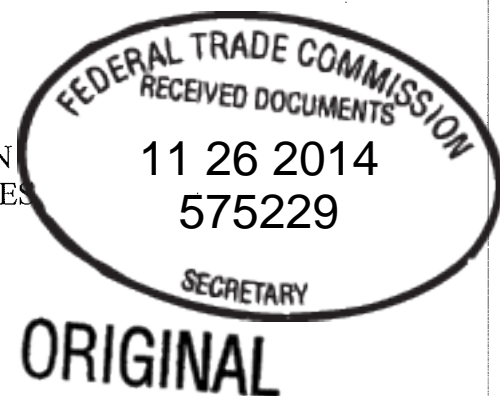


UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF THE ADMINISTRATIVE LAW JUDGES



\_\_\_\_\_  
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

PUBLIC

**OBJECTION OF RESPONDENT JOHN FANNING  
TO MOTION TO SUPPLEMENT RECORD ON  
MOTION FOR SUMMARY DECISION**

In another “gotcha” filing, Complaint Counsel claims victory on summary decision because Respondent John Fanning (“Mr. Fanning”) inadvertently failed to respond to a second request for admissions apparently served on November 4, 2014. Without any prior notice, Complaint Counsel sprung the default trap. The gamesmanship must end at some point. The motion to supplement should be denied, and Mr. Fanning should be permitted to remedy the oversight by serving answers to the admissions late. In further response and opposition, Mr. Fanning states as follows:

1. Complaint Counsel cites no basis in the rules for “supplementing” the summary decision record. Complaint Counsel had ample opportunity to file all pleadings, and the so-called supplemental record must be stricken. Complaint Counsel merely seeks to re-argue the pending motion. Complaint Counsel’s proclamation that a “new evidentiary development emerged” to support the contention that newly discovered evidence exists is false. Mr. Fanning

has not made any admissions, and Complaint Counsel knows it. Moreover, Complaint Counsel consistently ignores that all inferences to be drawn in favor of Mr. Fanning on summary decision. The mere technical failure to provide responses does not prove the case. Complaint Counsel consistently has demonstrated an all-out effort to avoid the merits, because the claims asserted are unlawful and violate the Commission's regulatory authority. Complaint Counsel should not be permitted to win on claims that lack legal merit solely by conjuring a default.

2. Even more disappointing is the tack taken by Complaint Counsel. Mr. Fanning has aggressively defended the case throughout. Mr. Fanning did not ignore the requests. The failure to respond was obviously an oversight. To suggest that Mr. Fanning intentionally refused to respond to admissions and risk a default is preposterous. The admissions were apparently served via email around 5:00 PM on November 4, 2014 by Ms. Burke. November 4, 2014 was the same day that Mr. Fanning was working to complete and file his detailed opposition to the motion for summary decision. Between November 4 and 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. Complaint Counsel merely sprung the non-compliance in the recent filing received last evening. Since becoming aware of the oversight, counsel for Mr. Fanning has taken steps to complete the answers and expects to serve responses forthwith. There is no harm to Complaint Counsel, whereas the undue prejudice to Mr. Fanning is undeniable.

3. Complaint Counsel has not been prejudiced in the least. The contention that the admissions must be accepted because they now suddenly establish the right to summary decision is wrong. Complaint Counsel previously argued in its lengthy motion for summary decision that the undisputed facts already adduced through discovery already warranted relief against Mr. Fanning on both liability and remedy. Mr. Fanning has rebuffed the contentions, but Complaint Counsel's inconsistent position is glaring. Indeed, Complaint Counsel in support of summary decision argued that Mr. Fanning has no reasonable defense for rebutting so-called facts based on the massive amounts of alleged evidence gathered by Complaint Counsel through discovery, although Mr. Fanning contests such a characterization. Complaint Counsel deposed Mr. Fanning for approximately seven (7) hours on September 4, 2014. Complaint Counsel's contention that the lack of responses to the eight (8) requests for admissions impacted the ability to reply to Mr. Fanning's summary decision opposition is pure nonsense. Also, Complaint Counsel fails to disclose that counsel for Mr. Fanning was in the midst of considering Complaint Counsel's request for a three-day extension until November 15, 2014 to file a reply to Mr. Fanning's opposition, when Complaint Counsel decided not to pursue an extension. **(Tab A)**. Complaint Counsel never stated that an extension was needed because of the deadline for admissions, and never even mentioned the admissions.

4. Even if wrongfully deemed admitted, the admissions do not permit the granting of relief on summary decision. The requests for admissions are not relevant to the core issues presented in the case. They do not bear on whether deception liability under Section 5 is triggered, and whether the Complaint is an unlawful exercise of regulatory authority. They do not address the undeniable First Amendment issues and rights at stake. They do not address the unlawful enforcement remedies Complaint Counsel requests against Mr. Fanning. At best, the

admissions, if deemed admitted which would be unjust under the circumstances, only go to Complaint Counsel's argument that Mr. Fanning maintained "control" over Jerk, LLC and is therefore personally liable for the conduct of the company. Mr. Fanning has already addressed these contentions and theories in his opposition to summary decision, both in the arguments presented and the Affidavit on file. At best, to the extent the deemed-admitted admissions conflict with prior testimony and evidence presented, they establish a factual dispute that absolutely bars summary decision.

### **CONCLUSION**

For the foregoing reasons, Respondent John Fanning requests the Commission to deny Complaint Counsel's motion to supplement in its entirety.

Respectfully submitted,

**JOHN FANNING,**

By his attorneys,

/s/ Peter F. Carr, II

Peter F. Carr, II

ECKERT, SEAMANS, CHERIN & MELLOTT, LLC

Two International Place, 16<sup>th</sup> Floor

Boston, MA 02110

617.342.6800

617.342.6899 (FAX)

Dated: November 26, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that on November 26, 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](mailto: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](mailto:oalj@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](mailto:sschroeder@ftc.gov)  
[yfang@ftc.gov](mailto:yfang@ftc.gov)  
[kobrien@ftc.gov](mailto:kobrien@ftc.gov)

One electronic copy per the prior order to:

Maria Crimi Speth  
Jaburg & Wilk, P.C.  
3200 N. Central Ave., Suite 2000  
Phoenix, AZ 85012  
[mcs@jaburgwilk.com](mailto:mcs@jaburgwilk.com)

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

Dated: November 26, 2014

# TAB A

## Peter Carr

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**From:** Schroeder, Sarah <SSCHROEDER@ftc.gov>  
**Sent:** Thursday, November 06, 2014 8:43 AM  
**To:** Peter Carr  
**Subject:** Re: 3-day extension

Thanks Peter. I decided not to seek an extension.

By the way, are you planning to designate any part of Mr. Fanning deposition or Jerk's financial records confidential? We designated these materials confidential out of an abundance of caution because at the end of Mr. Fanning's deposition you indicated that he may want to mark some material confidential.

---

**From:** Peter Carr [mailto:PCarr@eckertseamans.com]  
**Sent:** Wednesday, November 05, 2014 09:11 PM  
**To:** Schroeder, Sarah  
**Subject:** RE: 3-day extension

What day do you want as deadline

Sent with Good ([www.good.com](http://www.good.com))

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**From:** Schroeder, Sarah <SSCHROEDER@ftc.gov>  
**Sent:** Tuesday, November 4, 2014 7:43:55 PM  
**To:** Peter Carr  
**Subject:** RE: 3-day extension

A lot of schools are off on Veteran's Day.

---

**From:** Peter Carr [mailto:PCarr@eckertseamans.com]  
**Sent:** Tuesday, November 04, 2014 4:44 PM  
**To:** Schroeder, Sarah  
**Subject:** RE: 3-day extension

What holiday weekend

Sent with Good ([www.good.com](http://www.good.com))

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**From:** Schroeder, Sarah <SSCHROEDER@ftc.gov>  
**Sent:** Tuesday, November 4, 2014 7:40:19 PM  
**To:** Peter Carr  
**Subject:** RE: 3-day extension



It's due November 12<sup>th</sup>. The Commission would then have 45-days to issue an order. An extension would not impact any of the deadlines in the scheduling order.

---

**From:** Peter Carr [<mailto:PCarr@eckertseamans.com>]  
**Sent:** Tuesday, November 04, 2014 4:39 PM  
**To:** Schroeder, Sarah  
**Subject:** RE: 3-day extension

When is it due and how will it impact nah other deadlines.

PFC

Sent with Good ([www.good.com](http://www.good.com))

---

**From:** Schroeder, Sarah <[SSCHROEDER@ftc.gov](mailto:SSCHROEDER@ftc.gov)>  
**Sent:** Tuesday, November 4, 2014 7:25:52 PM  
**To:** Peter Carr  
**Subject:** 3-day extension

Hi Peter,

Given the holiday weekend, would you agree to a 3-day extension for us to file our reply to Mr. Fanning's MSJ opposition? Please let me know by 12pm (ET) tomorrow if you would oppose our motion for a brief extension.

Best Regards,  
Sarah

Sarah Schroeder, Attorney  
Federal Trade Commission  
901 Market Street, Suite 570  
San Francisco, CA 94103  
Phone: (415) 848-5186  
Email: [sschroeder@ftc.gov](mailto:sschroeder@ftc.gov)

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