UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright
Terrell McSweeny

In the Matter of	)	
Jerk, LLC, a limited liability company, also d/b/a JERK.COM, and	)	DOCKET NO. 9361
John Fanning, individually and as a member of Jerk, LLC.	)	PUBLIC DOCUMENT

COMPLAINT COUNSEL'S CONSOLIDATED OPPOSITION TO RESPONDENT JOHN FANNING'S AND JERK, LLC'S MOTIONS TO STAY ENFORCEMENT OF THE COMMISSION'S ORDER PENDING APPEAL

When in 1994 Congress eliminated automatic stays of FTC orders pending federal court review, it "expressed concern that with an automatic stay, 'a respondent may continue to engage in conduct which the FTC has determined unlawful until ultimate disposition of a petition for review, which often takes years.'" *In re California Dental*, 1996 FTC LEXIS 277, *9 (1996) (citing S. Rep. No. 130, 103d Cong., 1st Sess. at 11 (1993)). This precise concern is at the forefront here.

After full briefing on summary decision, on March 13, 2015, the Commission held that Respondents Jerk, LLC ("Jerk") and John Fanning ("Fanning") deceived consumers through two counts of deception alleged in the Complaint. The Commission concluded that Respondents' misrepresentations were serious and deliberate, and resulted in substantial harm to consumers.

Consequently, the Commission entered the Final Order ("Order"), imposing injunctive relief. Respondents now seek an indefinite stay of that Order—in its entirety—for however long it takes them to appeal to the United States Court of Appeals for the First Circuit. Yet they provide no valid basis for a stay. Instead of articulating any complexity or legal novelty about this case that would present a close appellate issue, Respondents rehash the same legal arguments they made to the Commission—repeatedly—in their summary decision oppositions. Likewise, instead of providing a coherent, factual articulation of irreparable harm if the Order is not stayed, Fanning offers conclusory and vague concerns about the Order impeding his various business dealings.

Most notably, Respondents completely sidestep the serious consumer harm threatened by deferring the Order. They present no basis from which to conclude that the very misconduct and consumer harm the Order is calculated to stop would not persist during its stay. They do not commit themselves to complying with the Order's core provisions enjoining further unlawful activity. On the contrary, they call into question the Order's underlying legitimacy, which renders the likelihood of continued violations almost certain.

I. LEGAL STANDARD

Commission Rule 3.56(b) permits a party subject to a cease and desist order under Section 5 of the FTC Act to apply to the Commission for a stay of all or part of that order pending judicial review. 16 C.F.R. § 3.56(b). A motion for a stay must address the following four factors: (1) "the likelihood of the applicant's success on appeal," (2) "whether the applicant will suffer irreparable harm if a stay is not granted," (3) "the degree of injury to other parties if a stay is granted," and (4) "why the stay is in the public interest." 16 C.F.R. § 3.56(c). It is the respondent's burden to establish that the sought stay is warranted. *In re Toys "R" Us, Inc.*, 126 F.T.C. 695, *8 (1998). Thus, Rule 3.56(c) requires that the respondent's motion for a stay must

be supported by "affidavits or other sworn statements, and a copy of the relevant portions of the record." *In re Kentucky Household Goods Carriers Association, Inc.*, 140 F.T.C. 1142, 1145, 1148 (2005) (denying stay because Respondents provided "no specific factual support for [their] assertions").

II. RESPONDENTS FAILED TO MEET THE STANDARD FOR A STAY

None of Rule 3.56(c)'s four factors supports a stay here. The questions adjudicated by the Commission are not sufficiently difficult or novel to render reversal by a circuit court likely. Additionally, Respondents fail to demonstrate that they will suffer irreparable harm if the Order remains in effect for the pendency of their appeal. Consumers, on the other hand, stand to suffer significant harm if enforcement of the Order is deferred.[1]

A. Respondents Are Unlikely to Succeed on Appeal.

1. The Commission based its decision on unconverted facts and a straightforward application of Section 5 deception law to them.

The first factor in determining whether a stay is warranted is Respondents' likelihood of success on appeal. This factor cuts in favor of a stay only in cases where the Commission rules "on an admittedly difficult legal question." *California Dental*, 1996 FTC LEXIS 277, at *10 (quoting *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841, 844-45 (D.C. Cir. 1977)). The seriousness or importance of either the case or the legal questions presented will not militate toward the stay absent a finding that the case was sufficiently complex or that the legal questions decided were sufficiently difficult. *In re North Texas Specialty*

[1] Jerk joins Fanning's motion to stay enforcement of the Order, but fails to include any supporting affidavit or other sworn statement in support of a stay for itself. Although Fanning's motion does include a sworn statement by Fanning himself, that statement addresses only Fanning's own position, not Jerk's. Notwithstanding Jerk's failure to meet Rule 3.56(c)'s threshold procedural requirement, a stay against it is unwarranted in any event for failure to meet the Rule's four factors.

Physicians, 141 F.T.C. 456, 459 (2006).

This framework undercuts Respondents' request. This is a straightforward deception case resolved on summary decision. The likelihood that an appellate court would find error with the Commission's factual conclusions is miniscule. The Commission based its decision on uncontroverted evidence. The only evidence Respondents offered on the record was Fanning's self-serving affidavit, which the Commission rightly rejected as unreliable.

Moreover, the Commission's decision was based on well-established law. Its opinion contains no hint that this case involved difficult or novel legal questions. And Respondents fail to identify any such questions now. Instead, they largely revisit legal arguments that the Commission already considered, and rejected, on summary decision.[2] For example, Respondents once again argue that the representations underpinning Count I cannot form the basis for a Section 5 violation because they do not constitute an "advertisement."[3] As the Commission explained, however, "Section 5 applies broadly to 'deceptive act or practices'" and "[t]hus the Commission's authority is not confined to claims that can be identified as advertising or other promotional claims."[4] In reaching that conclusion, the Commission relied on well-established FTC precedent involving deceptive representations on websites, in privacy policies, and in legal disclaimers.[5] Respondents ignore that explanation, but still fail to present any authority that limits Section 5's application to some circumscribed conception of advertising.

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[2] Respondents' arguments regarding likelihood of success on appeal revolve around Count I of the Complaint. Fanning's motion briefly mentions Count II, but fails to identify any facts that challenge the Commission's findings. Fanning's Motion To Stay Order Pending Review (Apr. 29, 2015) ("Fanning Mtn.") at 6.

[3] Fanning Mtn. at 4-6.

[4] Opinion of the Commission (Mar. 13, 2015) ("Comm'n Op.") at 11.

[5] *Id.* at 5, 11.

The only argument made by Respondents that could be characterized as new is the contention that they lacked "fair notice" that they could be liable for implied claims, and thus did not fully brief the issue.[6] Seizing on the Commission's determination that the claim alleged in Count I was an implied representation, as opposed to an express one, Respondents argue that the Commission "*sua sponte* altered the theory espoused on summary judgment."[7] Respondents' assertion that they were unaware of the allegations in this case defies credulity. First, the Complaint explicitly states that Respondents made the deceptive representations alleged in Count I "expressly *or by implication.*"[8] Second, Complaint Counsel's summary decision briefing made it clear that the evidence presented established that "Jerk made the representation alleged in Count I through multiple explicit and *clearly implied* statements."[9] Complaint Counsel not only made this in-the-alternative position clear, but also relied on cases involving implied claims,[10] and explained how the display of personal photographs taken from Facebook on Jerk.com created the impression that someone the consumers knew created their Jerk profiles.[11]

Finally, Respondent's own briefings in opposition to summary decision belie the notion

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[6] Fanning Mtn. at 4.

[7] *Id.*

[8] Complaint (Apr. 7, 2014) at ¶ 15 (emphasis added).

[9] Complaint Counsel's Reply to Respondent Jerk, LLC's Opposition to Complaint Counsel's Motion for Summary Decision (Jan. 16, 2015) at 6 (emphasis added). *See also id.* at 7 (Jerk.com's Twitter page likewise *clearly implied* that Jerk. com displayed people-created profiles) (emphasis added); *id.* at 9 ("representation alleged in Count I was conveyed through express and *conspicuous implied* statements") (emphasis added); *cf.* Complaint Counsel's Motion for Summary Decision (Sept. 29, 2014) at 20 ("Even if this representation were not disseminated through express statements, it would still be presumptively material . . .").

[10] Complaint Counsel's Reply to Respondent John Fanning's Opposition to Complaint Counsel's Motion for Summary Decision (Nov. 12, 2014) at 9.

[11] Complaint Counsel's Motion for Summary Decision (Sept. 29, 2014) at 7-8. *See also id.* at 20.

that they were caught unaware by the presence of implied claims in this case. Jerk, in its opposition to summary decision, described Complaint Counsel's position as arguing that jerk.com's "About Us" page "*implicitly* represented that all profiles on jerk.com were created by jerk.com users."[12] Jerk also argued:

> Complaint Counsel argues that this purported representation could be presumed material because it was made explicitly ***or was made implicitly*** but intentionally. *See Kraft, Inc.*, 970 F.2d at 322. No explicit representation is contained in the evidence, so that theory fails. Even if the Commission somehow discerns ***an implicit representation***, the presumption of materiality does not apply because there is no evidence Jerk intended to make it to consumers.[13]

Similarly, Fanning's opposition to summary decision urged the Commission to interpret the words in jerk.com's "About Us" section "in context" as merely a legal disclaimer, as opposed to the site's expression about the source of content.[14] In other words, like Jerk, Fanning urged the Commission to reject the *implied* claim interpretation proposed by Complaint Counsel. Thus, Respondents were fully aware that Count I was based on either an express or implied interpretation of Respondent's statements, and argued against the implied interpretation advanced by Complaint Counsel. The fact that Respondents did not petition for reconsideration, as is allowed by Rule 3.55 when facing "new questions raised by the [Commission's] decision . . . which the petitioner had no opportunity to argue," only reaffirms this argument as a red herring.

In sum, especially because the Commission enjoys great deference in interpreting

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[12] Respondent Jerk LLC's Opposition to Complaint Counsel's Motion for Summary Decision (Jan. 5, 2015) at 7 (emphasis added).

[13] *Id.* at 10 (emphasis added).

[14] Opposition of Respondent John Fanning to Complaint Counsel's Motion for Summary Decision (Nov. 4, 2014) at 9. *See also id.* at 9-10 ("Nothing contained in the homepage disclaimer constitutes a 'claim' about the source of content, either express or implied . . .").

deceptive claims,[15] Respondents' argument that the Commission's "finding has no basis in law" is highly unlikely to succeed on appeal.[16]

2. The Order is narrowly-tailored and reasonably related to Respondents' unlawful practices.

Fanning also asserts that Respondents will be victorious on appeal because the Order "far exceeds the bounds of permissible relief."[17] However, Fanning fully argued this issue on summary decision,[18] and the Commission addressed the argument in its opinion, finding the Order valid because it is sufficiently clear and reasonably related to Respondents' law violations.[19] Indeed, the Commission went an extra step by excising from the Order proposed provisions that it found unjustified.[20] "Respondents' renewal of [their] legal argument, without more, is insufficient to justify granting a stay." *North Texas Specialty Physicians*, 141 F.T.C. 456, at 458.

In any event, the attack on the Order as overbroad or otherwise impermissible does not raise a genuinely difficult or novel legal question. Federal courts have routinely upheld FTC orders that contain the type of injunctive provisions that this Order includes, including fencing-in relief and compliance monitoring. *See, e.g.*, *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) ("the Commission is not limited to prohibiting the illegal practice in the precise form in which it

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[15] *See Pom Wonderful, LLC, et al, v, Federal Trade Commission*, 777 F.3d 478, 490 (D.C. Cir. 2015) ("The Commission 'is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the [FTC] Act'") (citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965)); *Polygram Holding Inc., v. FTC*, 416 F.3d 29, 33 (D.C. Cir. 2005) (denying petition for review in administrative matter because courts are to give "deference to the Commission's informed judgment").

[16] Fanning Mtn. at 4-6.

[17] Fanning Mtn. at 2.

[18] Fanning Opposition to Summary Decision at 24-26.

[19] Comm'n Op. at 32-36.

[20] *Id.* at 34-35.

is found to have existed in the past."); *United States DOJ v. Daniel Chapter One*, 2015 U.S. Dist. LEXIS 42751, *17 (D.D.C. March 31, 2015) ("courts may order record-keeping and monitoring to ensure compliance with a permanent injunction"). Respondents offer no reason to suspect that the First Circuit will rule to the contrary.

B. Respondents Fail to Show Irreparable Harm to Themselves.

Respondents have not met their burden of "show[ing], with particularity, that the alleged irreparable injury is substantial and likely to occur absent a stay." *California Dental*, 1996 FTC LEXIS 277, at *6.

Jerk presents no argument whatsoever about irreparable harm to itself, thereby failing Rule 3.56(c)'s test. Fanning does argue irreparable harm, articulating three points about the projected harm the Order would impose on him: (1) the Order will abrogate his First Amendment rights; (2) the Order will "affect [his] livelihood" by "negatively impact[ing]" his business; and (3) the Order's notification requirements are burdensome because Fanning conducts business with "a large number of companies on a regular basis."[21]

Fanning's arguments are unavailing. First, the Commission has already considered, and *rejected*, Fanning's First Amendment challenge to the Order.[22] Moreover, as the Commission pointed out, Fanning's contention that the Order will prohibit his ability to make or publish *true* statements is factually wrong.[23] So long as Fanning does not make *misrepresentations* covered by Count I, his speech will remain unencumbered by the Order.[24]

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[21] Fanning Mtn. at 9-11; Ex. 3, p. 2.

[22] Comm'n Op. at 36.

[23] Fanning Mtn. Ex. 3, p. 2; Comm'n Op. at 36 (clarifying that the Order prohibits "misleading" speech).

[24] If Fanning is concerned that disposing of consumer information required under Part II of the

Second, Fanning's concern about negative business impact also falls short because Fanning provides no fact-based explanation to support that conclusion. A respondent's "[s]imple assertions of harm or conclusory statements based on unsupported assumptions will not suffice." *California Dental*, 1996 FTC LEXIS 277, at *6. Here, Fanning contends that the Order's compliance monitoring and reporting requirements "will infringe upon my privacy rights, will potentially infringe upon the privacy rights of my clients, and will contravene certain non-disclosure agreements."[25] But Fanning provides no explanation of how the perceived infringement upon *his* privacy rights would affect any business of his, or whether and how that impact would be irreparable. Fanning's contention about the perceived infringement on his clients' privacy rights is even more speculative, as Fanning himself concedes that any such infringement is merely "potential[]." Likewise, Fanning's allusion to "certain" non-disclosure agreements is insufficient to support a stay. Fanning does not identify any such agreement, or explain how or why the absence of a stay would contravene it.

Third, Fanning's concern that the Order's ten-year reporting requirement would unduly burden him has no bearing on the showing of "irreparable harm" required by Rule 3.56(c). Even if Fanning could successfully equate the typical burdens associated with compliance reporting with irreparable harm, the conclusion that Fanning's business transactions are so numerous and frequent as to render his burden irreparable, or even exceptionally great, is groundless in the absence of any specific facts.

Order would lead to irreversible harm, Complaint Counsel would not object to storing that information in escrow under FTC control until the conclusion of Fanning's appeal. This solution would prevent the threat of ongoing consumer harm, while preserving Respondents' ability to regain control of the information should the appellate court strike Part II.

[25] Fanning Mtn. Ex. 3, p. 2.

C. Staying the Order Would Risk Significant Harm to Consumers.

Because the movants' adversary is Complaint Counsel, responsible for representing the public interest in effective law enforcement, the Commission considers the Rule's third and fourth prongs together, inquiring into the likely harm from issuing a stay to others and the public interest. *California Dental*, 1996 FTC LEXIS 277, at *8.

Respondents fail to present a convincing argument that their sought stay would present little harm to others and the public interest. Fanning's argument that there is no possible risk of harm to the public because jerk.com is not currently operational is both erroneous and logically untenable. Jerk.com is currently live online.[26] What level of involvement Respondents continue to have with the jerk.com domain is a question to which the Commission will not know the definitive answer until Respondents comply with the Order.[27] In any event, whether or not Respondents continue to operate jerk.com misses the point. Citing Respondents' demonstrated pattern of transferring consumer information from jerk.com to other websites, the Commission already sanctioned the Order's application to beyond just the jerk.com URL.[28] Thus, the risk of harm to consumers from Respondents continuing to engage in conduct that contravenes the Order does not hinge on jerk.com's operational status.

Contrary to Fanning's conclusory argument, staying the Order risks significant harm to consumers. Respondents' misconduct has the potential to harm millions of consumers, as

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[26] *See* www.jerk.com (last visited May 1, 2015).

[27] In July of 2014, Jerk obtained a default judgment against Louis Lardas (d/b/a Internet Domains) in an Arizona lawsuit in which Jerk complained that Lardas breached his domain lease agreement with Jerk by posting offensive content on Jerk.com without Jerk's authorization. *See* Jerk, LLC v. Lardas, Ariz. Sup. Ct. cv2013-011439 (filed Aug. 14, 2013). Jerk's action and its disposition leave open the possibility that Jerk continues to retain or can reassert lawful control over jerk.com.

[28] Comm'n Op. at 33-34.

evidenced by Respondents falsely passing off as many as 85 million jerk.com profiles as user-generated, and then charging consumers money to manage those profiles without providing any benefit in return.[29] This misconduct has resulted in hundreds of filed consumer complaints, some of which reported concerns about personal and family safety, in addition to lost money.[30] The Commission has already recognized this "substantial harm to consumers."[31]

The Commission also concluded that Respondents' violations were not only serious, but also deliberate, since Respondents made their misrepresentations knowingly.[32] This finding of deliberateness reaffirms the need to protect consumers now. This is not a case where a respondent violates Section 5 unwittingly, and through the FTC's enforcement action recognizes the mistake and commits itself to resolving it notwithstanding the Order. Here, Respondents have consistently challenged this action as illegitimate, maintaining that the alleged misconduct was lawful, even constitutionally immune. Even now, after the Commission found him liable for Section 5 deception violations, Fanning characterizes this action as "malicious" and "unlawful," and maintains an "absolute right to use, publish and disseminate information gathered from public sources."[33] This persistent demonstrated unwillingness to accept the legitimacy of the Commission's action and its issued injunction magnifies the concern that Respondents will continue to engage in deceptive conduct if the Order's enforcement is deferred.

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[29] *Id.* at 33.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Fanning Mtn. at 3, 7.

III. CONCLUSION

Respondents have not met their burden under Commission rules for a stay. They have not shown likelihood of success on appeal, nor have they demonstrated irreparable harm. Conversely, consumers stand to suffer continued substantial harm if Respondents are not under Order. To protect consumers, the Commission should not stay enforcement of the Order.

Dated: May 6, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2015, I served a true and correct copy of COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO STAY ENFORCEMENT OF THE COMMISSION'S ORDER PENDING APPEAL on:

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