

ORIGINAL

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



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

PUBLIC

**ASSENTED-TO MOTION OF RESPONDENT JOHN FANNING
FOR LEAVE TO AMEND ANSWERS TO SECOND REQUEST FOR ADMISSIONS,
AND TO SERVE ANSWERS LATE**

Respondent John Fanning ("Mr. Fanning"), pursuant to Rule 3.32(b) and (c) and the Commission's Order dated December 5, 2014 (copy attached at **Tab A**), hereby requests this Court for leave to serve late answers to Complaint Counsel's second request for admissions, and to permit an amendment to the prior responses currently deemed admitted for failure to provide timely responses. Mr. Fanning served answers on December 4, 2014. (**Tab B**). Mr. Fanning requests relief from this Court to avoid undue prejudice from the admissions being binding and conclusive as a result of the failure to respond by inadvertence and mistake, and to permit a decision on the merits. Complaint Counsel will not suffer any undue prejudice from permitting late amended responses. In further support of the requested relief, Mr. Fanning states as follows:

1. Complaint Counsel apparently served the second request for admissions on November 4, 2014. Unfortunately, counsel for Mr. Fanning did not realize that additional requests for admissions had been served on November 4, 2014. The admissions were served via

email around 5:00 PM by Ms. Burke. November 4, 2014 was the same day that Mr. Fanning was working to complete and file his detailed opposition to Complaint Counsel's motion for summary decision. Between November 4 and the response deadline of November 14, there was extensive activity in the case. Counsel for Mr. Fanning has been deluged with emails from Complaint Counsel throughout this case, and it is virtually impossible to keep track of all of the various communications and filings. In addition, although Complaint Counsel and counsel for Mr. Fanning communicated about discovery issues during this time period, Complaint Counsel never raised the admissions or queried the status of responses. Counsel for Mr. Fanning did not realize that admissions were outstanding. Counsel for Mr. Fanning became aware of the oversight when Complaint Counsel filed on November 25, 2014 a motion to supplement the summary decision record to add facts deemed admitted based solely on Mr. Fanning's failure to provide timely responses to the admissions. Upon learning of the oversight, counsel for Mr. Fanning took steps immediately to complete the answers and served them on December 4, 2014. Mr. Fanning has aggressively defended the case throughout. Mr. Fanning did not ignore the requests. The failure to respond was obviously an oversight.

2. Whereas the undue prejudice to Mr. Fanning is undeniable, there is no harm to Complaint Counsel in permitting the deemed non-responses to be stricken and supplemented with the answers served on December 4, 2014. This case must be decided on the merits instead of by default. There is no undue surprise. 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. There is no undue delay. Mr. Fanning served responses within nine (9) days of counsel learning of the oversight, and long before trial on the merits. Rule 3.32(c) grants this Court the power to permit amendment of admissions where justice requires

and no prejudice will result to Complaint Counsel as the party that obtained the admission. This is exactly such a case. Good cause exists to permit the amendment.

CONCLUSION

For the foregoing reasons, and in the interests of justice, Respondent John Fanning requests this Court to grant leave and to permit him to amend his answers to Complaint Counsel's second request for admissions.

Respectfully submitted,

JOHN FANNING,

By his attorneys,

/s/ Peter F. Carr, II

Peter F. Carr, II
ECKERT, SEAMANS, CHERIN & MELLOTT, LLC
Two International Place, 16th Floor
Boston, MA 02110
617.342.6800
617.342.6899 (FAX)

Dated: December 9, 2014

ASSENTED-TO:

FEDERAL TRADE COMMISSION

By its attorneys,

/s/ Sara Schroeder

Sara Schroeder
Federal Trade Commission
901 Market Street, Suite 670
San Francisco, CA 94103
Email: sschroeder@ftc.gov

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 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: ojl@ftc.gov

One electronic copy to the Office of the Counsel for the Federal Trade Commission:

Sarah Schroeder
Yan Fang
Kerry O'Brien
Federal Trade Commission
901 Market Street, Suite 670
San Francisco, CA 94103
Email: sschroeder@ftc.gov
yfang@ftc.gov
kobrien@ftc.gov

One electronic copy to counsel for Jerk, LLC:

David Duncan
Zalkind Duncan & Bernstein LLP
65A Atlantic Avenue
Boston, MA 02110
(617) 742-6020
dduncan@zalkindlaw.com

/s/ Peter F. Carr, II
Peter F. Carr, II
ECKERT, SEAMANS, CHERIN & MELLOTT, LLC
Two International Place, 16th Floor
Boston, MA 02110
617.342.6800
617.342.6899 (FAX)

Dated: December 9, 2014

EXHIBIT A

Complaint Counsel's Motion for Summary Decision. Respondent Jerk did not respond to the motion.¹ On November 12, Complaint Counsel filed their reply, and Mr. Fanning filed a surreply on November 19.

Following Mr. Fanning's opposition to Complaint Counsel's motion, on November 4, Complaint Counsel served its Second Request for Admissions on Respondents Jerk and Mr. Fanning. Neither Jerk nor Mr. Fanning responded to the Second Request for Admissions within the ten-day period provided by Commission Rule 3.32(b). *See* Declaration of Beatrice Burke, ¶ 7 (attached to Complaint Counsel's Motion to Supplement the Record). Complaint Counsel now move to add those statements to the record for their pending motion for summary decision as admissions.

In his opposition to the motion to supplement the record, Mr. Fanning admits that he did not respond to the Request for Admissions by November 14, but also states the failure to respond "was obviously an oversight." Fanning Opposition, ¶ 2. He also states that counsel for Mr. Fanning "has taken steps to complete the answers and expects to serve responses forthwith." *Id.* Mr. Fanning argues that Complaint Counsel provides no basis in Commission rules to supplement the summary decision record. He also claims there is undue prejudice against him if the admissions are added to the summary decision record and given conclusive effect.

Analysis

Commission Rule 3.24(a)(3) permits the affidavits supporting or opposing a motion for summary decision to be supplemented with additional discovery. Thus, contrary to Mr. Fanning's argument, Complaint Counsel's motion to supplement the summary decision record is properly before us.

Commission Rule 3.32(b) states that when a party serves written requests for admission on another party, "the matter is admitted unless, within ten (10) days after service . . . the party to whom the request is directed serves . . . a sworn written answer or objection addressed to the matter." Here, as Mr. Fanning admits, he did not respond to the Second Request for Admissions within the deadline. Thus, under Commission rules, the matters are deemed admitted. *See* 16 C.F.R. § 3.32(b). Moreover, absent other action, the admitted matters are deemed "conclusively established." *See* 16 C.F.R. § 3.32(c).

Mr. Fanning argues that his failure to respond to the Second Request for Admissions was inadvertent and that the use of the admissions is prejudicial. There is no question that the consequences to a party of having requests for admission deemed admitted and conclusively established can be severe. We note, however, that parties facing such consequences may appeal to an Administrative Law Judge. Commission Rule 3.32(b) states that requests for admission must be answered within ten (10) days or "such shorter or longer time as the Administrative Law

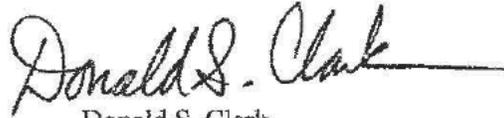
¹ In fact, Jerk has not provided any response or otherwise participated in this action since Jerk counsel of record filed a notice with the Commission and the Administrative Law Judge that as of July 18, 2014, she and her law firm no longer represent Jerk.

Judge may allow.” 16 C.F.R. § 3.32(b). Rule 3.32(c) provides that the ALJ “may permit withdrawal or amendment [of an admission] when the presentation of the merits of the proceeding will be subserved thereby and the party who obtained the admission fails to satisfy the Administrative Law Judge that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.” 16 C.F.R. § 3.32(c).

In light of the fact that the relevant requests for admissions were served recently and Mr. Fanning’s failure to respond might be due to excusable oversight, we decline to supplement the summary decision record at this time. We will allow Jerk and Mr. Fanning the opportunity to seek relief from the ALJ for their failure to timely respond to Complaint Counsel’s Second Request for Admissions pursuant to Rule 3.32(c). Any such motion must be filed no later than December 12, 2014.

Accordingly, Complaint Counsel’s Motion to Supplement the Record for Summary Decision is hereby DENIED WITHOUT PREJUDICE.

By the Commission.



Donald S. Clark
Secretary

Issued: December 5, 2014

EXHIBIT B

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

**RESPONDENT JOHN FANNING'S RESPONSES TO COMPLAINT COUNSEL'S
SECOND REQUESTS FOR ADMISSIONS**

Pursuant to Rule 3.32(b), Respondent John Fanning provides the following responses to Complaint Counsel's Second Requests for Admissions:

1. John Fanning was hired to advise Jerk, LLC by NetCapital.com, LLC, either directly or through its lawyer(s).

Denied. John Fanning advised Jerk, LLC through NetCapital.com, LLC.

2. John Fanning has been the Chairman of NetCapital.com, LLC.

Admit.

3. As part of his duties advising Jerk, LLC, John Fanning advised Jerk, LLC about Jerk.com's compliance with United States laws.

Denied. John Fanning advised lawyers about compliance with laws with respect to Jerk.com.

4. As part of his duties advising Jerk, LLC, John Fanning has reviewed content displayed on the Jerk.com website.

Denied.

5. As part of his duties advising Jerk, LLC, John Fanning has met with investors about providing financial backing for Jerk.com.

Denied. As part of his duties advising NetCapital.com LLC, John Fanning met with investors about providing financial backing for Jerk.com.

6. As part of his duties advising Jerk, LLC, John Fanning has used the email address john@netcapital.com to send and receive email communications relating to Jerk.com.

Denied. As part of his duties advising NetCapital.com LLC, John Fanning had access to email sent to john@netcapital.com.

7. As part of his duties advising Jerk, LLC, John Fanning has advised the person whom he considered to be Jerk, LLC's CEO.

Denied.

8. As part of his duties advising Jerk, LLC, John Fanning has advised Jerk, LLC's lawyer Maria Speth.

Denied.

SWORN TO AND SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY

THIS 26TH DAY OF NOVEMBER, 2014.

/s/John Fanning
John Fanning

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2014, I caused a true and accurate copy of the foregoing document entitled Respondent John Fanning's Responses to Complaint Counsel's Second Requests Request for Admissions to be served as follows:

One electronic copy and one paper copy to the Office of the Counsel for the Federal Trade Commission:

Sarah Schroeder
Federal Trade Commission
901 Market Street, Suite 670
San Francisco, CA 94103
Email: sschroeder@ftc.gov

/s/ Peter F. Carr, II
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Dated: December 4, 2014