

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



ORIGINAL

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) DOCKET NO. 9361
)
John Fanning,)
individually and as a member of)
Jerk, LLC.)
)
_____)

**COMPLAINT COUNSEL’S OPPOSITION TO
RESPONDENT JOHN FANNING’S MOTION TO ENLARGE TIME TO RESPOND TO
COMPLAINT COUNSEL’S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Commission Rules of Practice 3.22, 3.24, and 4.3, Complaint Counsel respectfully submit this Opposition to Respondent John Fanning’s Motion to Enlarge Time (“Fanning’s Motion”) to respond to Complaint Counsel’s Motion for Summary Decision filed on September 29, 2014 (“MSD”). Fanning’s Motion should be denied because he failed to meet and confer with Complaint Counsel. Furthermore, the month-long extension requested by Fanning is excessive and prejudicial to Complaint Counsel. Should the Commission decide to extend the deadlines notwithstanding Fanning’s failure to meet and confer about his request, Complaint Counsel would request a more reasonable extension for Fanning, along with a modest extension for their reply.

I. Fanning's Motion should be denied because he failed to meet and confer with Complaint Counsel before filing.

The Court's May 28, 2014, Scheduling Order in this matter states:

Each motion (other than a motion to dismiss or a motion for summary decision) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. . . . Motions that fail to include such separate statement may be denied on that ground.

Scheduling Order, pp. 4-5. Fanning's Motion contains no such separate statement. It cannot, since Fanning did not meet and confer with Complaint Counsel before his filing. He did not even attempt to do so. On this basis alone, Fanning's Motion should be denied.

II. The month-long extension Fanning seeks is unreasonably long and would prejudice Complaint Counsel.

Had Fanning conferred with Complaint Counsel before seeking an extension, he would have learned about Complaint Counsel's willingness to agree on a reasonable extension for Fanning's response deadline. Fanning, however, did not confer, but instead has asked for a month-long extension. That is unreasonably long, and the Commission should not grant it. If the Commission extends Fanning's response to November 14, the deadline for the Commission's decision will be shifted to January 8, 2015, on the eve of trial. Complaint Counsel will have to finalize their witness list, provide rebuttal expert reports, and file motions *in limine*—all before the Commission may rule on the MSD.

The prejudice to Complaint Counsel, and to this proceeding, for this overly long extension far outweighs Fanning's stated reasons for seeking it. Fanning complains about the voluminous filing accompanying Complaint Counsel's MSD. That argument is meritless. Complaint Counsel have presented the evidence necessary to support their motion. They have

laid out their arguments, material facts, and supporting evidence in a clear and orderly manner. There is no needle in a haystack for Fanning to find in this record, or thousands of documents to review for relevance.

Fanning's argument that summary decision will subvert his due process right to "expose [the Commission's] unlawful exercise of regulatory authority" is unavailing. The Commission enacted its Rules, which allow for summary decision, through lawful procedure. Its summary decision process and standard mirrors Rule 56 of the Federal Rules of Civil Procedure, which permits summary judgment and which federal courts have applied in countless cases without serious due process concerns. If Fanning genuinely argues that due process entitles a civil defendant a trial when summary decision is otherwise warranted, he should provide legal authority supporting that proposition.

Fanning's argument that his counsel is too busy with other matters to respond until a full month after the deadline is similarly meritless. Fanning is represented by a large law firm with fifteen offices nationwide. His counsel of record, Peter Carr, is the partner in charge of his firm's Boston office, which alone has twenty-five attorneys.¹ Mr. Carr's "tight schedule" is no excuse for seeking unreasonably long delays in briefing filings. In addition, Fanning has not objected to the schedule enshrined in the Scheduling Order. Fanning should reasonably have expected Complaint Counsel to file a dispositive motion within a timeframe for the Commission to render a decision before trial.

¹ See <http://www.eckertseamans.com/offices.aspx?OfficeID=7>

III. Complaint Counsel would support a more reasonable extension, should the Commission choose to grant one at all.

Should the Commission decide to exercise its discretion to grant an extension notwithstanding Fanning's improperly filed motion, Complaint Counsel proposes the following schedule:

- Deadline for Fanning to file an Answer to Complaint Counsel's MSD: October 28, 2014
- Deadline for Complaint Counsel to file their Reply: November 10, 2014

These extensions would be reasonable and more consistent with the fast pace of administrative litigation. A 14 day extension would double the amount of time that Fanning has to respond to the MSD, from 14 to 28 days.² At twice the normal time allotted, Fanning should have no difficulty responding to the MSD by October 28th. Nothing in his motion suggests otherwise.

In return, Complaint Counsel seeks an additional six days in which to file a reply. This modest reciprocal extension is appropriate to address Fanning's likely forthcoming arguments, foreshadowed in his pending motion, about "a search for the truth and a check on the Executive Branch."

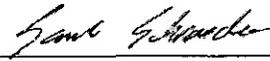
IV. Conclusion

In summary, Fanning's motion should be denied for his failure to meet and confer. If, however, in light of Complaint Counsel's articulated support for a reasonable extension, the Commission were to order an extension, it should extend the deadlines proposed herein, instead of granting the unreasonably long and prejudicial extension Fanning seeks.

² Commission Rule 3.24(a)(2) provides that a party opposing a motion for summary decision has 14 days in which to file an opposition.

Dated: October 3, 2014

Respectfully submitted,



Sarah Schroeder
Yan Fang
Boris Yankilovich
Kenneth H. Abbe

Federal Trade Commission
Western Region – San Francisco
901 Market Street, Suite 570
San Francisco, CA 94103

COMPLAINT COUNSEL

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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.**

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) DOCKET NO. 9361
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[PROPOSED] ORDER

It is hereby ORDERED that:

Respondent Fanning's Motion to Enlarge Time is Denied; or

Respondent Fanning's opposition to Complaint Counsel's Motion for Summary

Decision shall be due on _____. Complaint Counsel's reply in support
of the Motion for Summary Decision shall be due on _____.

ORDERED:

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED:

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2014, I served a true and correct copy of (1) COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT JOHN FANNING'S MOTION TO ENLARGE TIME TO RESPOND TO COMPLAINT COUNSEL'S MOTION FOR SUMMARY JUDGMENT, and (2) PROPOSED ORDER 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

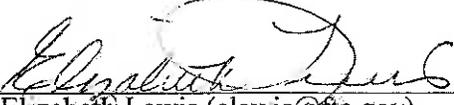
Jerk, LLC:

P.O. Box 277
Hingham, MA 02043

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

Date: October 3, 2014


Elizabeth Lewis (elewis@ftc.gov)
Federal Trade Commission
10877 Wilshire Boulevard
Los Angeles, CA 90024
Phone: (310) 824-4343
Fax: (310) 824-4380