

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



ORIGINAL

_____)
In the matter of:)
)
Jerk, LLC, a limited liability company,) DOCKET NO. 9361
)
Also d/b/a JERK.COM, and)
) PUBLIC
John Fanning,)
Individually and as a member of)
Jerk, LLC,)
)
Respondents.)
_____)

**OBJECTION OF RESPONDENT JOHN FANNING
TO RENEWED MOTION TO COMPEL DISCOVERY**

Complaint Counsel continues to waste resources with trivial motions to compel that lack substance and merit. Complaint Counsel continues to deluge Mr. Fanning and his counsel with filings, emails, correspondence, and discovery demands to bury him and to force him to spend money. At least four (4) attorneys for the Commission are working on this matter full-time. Complaint Counsel's scorched earth strategy with the intent to beat Mr. Fanning down is well-established. Mr. Fanning has never intentionally failed to comply with discovery, or refused to engage in efforts to confer. Complaint Counsel is on the west coast and has a penchant for proposing times to meet and confer well-after 5:00 PM Boston time. Meanwhile, Complaint Counsel completely stonewalled Mr. Fanning's discovery requests specifically aimed at the central issues and theories raised in the case. Mr. Fanning chose not to expend resources on compelling further answers, but rather focused on other important matters in the case, including responding to the motion for summary decision papers that collectively exceeded 100 pages and

the sixteen page reply to Mr. Fanning's opposition. Complaint Counsel has served more than 20 deposition subpoenas, and, according to the Complaint Counsel in the summary decision motion: "Since the start of discovery in late May, Complaint Counsel have received more than 13,800 pages of documents from sixteen third parties, as well as five sworn declarations, and have deposed four witnesses." Unfortunately, Complaint Counsel questioned witnesses at deposition for hours on irrelevant topics. Complaint Counsel even spent hours deposing the former attorney for Jerk, LLC, and asked question after question that clearly implicated the attorney-client privilege and work product. Mr. Fanning was deposed for approximately seven (7) hours on September 4, 2014 and answered all questions to the best of his ability, as captured in 300-plus pages of transcript, despite the passage of many years and despite much questioning that, once again, had no relevance to the claims or defenses. Complaint Counsel has run to this Court claiming a need for more discovery, despite representing to the Commissioners that Complaint Counsel had all the facts necessary to grant summary decision and deny Mr. Fanning a trial. Complaint Counsel will not stop until and unless this Court intervenes.

As for the responses, Mr. Fanning cannot be forced to answer affirmatively a question for which he is unsure the answer. The mere fact that Complaint Counsel does not like Mr. Fanning's responses or disagrees with the answers is not a proper basis to compel. Similarly, Mr. Fanning's response to Interrogatory No. 5 that he did not personally provide services to Jerk, LLC is a full, complete and proper answer to the question as posed. Nonetheless, to the extent that the question goes to the claim that Mr. Fanning "controlled" Jerk LLC for the purpose of establishing personal liability, Complaint Counsel in the summary decision papers committed six (6) pages on this point under the heading "Uncontroverted evidence demonstrates that Fanning is individually liable for the deceptive conduct alleged." If Mr. Fanning's liability is already

“uncontroverted” as claimed, no further discovery is warranted or necessary. Moreover, Complaint Counsel concedes that this area of inquiry was already fully-explored at Mr. Fanning’s deposition. Mr. Fanning described the work he performed in his advisory capacity including to provide “advice to ensure that the software that was being written and developed and built offshore was complying with the U.S. regulation.” (Fanning Depo., p. 196:3-6, cited in Complaint Counsel’s motion for summary decision). Also, Mr. Fanning submitted an Affidavit dated November 4, 2014 in opposition to summary decision that identified his involvement as an advisor to Jerk, LLC through NetCapital.com LLC. Specifically, Mr. Fanning stated that:

“NetCapital.com. LLC is a private equity/venture capital firm, with a number of partners, that invests in and provides advisory services to a wide-range of technology start-ups including those in its portfolio of companies. My authority was limited, and at all times I acted on behalf of NetCapital.com, LLC with respect to Jerk, LLC. I never acted in my individual capacity.”

“Jerk.com essentially was operated and controlled by Louis Lardass of Internet Domains, which owned the Jerk.com domain, and foreign software developers who were reportedly supported by various interns, college students, and other independent contractors working for their own benefit.”

“I was not responsible for spearheading and operating Jerk, LLC or Jerk.com.”

“Through and on behalf of NetCapital.com. LLC, I was part of a group involved in efforts to launch, finance, and expand the Jerk brand through the Jerk.com website.”

“I did not write any software code for Jerk, LLC to operate Jerk.com, and did not place any consumer content on Jerk.com.”

“I was not a software developer or web developer for Jerk, LLC.”

“I had no authority over or advisory agreement with the primary developers of the Jerk, LLC software.”

There is nothing more that Mr. Fanning can say in response to the interrogatory.

Complaint Counsel’s feigned outrage over the answers by Mr. Fanning is purely a further effort falsely to portray Mr. Fanning as a scoundrel and a villain.

As for document requests, Mr. Fanning did not waive his right to object. The fact that the responses were “tardy” by no more than two weeks, during the exact time that Mr. Fanning and his counsel were dealing with the extreme motion for summary decision, did not cause any prejudice to Complaint Counsel. Mr. Fanning had a right to object to the broad and over-reaching request, particularly considering the massive amounts of discovery that Complaint Counsel has already served and taken. Complaint Counsel controls all of the witnesses and the information, not Mr. Fanning.

The snippets from various unpublished decisions of federal district courts throughout the country on discovery issues cited by Complaint Counsel as support for the motion and relief requested do not control. Complaint Counsel ignores that all of these various cases involving discovery issues are extremely fact specific, and many have a long history that shaped the discretionary relief ordered by a federal court judge. Mr. Fanning could probably cite cases for the opposite propositions, if time and resources permitted. Complaint Counsel’s motion should be judged in the light of what has occurred in this case and the central issues presented in this case, and not measured against a discovery order entered in a 2008 case from the Southern District of Florida.

Finally, Complaint Counsel’s assertion that discovery must be reopened to force Mr. Fanning to expend unnecessarily more resources must be denied. As discussed above, Complaint Counsel has taken an overwhelming amount of discovery, and has effectively wielded its regulatory might to strong-arm access to information of all sorts. It would be a complete injustice and waste of resources to permit the tactics to continue through even more discovery. This is especially true given Complaint Counsel’s representations to the Commissioners in

seeking summary decision, in the motion filed on September 26, 2014, to avoid trial before this Court, as follows:

This action is ripe for summary decision. Given the track record in this matter, having the case proceed through another three months of discovery and an administrative hearing is far more likely to result in more obstructionist conduct than the development of additional evidence giving rise to any dispute of material fact.

The likelihood that Respondents will unearth any evidence through the remainder of discovery or the evidentiary hearing sufficient to counter or dispute the record evidence already developed by Complaint Counsel is miniscule. [...].

* * *

Through diligent discovery work Complaint Counsel have built a record of overwhelming uncontroverted evidence to support the Complaint's counts.

The contradictions and inconsistencies are glaring.

CONCLUSION

For the foregoing reasons, Respondent John Fanning requests this Court to deny Complaint Counsel's renewed motion to compel discovery.

Respectfully submitted,

JOHN FANNING,

By his attorneys,

/s/ Peter F. Carr, II

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Dated: December 4, 2014

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 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:

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One electronic copy per the prior order to:

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Dated: December 4, 2014