

ORIGINAL

PUBLIC

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



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

ORDER ON COMPLAINT COUNSEL'S MOTION TO COMPEL DISCOVERY

I.

On August 5, 2014, Federal Trade Commission ("FTC") Complaint Counsel filed a motion to compel discovery from Respondent Jerk, LLC ("Jerk") and Respondent John Fanning ("Fanning"), and its memorandum in support thereof ("Motion"). Respondent Fanning filed an objection to the Motion on August 12, 2014 ("Opposition"). Respondent Jerk has not filed any response to the Motion. Under FTC Rule 3.38(a), the deadline for filing a response to the Motion was August 12, 2014. For the reasons set forth below, Complaint Counsel's Motion is GRANTED IN PART and DENIED WITHOUT PREJUDICE IN PART.

II.

Pursuant to FTC Rule 3.38(a),¹ Complaint Counsel seeks an order compelling: (1) Fanning to appear for depositions on behalf of himself and as representative of Jerk at the FTC's office in San Francisco, on two business days between August 21 and 27, 2014; (2) Jerk to respond to Complaint Counsel's Interrogatories at least three business days before the deposition of Jerk's representative; and (3) Fanning to produce documents at least five business days before his deposition.

¹ Rule 3.38(a) provides: "A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery, including . . . a deposition under § 3.33, an interrogatory under § 3.35, or a production of documents or things or access for inspection or other purposes under § 3.37. . . . Any response to the motion by the opposing party must be filed within 5 days of receipt of service of the motion Unless the Administrative Law Judge determines that the objection is justified, the Administrative Law Judge shall order that . . . documents, depositions, or interrogatories be served or disclosure otherwise be made." 16 C.F.R. § 3.38(a).

It should be noted at the outset that Fanning was named along with Jerk as a Respondent in the Complaint, “individually and as a member of Jerk, LLC,” and that Fanning and Jerk have been represented by separate attorneys. According to the Notices of Appearance filed in this case, Fanning has been represented by Mr. Peter Carr of Eckert, Seamans, Cherin & Mellott, LLC and Jerk has been represented by Ms. Maria Speth of Jaburg & Wilk, P.C. At the Initial Prehearing Conference, held on May 28, 2014, Mr. Carr appeared on behalf of John Fanning and Ms. Speth appeared on behalf of Jerk. On July 30, 2014, Jerk’s counsel filed a Notice Regarding Representation stating, “Counsel, Maria Crimi Speth and the law firm Jaburg & Wilk, P.C. hereby give notice that as of July 18, 2014, they no longer represent Jerk, LLC.” No other attorney has subsequently filed a Notice of Appearance on behalf of Jerk.

A. Depositions of Fanning in his individual capacity and as a representative of Jerk

On June 3, 2014, Complaint Counsel served a Notice of Deposition on Fanning to testify in his individual capacity at a deposition in Boston, MA, on July 29, 2014. (Motion, Ortiz Attachment B). Also on July 2, 2014, Complaint Counsel served a Rule 3.33(c)(1)² Notice of Deposition on Jerk, seeking a corporate representative to testify on behalf of Jerk at a deposition in Boston, MA, on July 28, 2014. (Motion, Ortiz Attachment A). Complaint Counsel states that Jerk’s counsel designated Fanning as the person who would testify on Jerk’s behalf. (Motion at 1). By email dated June 4, 2014, Ms. Speth confirmed to Complaint Counsel, “Jerk, LLC designates John Fanning as a person who has knowledge on some of the matters specified in your attached notice. . . . Jerk, LLC believes that John Fanning is the proper person to designate.” (Motion, Schroeder Attachment E-3).

Complaint Counsel represents that the depositions were scheduled for Boston based on a request by Fanning’s counsel, Mr. Carr, because that location would be most convenient to Fanning, who lives in the Boston area. (Motion, Schroeder Attachment F). Complaint Counsel further represents that the parties were engaged in good faith settlement discussions during the time period leading up to the noticed depositions. (Motion at 2).

According to the transcript of proceedings on July 28, 2014, the date scheduled for the deposition of Jerk, Complaint Counsel appeared through Ms. Schroeder. Ms. Schroeder made a statement for the record that counsel for Jerk had represented that

² Rule 3.33(c)(1) provides: “A party may name as the deponent a public or private corporation, partnership, [or] association . . . and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who *consent* to testify on its behalf, and may set forth, for each person designated, the matters on which he or she will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.” 16 C.F.R. § 3.33(c)(1) (emphasis added).

Fanning would attend the deposition as Jerk's corporate representative. Neither Fanning nor any other corporate representative for Jerk appeared at the July 28, 2014 deposition. (Motion, Ortiz Attachment I).

According to the transcript of proceedings on July 29, 2014, the date scheduled for the deposition of Fanning, Complaint Counsel appeared through Ms. Schroeder. Ms. Schroeder made a statement for the record that Mr. Fanning was not present for his deposition and that Complaint Counsel had received no notice that Fanning was ill or otherwise unable to attend. (Motion, Ortiz Attachment J). Mr. Carr, Fanning's counsel, who appeared for the deposition, stated for the record that Carr had been engaged in settlement discussions with Complaint Counsel on July 28, 2014, that in a phone conversation with Mr. Boris Yankilovich for Complaint Counsel, Complaint Counsel and Fanning's counsel reached general terms about postponing the deposition, but that by email sent at 9:17 p.m. on July 28, 2014, Complaint Counsel stated that if Carr did not agree to its most recent settlement proposal, Complaint Counsel intended to proceed with the deposition of Mr. Fanning. (Opposition, Carr Attachment 1). Complaint Counsel contends no such agreement was reached. (Motion, Ortiz Attachment J).

1. Deposition of Fanning in his individual capacity

With respect to the request in Complaint Counsel's Motion that Fanning be compelled to testify at a deposition in his individual capacity, Commission Rule 3.38(a) sets forth that unless the Administrative Law Judge finds the objection is justified, the Administrative Law Judge shall order that the deposition be held. Upon review of the Motion, Opposition, and the exhibits attached thereto, the record fails to demonstrate that Fanning's objection is justified. Accordingly, Fanning is hereby ordered to appear for his deposition. Complaint Counsel seeks dates between August 21 and 27 and to conduct the deposition in San Francisco, where Complaint Counsel is located. In an August 5, 2014, email from Mr. Carr to Complaint Counsel, Fanning's counsel agreed to the deposition taking place in San Francisco, and further agreed to make him available "either September 3 or 4." (Opposition, Carr Attachment 7).

Based on the foregoing, Complaint Counsel's request that Fanning be compelled to testify at a deposition in his individual capacity is GRANTED. Fanning is hereby ORDERED to appear for a deposition in his personal capacity in San Francisco on either September 3 or 4, 2014. If Mr. Fanning is no longer available to appear for his deposition on those dates, he shall appear for his deposition in San Francisco between August 21 and 27, 2014.

2. Deposition of Fanning as a corporate representative of Jerk

With respect to the request in Complaint Counsel's Motion that Fanning be compelled to testify at a deposition as a corporate representative, Commission Rule 3.33(c)(1) provides that an organization "shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he or she will testify." 16 C.F.R.

§ 3.33(c)(1). Before withdrawing as counsel, Ms. Speth, on behalf of Jerk, designated John Fanning as a person with knowledge on matters specified in Complaint Counsel's Rule 3.33(c) deposition notice. (Motion, Schroeder Attachment E-3). There is nothing in the record to indicate that Jerk no longer wishes to designate Fanning as its corporate representative. Fanning asserts that Fanning never agreed to appear and testify on behalf of the company. (Opposition at 5).

Commission Rule 3.33(c)(1) is analogous to Rule 30(b)(6) of the Federal Rules of Civil Procedure. "Where the Commission has adopted provisions substantially similar to provisions in the Federal Rules, judicial constructions of such analogous provisions may serve as interpretive aids, but they are not to be regarded as binding, because application of the Commission's rules must be tailored to the circumstances of Commission proceedings." 43 Fed. Reg. 56862, 56863 (FTC Final Rules Dec. 4, 1978), *cited in In re Thompson Medical Co.*, 1983 FTC LEXIS 98, at *9 n.7 (March 11, 1983). Cases interpreting Federal Rule 30(b)(6) make clear that an organization has a duty to name and prepare a person or persons to testify on its behalf.

For example, in *Wachovia Sec., LLC v. NOLA, LLC*, 248 F.R.D. 544 (N.D. Ill. 2008), where a corporation designated a citizen of the United Kingdom as its corporate representative who refused to appear for deposition and the corporation failed to designate anyone in his place, the court explained:

A corporation cannot simply designate any representative who possesses the relevant information the deposing party seeks and wash its hands of any future responsibility. In other words, Rule 30(b)(6) does not allow a corporation to designate a corporate representative, then throw up its hands when the designee refuses to participate, then claim it has done its part. On the contrary, implicit in designating a Rule 30(b)(6) representative who is not an employee or managing agent, is that the witness will be able *and* willing to answer questions relating to the information sought. Federal Rule of Civil Procedure 30(b)(6) provides:

A party may in the party's notice and in a subpoena name as the deponent a public or private corporation for a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who *consent* to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify....

(Emphasis added). Moreover, the Advisory Committees Notes to the 1970 Amendment pertaining to Rule 30(b)(6), explains that an organization in response to a citation to discover assets shall "name one or more of its officers, directors, or managing agents or other persons *consenting* to appear and testify on its behalf with respect to matters known or

reasonably available to the organization. The organization may designate persons other than officers, directors, and managing agents, but *only with their consent.*" (Emphasis added). At the same time, a corporation's lack of control over potential designees does not eliminate the corporation's duty to appoint a Rule 30(b)(6) witness altogether. *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1146 (10th Cir. 2007) (Noting that the duty to appoint a corporate representative is "not negated by a corporation's alleged lack of control over potential Rule 30(b)(6) deponents.") It is well settled that corporations must also make a "conscientious good faith effort" when making its designation. *Sec. and Exch. Comm'n v. Buntrock*, 217 F.R.D. 441, 444 (N.D. Ill. 2003) (other citations omitted). In sum, the rule requires a company to do the following: (1) . . . appoint someone it has control over, such as an employee, or a consenting individual, whom the company has prepared to answer questions relating to the information sought by the deposing party; (2) where one person is not capable of answering all related questions, a corporation must appoint as many individuals as necessary to complete the relevant inquiry; and (3) [r]egardless of how many representatives are appointed, the company must apply good faith principles in its efforts to make a designation.

Id. at 548-49.

In its Answer to the Complaint, Jerk admits that Respondent John Fanning has done business at 165 Nantasket Avenue, Hull, MA 02045, but denies that Fanning is a member and manager of Jerk, LLC, and denies that Fanning has formulated, directed, controlled, or had authority to control the acts and practices of Jerk, LLC, including the acts or practices alleged in the Complaint. (Answer ¶ 2). Without knowing whether Fanning is someone who Jerk has control over but knowing that Fanning does not consent to testify on behalf of the company, Fanning cannot be compelled to testify on Jerk's behalf. For this reason, Complaint Counsel's request that Fanning be compelled to testify at a deposition as a corporate representative is DENIED WITHOUT PREJUDICE.

However, Jerk is still required to produce an individual to testify as to matters known or reasonably available to the organization in response to Complaint Counsel's 3.33(c)(1) deposition notice.³

B. Responses to Interrogatories served on Jerk

Complaint Counsel requests that Jerk be compelled to respond to Complaint Counsel's First Set of Interrogatories and asserts that Jerk has provided no justification for its non-response. As stated above, Jerk has not filed an opposition to Complaint Counsel's Motion.

³ Complaint Counsel may inquire into whether Fanning is someone Jerk has control over at the deposition of Fanning in his individual capacity.

Pursuant to Commission Rule 3.22(d), if the opposing party has not filed a response to a motion, the party “shall be deemed to have consented to the granting of the relief asked for in the motion.” 16 C.F.R. § 3.22(d). In addition, under Commission Rule 3.38(a), “[u]nless the Administrative Law Judge determines that [an] objection is justified, the Administrative Law Judge shall order that . . . [responses to] interrogatories be served” 16 C.F.R. § 3.38(a).

Although counsel for Jerk filed a Notice Regarding Representation indicating that Jerk is no longer represented by said counsel, Jerk remains a party in this case and is not entitled to ignore a discovery motion. Jerk did not file a response to the Motion and it cannot be determined whether Jerk has valid objections to the interrogatories. Accordingly, Jerk shall be deemed to have consented to the granting of the relief requested and ordered to respond. *See* 16 C.F.R. § 3.22(d).

For these reasons, Complaint Counsel’s request that Jerk be compelled to respond to Complaint Counsel’s First Set of Interrogatories is GRANTED. Jerk is hereby ORDERED to respond to Complaint Counsel’s First Set of Interrogatories by August 20, 2014.

C. Responses to Requests for Documents served on Fanning

Complaint Counsel asserts that Fanning failed to produce any documents in response to Complaint Counsel’s 32 Requests for Production (RFP) and that Fanning’s sole response to every RFP was that “[a]fter a diligent search” he was “not able to locate any responsive documents in his possession, custody, or control.” (Motion, Ortiz Attachment G). Complaint Counsel charges that this response is not credible.

Fanning responds that Complaint Counsel is improperly attempting to force Mr. Fanning to respond on behalf of Jerk, LLC, including by referring to “Respondents” collectively in its Requests, instead of limiting the requests to Mr. Fanning. Fanning further charges that Complaint Counsel’s RFP is primarily a “fishing expedition” and that “[t]he mere fact that [Complaint Counsel] does not like Mr. Fanning’s responses does not constitute failure to comply.” (Opposition at 2, 5).

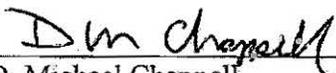
Fanning’s Responses to Complaint Counsel’s First Set of Requests for Documents, dated July 11, 2014, (Motion, Ortiz Attachment G), provides the following response to each of Complaint Counsel’s Requests: “After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.” (Motion, Ortiz Attachment G). This pleading was signed by counsel for Fanning. “Signing a document constitutes a representation by the signer that he or she has read it; that to the best of his or her knowledge, information, and belief, the statements made in it are true; that it is not interposed for delay; and that to the best of his or her knowledge, information, and belief, it complies with the rules in this part.” 16 C.F.R. § 4.2(f)(2).

In light of the representation that Fanning is not able to locate any responsive documents in Fanning's possession, custody, or control, there is nothing to compel at this stage. However, Complaint Counsel may inquire further at the deposition of Fanning to determine whether Fanning is withholding responsive documents. For these reasons, Complaint Counsel's request to compel documents from Fanning is DENIED WITHOUT PREJUDICE.

IV.

For the reasons set forth above, Complaint Counsel's Motion is GRANTED IN PART and DENIED WITHOUT PREJUDICE IN PART.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: August 15, 2014