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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

**ORDER GRANTING IN PART AND DENYING IN PART
COMPLAINT COUNSEL'S RENEWED MOTION TO COMPEL**

I.

On November 26, 2014, Federal Trade Commission ("FTC") Complaint Counsel filed a Renewed Motion to Compel Discovery, and its memorandum in support thereof ("Motion"). Complaint Counsel seeks an order compelling Respondent John Fanning ("Fanning") to provide full answers to certain of Complaint Counsel's Second Set of Interrogatories ("Interrogatories") and documents responsive to Complaint Counsel's Second Request for Production of Documents number 4. Respondent Fanning filed an Opposition to the Motion on December 4, 2014 ("Opposition").

As set forth below, the Motion is GRANTED IN PART and DENIED IN PART.

II.

Complaint Counsel served Fanning with its Second Set of Interrogatories and Second Request for Production of Documents on or about October 7, 2014. Pursuant to FTC Rules 3.35(a)(2) and 3.37(b), Fanning's objections and responses were due within 30 days. On November 17, 2014, Complaint Counsel filed a motion to compel Fanning's responses, stating that Fanning had failed to respond to Complaint Counsel's discovery requests. Fanning responded to Complaint Counsel's motion on November 24, 2014, stating that he "provided responses to supplemental interrogatories and supplemental requests for production, albeit a bit late." Objection to November 17 Motion to Compel at 1. Based on Fanning's representation, an Order was issued on November 25, 2014, denying Complaint Counsel's motion without prejudice to renewing the motion in the event Fanning's responses were inadequate.

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A.

The interrogatories that are the subject of this Motion, and Fanning's responses thereto, are as follows:

Interrogatories 1-4

1. Identify all current and past investors in Jerk, LLC or Jerk.com, including any individual or entity directly invested in Jerk, LLC or Jerk.com.

Answer to Int. 1

I am unsure of the answer to this question.

2. Identify (1) each email account that the Company has used, and (2) for each account, each person who has corresponded through that account, including but not limited to support@jerk.com.

Answer to Int. 2

I am unsure of the answer to this question.

3. Identify all individuals who have sent messages from the email account john@netcapital.com.

Answer to Int. 3

I am unsure of the answer to this question.

4. Identify (1) each Twitter account that the Company has used, and (2) for each such account, each person who has used that account to post a message from that account.

Answer to Int. 4

I am unsure of the answer to this question.

Complaint Counsel contends that Fanning did not answer "fully," as required by Rule 3.35(a)(2) ("Each interrogatory shall be answered separately and fully in writing under oath . . ."). Fanning argues that he "cannot be forced to answer affirmatively a question for which he is unsure the answer." Opposition at 2. Fanning also contends that Complaint Counsel has no need for further interrogatory answers because Fanning has already been deposed for 7 hours and because Complaint Counsel has filed a Motion for Summary Decision in this case in which Complaint Counsel asserts it has no need for any further discovery. Fanning does not contend that the requested information is irrelevant or duplicative, or unduly burdensome to provide. *See* Rule 3.31(c)(1), (2).

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Having considered the parties' arguments, Fanning did not answer Interrogatories 1-4 fully and his answers shall be supplemented. A showing of need is not required to obtain discovery of nonprivileged information, or discovery as to which there has been no showing of undue burden. *See* Rule 3.31(c)(1) ("Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent."). Fanning is not required to provide information of which he has no knowledge, but his answers must clearly state that which he does know and if he lacks knowledge, to clearly state so. *See also* Complaint Counsel's Second Set of Interrogatories, Instruction C ("Answer each Interrogatory fully and completely based on the information and knowledge currently available to you, regardless of whether you intend to supplement your response. Your answers to any Interrogatory herein must include all information within your possession, custody or control, including information reasonably available to you and your agents, attorneys or representatives."). Accordingly, as to Interrogatories 1-4, Complaint Counsel's Motion is GRANTED.

Interrogatory No. 5

Fanning answered Interrogatory 5 as follows:

5. Describe in detail any service or work that Respondent John Fanning has provided to Jerk, LLC.

Answer to Int. 5

I did not provide services to Jerk, LLC in my personal capacity.

Complaint Counsel argues that this answer is not responsive because the Interrogatory is not limited to services Fanning may have provided in a "personal capacity," but seeks information as to all services or work provided by Fanning to Jerk, LLC. Fanning responds that:

this area of inquiry was already fully-explored at Mr. Fanning's deposition. Mr. Fanning described the work he performed in his advisory capacity including to provide "advice to ensure that the software that was being written and developed and built offshore was complying with the U.S. regulation." (Fanning Depo., p. 196:3-6, cited in Complaint Counsel's motion for summary decision). Also, Mr. Fanning submitted an Affidavit dated November 4, 2014 in opposition to summary decision that identified his involvement as an advisor to Jerk, LLC through NetCapital.com LLC. Specifically, Mr. Fanning stated that:

"NetCapital.com. LLC is a private equity/venture capital firm, with a number of partners, that invests in and provides advisory services to a wide-range of technology start-ups including those in its portfolio of companies. My authority was limited, and at all times I acted on behalf of NetCapital.com, LLC with respect to Jerk, LLC. I never acted in my individual capacity."

"Jerk.com essentially was operated and controlled by Louis Lardass of Internet

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Domains, which owned the Jerk.com domain, and foreign software developers who were reportedly supported by various interns, college students, and other independent contractors working for their own benefit.”

“I was not responsible for spearheading and operating Jerk, LLC or Jerk.com.”

“Through and on behalf of NetCapital.com, LLC, I was part of a group involved in efforts to launch, finance, and expand the Jerk brand through the Jerk.com website.”

“I did not write any software code for Jerk, LLC to operate Jerk.com, and did not place any consumer content on Jerk.com.”

“I was not a software developer or web developer for Jerk, LLC.”

“I had no authority over or advisory agreement with the primary developers of the Jerk, LLC software.”

Opposition at 3. Fanning asserts that “[t]here is nothing more that Mr. Fanning can say in response to the interrogatory.” *Id.*

Having fully considered the parties’ arguments, and based on Fanning’s representation that he has nothing further to say in response to the Interrogatory, no further supplementation will be required. With respect to Interrogatory 5, therefore, Complaint Counsel’s Motion is DENIED.

B.

The Motion seeks to compel documents in response to Request number 4 of Complaint Counsel’s Second Request for Production of Documents, as follows:

Document Request No. 4

Document Request No. 4 asked for “[a]ll communications regarding Jerk, LLC or Jerk.com, other than communications with Complaint Counsel.” Fanning objected to Request No. 4 as “overly broad, unduly burdensome, vague and ambiguous.”

Complaint Counsel contends that Fanning waived objections by failing to serve his objections and responses until two weeks after the 30-day time period allowed by the Rules. Fanning states that he did not waive the right to object; that his delayed response was due to “dealing with” the pending Motion for Summary Decision; and that Complaint Counsel was not prejudiced by the delayed response. Fanning also asserts that Complaint Counsel has no need for the requested documents “considering the massive amounts of discovery that Complaint Counsel has already served and taken.” Opposition at 4.

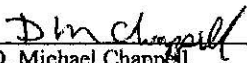
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The rules are clear that responses and objections to document requests are to be provided within 30 days. 16 C.F.R. §§ 3.35(a)(2), 3.37(b). Fanning's general allegation that he was "dealing" with the Motion for Summary Decision is not a sufficient justification for waiting over two weeks – and for a Motion to Compel – before responding. Under these circumstances, Fanning has waived its objections to Document Request No. 4. *In re Daniel Chapter One*, No. 9329, 2009 WL 569694, at * 1 (F.T.C. Jan 9, 2009). Moreover, Fanning fails to articulate a persuasive basis for any of its objections. For these reasons, Complaint Counsel's request for an order compelling Fanning to produce documents in response to Document Request No. 4 is GRANTED. *See* 16 C.F.R. § 3.38(a) ("Unless the Administrative Law Judge determines that the objection is justified, the Administrative Law Judge shall order" that the requested discovery be provided.).

III.

As set forth above, and for all the foregoing reasons, Complaint Counsel's Motion is GRANTED IN PART and DENIED IN PART. Fanning shall supplement his answers to Interrogatories 1-4 and produce documents in response to Document Request No. 4 no later than December 16, 2014.

ORDERED:


D. Michael Chappell
Chief Administrative Law Judge

Date: December 8, 2014