

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 MOTION FOR SANCTIONS AGAINST JERK. LLC**

Although the current motion for sanctions filed by Complaint Counsel is directed against only Respondent Jerk, LLC, Respondent John Fanning is compelled to object to the request for sanctions considering the history of this matter, and to the extent that any relief sought by Complaint Counsel will bear negatively on Mr. Fanning's defense. In further response and opposition, Mr. Fanning states as follows:

1. For the reasons addressed in detail below, Complaint Counsel seeks sanctions that violate well-settled law. Nonetheless, in the event the motion is granted, Mr. Fanning opposes entry of default and any sanctions against Jerk, LLC until both the ruling by the Commissioners on the pending motion for Summary Decision and final disposition of all claims following trial. Complaint Counsel must be barred from asserting that any sanctions entered against Jerk, LLC or adverse findings against Jerk, LLC are automatically binding upon Mr. Fanning and somehow establish his personal liability for the claims asserted. Mr. Fanning anticipates Complaint

Counsel's strategy in this regard. In no event should Mr. Fanning sustain any prejudice from any discovery sanctions that may enter against Jerk, LLC.

2. The matters presented on Summary Decision are fully briefed and under advisement by the Commissioners. The request for sanctions could interfere with or circumvent the pending decision by the Commissioners. It would be unjust to reward Complaint Counsel with sanctions where the Commissioners may rule that the Complaint fails to state a claim under the Act as a matter of law, that the claims exceed the regulatory authority of the Commission, or that the claims asserted in the Complaint violate protected First Amendment rights. Complaint Counsel ignores the fundamental rule that judgment by default cannot enter against a party in any action where the claim asserted does not provide for recovery as a matter of law. See Prudential-Bache Securities, Inc. v. Commissioner of Revenue, 412 Mass. 243, 249 (1992) (citations omitted) (“A judge has the duty to enter a judgment that is lawful in light of the facts established, even in the absence of a contest before him.”); Productora Importadora De Papel S.A. De C.V. v. Fleming, 376 Mass. 826, 834-837 (1978) (citations omitted) (default judgment and damages award entered against individual defendant vacated where allegations of the complaint did not state a claim for relief as a matter of Massachusetts law); J & J Sports Productions, Inc. v. Romenski, 845 F.Supp.2d 703, 705-706 (W.D.N.C. 2012) (citations omitted); 10A Wright, Miller & Kane, Federal Practice & Procedure, § 2688 (3d ed. Supp. 2010) (“Even after default, however, it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law” and “liability is not deemed established simply because of the default ... [.]”). Complaint Counsel is not entitled to win on liability by forfeit on claims that are unlawful. Likewise, Complaint Counsel is not entitled to an award of final relief that is unlawful, and all final

remedies must be barred absent further notice and an opportunity to be heard. See, e.g., Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 158 (2d Cir. 1992) (even in default situation, the burden is on the plaintiff to establish its entitlement to recovery in an evidentiary proceeding in which the defendant has the opportunity to appear and defend); Bravado Intern. Group Merchandising Services, Inc. v. Ninna, Inc., 655 F. Supp. 2d 177, 199 (E.D. N.Y. 2009) (when defendants are in default and when the applicable statute provides for injunctive relief as a possible remedy, a court may issue an injunction provided that plaintiffs meet the requirements for obtaining a permanent injunction).

3. Complaint Counsel's request for sanctions also fails for lack of any prejudice. Despite the vitriolic pleadings, Complaint Counsel presents no evidence of tangible prejudice resulting from the alleged discovery violations necessary to justify the draconian sanctions sought. It should not be overlooked that Complaint Counsel's discovery demands and requests, in the first instance, were improper and an abuse of the adjudicatory discovery process that is supposed to be restricted to yielding information "relevant to the allegations of the complaint, to the proposed relief, or to the defenses of the respondent" per Rule 3.31(c)(1). Complaint Counsel's scorched earth strategy has been effective. Also, Complaint Counsel knows that Jerk, LLC (and Mr. Fanning) expressly denies core factual allegations which Complaint Counsel now requests this Court to deem admitted. In other words, Complaint Counsel is now asking this Court to find as true certain facts that Complaint Counsel knows are disputed, and perhaps knows are actually false. For instance, Complaint Counsel in its Proposed Order requests this Court to find as established facts the allegations at Page 7 of its Memorandum to include that (i) "John Fanning has been the managing member of Jerk," (ii) "John Fanning has had authority to control Jerk's acts and practices," and (iii) "NetCapital.com, LLC has been the majority

shareholder of Jerk” without any ability by Mr. Fanning to contest the conclusions. This is an absolute deprivation of Mr. Fanning’s rights that cannot stand. Further, Complaint Counsel fails to provide any justification for the request, as a remedy for a discovery violation, to convert blatant inadmissible evidence into admissible evidence at trial with all rights to object waived. Such a remedy violates all notions of Due Process and fairness.

4. Complaint Counsel has conceded no prejudice. Adjudication of the case has proceeded. Contrast SEC v. Lawbaugh, 359 F.Supp.2d 418, 421 (D.Md. 2005) (default judgment “may be appropriate when the adversary process has been halted because of an essentially unresponsive party.”). Indeed, according to Complaint Counsel in its 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.” Complaint Counsel represented to the Commissioners in arguing for Summary Decision that no material facts remained in dispute, and trial was not needed, based on the alleged mountain of undisputed evidence unearthed during fact discovery. Specifically, Complaint Counsel represented:

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.

Any notion that Complaint Counsel has been prejudiced by a lack of supplemental discovery responses by Jerk. LLC is frivolous.

CONCLUSION

For the foregoing reasons, Respondent John Fanning requests this Court to deny Complaint Counsel's request for sanctions against Jerk, LLC.

Respectfully submitted,

JOHN FANNING,

By his attorneys,

/s/ Peter F. Carr, II

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Dated: February 11, 2015

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 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 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
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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
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One electronic copy to the Office of the Counsel for the Federal Trade Commission:

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Respondent

I hereby certify that on February 11, 2015, I filed via other means, as provided in 4.4(b) of the foregoing Objection of Respondent John Fanning to Motion for Sanctions Against Jerk, LLC, with:

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Eckert Seamans Cherin & Mellott, LLC
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Respondent

Peter Carr
Attorney