

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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



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.)

DOCKET NO. 9361

PUBLIC DOCUMENT

**COMPLAINT COUNSEL'S MOTION TO SUPPLEMENT THE RECORD ON
COMPLAINT COUNSEL'S PENDING MOTION FOR SUMMARY DECISION**

Pursuant to Federal Trade Commission Rules of Practice 3.24 and 3.32, and for the reasons stated in the supporting Memorandum filed herewith, Complaint Counsel respectfully request that the Commission permit Complaint Counsel to supplement the record on Complaint Counsel's pending Motion for Summary Decision with Respondents' admissions.

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S MOTION TO
SUPPLEMENT THE RECORD ON COMPLAINT COUNSEL'S PENDING MOTION
FOR SUMMARY DECISION**

After Complaint Counsel filed their Motion for Summary Decision and completed their briefing in support of it, a new evidentiary development emerged bearing sufficient importance to seek supplementation of the record. Specifically, Respondents Jerk, LLC ("Jerk") and John Fanning ("Fanning") have constructively admitted critical facts that strongly support the disposition of this case on summary decision. Complaint Counsel could not present this new evidence in their Motion for Summary Decision or Statement of Material Facts because the admissions were not available at the time. Nonetheless, the Commission should consider this evidence when weighing the pending motion for summary decision because these admissions are highly probative and entirely consistent with the undisputed material facts and evidence presented by Complaint Counsel in support of summary decision.

BACKGROUND

Complaint Counsel moved for summary decision on September 29, 2014. (Declaration of Beatrice Burke, enclosed herewith ("Burke Dec.") ¶ 2) Fanning filed his opposition on November 4, and Complaint Counsel filed their reply on November 12.¹ (*Id.*) Jerk did not oppose summary decision. (*Id.*)

On November 4, Complaint Counsel served their Second Requests for Admission ("RFAs") on Respondents. (*Id.* ¶ 3-4, Exs. A-C) Complaint Counsel served Fanning by sending an email to his counsel, Mr. Peter Carr. (*Id.* ¶ 4) Complaint Counsel served Jerk by sending an email to Ms. Maria Crimi Speth, the counsel who had previously entered an appearance for Jerk

¹ On November 19, Fanning filed a surreply to Complaint Counsel's reply. While Fanning's surreply was filed without first obtaining leave and is therefore procedurally improper before the Commission, *see* 16 C.F.R. § 3.22(d), *see also In re N.C. State Bd. of Dental Examiners*, 151 F.T.C. 607, 609 n.2 (2011), it is useful in highlighting the distinction between the argumentative, evidence-barren rebuttals offered therein and the newly-discovered evidence presented here. *See Panoke v. U.S. Army Military Police Brigade*, No. CIV. 05-00432, 2007 WL 2790750, at *13 (D. Haw. Sept. 21, 2007) (rejecting the argumentative surreply masked as an evidentiary supplementation of the record).

in this action, and by mailing a copy to Jerk's registered agent (*id.* ¶ 3)—both methods authorized by the Chief Administrative Law Judge's Order of November 3, 2014. Complaint Counsel also provided copies of the RFAs to the Secretary. (*Id.* ¶ 5)

Complaint Counsel did not receive any response to the RFAs from Respondents by the end of the ten-day period prescribed by Rule 3.32(b). (*Id.* ¶ 7) Indeed, to date Complaint Counsel have not received any response to the RFAs from Respondents at all; nor has any copy of such been filed with the Secretary. (*Id.* ¶ 7)

ARGUMENT

A. Legal Standard.

On summary decision, Rule 3.24(a)(3) permits supplementation of the record with additional evidence. Federal courts also have permitted supplementation of the record on a pending motion for summary judgment. *See, e.g., Miller v. Great Am. Ins. Co.*, --- F. Supp. 3d ---, No. 2:11-CV-67, 2014 WL 5877609, at *1, *5-6 (E.D. Va. Nov. 12, 2014); *O'Neil v. City of Iowa City, Iowa*, No. 3:05-CV-14, 2006 WL 4899911, at *1 (S.D. Iowa Aug. 11, 2006); *Steven N.S. Cheung, Inc. v. United States*, No. C04-2050, 2006 U.S. Dist. LEXIS 51755, at *6 (W.D. Wash. July 28, 2006). They have allowed evidentiary supplementation where, as here, "new facts have come to light and the Court would benefit from having the most complete record available to it when resolving the instant motion for summary judgment." *Cheung*, 2006 U.S. Dist. LEXIS 51755 at *6. In determining whether to allow a supplementation of the record on summary judgment, some courts consider: "(1) the moving party's reasons for not originally submitting the evidence; (2) the importance of the omitted evidence to the moving party's case; (3) whether the evidence was previously available to the non-moving party when it responded to the summary judgment motion; and (4) the likelihood of unfair prejudice to the non-moving

party if the evidence is accepted.” *Calvasina v. Wal-Mart Real Estate Bus. Trust*, 899 F. Supp. 2d 590, 606 (W.D. Tex. 2012) (citing *Freeman v. County of Bexar*, 142 F.3d 848, 853 (5th Cir. 1998)); see also *In re Jenkins*, 2003 Bankr. LEXIS 1267, *10 (Bankr. N.D. Tex. Oct. 7, 2003) (same).

B. Complaint Counsel Have A Valid And Justifiable Reason For Not Submitting Respondents’ Admissions Earlier.

Complaint Counsel have a well-justified reason for seeking to supplement the record on summary decision. As demonstrated in the pending Motion for Summary Decision, Complaint Counsel conducted extensive discovery in this action. They reserved a handful of requests for admission for after Respondents’ opposition to summary decision. Complaint Counsel hoped Respondents’ opposition would clarify what material facts remained subject to genuine dispute. Having received no opposition from Jerk and an opposition raising no genuine dispute about material facts from Fanning, Complaint Counsel immediately served their remaining RFAs with the intent to conclusively resolve the core issues of Respondents’ liability and not expend resources on an unnecessary trial.

Complaint Counsel served the RFAs without delay on November 4, the same day they received Fanning’s opposition to summary decision and learned of Jerk’s failure to oppose. Complaint Counsel could not anticipate when Respondents would respond to the RFAs, and whether their responses, due November 14, would arrive before or after Complaint Counsel’s November 12 deadline to reply in support of summary decision. As it turned out, Respondents did not respond to the RFAs at all, and have therefore admitted all the matters presented therein. See 16 C.F.R. § 3.32(b) (“The matter is admitted unless, within ten (10) days after service of the request, or within such shorter or longer time as the Administrative Law Judge may allow, the party to whom the request is directed serves upon the party requesting the admission, with a copy

filed with the Secretary, a sworn written answer or objection addressed to the matter.”); *see also* *Luick v. Graybar Electric Co.*, 473 F.2d 1360, 1362 (8th Cir. 1973) (holding that, under the Federal Rules of Civil Procedure, “[u]nanswered requests for admissions render the matter requested conclusively established for the purpose of that suit”); *United States v. 2204 Barbara Lane*, 960 F.2d 126, 129 (11th Cir. 1992) (defendants’ failure to respond to requests for admissions constituted conclusive admission on decisive matters); *Kingstro v. Cnty. of San Bernardino*, No. CV 12-4673, 2014 WL 3571803, at *6 (C.D. Cal. July 18, 2014) (deeming admitted, on summary judgment, responses submitted after the deadline prescribed by the federal rules); *cf. Rainbolt v. Johnson*, 669 F.2d 767, 768 (D.C. Cir.1981) (reversing the district court for failing to give binding and conclusive effect to unanswered requests for admissions).

Complaint Counsel did not know, and could not have known, that Respondents would not respond to the RFAs. Thus, Complaint Counsel could not have raised this new evidence in their reply brief on summary decision, which they filed on November 12. Since this new evidence came to light after Complaint Counsel’s final submission on summary decision, Complaint Counsel should have the opportunity to present it to the Commission now. *See Cheung*, 2006 U.S. Dist. LEXIS 51755 at *6 (permitting supplementation of the record where “new facts have come to light”).

C. Respondents’ Admissions Are Relevant To Complaint Counsels’ Case.

Respondents’ admissions are relevant to Complaint Counsels’ case. To justify admission into the record on summary decision, the new evidence should be relevant to the issues in the case. *See Cheung*, 2006 U.S. Dist. LEXIS 51755 at *5-6 (admitting new evidence to the extent it is relevant). Because “summary judgment may be based on admitted matter,” *Luick*, 473 F.2d at 1362, courts have relied on deemed party admissions where they would help the court resolve

issues dispositive of the alleged claims on summary judgment. *See 2204 Barbara Lane*, 960 F.2d at 129 (granting summary judgment based on defendants' deemed admissions on the core issue); *Kingstro*, 2014 WL 3571803 at *15 (relying on deemed admissions as dispositive in granting summary judgment).

Here, Respondents' admissions are important because they are highly probative, if not outright dispositive, of Jerk's deceptive conduct and Fanning's individual liability for them. For instance, in addition to the uncontroverted evidence presented by Complaint Counsel establishing that Jerk did, in fact, violate Section 5 of the FTC Act through the conduct alleged in the Complaint, Jerk has now conclusively admitted so. (Burke Dec. Ex. A ¶¶ 1, 2) The company also has admitted that it employed Fanning as a managing member with authority to control Jerk's acts and practices. (*Id.* Ex. A ¶¶ 3, 4) Similarly, Fanning has admitted that, during the relevant time period, he served as Chairman of Netcapital.com, LLC, the company that held the majority stake in Jerk, and that as part of his duties for Jerk, he advised the company on compliance with U.S. laws; reviewed content displayed on Jerk.com; met with investors about providing financial backing for Jerk; and advised the person he considered to be Jerk's CEO. (*Id.* Ex. B ¶¶ 1-5, 7, 8; Ex. A ¶ 5)

Respondents' admissions to these facts are not surprising given that Complaint Counsel have independently established them through other evidence. (Complaint Counsel's Statement of Material Facts as to Which There Is No Genuine Issue of Fact., filed Sept. 29, 2014, ¶¶ 14-181) The admissions are nevertheless important because they conclusively preclude any likelihood—no matter how remote it was in the first place, in the face of Complaint Counsel's overwhelming evidence—of Respondents genuinely disputing Complaint Counsel's evidence at trial. *See Kingstro*, 2014 WL 3571803 at *15 (granting summary judgment where deemed

admissions compelled conclusions on core issues). In short, Respondents' admissions confirm what Complaint Counsel's evidence already shows: Respondents are liable as alleged in the Complaint.

D. The New Evidence Was Readily Available to Respondents and Its Admission Will Not Prejudice Them.

Supplementing the record with Respondents' deemed admissions will not prejudice Respondents. These admissions are Respondents' own evidence. By definition, this evidence was available to Respondents, even before it was available to Complaint Counsel. Accordingly, Respondents cannot plausibly argue that the Commission's review of this evidence will prejudice Respondents by catching them off guard or depriving them of an opportunity to examine and rebut the evidence. *See Briggs v. Prince*, No. 12-0624, 2014 U.S. Dist. LEXIS 106873, at *15 (E.D. La. Aug. 4, 2014) (finding no prejudice where the opposing party had been aware of the newly introduced evidence); *cf. H & A Land Corp. v. City of Kennedale*, 4:02-CV-458, 2005 U.S. Dist. LEXIS 25797, at *9-10 (N.D. Tex. Oct. 24, 2005) (finding prejudice where the opposing party would not have adequate opportunity to respond to the new evidence through discovery).

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully ask the Commission to supplement the record on Complaint Counsel's pending Motion for Summary Decision with Respondents' admissions to the RFAs.

PUBLIC DOCUMENT

Dated: November 25, 2014

Respectfully submitted,



Sarah Schroeder
Yan Fang
Boris Yankilovich
Ken Abbe
Western Region – San Francisco
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103

COMPLAINT COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2014, I served a true and correct copy of Complaint Counsel's Motion to Supplement the Record on Complaint Counsel's Pending Motion for Summary Decision on:

The Office of the Secretary:

Donald S. Clark
Office of the Secretary
600 Pennsylvania Avenue, N.W.
Room H-172
Washington, D.C. 20580

The Office of the Administrative Law Judge

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Avenue, N.W.
Room H-106
Washington, D.C. 20580

Counsel for John Fanning:

Peter F. Carr, II
Eckert, Seamans, Cherin & Mellott, LLC
Two International Place, 16th Floor
Boston, MA 02110
Email: pcarr@eckertseamans.com

Jerk, LLC's Registered Agent:

National Registered Agents, Inc.
160 Greentree Drive, Suite 101
Dover, DE 19904

Counsel who entered an appearance for Jerk, LLC:

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

Date: November 25, 2014


Elizabeth Lewis (elewis@ftc.gov)
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103
Phone: 415-848-5100
Fax: 415-848-5184

email address Ms. Speth had previously provided for use in this litigation and has used to correspond with Complaint Counsel. That day, I also served an additional copy on Jerk by overnight delivery to Jerk's registered agent, National Registered Agents, Inc. in Dover, Delaware.

4. Attached hereto as Exhibit B is a true and correct copy of Complaint Counsel's Second Request for Admissions to Respondent John Fanning, which I served on Fanning on November 4, 2014 at approximately 1:46 pm Pacific by email to his counsel, Mr. Peter F. Carr, at the email address Mr. Carr has provided for use in this litigation and regularly uses to correspond with Complaint Counsel.

5. On November 4, 2014 at approximately 1:52 pm Pacific, I sent an email to the Office of the Secretary enclosing copies of Complaint Counsel's Second Request for Admissions to Respondent Jerk, LLC and Second Request for Admissions to Respondent John Fanning.

6. Attached hereto as Exhibit C is a true a correct copy of the Certificate of Service for Complaint Counsel's Second Request for Admissions to Respondent Jerk, LLC and Second Request for Admissions to Respondent John Fanning.

7. Complaint Counsel have not received any response from either Jerk or Fanning to Complaint Counsel's Second Request for Admissions to Respondent Jerk, LLC and Second Request for Admissions to Respondent John Fanning. A representative of the Office of the Secretary has confirmed to Complaint Counsel that it also has not received any response from either Respondent.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this November 25, 2014, in San Francisco, CA.



Beatrice Burke

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
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individually and as a member of)
Jerk, LLC.)
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COMPLAINT COUNSEL'S SECOND REQUEST FOR ADMISSIONS TO
RESPONDENT JERK, LLC

Pursuant to Commission Rule of Practice 3.32, Complaint Counsel request that Respondent Jerk, LLC admit the truth of the statements set forth below within ten (10) days after service of this Request.

INSTRUCTIONS

For the purposes of this Request for Admissions, each paragraph constitutes a separate statement and is to be admitted or denied separately.

Pursuant to Rule 3.32(b), you must specifically admit or deny the requested admission, or set forth in detail the reasons why you cannot admit or deny the matter. A denial must fairly meet the substance of the requested admission, and when good faith requires that you qualify your answer or deny only a part of the requested admission, you must specify what portion of it is true and qualify or deny the remainder. In addition, you may not give lack of information or knowledge as a reason for failure to admit or deny unless you state that you have made reasonable inquiry and that the information known or readily obtainable by you is insufficient to enable you to admit or deny.

Rule 3.32(b) requires that your responses be sworn to under oath.

It is not grounds for objection that the requested admission relates to opinions of fact or the application of law to fact. Your belief that the matter on which an admission is requested

presents a genuine issue for trial does not, on that ground alone, provide a valid basis for objection.

For the purposes of this Request for Admissions, the term "profile" shall mean a page on the website Jerk.com that displayed a person's name, picture (or a blank square or avatar in lieu of a picture), buttons to vote the profiled person a "jerk" or "not a jerk," a tally of the vote results, and a space to enter comments and add other information about the profiled person.

Unless otherwise specified, the relevant time period is from January 1, 2008 to the date of full and complete compliance with this Request for Admissions.

ADMISSION REQUESTS

Complaint Counsel requests the following admissions:

1. Paragraphs 4 through 14 of the Federal Trade Commission's Complaint in this action (the "Complaint") accurately describe Jerk, LLC's acts and practices.
2. Jerk, LLC has made deceptive representations in violation of Section 5(a) of the Federal Trade Commission Act as described in Paragraphs 15 through 19 of the Complaint.
3. John Fanning has been a managing member of Jerk, LLC.
4. John Fanning has had authority to control Jerk, LLC's acts and practices.
5. NetCapital.com, LLC has been the majority shareholder of Jerk, LLC.
6. Jerk, LLC does not currently carry out any activities, including any ongoing business.
7. Jerk, LLC does not currently have any place of business.
8. Jerk, LLC does not currently have any members, officers, directors, managers, or employees.

Date: November 4, 2014

/s/ Sarah Schroeder
Sarah Schroeder
Federal Trade Commission
Bureau of Consumer Protection
901 Market Street, Suite 570
San Francisco, CA 94103
Phone: (415) 848-5100

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RESPONDENT JOHN FANNING

Pursuant to Commission Rule of Practice 3.32, Complaint Counsel request that Respondent John Fanning admit the truth of the statements set forth below within ten (10) days after service of this Request.

INSTRUCTIONS

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ADMISSION REQUESTS

Complaint Counsel requests the following admissions:

1. John Fanning was hired to advise Jerk, LLC by NetCapital.com, LLC, either directly or through its lawyer(s).
2. John Fanning has been the Chairman of NetCapital.com, LLC.
3. As part of his duties advising Jerk, LLC, John Fanning advised Jerk, LLC about Jerk.com's compliance with United States laws.
4. As part of his duties advising Jerk, LLC, John Fanning has reviewed content displayed on the Jerk.com website.
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6. As part of his duties advising Jerk, LLC, John Fanning has used the email address [REDACTED].com to send and receive email communications relating to Jerk.com.
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8. As part of his duties advising Jerk, LLC, John Fanning has advised Jerk, LLC's lawyer Maria Speth.

Date: November 4, 2014

/s/ Sarah Schroeder
Sarah Schroeder
Federal Trade Commission
Bureau of Consumer Protection
901 Market Street, Suite 570
San Francisco, CA 94103
Phone: (415) 848-5100

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2014, I served a true and correct copy of (1) COMPLAINT COUNSEL'S SECOND REQUEST FOR ADMISSIONS TO RESPONDENT JOHN FANNING, and (2) COMPLAINT COUNSEL'S SECOND REQUEST FOR ADMISSIONS TO RESPONDENT JERK, LLC on:

Counsel for John Fanning:

Peter F. Carr, II
Eckert, Seamans, Cherin & Mellott, LLC
Two International Place, 16th Floor
Boston, MA 02110
Phone: (617) 342-6800
Email: pcarr@eckertseamans.com

Jerk, LLC's Registered Agent:

National Registered Agents, Inc.
160 Greentree Drive, Suite 101
Dover, DE 19904

Counsel who entered an appearance for Jerk, LLC:

Maria Crimi Speth
Jaburg & Wilk, P.C.
3200 N. Central Avenue, Suite 2000
Phoenix, AZ 85012
Phone: (602) 248-1089
Email: mcs@jaburgwilk.com

The Office of the Secretary:

Donald S. Clark
Office of the Secretary
600 Pennsylvania Avenue, N.W.
Room H-172
Washington, D.C. 20580

Date: November 4, 2014



Beatrice Burke (bburke@ftc.gov)
Federal Trade Commission
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San Francisco, CA 94103
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Fax: 415-848-5184

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