-mail up
24 until around nine o'clock last night. I
25 did not receive anything. I woke this

1 default action against Jerk.
2 None of those conditions were
3 discussed in the call with counsel earlier
4 that day. There was not any conditions
5 placed of such on us entering into
6 settlement discussions with respect to a
7 consent order, and none of those
8 conditions were discussed as a basis for
9 adjourning this morning's deposition.

10 In addition in the e-mail from counsel
11 there were dates for a proposed deposition
12 of Mr. Fanning in San Francisco if, in
13 fact, we were not able to resolve the
14 matter. Those dates that were proposed
15 were August 6, 7 or 14. In contrast to
16 the representations by counsel that we
17 would look to dates at the end of August,
18 beginning of September, these dates are
19 actually next week, which also flies in
20 the face of the discussion with counsel
21 about whereas we would not try in any way
22 to prolong the matter in discussions, we
23 would proceed promptly to negotiations and
24 hopeful resolution, that we would need
25 some time to engage in such discussions.

10

12

1 morning early and saw that there was an
2 e-mail from counsel for the FTC, Kerry
3 O'Brien. It was apparently sent at 9:17
4 P.M. last night, although I have no record
5 of getting it at that point. I did get it
6 this morning.

7 I responded back somewhere between
8 5:00, 5:30 this morning advising that what
9 counsel had put in her e-mail was not
10 consistent with what we had discussed and
11 agreed to as I understood it on the terms
12 of adjourning this deposition this morning
13 in an effort of trying to settle the case.

14 In particular counsel's e-mail
15 indicated that -- and in fact her e-mail
16 did set forth a proposed revised draft
17 consent order to remove Jerk, LLC; but in
18 her e-mail counsel indicated that in order
19 to get this moving along that Mr. Fanning
20 would have to sign an affidavit stating
21 that he is a member of the LLC and that
22 Jerk is defunct and indicated that I had
23 made a representation to that effect. It
24 also requested Mr. Fanning's agreement to
25 cooperate with The Commission in any

1 So the proposed dates for next week is
2 contrary to what we discussed on the
3 phone. So I sent an e-mail back to
4 counsel indicating that I did not agree to
5 those terms that were different than what
6 had been stated on the phone and
7 represented to me in the telephone call
8 last evening but that I would, in fact,
9 look at the revised draft, I would, in
10 fact, agree to have Mr. Fanning appear in
11 San Francisco if his deposition needed to
12 be taken and the case was not resolved at
13 the end of August, beginning of September.

14 I did, in fact, say that I would
15 review the revised draft and I would
16 comment on it; and I did, in fact, say
17 that in essence I would wait for any
18 further comments back from the FTC this
19 morning with respect to some of the
20 commentary or revisions I proposed last
21 evening. I have since that time -- and I
22 reconfirmed that so -- strike that.

23 I made that statement early this
24 morning. I then had communications with
25 Attorney Schroeder by e-mail this morning.

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1 Attorney Schroeder's position was that
2 because I did not accept the terms and
3 conditions that were stated in the e-mail
4 from Attorney O'Brien last evening that we
5 would go forward with the deposition this
6 morning of Mr. Fanning.

7 I told counsel that Mr. Fanning would
8 not appear today because that was not my
9 understanding of the terms we agreed to,
10 that I was -- and, again, I believe I said
11 I am working on the consent agreement.

12 Whatever the e-mail says, it says.
13 Counsel came here and put on the
14 record that Mr. Fanning is not appearing.
15 I want to say again that Mr. Fanning is
16 not here today because I told him last
17 night not to appear today because I was
18 relying upon what was said to me by
19 counsel for the FTC with respect to an
20 effort to resolve this case and to adjourn
21 the deposition for this morning so we
22 could focus on resolution of the case.

23 That is the only reason Mr. Fanning is
24 not here today, based upon that discussion
25 I had with counsel last night. It in fact

1 can settle the case. I know counsel has
2 said that to me all along in this case and
3 I don't -- I understand that is their
4 position and have had reach-out from The
5 Commission to try to resolve it for
6 months. I get that. I understand that
7 but, nonetheless, I think that the time
8 would be better well served in trying to
9 find a way to resolve the case.

10 I marked up the consent decree that
11 was sent to me last night and received
12 this morning. I sent it back to my client
13 for comment; and once I get final approval
14 from him, I intend to send that to The
15 Commission this morning.

16 That is my statement, and I am not
17 trying to argue with counsel. I am not
18 trying to take any hard-line positions
19 with counsel. I really did rely upon what
20 was said to me last night on the
21 telephone. I am not trying to hide the
22 ball in any way. I am not trying to
23 prolong the proceedings. I don't mean to
24 make counsel fly out here from San
25 Francisco for no reason. I have no

14

16

1 was suggested by counsel to the FTC as we
2 could proceed in this matter when I said
3 that going forward with the deposition may
4 impact the ability to resolve the case.

5 But for the fact that that was
6 represented to me, I can say unequivocally
7 that Mr. Fanning would be here today to
8 testify, and that was always the intent
9 and the purpose. I had the entire day on
10 my calendar set aside for the deposition
11 today. I have accommodated everybody in
12 this room. It's not a pretext or made up.

13 We were prepared to go forward and to
14 the extent that somehow the FTC is now
15 going to take the position that
16 Mr. Fanning has violated or flouted the
17 rules of The Commission or is in default,
18 that would be inappropriate and it would
19 be unfair.

20 That is my statement. I would like
21 counsel to know that I am not upset at
22 counsel necessarily because I had to be
23 here anyway. I am disappointed. I think
24 we should be spending the time to try to
25 narrow, resolve the dispute to see if we

1 involvement with the company. I have
2 nothing to do with what went on yesterday
3 at the deposition, zero.

4 So this is not personal. It's not
5 intended to cause harm to counsel that
6 came this far to appear today. It really
7 was for the purpose to try and find a
8 resolution of this case. That is my
9 statement.

10 MS. SCHROEDER: Counsel for the
11 FTC was very clear that this depo would
12 proceed unless there was a signed
13 settlement or a set date for a deposition
14 in San Francisco. Neither of those things
15 have happened.

16 We offered a settlement back in April,
17 and there was no counter-response until
18 late in the evening yesterday. Counsel
19 for Mr. Fanning contacted us around 4:00
20 P.M. wanting to talk about the settlement.
21 We quickly talked to people back in D.C.
22 Unfortunately most people were
23 unavailable. I am now going to read the
24 e-mail chain from Ms. Kerry O'Brien to
25 Mr. Peter Carr.

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1 The first one begins at 9:12 P.M.
 2 yesterday, Monday, July 28. "Dear Peter,
 3 as promised please find attached a draft
 4 order that we have revised for
 5 Mr. Fanning's signature alone. We usually
 6 disfavor separate settlements for
 7 different respondents and would ordinarily
 8 not settle with Mr. Fanning alone without
 9 Jerk."
 10 "In this case, given your
 11 representation that Jerk is a defunct
 12 company, we can proceed with this approach
 13 on the condition that Mr. Fanning provides
 14 a sworn affidavit stating as a member of
 15 the LLC that Jerk is, in fact, defunct and
 16 that he agrees to cooperate with the FTC
 17 in any default against Jerk."
 18 "You indicated on the phone that you
 19 and your client may need additional time
 20 to consider entering into a consent order
 21 and that you wish to avoid the cost you
 22 will incur at tomorrow's deposition of
 23 Mr. Fanning. Per your request to give you
 24 more time we are willing to reschedule
 25 tomorrow's deposition to one of the

18

1 following dates, August 6, 7, or 14 at our
 2 office in San Francisco."
 3 "Having already spent a considerable
 4 time and expense of flying Sarah to Boston
 5 to depose Mr. Fanning tomorrow and in
 6 light of today's no-show at the Jerk, LLC,
 7 deposition we would grant this extension
 8 only on the express condition that
 9 Mr. Fanning come to San Francisco for his
 10 deposition on one of these dates and
 11 during regular business hours starting at
 12 9:00 or 9:30 A.M. Pacific."
 13 "If you do not agree to this proposal,
 14 we are ready to proceed with the
 15 deposition as scheduled at 9:00 AM
 16 tomorrow. Alternatively if Mr. Fanning
 17 decides to sign the attached consent order
 18 before tomorrow's deposition, this will
 19 likely spare everyone future time and
 20 expense. The choice is yours."
 21 "Please let us know in writing no
 22 later than 7:00 AM Eastern tomorrow
 23 whether, one, Mr. Fanning plans to sign
 24 the order before the deposition tomorrow,
 25 two, you wish to reschedule the deposition

19

1 on the terms laid out in the e-mail or,
 2 three, you wish to proceed with tomorrow's
 3 deposition as originally scheduled."
 4 "If we do not receive a response by
 5 7:00 A.M. or if you propose some other
 6 option, we will proceed with the
 7 deposition tomorrow as scheduled. We will
 8 follow up internally with our colleagues
 9 in D.C. about the language you raised in
 10 the compliance monitoring section."
 11 "Please bear in mind, however, that the
 12 Bureau of Consumer Protection is highly
 13 unlikely to approve any further changes to
 14 the Commission's standard order language.
 15 Moreover, as I mentioned on the phone to
 16 resolve this litigation both the Bureau of
 17 Consumer Protection and The Commission
 18 will need to approve of any consent
 19 agreement that Mr. Fanning signs.
 20 Regards, Kerry."
 21 This morning Mr. Carr responded at
 22 5:15 AM Eastern time. "Kerry, this is not
 23 what we discussed with Boris. I will
 24 agree to terms Boris outlined by phone
 25 yesterday. We will adjourn the deposition

20

1 scheduled for today. I will review the
 2 draft CO. I will wait for comments from
 3 you concerning proposed changes and
 4 perhaps discuss other changes to the
 5 language. If you do not -- if we do not
 6 resolve, the deposition of Mr. Fanning
 7 will take place in SF. Boris said late
 8 August, early September. I will wait for
 9 those dates from you. Thanks, Peter."
 10 Then I responded this morning at
 11 approximately 6:18 Eastern time. "Peter,
 12 if you did not agree to the terms Kerry
 13 laid out in her e-mail, we will proceed
 14 with Mr. Fanning's deposition today as
 15 scheduled. I will see you around 8:45."
 16 As Mr. Fanning is not here, this now
 17 concludes the deposition.
 18 MR. CARR: Wait a second. I
 19 didn't get off the record. It doesn't
 20 conclude anything because counsel did a
 21 couple of things.
 22 Counsel was not privy -- Counsel
 23 Schroeder was not privy to my discussions
 24 with Counsel Boris and Counsel Kerry last
 25 evening on the phone, and there has been

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1 no explanation given to me why those terms
 2 were changed between 5:30 P.M. when I was
 3 on the phone with Boris and 9:15 P.M. when
 4 the e-mail was purportedly sent. That is
 5 No. 1.
 6 No. 2, it was Boris that suggested the
 7 process to adjourn the deposition for
 8 today when I indicated that we didn't want
 9 to spend the money and time today to do
 10 this deposition in hopes of trying to
 11 resolve the case. He was the one that
 12 suggested late August, early September;
 13 and he was the one that said he would put
 14 that in writing to me and I told him I
 15 would agree to those dates if my client
 16 agreed in San Francisco.
 17 He also made it clear, as Kerry says
 18 in her e-mail, that they were still
 19 waiting for comments back to my comments
 20 to the consent order that was previously
 21 sent before the further changes were made
 22 and received today this morning at 5:00
 23 o'clock, not last night. I didn't have my
 24 e-mail at 9:15. That indicates that we
 25 did have the call where they said that we

22

1 need time, we need time, The Commission,
 2 to review your comments internally and
 3 will not have them back to you until late
 4 this morning, this morning. So there is
 5 no way that the deposition could be going
 6 forward today while The Commission was
 7 still reviewing those comments as agreed.
 8 Further, I sent an e-mail back to
 9 Sarah, to Ms. Schroeder in response to her
 10 e-mail this morning which she did not
 11 read, and I said to her as follows -- and
 12 this was at 7:43 AM -- "I am not
 13 proceeding today. I agreed to the terms
 14 Boris set forth last night."
 15 MS. SCHROEDER: If you could
 16 clarify, you started reading your e-mail.
 17 MR. CARR: I am reading my e-mail
 18 to Sarah. "I am not proceeding today. I
 19 agreed to the terms Boris set forth last
 20 night. Those are the ones that I conveyed
 21 to my client and we agreed. It was never
 22 mentioned any affidavit or otherwise.
 23 Boris also said late August, early
 24 September in California."
 25 "My client agrees to that schedule, to

23

1 appear in California if we are not able to
 2 resolve. August 6 is next week. The
 3 understanding is that we would adjourn to
 4 give some reasonable time to discuss
 5 resolution in hopes that we could resolve
 6 the matter."
 7 "I said clearly that the purpose is
 8 not delay, but next week is not consistent
 9 with what we discussed. I am relying on
 10 the discussion I had last night which I
 11 conveyed to my client. Based on those
 12 discussions, Mr. Fanning will not be
 13 appearing today and we will work on the
 14 resolution."
 15 "I am waiting to hear back from Boris
 16 this morning on the comments I sent. As
 17 was also discussed last evening on the
 18 call, Mr. Fanning will agree to appear for
 19 a depo in California in late August, early
 20 September if we are not able to resolve."
 21 "I also object to the statement that I
 22 represented that Jerk was a defunct
 23 company. I have no knowledge of the
 24 company's status and never made such a
 25 statement. I said that I understood that

24

1 the Jerk site is not operating and could
 2 possibly get some statement from
 3 Mr. Fanning in the settlement document
 4 that he has discontinued performing any
 5 services concerning Jerk. I never stated
 6 anything about the company."
 7 "If you still plan to appear, I will
 8 put on the record the substance of my
 9 discussions last evening with counsel and
 10 my reliance thereon in adjourning the
 11 deposition today. That seems like a huge
 12 waste of resources."
 13 That was at 7:43 to Ms. Schroeder with
 14 no response. I then sent another e-mail
 15 just to be clear, and this was at 7:45.
 16 "By the way, I did not get the e-mail last
 17 evening until this morning. I checked my
 18 e-mail until 9:00 o'clock and then was not
 19 available. I do not know when it came
 20 into my e-mail. I responded immediately
 21 this morning when received."
 22 I don't understand -- that is the end
 23 of the e-mail communications. I don't
 24 understand the position of The Commission.
 25 I don't understand why the deal terms

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1 changed from last night to 9:15, and I am
 2 disappointed.
 3 To the extent that again The
 4 Commission is going to use this record
 5 against Mr. Fanning's interests, it's
 6 unfair, it's unjust, it's unreasonable and
 7 I understand you may be upset that you had
 8 to come out here.
 9 That is not my issue. I was clear
 10 with counsel last night. I agreed to what
 11 was laid out. Nobody ever mentioned any
 12 sort of affidavit, and The Commission
 13 knows that Mr. Fanning has taken the
 14 position throughout this litigation that
 15 he is not a member of Jerk, LLC, and now
 16 to put a condition on that to negotiate a
 17 settlement and adjourn the deposition that
 18 he has to admit something that they know
 19 has been contested is just not right.
 20 So I hope we can get the resolution
 21 back on track. I hope that we actually
 22 can negotiate in good faith. I hope that,
 23 in fact, we can get responses back to what
 24 I sent yesterday in an effort to resolve
 25 the case starting the discussions

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1 yesterday, and I hope that The Commission
 2 will not try to use this deposition or
 3 non-appearance of Mr. Fanning in some way
 4 to the prejudice of his rights because
 5 that would be unjust. I have nothing
 6 further.
 7 MS. SCHROEDER: This is all a
 8 distraction. The main point is that the
 9 FTC has always been clear that this
 10 deposition would proceed as scheduled
 11 unless there was a signed order or a set
 12 date for future deposition of Mr. Fanning.
 13 Neither of those have happened and so
 14 he was scheduled to appear and he did not
 15 appear. Close the record.
 16 MR. CARR: That is not accurate.
 17 That is a misstatement of what was
 18 discussed last night with Boris and Kerry.
 19 That is not accurate, counsel.
 20 Boris said either we could resolve it
 21 through a negotiated consent order,
 22 however, I'm not sure that we can change
 23 the standard language but there may be
 24 other things we can discuss or Mr. Fanning
 25 can sign the agreement as written that I

27

1 am going to get to you for your review.
 2 I got that agreement that was the
 3 other option at 9:17 last night, not this
 4 morning when I opened it up.
 5 MS. SCHROEDER: Counsel --
 6 MR. CARR: Let me finish, please.
 7 I didn't get it until this morning. How
 8 am I supposed to in good faith review an
 9 agreement at 5:30 this morning when I got
 10 in the office at 6:15, turn it around,
 11 talk to my client, get his input and have
 12 him sign it between now and 9:00 o'clock?
 13 That is unreasonable and it doesn't
 14 make any sense. Mr. Boris was the one who
 15 said that we could negotiate, and that is
 16 what I relied upon. Had you sent me an
 17 e-mail, had somebody from The Commission
 18 sent me an e-mail offering or proposing
 19 dates at the end of August, beginning of
 20 September that was represented to me, I
 21 would have sent back an e-mail confirming
 22 one of those dates in California. That is
 23 what I would have done.
 24 But you sent me an e-mail, The
 25 Commission, last night that I got this

28

1 morning looking for a deposition date for
 2 next week. I didn't even have time to
 3 talk to my client. That is unreasonable.
 4 So don't make it out that we have not
 5 agreed to produce him in California. That
 6 is false. I would have agreed to produce
 7 him if we didn't settle the case at the
 8 end of August, beginning of September like
 9 it was represented to me, and that was not
 10 done.
 11 This is nothing more than they changed
 12 the terms on me to then say if he doesn't
 13 appear -- if you don't agree to these
 14 terms and he doesn't appear tomorrow, he
 15 is in default. That is not fair. That is
 16 not fair; and frankly, counsel, you were
 17 not on the call. So I don't think you can
 18 make any commentary about what was said or
 19 not said, but I'm telling you as an
 20 officer of the court that what was in
 21 counsel's e-mail to me late last night is
 22 not consistent with what was discussed on
 23 the phone, and that is not fair.
 24 It's not fair to me, and it's
 25 primarily not fair to my client because

Statement on the Record

Jerk, LLC, et al.

7/29/2014

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1 now you're blaming me for Mr. Fanning's
2 non-appearance today, and that is not
3 fair, counsel, and you know it's not fair.

4 MS. SCHROEDER: This is a good
5 show. The fact is complaint counsel
6 submitted a settlement offer to
7 Mr. Fanning back in April. At the 11th
8 hour last night Mr. Carr, Mr. Fanning's
9 attorney, began to talk about settlement
10 negotiations.

11 There is no signed settlement today.
12 The deposition is proceeding as scheduled.
13 Mr. Fanning has a history of not appearing
14 for depositions. He did not appear at the
15 investigational hearing for this matter.
16 He did not appear at a deposition in
17 another matter called Results by IQ. This
18 is a show to show that Mr. Fanning, to get
19 him out of appearing for a deposition in
20 this case.

21 He has also not produced his
22 interrogatory responses, his comments. He
23 has also not produced any relevant
24 documents in this case.

25 MR. CARR: Again, I don't want to

1 MR. CARR: And further, and
2 further, okay, there was nothing to sign
3 because Boris said, "Don't worry about the
4 prior order. I have to change it to get
5 the company out. I have to revise it and
6 I will send you the revised document for
7 you to look at."

8 That is what came over at 9:15. I did
9 send back proposed revised language to
10 Section 8 of the prior version of the
11 consent order yesterday afternoon before
12 5:00 o'clock. It went over and I got -- I
13 then called Counsel Schroeder to discuss
14 it. I didn't get Counsel Schroeder. I
15 left a voice message. I was advised that
16 Counsel Schroeder had personal commitments
17 and was not available to discuss the
18 matter further.

19 I then got the call from Boris. I
20 then immediately called him back. I then
21 had a conversation with him via cell phone
22 in my car while I was driving home to my
23 family in a pouring rainstorm, okay, and
24 even offered to have further
25 communications last evening.

30

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1 debate on this record, but what you just
2 said is false.

3 MS. SCHROEDER: Did he appear for
4 an investigational hearing?

5 MR. CARR: He doesn't have an
6 obligation to appear. He has Civil
7 Rights. He does not have to appear before
8 The Commission -- let me finish. He did
9 not -- if he did not appear, that does not
10 mean he didn't appear for a deposition,
11 okay.

12 You have just said that he refuses to
13 appear here today, and that is false. He
14 also did not refuse to appear at a
15 deposition in that other matter. I know
16 that for a fact. So those statements are
17 not true and, furthermore, as I indicated,
18 I didn't want to spend time on
19 interrogatory answers because I wanted to
20 spend time on the consent agreement as I
21 indicated previously which is a better use
22 of resources. Okay. That is what I had
23 said and further --

24 MS. SCHROEDER: We granted an
25 extension for the interrogatories.

1 So I have bent over backwards.
2 Granted it was -- you know, there has been
3 time delay. I don't contest that, that
4 you sent it over and that we have gone
5 back and forth. I made it clear to Boris
6 and he said he understood that my request
7 to try to engage in discussions to resolve
8 the case was not going to be construed,
9 inferred by anybody that Mr. Fanning
10 wanted to avoid his deposition today, and
11 Boris said, "I totally understand that. I
12 don't take it that way."

13 Now you're turning it around on me?
14 This isn't a show. I'm not on camera. I
15 am on a record, but you are counsel to the
16 FTC and so are your colleagues and I have
17 a right to rely upon what they tell me.
18 You told me to talk to Kerry because she
19 was the one that had authority. You told
20 me that yesterday, and Boris said that he
21 had authority and I relied upon what they
22 said. That is the case.

23 Now, if I was wrong in relying upon
24 what other lawyers told me, if that is the
25 case, I apologize and I'm guilty and I

Statement on the Record

Jerk, LLC, et al.

7/29/2014

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1 will be responsible; but I don't think
2 that I should be held and my client should
3 be held accountable in any way, shape or
4 form; and all those other things you
5 talked about are false and have nothing to
6 do with today.

7 But if you want to hold my client
8 accountable because I mistakenly believed
9 I could trust the word of your colleagues,
10 then I guess that is what is going to
11 happen, will happen.

12 MS. SCHROEDER: You mentioned
13 that Mr. Fanning did not appear for the
14 investigational hearing because it
15 violated his Civil Rights. Can you
16 explain that?

17 MR. CARR: No, I am not going
18 to -- I said that Mr. Fanning -- you put
19 on the record that he refused and that
20 somehow evidenced that he is trying to
21 avoid his obligation.

22 I don't recall that the law requires
23 an individual to appear at a conference
24 before the FTC merely because they want to
25 talk to somebody. I don't think that they

1 MS. SCHROEDER: This concludes the
2 deposition of Mr. Fanning.

3 MR. CARR: Thank you.

4 MS. MOELLER: Hold on for one
5 second. This concludes the deposition of
6 John Fanning. The number of disks used
7 were one. The original will be retained
8 by For The Record. We are going off video
9 record. The time is 9:33 A.M.

34

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1 have to, and I don't think you have the
2 right to make him or even draw the
3 inference with respect to anything, the
4 fact that an individual citizen of the
5 United States chose not to go and speak to
6 the government.

7 If you believe that the government has
8 a right to compel somebody to appear to a
9 meeting and then hold that against them if
10 they don't, then I would like to know what
11 that is. I am not going to debate the law
12 with you. I am not going to, but if
13 you're upset, if The Commission is upset
14 because they think that Mr. Fanning
15 thumbed his nose at them, that is not
16 really a professional attitude. He was
17 going to be here today. He was going to
18 be here today.

19 MS. SCHROEDER: My understanding
20 is he intentionally did not come to the
21 investigational hearing, he intentionally
22 ignored a civil investigative demand from
23 The Commission, is that correct?

24 MR. CARR: No, I did not say that.
25 There's no personal knowledge.

1 CERTIFICATE
COMMONWEALTH OF MASSACHUSETTS:
2 PLYMOUTH, SS.:

3 I, ELAINE M. BUCKLEY, a Notary Public in
4 and for the Commonwealth Massachusetts, do
5 hereby certify:

6 That the said proceeding was taken before
me as a Notary Public at the said time and
7 place and was taken down in shorthand
writing by me;

8 That I am a Registered Professional
9 Reporter, that the said proceeding was
thereafter under my direction transcribed
10 into computer-assisted transcription, and
that the foregoing transcript constitutes
11 a full, true, and correct report of the
proceedings which then and there took
12 place;

13 IN WITNESS WHEREOF, I have hereunto
subscribed my hand and affixed my official
14 seal this 30th day of July 2014.

15
16 ELAINE M. BUCKLEY

17 My commission expires:
November 19, 2015

EXHIBIT 2

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Eckert Seamans Cherin & Mellott, LLC
Two International Place
16th Floor
Boston, MA 02110

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May 29, 2014

VIA EMAIL AND MAIL

Sarah Schroeder, Attorney
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103

Re: In the Matter of Jerk, LLC,
FTC Docket No. 9361

Dear Sarah:

As I mentioned yesterday following the Scheduling Conference, a deposition of John Fanning cannot take place in June as you proposed. There are multiple reasons for this, including: Mr. Fanning has pre-existing obligations; I have a trial scheduled for June 9 and 10; I have a court-ordered mediation that must take place before July 1; I am away on family vacation during the week of June 23; and, I have other court appearances and depositions scheduled already in June. Not to mention, you are unavailable for one week in June, and Maria has her own scheduling conflicts.

I also informed you that Mr. Fanning will make himself available in late July or early August for a deposition in Boston. I explained that early or mid-July is not feasible in large part due to the fact that I am just back from vacation the first week of July heading into the Fourth of July Holiday, during which time I need to prepare for an arbitration trial scheduled to commence on July 9 in Washington, D.C., and which I expect will require post-hearing briefing. Your initial position that late July or early August was too late because you did not expect Mr. Fanning to appear and would need time to pursue court intervention is unavailing considering that I specifically offered to provide possible dates for Mr. Fanning to appear at deposition. Your further position that you would require the deposition to take place in San Francisco instead of Boston if you had to wait until July or August is purely punitive.

At this point, I offer the following dates for Mr. Fanning's deposition in Boston: July 28, July 29, August 5, or August 12. I again offer to host the deposition in my office to accommodate the parties. I can also provide contact information for a court report if you require. I see no good reason to conduct the deposition in the United States Attorney's Office in Boston as you previously suggested instead of my office. I disagree that being deposed in the setting you suggest is not rife with intimidation and uneasiness.

I do not know whether Maria is available on the dates I have proposed, so I will await her response. Meanwhile, please confirm your availability so that we can lock in a date now.

{K0545674.1}
Peter F. Carr, II
pcarr@eckertseamans.com
617.342.6857

Finally, I suggest sooner than later that counsel confer on the other anticipated depositions to establish a tentative schedule. All counsel have busy schedules, and it makes no sense for the parties merely to notice a deposition for a date that may not work for all counsel thereby resulting in the need to reschedule. Also, Mr. Fanning may want to attend certain or all of the depositions, which is his right as a party, and I will need to confirm his availability. Further, we may need to make arrangements for flights and hotels if travel is involved. I believe it makes practical sense to map out a deposition schedule in advance as best possible to avoid confusion and disputes. Let me know when we may be able to confer.

Thank you in advance for your consideration.

Very truly yours,



Peter F. Carr, II
PFC/var

cc: John Fanning
Maria Crimi Speth, Esquire

EXHIBIT 3

Peter Carr

From: Peter Carr
Sent: Tuesday, August 05, 2014 2:53 PM
To: 'Schroeder, Sarah'
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry; Vicki A. Roy; Debra A. Gower (dag@jaburgwilk.com); mcs@jaburgwilk.com
Subject: RE: motion to compel

Sarah-

Notwithstanding my concerns about this entire process and how this is going down, Mr. Fanning is able to appear for his personal deposition in San Francisco on either September 3 or 4. Please confirm one of these dates today so I can lock in and make the necessary arrangements. I reserve all rights on behalf of Mr. Fanning.

Thanks.

PFC

Peter F. Carr, II
ECKERT SEAMANS CHERIN & MELLOTT, LLC

Two International Place • 16th Floor • Boston, MA 02110
Direct (617) 342.6857 | Facsimile (617) 342.6899
pcarr@eckertseamans.com

eckertseamans.com | [bio](#) | [vCard](#)



From: Schroeder, Sarah [mailto:SSCHROEDER@ftc.gov]
Sent: Tuesday, August 05, 2014 1:18 PM
To: Peter Carr
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry; Vicki A. Roy; Debra A. Gower (dag@jaburgwilk.com); mcs@jaburgwilk.com
Subject: RE: motion to compel

Peter,

I'm not sure what I need to respond to since this email was supposed to be a meet and confer about our motion to compel, but so you know that I'm not ignoring you, here are my answers to your questions.

Kerry O'Brien already replied to your proposed order language changes on July 30th. In case you did not receive her email, I'm attaching it here. As we have said repeatedly, Kerry is your point of contact for settlement discussions.

It's absolutely true that Mr. Fanning refused to show up at his deposition on July 29. You telling us a few hours before the deposition that he wasn't going to show doesn't change that fact.

My supervisor is Kerry O'Brien, the FTC's Assistant Regional Director for the San Francisco Office.

-Sarah

From: Peter Carr [<mailto:PCarr@eckertseamans.com>]
Sent: Monday, August 04, 2014 6:35 PM
To: Schroeder, Sarah; Vicki A. Roy; Debra A. Gower (dag@jaburgwilk.com); mcs@jaburgwilk.com
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry
Subject: RE: motion to compel

Sarah-

Please respond as requested.

PFC

Sent with Good (www.good.com)

From: Peter Carr
Sent: Friday, August 1, 2014 11:39:56 AM
To: Schroeder, Sarah; Vicki A. Roy; Debra A. Gower (dag@jaburgwilk.com); mcs@jaburgwilk.com
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry
Subject: RE: motion to compel

Sarah-

Please advise as to the status of the comments to the proposed consent decree.

You also know that it is false that Mr. Fanning refused to appear on July 29.

Please also provide me with the name of your supervisor or boss.

Thanks you.

PFC

Peter F. Carr, II
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pcarr@eckertseamans.com
eckertseamans.com | [bio](#) | [vCard](#)

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

From: Schroeder, Sarah [<mailto:SSCHROEDER@ftc.gov>]
Sent: Friday, August 01, 2014 11:12 AM
To: Peter Carr; Vicki A. Roy; Debra A. Gower (dag@jaburgwilk.com); mcs@jaburgwilk.com
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry
Subject: motion to compel

Peter, Maria:

I'm writing in an attempt to meet and confer on a motion to compel we plan to file. Since I already discussed the overarching issues with Peter on Tuesday, and given that Maria appears to be no longer authorized by Jerk to act on behalf of the company, I am laying out the meet and confer terms in this email. Maria, I ask that you please forward this to your former client, or let me know with whom I should communicate.

We plan to ask the Court to compel the deposition of Mr. Fanning on August 14 and the deposition of Jerk, LLC on August 15, both at our office in San Francisco, as a remedy to their failure to appear on the designated dates of July 28 and 29 in Boston. We also plan to ask the Court to compel Jerk to provide responses to our interrogatories and to compel Mr. Fanning to produce documents in response to our requests for production, both on or before August 8. Please let me know if you agree to comply with these requests voluntarily by 2 pm (ET) tomorrow. Let me add for the record that while I'm willing to work toward a solution that would negate the need for court intervention, I am not interested in entertaining responses attacking the justification for us having to move to compel this discovery. That justification is well documented and will be outlined in our motion.

-Sarah

Sarah Schroeder, Attorney
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103
Phone: (415) 848-5186
Email: sschroeder@ftc.gov

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EXHIBIT 4

Peter Carr

From: Peter Carr
Sent: Tuesday, July 29, 2014 12:30 PM
To: O'Brien, Kerry
Cc: Yankilovich, Boris; Schroeder, Sarah
Subject: RE: Proposed consent order
Attachments: FANNING-FTC- PROPOSED CONSENT ORDER (K0552676-2).docx; FANNING-FTC-REVISED CONSENT ORDER REDLINE (PFC DRAFT) - K0552676 AND K0552676 (K0552770).docx

FOR SETTLEMENT PURPOSES

Attached please find my proposed comments to the draft you sent this morning in clean and redline. Most of the changes are intended to resolve internal inconsistencies in the document. Also, I cleaned up to remove items that were clearly hold-over from the draft that included the company. I also changed to make clear that rights are preserved in the event the Commission does not approve or withdraws approval after execution, as we discussed last evening. Finally, you will see that I limited my changes to compliance monitoring section and do not press the comments I sent yesterday. I believe the changes I proposed to this section are consistent with the rest of the language as exists.

Finally, please provide dates for end of August/early September for a proposed deposition in CA if needed, as discussed last evening. Hopefully, we can reach terms and further discovery will not be needed.

Please advise.

Thanks.

PFC

Peter F. Carr, II
ECKERT SEAMANS CHERIN & MELLOTT, LLC

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pcarr@eckertseamans.com

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**ECKERT
SEAMANS**
ATTORNEYS AT LAW

From: O'Brien, Kerry [<mailto:KOBRIEN@ftc.gov>]

Sent: Monday, July 28, 2014 9:13 PM

To: Peter Carr

Cc: Yankilovich, Boris; Schroeder, Sarah

Subject: FW: Proposed consent order

Dear Peter,

As promised, please find attached a draft order that we have revised for Mr. Fanning's signature alone. We usually disfavor separate settlements with different respondents, and would ordinarily not settle with Mr. Fanning alone without Jerk. In this case, given your representation that Jerk is a defunct company, we can proceed with this approach on the condition that Mr. Fanning provides a sworn affidavit stating as a member of the LLC that Jerk is in fact defunct and that he agrees to cooperate with the FTC in any default action against Jerk.

You indicated on the phone that you and your client may need additional time to consider entering into the consent order and that you wish to avoid the costs that you will incur at tomorrow's deposition of Mr. Fanning. Per your request to give you more time, we are willing to reschedule tomorrow's deposition to one of the following dates – August 6, 7, or 14 – at our office in San Francisco. Having already spent the considerable time and expense of flying Sarah to Boston to depose Mr. Fanning tomorrow, and in light of today's no-show at the Jerk LLC deposition, we would grant this extension only on the express condition that Mr. Fanning come to San Francisco for his deposition on one of these dates and during regular business hours (starting at 9 or 9:30 am Pacific). If you do not agree to this proposal, we are ready to proceed with the deposition as scheduled at 9 am tomorrow. Alternatively, if Mr. Fanning decides to sign the attached consent order before tomorrow's deposition, this will likely spare everyone further time and expense. The choice is yours.

Please let us know in writing no later than 7 am Eastern tomorrow whether (i) Mr. Fanning plans to sign the order as is before the deposition tomorrow; (ii) you wish to reschedule the deposition on the terms laid out in this email, or (iii) you wish to proceed with tomorrow's deposition as originally scheduled. If we do not receive a response by 7 am or if you propose some other option, we will proceed with the deposition tomorrow as scheduled.

We will follow up internally with our colleagues in DC about the language you raised in the Compliance Monitoring section. Please bear in mind, however, that the Bureau of Consumer Protection is highly unlikely to approve any further changes to the Commission's standard order language. Moreover, as I mentioned on the phone, to resolve this litigation, both the Bureau of Consumer Protection and the Commission will need to approve of any consent agreement that Mr. Fanning signs.

Regards,

Kerry

Kerry O'Brien
Assistant Regional Director
Federal Trade Commission
Western Region – San Francisco
901 Market Street, Suite 570
San Francisco, CA 94103
(415) 848-5189
(415) 848-5184 (fax)

From: Yankilovich, Boris
Sent: Monday, July 28, 2014 3:23 PM
To: 'Peter Carr'
Cc: O'Brien, Kerry; Schroeder, Sarah; Vicki A. Roy
Subject: RE: Proposed consent order

Peter,

I spoke with Sarah earlier today and I know she had something personal lined up in Boston for the evening. If this is about the draft order, Kerry and I are available to speak this pm. Just let me know when and where to call you.

Boris Yankilovich
Federal Trade Commission
901 Market Street, Suite 570 | San Francisco, CA 94103
Office: 415.848.5120 | Mobile: 202.468.2013 | Fax: 415.848.5184
Email: byankilovich@ftc.gov

From: Peter Carr [<mailto:PCarr@eckertseamans.com>]
Sent: Monday, July 28, 2014 2:45 PM
To: Schroeder, Sarah; Vicki A. Roy
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry
Subject: RE: Proposed consent order

Sarah-

Got your voice message. Are you available to speak.

PFC

Peter F. Carr, II
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eckertseamans.com | [bio](#) | [vCard](#)



From: Schroeder, Sarah [<mailto:sschroeder@ftc.gov>]
Sent: Friday, July 18, 2014 7:08 PM
To: Peter Carr; Vicki A. Roy
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry
Subject: Proposed consent order

Peter,

It was nice speaking with you today. I've attached the most recent proposed consent order for the Jerk, LLC matter. I've also attached a comparison to the original order. As you may recall, we discussed changes to the order in April and I obtained permission to make certain modifications. I'm happy to discuss narrowing the language in Provision VIII (compliance monitoring), but do not have authority to make further changes to the other provisions.

Let's plan to talk again on Wednesday after you've conferred with your client. I hope you have a good weekend.

Best Regards,
Sarah

Sarah Schroeder, Attorney
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103
Phone: (415) 848-5186
Email: sschroeder@ftc.gov

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EXHIBIT 5

Peter Carr

From: Peter Carr
Sent: Wednesday, July 30, 2014 7:20 PM
To: O'Brien, Kerry
Cc: Yankilovich, Boris; Schroeder, Sarah
Subject: RE: Proposed consent order

Further I have saved Sarah's voice message in which she states that you will be removing section 7 of your draft.

PFC

Sent with Good (www.good.com)

From: Peter Carr
Sent: Wednesday, July 30, 2014 6:48:45 PM
To: O'Brien, Kerry
Cc: Yankilovich, Boris; Schroeder, Sarah
Subject: RE: Proposed consent order

Also my client cannot sign a document that has statements that are not true or require him to do things he cannot do.

PFC

Sent with Good (www.good.com)

From: Peter Carr
Sent: Wednesday, July 30, 2014 6:45:41 PM
To: O'Brien, Kerry
Cc: Yankilovich, Boris; Schroeder, Sarah
Subject: RE: Proposed consent order

Kerry-

I need a specific response to the changes i proposed as many are non-controversial or for clarification or consistent with what was stated to me in the past. This type of hard-line response is not conducive to settlement.

Please advise.

Thanks.

PFC

Sent with Good (www.good.com)

From: O'Brien, Kerry <KOBRIEN@ftc.gov>
Sent: Wednesday, July 30, 2014 5:45:33 PM
To: Peter Carr
Cc: Yankilovich, Boris; Schroeder, Sarah
Subject: Proposed consent order

Dear Peter,

Thank you for your response to our offer and your markup. Unfortunately, we cannot agree to it. As we mentioned on the telephone, we cannot agree to an order that modifies Commission boilerplate. Please note that the order expressly states that it “is for settlement purposes only and does not constitute an admission by Respondent Fanning that the law has been violated as alleged in the Complaint, or that the facts as alleged in the Complaint, other than jurisdictional facts, are true.” Also, the proposed order we sent you reflects substantial modifications that we made to the Notice Order in response to concerns raised by Mr. Fanning. Specifically, we modified the “Monitoring Provisions” and “Compliance Monitoring – John Fanning” provisions of the order. These were not minor concessions.

Please let me know whether Mr. Fanning is willing to sign the consent order that I sent to you on July 28 and is attached to this email. If he signs it by August 4, 2014, we are prepared to recommend this order to the Bureau of Consumer Protection and the Commission on the condition that we also have a settlement with Jerk if it is an existing company. If Jerk does not exist, we can proceed independently with Mr. Fanning. Given Jerk’s counsel’s prior designation of Mr. Fanning as Jerk’s corporate representative, he is in the best, if not the exclusive, position to tell us whether Jerk does or does not exist.

Regards,

Kerry

Kerry O'Brien
Assistant Regional Director
Federal Trade Commission
Western Region – San Francisco
901 Market Street, Suite 570
San Francisco, CA 94103
(415) 848-5189
(415) 848-5184 (fax)

EXHIBIT 6

Peter Carr

From: Peter Carr
Sent: Tuesday, August 05, 2014 2:57 PM
To: 'O'Brien, Kerry'
Cc: Yankilovich, Boris; Fang, Yan; Schroeder, Sarah; Vicki A. Roy; Debra A. Gower (dag@jaburgwilk.com); mcs@jaburgwilk.com
Subject: RE: motion to compel

Kerry-

The one you sent had compliance issues that were clearly intended for the company and improper hold-over. That is why I deleted.

PFC

Peter F. Carr, II
ECKERT SEAMANS CHERIN & MELLOTT, LLC

Two International Place • 16th Floor • Boston, MA 02110
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From: O'Brien, Kerry [mailto:KOBRIEN@ftc.gov]
Sent: Tuesday, August 05, 2014 2:53 PM
To: Peter Carr
Cc: Yankilovich, Boris; Fang, Yan; Schroeder, Sarah; Vicki A. Roy; Debra A. Gower (dag@jaburgwilk.com); mcs@jaburgwilk.com
Subject: RE: motion to compel

Peter,

Just to clarify. The proposed order, which I sent to you, does not contain Section 7 of the notice order, which was entitled "Compliance Monitoring – Jerk, LLC."

Regards,

Kerry

Kerry O'Brien
Assistant Regional Director
Federal Trade Commission
Western Region – San Francisco
901 Market Street, Suite 570

San Francisco, CA 94103
(415) 848-5189
(415) 848-5184 (fax)

From: Peter Carr [<mailto:PCarr@eckertseamans.com>]
Sent: Tuesday, August 05, 2014 11:35 AM
To: O'Brien, Kerry
Cc: Yankilovich, Boris; Fang, Yan; Schroeder, Sarah; Vicki A. Roy; Debra A. Gower (dag@jaburgwilk.com); mcs@jaburgwilk.com
Subject: RE: motion to compel

Kerry-

I disagree. There was never any mention of Mr. Fanning having to cooperate or to sign any document in which he agreed to statements that were false or disputed. The email you sent to me that evening was not consistent with our telephone call the night before. Also, I have the voice recording from Sarah stating that you were going to update the draft agreement to remove the Jerk-related items, and specifically identified removing what was section 7. Then I get a draft that still contains section 7, and I sent back a revised draft removing that section to be told that you cannot change standard language. The draft you sent has numerous internal inconsistencies. For instance, how can you expect Mr. Fanning to agree to a fact that is disputed such as his membership status, and then have a statement that it is without admission of liability and he denies all allegations in the Complaint including membership status. Likewise, how can you have an order that lasts 20 years when the obligations regarding compliance reporting/monitoring last only 5 years. There may be standard language, but wrong standard language does not make it right. My proposed changes were reasonable, legitimate and narrow in the spirit of getting this resolved.

That is why I suggested that you mark up my draft and return it so that we could see what further work could be done.

Thanks.

PFC

Peter F. Carr, II
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From: O'Brien, Kerry [<mailto:KOBRIEN@ftc.gov>]
Sent: Tuesday, August 05, 2014 2:09 PM
To: Peter Carr
Cc: Yankilovich, Boris; Fang, Yan; Schroeder, Sarah; Vicki A. Roy; Debra A. Gower (dag@jaburgwilk.com); mcs@jaburgwilk.com
Subject: RE: motion to compel

Dear Peter,

As I stated in my July 30th email to you, I rejected your comments to the order because they changed the Commission's standard order language. If you review the Commission's website, you will see numerous administrative orders that contain that standard language.

Also, as we told you, we generally cannot recommend settlement unless both respondents settle at the same time or we have a cooperation agreement with the settling respondent. We understood from both you and Maria that Jerk, LLC, was defunct, which prompted us to attempt to reach a settlement with Mr. Fanning alone. According to your July 29 email, you stated, however, that you have no knowledge of the company's status. If Jerk, LLC, is not defunct, we will need to add a cooperation clause to any order that Mr. Fanning signs.

If, in the future, you would like to discuss settlement, please contact me.

Regards,

Kerry

Kerry O'Brien
Assistant Regional Director
Federal Trade Commission
Western Region - San Francisco
901 Market Street, Suite 570
San Francisco, CA 94103
(415) 848-5189
(415) 848-5184 (fax)

From: Peter Carr [<mailto:PCarr@eckertseamans.com>]
Sent: Monday, August 04, 2014 6:35 PM
To: Schroeder, Sarah; Vicki A. Roy; Debra A. Gower (dag@jaburgwilk.com); mcs@jaburgwilk.com
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry
Subject: RE: motion to compel

Sarah-

Please respond as requested.

PFC

Sent with Good (www.good.com)

From: Peter Carr
Sent: Friday, August 1, 2014 11:39:56 AM
To: Schroeder, Sarah; Vicki A. Roy; Debra A. Gower (dag@jaburgwilk.com); mcs@jaburgwilk.com
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry
Subject: RE: motion to compel

Sarah-

Please advise as to the status of the comments to the proposed consent decree.

You also know that it is false that Mr. Fanning refused to appear on July 29.

Please also provide me with the name of your supervisor or boss.

Thanks you.

PFC

Peter F. Carr, II
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From: Schroeder, Sarah [<mailto:SSCHROEDER@ftc.gov>]

Sent: Friday, August 01, 2014 11:12 AM

To: Peter Carr; Vicki A. Roy; Debra A. Gower (dag@jaburgwilk.com); mcs@jaburgwilk.com

Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry

Subject: motion to compel

Peter, Maria:

I'm writing in an attempt to meet and confer on a motion to compel we plan to file. Since I already discussed the overarching issues with Peter on Tuesday, and given that Maria appears to be no longer authorized by Jerk to act on behalf of the company, I am laying out the meet and confer terms in this email. Maria, I ask that you please forward this to your former client, or let me know with whom I should communicate.

We plan to ask the Court to compel the deposition of Mr. Fanning on August 14 and the deposition of Jerk, LLC on August 15, both at our office in San Francisco, as a remedy to their failure to appear on the designated dates of July 28 and 29 in Boston. We also plan to ask the Court to compel Jerk to provide responses to our interrogatories and to compel Mr. Fanning to produce documents in response to our requests for production, both on or before August 8. Please let me know if you agree to comply with these requests voluntarily by 2 pm (ET) tomorrow. Let me add for the record that while I'm willing to work toward a solution that would negate the need for court intervention, I am not interested in entertaining responses attacking the justification for us having to move to compel this discovery. That justification is well documented and will be outlined in our motion.

-Sarah

Sarah Schroeder, Attorney
Federal Trade Commission
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San Francisco, CA 94103
Phone: (415) 848-5186
Email: sschroeder@ftc.gov

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Neither this information block, the typed name of the sender, nor anything else in this message is intended to constitute an electronic signature unless a specific statement to the contrary is included in this message.

EXHIBIT 7

Peter Carr

From: Schroeder, Sarah <SSCHROEDER@ftc.gov>
Sent: Tuesday, August 05, 2014 4:58 PM
To: Peter Carr
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry; Vicki A. Roy; Debra A. Gower (dag@jaburgwilk.com); mcs@jaburgwilk.com
Subject: RE: motion to compel

Peter,

Thanks for your reply. First off, not having heard from you by end of day yesterday, we have already sent off our motion to compel to file. You'll receive service by email shortly. Second, the dates you're proposing now are not the ones that I presented. Third, we also need to secure Mr. Fanning's deposition as Jerk's corporate representative, as Jerk's counsel indicated that he is the only available person with knowledge who can testify about the categories of information in our subpoena. Fourth, you haven't responded to our other discovery issue – the production of documents – and Jerk has not responded about its outstanding interrogatory responses. In sum, this is now in the Court's hands. If Mr. Fanning agrees to our deposition dates and to produce documents in time, please feel free to alert the Court so we can limit the dispute to just Jerk's outstanding discovery. As always, we remain willing to work with you to resolve issues without court intervention.

Best Regards,
Sarah

From: Peter Carr [mailto:PCarr@eckertseamans.com]
Sent: Tuesday, August 05, 2014 11:53 AM
To: Schroeder, Sarah
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry; Vicki A. Roy; Debra A. Gower (dag@jaburgwilk.com); mcs@jaburgwilk.com
Subject: RE: motion to compel

Sarah-

Notwithstanding my concerns about this entire process and how this is going down, Mr. Fanning is able to appear for his personal deposition in San Francisco on either September 3 or 4. Please confirm one of these dates today so I can lock in and make the necessary arrangements. I reserve all rights on behalf of Mr. Fanning.

Thanks.

PFC

Peter F. Carr, II
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