

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

_____)
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.)
_____)

**EMERGENCY MOTION OF RESPONDENT JOHN FANNING
TO CONTINUE ADJUDICATORY HEARING OR, IN THE ALTERNATIVE, TO STAY
FURTHER PREHEARING PROCEEDINGS
PENDING SUMMARY DECISION RULING**

Respondent John Fanning respectfully requests the Commission to defer the adjudicatory hearing currently scheduled for March 23, 2015 until after the Commission rules on Complaint Counsel’s pending motion for summary decision. Respondent suggests that trial be postponed until April 6, 2015, and all prehearing deadlines be revised and reset based on the new trial date. In the alternative, Respondent requests the Commission to retain the current March 23, 2015 trial date, but to stay all further prehearing proceedings until a ruling on the summary decision motion. Pursuant to the Commission’s recent order, a ruling on the summary decision motion is due on March 13, 2015, just a few days before the March 17, 2015 final prehearing conference in accordance with the Amended Scheduling Order (**Tab A**) entered by the Chief Administrative Law Judge (“ALJ”). Judicial economy and efficiency support a stay so that the Parties can

understand, focus on, and prepare for the actual claims and issues, if any, that may remain to be tried following the Commission's ruling. In further support of the motion, Respondent states as follows:

1. The adjudicatory hearing before the ALJ is currently scheduled to commence on March 23, 2015 in Washington, D.C., after having been continued once to permit full briefing and adjudication of the motion for summary decision. According to the Amended Scheduling Order, the Parties are required to complete a host of pre-trial matters in preparation for trial in advance of the final prehearing conference scheduled for March 17, 2015, to include filing motions *in limine*, filing objections to exhibits, preparing stipulations, and filing pre-trial memoranda. The amount of work and the time commitment involved for both the Parties and the ALJ is substantial and significant. The Parties will be preparing for and the ALJ may be ruling on matters that may not be relevant or material to the issues and claims to be tried depending on the outcome of the summary decision motion.

2. At this stage, the Parties do not know what claims or issues will remain live for trial until the Commission rules on the pending motion for summary decision. The summary decision ruling will frame, and possibly narrow substantially, the issues and claims to be tried. The scope of trial and, thus, trial preparation remains uncertain.

3. In addition, counsel for the Parties will need to make firm arrangements for travel and accommodations in advance of appearing in Washington, D.C. for the final prehearing conference and trial, depending on the outcome of the summary decision motion.

4. Respondent proposes continuing the trial until April 6, 2015, and deferring the final pretrial conference until April 1, 2015. Efficiency and judicial economy support an extension of the trial date and revision of all further pending prehearing deadlines. This

proposed revised schedule will permit the Parties two (2) weeks following the Commission's ruling on the summary decision motion to complete all prehearing matters leading up to the final prehearing conference and trial, and with the benefit of the Commission's ruling that will provide a clearer understanding of the scope of the issues to be tried.

5. In the meet and confer conference, Complaint Counsel opposed continuing the hearing because a further change in the trial date may inconvenience potential witnesses. Although understandable, this reason does not justify denying a limited modification to the schedule in this matter as proposed. It is impossible to know Complaint Counsel's specific concerns, considering that Complaint Counsel has identified on its final proposed witness list 56 potential witnesses to testify at trial in this matter. Notwithstanding the lack of clarity, witnesses can be accommodated during the course of the hearing, and the number of possible witnesses permits ample opportunity to adjust the order of testimony, especially considering that this is a bench trial before the Chief ALJ. Moreover, some of the witnesses who may currently be prepared to appear may not even be necessary depending on the outcome of the summary decision motion. Nonetheless, if witness availability is a factor, Respondent in the alternative proposes that the March 23, 2015 trial date remain on the calendar, but that all other prehearing deadlines be stayed effective immediately until after the Commission's ruling. The prehearing deadlines and the final prehearing conference can be revised and reset once a ruling is issued and the Parties obtain clarity from the Commission on any remaining issues and claims. Although the deadlines will be admittedly tight, counsel for the Parties should be able to complete all tasks if they work cooperatively together with the guidance of the experienced Chief ALJ.

6. Respondent does not otherwise seek to delay these proceedings, and no Party will suffer undue prejudice by a change in the schedule. Indeed, all Parties and the ALJ will benefit

from knowing the issues and claims to be tried, and the certainty of a prehearing schedule.

Respondent's proposal is reasonable and makes good sense in the spirit of streamlining the trial and focusing on the real issues that may remain in dispute.

CONCLUSION

For the foregoing reasons, Respondent John Fanning requests the Commission to continue trial until April 6, 2015, and to reset accordingly all other prehearing proceedings.

Alternatively, Respondent requests that the March 23, 2015 trial date remain on the calendar, but that all other prehearing proceedings be stayed immediately and deferred until after the

Commission's ruling on the motion for summary decision.

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: March 5, 2015

CERTIFICATE OF COMPLIANCE WITH MEET AND CONFER OBLIGATION

I, Peter F. Carr, II, Esquire, counsel to Respondent John Fanning, hereby certify that on March 4, 2015, I sent an email to counsel for Jerk, LLC and Complaint Counsel in a good faith effort to resolve the issues addressed in the within motion. In my email, I proposed a continuance of the trial until April 6, 2015 with revised prehearing deadlines based on the status of the Commission's ruling on the pending motion for summary decision. Counsel for Jerk, LLC assented to the continuance. Complaint Counsel objected, stating "Unfortunately, we can't assent to moving the trial date. We're largely governed by the schedules of third party witnesses, who have already had to change their plans once when the trial got rescheduled from January to March. Asking them to reschedule again, after they've already committed to attending in late March, would be too disruptive." Because no agreement was reached, I advised Complaint Counsel that I would be filing a motion today.

/s/ Peter F. Carr, II _____
Peter F. Carr, II

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2015, 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 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:

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

One electronic copy via email to Counsel for Jerk, LLC:

Alexandria B. Lynn
48 Dartmouth Street
Watertown, MA 02472
Email: ab.lynn@outlook.com

/s/ Peter F. Carr, II
Peter F. Carr, II

Dated: March 5, 2015

TAB A

PUBLIC

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

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

FIRST REVISED SCHEDULING ORDER

On January 6, 2015, the parties filed a Joint Motion to Extend Pretrial Deadlines and Revise the Scheduling Order ("Joint Motion"). The parties' Joint Motion follows the Commission's Order, dated December 22, 2014, which rescheduled the hearing in this case to begin on March 23, 2015.

Having considered the positions of the parties and the procedural history recounted in previous orders, the Joint Motion is GRANTED, and the Scheduling Order is revised as follows:

- January 13, 2015 - Deadline for Respondent Jerk, LLC to respond to Complaint Counsel's interrogatories and document requests, as required by the August 15, 2014 and November 25, 2014 Orders.
- January 30, 2015 - Deadline for Respondent Jerk, LLC to produce qualified individual(s) to testify as to matters known or reasonably available to Jerk in response to Complaint Counsel's 3.33(c)(1) deposition notice, as required by the August 15, 2014 Order.
- February 9, 2015 - Parties exchange revised final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), including the basis of admissibility for each proposed

exhibit, and a brief summary of the testimony of each witness.

Parties serve courtesy copies on ALJ of revised final proposed witness and exhibit lists, including basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.

- February 10, 2015 - Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b). See Additional Provision 7.
- February 17, 2015 - Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
- March 5, 2015 - Deadline for filing motions *in limine* to preclude admission of evidence. See Additional Provision 9.
- March 6, 2015 - Complaint Counsel files pretrial brief supported by legal authority.
- March 9, 2015 - Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists.
- March 10, 2015 - Exchange proposed stipulations of law, facts, and authenticity.
- March 13, 2015 - Respondents' Counsel files pretrial brief supported by legal authority.
- March 16, 2015 - File final stipulations of law, facts, and authenticity. Any subsequent stipulations may be offered as agreed by the parties.
- March 17, 2015 - Final prehearing conference to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits.

To the extent the parties stipulate to certain issues, the parties shall prepare a Joint Exhibit which lists the agreed stipulations.

Counsel may present any objections to the final proposed witness lists and exhibits. Trial exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the

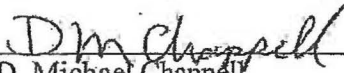
admission of each other's exhibits, the parties shall prepare a Joint Exhibit which lists the exhibits to which neither side objects. Any Joint Exhibit will be signed by each party. (Do not include a signature line for the ALJ.)

March 23, 2015

- Commencement of Hearing, to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

All Additional Provisions to the May 28, 2014 Scheduling Order remain in effect.

ORDERED:


D. Michael Chappell
Chief Administrative Law Judge

Date: January 7, 2015

Notice of Electronic Service for Public Filings

I hereby certify that on March 05, 2015, I filed via hand a paper original and electronic copy of the foregoing Emergency Motion of Respondent John Fanning to Continue Adjudicatory Hearing or, in the Alternative, to Stay Further Prehearing Proceedings Pending Summary Decision Ruling, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on March 05, 2015, I filed via E-Service of the foregoing Emergency Motion of Respondent John Fanning to Continue Adjudicatory Hearing or, in the Alternative, to Stay Further Prehearing Proceedings Pending Summary Decision Ruling, with:

Sarah Schroeder
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Complaint

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Kenneth H. Abbe
Attorney
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Complaint

I hereby certify that on March 05, 2015, I filed via other means, as provided in 4.4(b) of the foregoing Emergency Motion of Respondent John Fanning to Continue Adjudicatory Hearing or, in the Alternative, to

Stay Further Prehearing Proceedings Pending Summary Decision Ruling, with:

Alexandria Lynn
Alexandria B. Lynn, Esq.
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Peter F. Carr, II
Attorney
Eckert Seamans Cherin & Mellott, LLC
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Respondent

Peter Carr
Attorney