

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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



_____)
In the Matter of)
)
)
Jerk, LLC, a limited liability company,)
also d/b/a JERK.COM, and) DOCKET NO. 9361
)
John Fanning,) PUBLIC DOCUMENT
individually and as a member of)
Jerk, LLC.)
)
_____)

COMPLAINT COUNSEL’S OPPOSITION TO
RESPONDENT JERK, LLC’S MOTION TO EXTEND TIME TO RESPOND TO THE
MOTION FOR SUMMARY DECISION AND TO RESCHEDULE THE EVIDENTIARY
HEARING

After nearly five months of ignoring multiple deadlines, discovery obligations, and orders compelling discovery, Respondent Jerk, LLC (“Jerk”) has suddenly resurfaced. Asking for leave to oppose Complaint Counsel’s Motion for Summary Decision—more than a month after the Commission’s previously-extended deadline for Jerk’s response—and to postpone the impending evidentiary hearing, Jerk seeks a free pass for its flagrant noncompliance. Jerk offers no valid reason for its extreme delay, and its conduct in this action demonstrates an absence of good faith. Given the risk of substantial prejudice to this action’s orderly proceeding and Complaint Counsel, Jerk’s motion should be denied.

I. BACKGROUND

Although Jerk filed an Answer to the Complaint and made an appearance through counsel (Declaration of Beatrice Burke, filed herewith (“Burke Dec.”) ¶ 2), it has failed to participate in this litigation for the past five months. Since mid-July, Jerk has not produced any documents, subpoenaed any party, attended any deposition, or responded to any motion. (*Id.* ¶ 7) Jerk twice failed to produce any representative for a noticed company deposition, even after initially designating Respondent John Fanning (“Fanning”) as its representative, and after Chief Judge Chappell ordered Jerk to produce a deponent. (*Id.* ¶¶ 3, 9-10, Atts. A, E-H) Similarly, Jerk has not responded to Complaint Counsel’s two sets of interrogatories and second set of document requests, also ignoring Chief Judge Chappell’s orders. (*Id.* ¶¶ 8, 11)

Complaint Counsel moved for summary decision on September 29. Upon Fanning’s motion, the Commission gave both Fanning and Jerk an extension until November 4 to respond. Fanning timely filed his opposition, and later submitted a surreply to Complaint Counsel’s reply. Jerk did not oppose. Nor did Jerk confer with Complaint Counsel about its delinquency until December 8, when Jerk’s new counsel contacted Complaint Counsel for the first time. (*Id.* ¶ 6) The Commission’s decision on summary decision is due in three weeks, and the administrative hearing will begin on January 27, 2015.

II. LEGAL STANDARD

“Except as otherwise provided by law, the Commission, for good cause shown, may extend any time limit prescribed by the rules in this chapter or by order of the Commission or an Administrative Law Judge.” 16 C.F.R. § 4.3(b). “[W]here a motion to extend is made after the expiration of the specified period, the motion may be considered where the untimely filing was the result of excusable neglect.” *Id.*

The Federal Rules similarly prescribe “good cause” and “excusable neglect” standards. Fed. R. Civ. P. 6(b). “To demonstrate good cause, a party must show that despite its diligence, the time table could not reasonably have been met.” *Hartford v. Schindler Elevator Corp.*, 2011 U.S. Dist. LEXIS 138637, at *4 (N.D. Ind. Dec. 1, 2011). In determining excusable neglect, courts weigh (1) the danger of prejudice to the non-moving party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1993). Federal courts apply these factors when examining failure to oppose summary judgment in time. *See, e.g., Raymond v. Ameritech Corp.*, 442 F.3d 600, 606 (7th Cir. 2006).

“[E]ven where ‘excusable neglect’ is demonstrated, the judge retains discretion to deny relief.” *Rockwell Automation, Inc. v. United States*, 7 F. Supp. 3d 1278 (Ct. Int’l Trade 2014). Recognizing that trial courts, as managers of their dockets, have “wide discretion” to reject filings made after court-imposed deadlines, appellate courts review such decisions for abuse of discretion. *See Mendez v. Banco Popular de Puerto Rico*, 900 F.2d 4, 7 (1st Cir. 1990) (where the trial court “sets a reasonable due date, parties should not be allowed casually to flout it or painlessly to escape the foreseeable consequences of noncompliance”).

III. ARGUMENT

A. Jerk Provides No Explanation For Its Five-Month Absence From This Action.

To have its failure to comply with the Commission’s deadline for opposing summary decision excused, Jerk must provide “a satisfactory explanation” for its delinquency. *Graphic Commc’ns Int’l Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5 (1st Cir. 2001). Jerk’s sole offered reason is the purported abrupt abdication of its original attorney,

Maria Speth. (Declaration of David Duncan ¶ 4)¹ Ms. Speth's departure last July, however, is not a valid excuse for Jerk to neglect its litigation duties for five months. As a party to this action, Jerk is responsible for "fail[ing] to see to it that [its] lawyer acted with dispatch." *Link v. Wabash R. Co.*, 370 U.S. 626, 634, n.10 (1962); *see also Young v. City of Palm Bay, Fla.*, 358 F.3d 859, 864 (11th Cir. 2004) ("the Supreme Court has said that clients are to be held accountable for the acts and omissions of their attorneys"). Jerk "cannot now avoid the consequences of the acts or omissions of [its] freely selected agent," *Link*, 370 U.S. at 633-34, by arguing that "the negligent conduct of [its] counsel should not . . . deprive [it] of [its] day in court". *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 608 (7th Cir. 1986).

Jerk did not merely miss this one opposition deadline. It effectively disappeared from the case for the majority of the discovery period, ignoring multiple deadlines, motions, and orders, including Chief Judge Chappell's express warning that "Jerk remains a party in this case and is not entitled to ignore a discovery motion" on August 15. Yet Jerk fails to provide any explanation, let alone a satisfactory one, for its five-month disappearance. *See Kagan*, 795 F.2d at 611 (while difficulty in obtaining counsel "might explain a brief delay," it does "not justify the total silence . . . for more than 45 days"). Jerk merely asserts that it faced difficulty in finding another attorney, without explaining what that difficulty was or why it immobilized Jerk for months. The absence of an explanation is fatal to excusing Jerk's neglect. *See Gestetner Corp.*

¹ Ms. Speth alerted Complaint Counsel of her intended withdrawal on July 18, but she never sought (or obtained) leave to withdraw, ignoring Complaint Counsel's repeated requests that she do so. (Burke Dec ¶¶ 4, 5, Atts. B, C) During her deposition, Ms. Speth refused to state when her representation ended and why. (*Id.* Att. I at 43:11-44:12.) Her unilateral decision to withdraw on July 18 did not automatically render withdrawal accomplished. *See FTC v. Intellipay, Inc.*, 828 F. Supp. 33, 33-34 (S.D. Tex. 1993) ("An attorney of record may only withdraw by leave of court upon a showing of good cause and reasonable notice to the clients."). Indeed, on November 3, Chief Judge Chappell granted Complaint Counsel's motion to continue serving Jerk through Ms. Speth, in addition to Jerk's registered agent.

v. Case Equip. Co., 108 F.R.D. 138, 141 (D. Me. 1985) (denying extension where “[t]he motion makes no showing that the complete lack of attention paid to this case over a period of some four months was due to any mistake, excusable neglect or any other factor which might understandably account for the failure”); *Hosp. del Maestro v. N.L.R.B.*, 263 F.3d 173, 175 (1st Cir. 2001) (rejecting excusable neglect absent a “proffered reason that would justify, or even plausibly explain” the reason for the non-compliance).²

Jerk’s failure to seek a stay promptly after Ms. Speth departed, or at any time during the past five months, further undercuts excusable delay. *See Dudenhefer v. Davol, Inc.*, No. 94-30551, 52 F.3d 1068, at *3 (5th Cir. 1995) (unpub.) (affirming refusal to reopen summary judgment briefing where the delinquent party “neither requested a continuance from the district court nor informed the district court of his scheduling problems” after counsel’s withdrawal).

Finally, Jerk’s new counsel’s assurance of diligence going forward is irrelevant to excusable neglect. Especially after the close of fact discovery, Jerk “can not ‘clean the slate’ by retaining new counsel after [its] original counsel has failed to act diligently.” *Parker v. FedEx Nat’l LTL, Inc.*, 2011 U.S. Dist. LEXIS 156562, *14 (C.D. Cal. Apr. 11, 2011).

B. Permitting Jerk To Oppose Summary Decision Now Would Substantially Prejudice Complaint Counsel.

The prejudice factor, which typically weighs in favor of the party opposing extension, *Rockwell*, 7 F. Supp. 3d at 1291, is magnified here. If Jerk is allowed to oppose summary decision at this late stage, Complaint Counsel would be forced to confront Jerk’s opposition

² Any notion that Jerk could not more quickly find substitute counsel is implausible. Jerk has been represented not by Ms. Speth alone, but by her law firm (Burke Dec. Att. I at 49:19-21), which has several other lawyers. *See* <http://www.jaburgwilk.com/our-people>. Additionally, Fanning—whom Jerk previously designated as its representative and who has advised Jerk on legal issues (CX 92 at 53:13–54:4, 128:25–131:24)—has remained active in this action, represented by counsel.

without the benefit of its discovery, while diverting resources from preparing for the trial in six weeks. See *United States v. Holliday*, 2013 WL 6498984, at *3 (D. Kan. Dec. 11, 2013) (finding prejudice where trial was “only nine weeks away”).

By disappearing from this action for the majority of the discovery period, Jerk has shielded itself from depositions and numerous interrogatories and document requests, in violation of court orders. Consequently, Jerk would be free to oppose summary decision with untested factual assertions, outside the specter of impeachment, and with the benefit of a prolonged review of the submitted summary decision record. Absent the reopening of discovery—which no party seeks—Complaint Counsel would be unable to effectively rebut any new facts or evidence presented by Jerk. Allowing Jerk to “ignore [its] discovery obligations in the case and then secure a ‘do-over’ after seeing [Complaint Counsel’s] summary judgment motion” would be “inherently unfair.” *Schneider v. CLAAS of Am., Inc.*, 2013 WL 968986, at *3 (D. Kan. Mar. 12, 2013).³

C. Permitting Jerk to Oppose Summary Decision Now Would Upend This Action’s Orderly Proceeding.

Excusing Jerk’s delay would thwart the Commission’s rapid administrative litigation framework. The Commission has capped at eight months the period between the filing of the complaint and the evidentiary hearing. 16 C.F.R. § 3.11(b)(4). Accordingly, voicing its “preference to move Part 3 matters expeditiously,” the Commission made a deliberate choice “to

³ Jerk’s suggestion that *it* would suffer prejudice without a “meaningful opportunity to respond” (Jerk Mtn. at 3) is both irrelevant to the excusable neglect analysis and ignores the fact that Jerk already received double the time allotted under the Rules to oppose summary decision. Jerk’s suggestion is further undercut by its silence on whether it would (or could) present any arguments on summary decision that have not already been presented by Fanning, who argued, in two spirited briefs, not only against his own individual liability, but also against Jerk’s liability for the deception counts alleged.

ensure that discovery and other prehearing proceedings continue while the Commission deliberates over the dispositive motions.” *In re North Carolina Bd. of Dental Examiners*, 151 F.T.C. 604, 605-06 (2011) (citing 16 C.F.R. § 3.22(b)). In light of Jerk’s complete inaction in this action for nearly two-thirds of the entire pretrial period, postponing the case for another month to give Jerk a redo poses a grave threat to the Commission’s rules and principles. Even federal courts, which are not bound by the same regulatory constraints, have refused to excuse considerably shorter delinquencies. *See, e.g., Hosp. del Maestro*, 263 F.3d at 175; *Spears v. City of Indianapolis*, 74 F.3d 153, 158 (7th Cir. 1996).

Jerk attempts to downplay its proposal to postpone the evidentiary hearing by a month by characterizing the delay as not significant. (Jerk Mtn. at 3.) But a month-long delay at this late stage—with fact discovery concluded and Complaint Counsel’s expert reports and witness and exhibit lists submitted—presents significant and inescapable problems, including in rearranging the court’s docket and witness appearances.⁴ Moreover, Jerk’s proposal for merely a one-month postponement is disingenuous. If Jerk is allowed to belatedly oppose summary decision, basic fairness would require permitting Complaint Counsel to depose Jerk’s representative(s) and obtain Jerk’s outstanding discovery responses, plus additional time to investigate any new facts or evidence yielded by Jerk. The delay would likely last many months.⁵

Especially where the Commission has previously given Respondents a generous extension to oppose summary decision, such further delay on the eve of trial is unjustified. *See*

⁴ Several third-party witnesses have agreed to testify at trial at the end of January, and already have travel and hotel arrangements for that time. (Burke Dec. ¶ 13)

⁵ Jerk’s alternative proposal for expedited briefing without postponing trial is equally disingenuous, as it would neither give the Commission enough time to rule before trial nor allow Complaint Counsel to effectively oppose Jerk.

Spears, 74 F.3d at 157 (affirming denial of further extensions where plaintiff had already received a generous extension); *Lumsden v. Foster Farms, LLC*, 2008 WL 496137, at *4 (W.D. Wash. Feb. 21, 2008) (refusing an extension after the court already “extended deadlines in this case to accommodate plaintiff”).

D. Jerk Has Not Acted In Good Faith.

Jerk’s longstanding pattern of dilatory conduct in this action demonstrates an absence of good faith. “Virtually all ‘excusable neglect’ cases involve discrete, ‘one-off’ events, which result in a party missing one specific deadline.” *Rockwell*, 7 F. Supp. 3d at 1297 n.19. In contrast, Jerk’s failure to timely oppose summary decision, was “not an isolated instance of dilatory conduct,” but part of “a significant history of similar failures of timeliness.” *Clackamas County v. Midwest Emplrs. Cas. Co.*, 2010 U.S. Dist. LEXIS 135684, at *25 (D. Or. Dec. 22, 2010) (rejecting excusable neglect). For months—spanning most of fact discovery and past its closing—Jerk ignored multiple deadlines, discovery requests, court orders, and Complaint Counsel’s entreaties for contact with the company.⁶ This track record belies good faith. *See Nafziger v. McDermott Int’l, Inc.*, 467 F.3d 514, 523 (6th Cir. 2006) (affirming rejection of excusable neglect given “numerous instances of ‘previous dilatory conduct’”); *Rockwell*, 7 F. Supp. 3d at 1302 (rejecting good faith where the tardy party’s “track record smacks of a blatant disregard for the rules”); *cf. Perry v. Wolaver*, 2006 WL 1071888, at *2 (D. Me. Apr. 24, 2006) (finding good faith where the action “has otherwise been dutifully litigated”).⁷

⁶ Ms. Speth has ignored Complaint Counsel’s repeated requests for any point of contact at Jerk with whom they could discuss this action in the absence of outside representation. (Burke Dec. ¶¶ 4, 6, Atts. B, C) Even at her deposition, Ms. Speth would not identify any Jerk member, officer, director, or employee, or any other counsel who represented Jerk. (*Id.* Att. I at 46:7-49:7)

⁷ The curious timing of Jerk’s reappearance reinforces the absence of good faith. Jerk retained

IV. CONCLUSION

For the foregoing reasons, the Commission should deny Jerk's motion.

Dated: December 12, 2014

Respectfully submitted,



Sarah Schroeder
Yan Fang
Boris Yankilovich
Kenneth H. Abbe
Federal Trade Commission
Western Region – San Francisco
901 Market Street, Suite 570
San Francisco, CA 94103

COMPLAINT COUNSEL

new counsel only (and immediately) *after* Complaint Counsel moved to supplement the record on summary decision with Jerk's deemed admissions, providing no explanation for why it could not have retained that same counsel beforehand.

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2014, I served a true and correct copy of Complaint Counsel's Opposition to Respondent Jerk, LLC's Motion to Extend Time on:

The Office of the Secretary:

Donald S. Clark
Office of the Secretary
600 Pennsylvania Avenue, N.W.
Room H-172
Washington, D.C. 20580

The Office of the Administrative Law Judge

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Avenue, N.W.
Room H-106
Washington, D.C. 20580

Counsel for John Fanning:

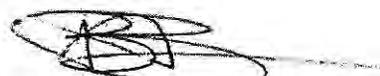
Peter F. Carr, II
Eckert, Seamans, Cherin & Mellott, LLC
Two International Place, 16th Floor
Boston, MA 02110
Email: pcarr@eckertseamans.com

Counsel who have entered an appearance for Jerk, LLC:

David Duncan
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65A Atlantic Ave.
Boston, MA 02110
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drusscol@zalkindlaw.com

Maria Crimi Speth
Jaburg & Wilk, P.C.
3200 N. Central Avenue, Suite 2000
Phoenix, AZ 85012
Email: mcs@jaburgwilk.com

Dated: December 12, 2014



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Federal Trade Commission
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Phone: 415-848-5100
Fax: 415-848-5184

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

In the Matter of)	
)	
Jerk, LLC, a limited liability company,)	
also d/b/a JERK.COM, and)	
)	DOCKET NO. 9361
John Fanning,)	
individually and as a member of)	PUBLIC DOCUMENT
Jerk, LLC.)	

**DECLARATION OF BEATRICE BURKE IN SUPPORT OF COMPLAINT COUNSEL'S
OPPOSITION TO RESPONDENT JERK, LLC'S MOTION TO EXTEND TIME TO
RESPOND TO THE MOTION FOR SUMMARY DECISION AND TO RESCHEDULE
THE EVIDENTIARY HEARING**

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the following is true and correct:

1. I am over 18 years of age, and I am a citizen of the United States. I am employed by the Federal Trade Commission ("FTC") as a paralegal in the FTC's Western Regional Office in San Francisco. I have worked and continue to work as a paralegal for Complaint Counsel in the above-captioned matter, and I have personal knowledge of the facts set forth herein. I am currently a member of the California Army National Guard Reserve and a United States Army veteran from active duty.
2. When Complaint Counsel filed the Complaint in this action on April 7, 2014, Respondent Jerk, LLC ("Jerk") was represented by Counsel Maria Speth of the law firm Jaburg &

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Wilk, P.C. These counsel filed a notice of appearance on Jerk's behalf on April 24, 2014 and filed Jerk's Answer to the Complaint on May 19, 2014.

3. Attached hereto as **Attachment A** is a true and correct copy of an email string between Complaint Counsel and Ms. Speth in June 2014 discussing Jerk's designation of Mr. Fanning as Jerk's company representative and his appearance in that capacity for deposition in Boston on July 28, 2014.
4. Attached hereto as **Attachment B** and **Attachment C** are true and correct copies of email exchanges between Complaint Counsel and Ms. Speth between July 18 and July 30, 2014.
5. Attached hereto as **Attachment D** is a Notice Regarding Representation filed by Ms. Speth in this action on July 30, 2014. Despite filing this notice, neither Ms. Speth nor Jaburg & Wilk have moved to withdraw from this action as Jerk's counsel.
6. Neither Ms. Speth nor Jaburg & Wilk identified for Complaint Counsel any other counsel representing Jerk. Nor has Jerk identified to Complaint Counsel any other counsel representing it until December 8, 2014, when Jerk's counsel David Duncan called Complaint Counsel Sarah Schroeder to discuss Jerk's opposition to summary decision.
7. Since July 18, Jerk has not responded to Complaint Counsel's discovery requests; has not produced any documents to Complaint Counsel; has not provided to Complaint Counsel any copies of subpoenas sent by Jerk to any party; has not attended any deposition noticed or attended by Complaint Counsel; and has not served Complaint Counsel with a response to motions filed in this action.
8. On June 24, 2014, Complaint Counsel served their First Set of Interrogatories on Jerk. To date, Jerk has not responded to these Interrogatories, notwithstanding the Chief Administrative Law Judge's August 15, 2014 order requiring Jerk to provide responses by August 20, 2014.

9. To date, no designated representative for Jerk has appeared to be deposed by Complaint Counsel in this action. On July 2, 2014, Complaint Counsel served on Jerk a notice for deposition, pursuant to Commission Rule 3.33(c)(1), of Jerk's representative(s) to be held on July 28, 2014 in Boston, Massachusetts. Attached hereto as **Attachment E** is a true and correct copy of this notice. No representative for Jerk appeared at this deposition. Attached hereto as **Attachment F** is a true and correct copy of the transcript of this deposition.
10. After the Chief Administrative Law Judge's August 15, 2014 order requiring Jerk to produce an individual to testify as to matters known or reasonably available to the organization in response to Complaint Counsel's 3.33(c)(1) deposition notice, Complaint Counsel served Jerk with a second deposition notice on August 18, 2014, noticing Jerk's deposition for August 27, 2014 in San Francisco, CA. Attached hereto as **Attachment G** is a true and correct copy of this notice. No representative for Jerk appeared at this deposition. Attached hereto as **Attachment H** is a true and correct copy of the transcript of this deposition.
11. On October 7, 2014, Complaint Counsel served their Second Set of Interrogatories and Second Requests for Production of Documents on Jerk. To date, Jerk has not responded to these Interrogatories and Requests for Production, in spite of the Chief Administrative Law Judge's November 25, 2014 Order granting Complaint Counsel's motion to require Jerk to provide responses within seven days of the Order.
12. Attached hereto as **Attachment I** is a true and correct copy of transcript excerpts from the October 7, 2014 deposition of Ms. Speth in this action.
13. Several third party witnesses have informed Complaint Counsel of their willingness and availability to testify at the evidentiary hearing in this action on January 27, 2014 or during the following days. Some of these witnesses have already confirmed the

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reservation of their travel arrangements to and lodging in Washington, DC for the hearing.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on December 12, 2014, in San Francisco, CA.

A handwritten signature in black ink, appearing to be "Beatrice Burke", written over a horizontal line.

Beatrice Burke

TAB

A

From: Maria Crimi Speth <mcs@jaburgwilk.com>
Sent: Wednesday, June 11, 2014 10:35 PM
To: Yankilovich, Boris
Cc: Fang, Yan; Ortiz, Kelly; Schroeder, Sarah; Peter Carr (PCarr@eckertseamans.com)
Subject: RE: Docket 9361-Jerk, LLC. et al. - Jerk, LLC deposition

Boris:

I asked for the categories so I could figure out who to designate, or frankly, if I had anyone to designate. As you know Jerk, LLC is not an operating entity. Once you provided the categories, I was able to determine that John Fanning is a person with some knowledge. I re-read Rule 3.3.3 to make sure I wasn't missing something. It says:

"The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he or she will testify."

I think the use of the word "may" makes it very clear that it is at the option of the organization.

Also, there is nothing to scramble about. The company has no way of compelling anyone to appear for a deposition, so if John doesn't know an answer, I very likely can't produce someone who does.

MARIA CRIMI SPETH | Shareholder | 602.248.1089

JABURG | WILK
Attorneys at Law



From: Yankilovich, Boris [mailto:byankilovich@ftc.gov]
Sent: Wednesday, June 11, 2014 11:46 AM
To: Maria Crimi Speth
Cc: Fang, Yan; Ortiz, Kelly; Schroeder, Sarah; Peter Carr (PCarr@eckertseamans.com)
Subject: RE: Docket 9361-Jerk, LLC. et al. - Jerk, LLC deposition

Hi Maria,

Whether you want to move to quash or limit is of course up to you. If you want to object to some of our categories as beyond the scope of permissible discovery, you should do that in advance of the deposition, as contemplated by Rule 3.33(b). In any event, you must, under Rule 3.33(c), set forth the topics on which the corporate representative will testify. This is squarely a matter of complying with the Rules, and doing so in good faith.

You asked us, emphatically, to provide you with a list of deposition categories in advance of even telling us who Jerk's corporate representative will be. We did that very quickly, working diligently to set out a clearly articulated list of categories reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, and to your defenses. Now that you've designated Mr. Fanning, you need to identify the categories for which you've designated him. We can't go into the 3.33(c) deposition blind, without knowing what Mr. Fanning will and won't be able to testify about on behalf of Jerk. That would just set us up for having to scramble for additional depositions and motions to compel, wasting everyone's time, including the court's. If we have a legitimate dispute about the scope of our deposition categories or the need for additional corporate designees if Mr. Fanning can't testify fully, we should work to resolve it now as opposed to waiting another month and a half. But we can't begin until you let us know what topics Mr. Fanning will be able to cover.

Boris Yankilovich
Federal Trade Commission
901 Market Street, Suite 570 | San Francisco, CA 94103
Office: 415.848.5120 | Mobile: 202.468.2013 | Fax: 415.848.5184
Email: byankilovich@ftc.gov

From: Maria Crimi Speth [<mailto:mcs@jaburgwilk.com>]
Sent: Tuesday, June 10, 2014 11:00 AM
To: Schroeder, Sarah; Peter Carr (PCarr@eckertseamans.com)
Cc: Fang, Yan; Yankilovich, Boris; Ortiz, Kelly
Subject: RE: Docket 9361-Jerk, LLC. et al. - Jerk, LLC deposition

Sarah:

I don't think the rules require me to do any of those things. I do not think a motion to quash is warranted. I was simply trying to avoid the FTC saying that Jerk, LLC has somehow agreed to the relevance of everything in your list just because we designated a witness. I also do not think that I need to identify which categories Mr. Fanning has knowledge about and which he doesn't. I think that is the purpose of the deposition.

MARIA CRIMI SPETH | Shareholder | 602.248.1089
JABURG | WILK
Attorneys at Law  

From: Schroeder, Sarah [<mailto:SSCHROEDER@ftc.gov>]
Sent: Tuesday, June 10, 2014 7:38 AM
To: Maria Crimi Speth; Peter Carr (PCarr@eckertseamans.com)
Cc: Fang, Yan; Yankilovich, Boris; Ortiz, Kelly
Subject: RE: Docket 9361-Jerk, LLC. et al. - Jerk, LLC deposition

Maria:

Thank you for confirming. In rereading your disclaimers at the end of your email, I want to make sure we're on the same page about the deposition. While I didn't set out to interpret your designation of Mr. Fanning as a waiver of objections, it's hard for me to evaluate your objections before I understand what they are. We discussed some of your reservations about some of the deposition categories very quickly during our call last week, but I don't think we made it through all the topics, and to be honest, my notes about your objections aren't crystal clear.

Here's what I propose: To the extent you have legitimate objections to any of the deposition topics, I encourage you to prepare a motion to quash or limit under Rule 3.34. We are of course happy to discuss those topics beforehand with the aim of obviating the need for the motion or reducing its scope. Speaking candidly, we took great pains to make sure that the deposition categories were clearly stated and well within the scope of permissible discovery under the Rules, so there's a good chance that any disagreement between us may be about semantics, in which case we will likely be able to work through it without need for the court's intervention.

If your reservations are not about the propriety of our questions but instead about Mr. Fanning's inability to testify about certain categories for lack of knowledge, can you please let us know for which categories you will designate Mr. Fanning as a testifying as Jerk's rep, and then we can discuss the potential need to line up other Jerk officers to cover the remaining categories. Since I'm out of the office next week and want to make progress on this, it would be very helpful if you could get that designation list to us before Thursday so we can have a meet and confer on Thursday or Friday.

Best Regards,
Sarah

From: Maria Crimi Speth [<mailto:mcs@jaburgwilk.com>]
Sent: Wednesday, June 04, 2014 4:40 PM
To: Schroeder, Sarah; Peter Carr (PCarr@eckertseamans.com)
Cc: Fang, Yan; Yankilovich, Boris; Ortiz, Kelly
Subject: RE: Docket 9361-Jerk, LLC. et al. - Jerk, LLC deposition

Sarah:

This is to confirm our conversation today regarding your notice of deposition of Jerk, LLC. Jerk, LLC designates John Fanning as a person who has knowledge on some of the matters specified in your attached notice. Rule 3.33(c)(1) requires you to describe with reasonable particularity the matters on which examination is requested. While some of the categories are reasonably particular, others are not. Based upon the information it has, Jerk, LLC believes that John Fanning is the proper person to designate.

As we also discussed, we have agreed to July 28 as the date of that deposition, which is the day before Mr. Fanning's deposition in his personal capacity.

Also, I want to be clear that the designation of John Fanning under Rule 3.33(c)(1) is not a waiver of our objection that some of the categories in the attached notice are not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. It is also not an admission that John Fanning is designated for any purpose other than that he has knowledge of some of the categories.

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602-248-0522 (fax)

www.jaburgwilk.com

This communication is intended only for the individual or entity to whom it is directed. It may contain information that is privileged, confidential, or otherwise exempt from disclosure under applicable law. Dissemination, distribution, or copying of this communication by anyone other than the intended recipient, or a duly designated employee or agent of such recipient, is prohibited. If you have received this communication in error, please notify us immediately by telephone at (602) 248-1000, or via e-mail, and delete this message and all attachments thereto.

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B

From: Maria Crimi Speth <mcs@jaburgwilk.com>
Sent: Wednesday, July 30, 2014 4:27 PM
To: Schroeder, Sarah; Ortiz, Kelly; 'pcarr@eckertseamans.com'; Debra A. Gower; 'vroy@eckertseamans.com'
Cc: Yankilovich, Boris; Fang, Yan; Abbe, Kenneth; O'Brien, Kerry
Subject: RE: interrogatory response

Follow Up Flag: Follow up
Flag Status: Flagged

I don't have any information that I am authorized to share with anyone.

MARIA CRIMI SPETH | Shareholder | 602.248.1089

JABURG | WILK
Attorneys at Law



From: Schroeder, Sarah [mailto:SSCHROEDER@ftc.gov]
Sent: Wednesday, July 30, 2014 4:10 PM
To: Maria Crimi Speth; Ortiz, Kelly; 'pcarr@eckertseamans.com'; Debra A. Gower; 'vroy@eckertseamans.com'
Cc: Yankilovich, Boris; Fang, Yan; Abbe, Kenneth; O'Brien, Kerry
Subject: interrogatory response

Maria,

Jerk, LLC's interrogatory response was due last week and we have not received anything. Do you know who we can follow up with to discuss the status of Jerk's interrogatory response?

From: Maria Crimi Speth [mailto:mcs@jaburgwilk.com]
Sent: Wednesday, July 30, 2014 10:40 AM
To: Schroeder, Sarah; Ortiz, Kelly; 'pcarr@eckertseamans.com'; Debra A. Gower; 'vroy@eckertseamans.com'
Cc: Yankilovich, Boris; Fang, Yan; Abbe, Kenneth; O'Brien, Kerry
Subject: RE: Motion to withdraw as counsel

Sarah:

I am not available to meet and confer because I don't represent any party.

MARIA CRIMI SPETH | Shareholder | 602.248.1089

JABURG | WILK
Attorneys at Law



From: Schroeder, Sarah [mailto:SSCHROEDER@ftc.gov]
Sent: Wednesday, July 30, 2014 6:23 AM
To: Maria Crimi Speth; Ortiz, Kelly; 'pcarr@eckertseamans.com'; Debra A. Gower; 'vroy@eckertseamans.com'
Cc: Yankilovich, Boris; Fang, Yan; Abbe, Kenneth; O'Brien, Kerry
Subject: Re: Motion to withdraw as counsel

Maria,

I hope you had a good vacation.

I understand your frustration, but Complaint Counsel is obligated to share certain material with attorneys who have entered an appearance in this matter. I again urge you to file a motion to withdraw or contact Chief Judge Chappell's clerk. In the meantime, we will continue to satisfy our obligations under the rules. If you would prefer, we can send material just to your legal assistant.

Also, we intend to file a motion for discovery sanctions pursuant to Rule 3.38. Please let me know when you are available to meet and confer about this motion.

Best Regards
Sarah

From: Maria Crimi Speth [<mailto:mcs@jaburgwilk.com>]
Sent: Wednesday, July 30, 2014 12:19 AM
To: Schroeder, Sarah; Ortiz, Kelly; 'pcarr@eckertseamans.com' (pcarr@eckertseamans.com) <pcarr@eckertseamans.com>; Debra A. Gower <dag@jaburgwilk.com>; vroy@eckertseamans.com <vroy@eckertseamans.com>
Cc: Yankilovich, Boris; Fang, Yan; Abbe, Kenneth; O'Brien, Kerry
Subject: RE: Motion to withdraw as counsel

Sarah:

I am back and trying to catch up. Your email below says the FTC administrative rules are unclear. I actually think they are silent on the issue. Absent a rule stating otherwise, I have no reason to believe that I have to file a motion to withdraw and I don't plan to do so. I don't represent this client any longer, I have no authority to act on its behalf, and there is no rule or any reference that would lead me to believe that I have to seek permission from the ALJ.

MARIA CRIMI SPETH | Shareholder | 602.248.1089
JABURG | WILK
Attorneys at Law  

From: Schroeder, Sarah [<mailto:sschroeder@ftc.gov>]
Sent: Monday, July 21, 2014 10:27 AM
To: Maria Crimi Speth; Ortiz, Kelly; 'pcarr@eckertseamans.com' (pcarr@eckertseamans.com); Debra A. Gower; vroy@eckertseamans.com
Cc: Yankilovich, Boris; Fang, Yan; Abbe, Kenneth; O'Brien, Kerry
Subject: Motion to withdraw as counsel

Thanks Maria. I know it's a hassle, but you need to file a Motion to Withdraw as Counsel. When the FTC administrative rules are unclear, Chief Judge Chappell has referred to the federal rules or the rules of other courts for guidance. As you know, most courts require attorneys who have entered an appearance to obtain the judge's permission to withdraw as counsel. These rules are designed to prevent prejudice to the other party. We would not oppose your motion to withdraw provided that you give us contact information for Jerk, LLC or the individual that you have been dealing with on behalf of Jerk, LLC, or successor counsel if you've now been informed of one. We need this information to get a sense of how Jerk plans to proceed in the litigation after your withdrawal, and more immediately, to confirm the corporate deposition set for next Monday.

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

From: Maria Crimi Speth [<mailto:mcs@jaburgwilk.com>]

Sent: Friday, July 18, 2014 6:36 PM

To: Ortiz, Kelly; 'pcarr@eckertseamans.com' (pcarr@eckertseamans.com); Debra A. Gower; vroy@eckertseamans.com

Cc: Schroeder, Sarah; Yankilovich, Boris; Fang, Yan; Burke, Beatrice

Subject: RE: FTC Dkt#9361 In the Matter of Jerk LLC -

Counsel:

Please be advised that effective today, I no longer represent Jerk, LLC. As far as I can tell from the rules, there is no withdrawal procedure in this forum so I consider this notice to be my removal from the matter. I do not know if Jerk, LLC can or will obtain new counsel.

MARIA CRIMI SPETH | Shareholder | 602.248.1089

JABURG WILK
Attorneys at Law



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C

From: Schroeder, Sarah
Sent: Thursday, July 24, 2014 10:33 AM
To: 'Maria Crimi Speth'
Cc: Debra A. Gower; Yankilovich, Boris
Subject: RE: Zinman document production

Follow Up Flag: Follow up
Flag Status: Completed

Maria,

I understand that you're no longer representing Jerk, but per my email last week, until the ALJ actually grants your withdrawal, we still have an obligation to communicate with Jerk through you. If you're no longer authorized to represent Jerk, what I can propose is to have us communicate directly with the company – presumably, with Mr. Fanning in his representative capacity -- until Jerk retains new counsel, as long as I have your and the company's authorization to do so. Please let me know if that works for you.

-----Original Message-----

From: Maria Crimi Speth [<mailto:mcs@jaburgwilk.com>]
Sent: Wednesday, July 23, 2014 1:38 PM
To: Schroeder, Sarah
Cc: Debra A. Gower; Yankilovich, Boris
Subject: Re: Zinman document production

Sarah:

I no longer represent Jerk, LLC. There is no need to keep me apprised of issues.

Sent from my iPad
Maria Crimi Speth
(602) 248-1089

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



ORIGINAL

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.)

NOTICE REGARDING REPRESENTATION

Counsel, Maria Crimi Speth and the law firm Jaburg & Wilk, P.C. hereby give notice that as of July 18, 2014, they no longer represent Jerk, LLC.

Respectfully submitted,

/s/Maria Crimi Speth

Maria Crimi Speth
Jaburg & Wilk, P.C.
3200 N. Central Ave., Suite 2000
Phoenix, AZ 85012
(602) 248-1089
(602) 248-0522

Dated: July 30, 2014

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2014, I caused a true and accurate copy of the foregoing to be served electronically through the FTC's e-filing system and on July 30, 2014, 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 Avenue, N.W., Room H-159
Washington, DC 20580

One paper copy and 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

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

Commission:

Sarah Schroeder
[SSCHROEDER@ftc.gov](mailto:sschroeder@ftc.gov)
Yan Fang
yfang@ftc.gov
Boris Yankilovich
byankilovich@ftc.gov
Federal Trade Commission
901 Market Street, Suite 670
San Francisco, CA 94103

One paper copy and one electronic copy to:

Peter F. Carr, II
Eckert, Seamans, Cherin & Mellott, LLC
Two International Place, 16th Floor
Boston, MA 02110
Email: pcarr@eckertseamans.com

/s/Debra Gower _____

TAB

E

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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.**

DOCKET NO. 9361

**COMPLAINT COUNSEL'S NOTICE OF
RULE 3.33(c)(1) DEPOSITION OF RESPONDENT JERK, LLC**

PLEASE TAKE NOTICE that, pursuant to Rule 3.33(c)(1) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings (16 C.F.R. § 3.33(c)(1)), Complaint Counsel will take the deposition of Jerk, LLC on the matters set forth below. Jerk, LLC is required to designate to testify on its behalf one or more officers, directors, managing agents, or other persons who have knowledge on the matters specified below. Pursuant to Rule 3.33(c)(1) and other applicable authority, Jerk, LLC's designee(s) must testify regarding all information known or reasonably available to Jerk, LLC.

1. The allegations in the Complaint.
2. The statements made in Jerk, LLC's Answer.
3. Any and all bases for Jerk, LLC's refusal to unequivocally admit every allegation in the Complaint where Jerk, LLC has not done so.
4. Jerk, LLC's affirmative defenses.
5. Any and all objections to the conduct relief Complaint Counsel seeks to obtain.
6. Jerk, LLC's responses and documents produced in response to the Federal Trade Commission's July 27, 2012 Civil Investigative Demand.
7. The identities of persons who have formulated, controlled, directed, or had authority to control Jerk, LLC since 2009.

8. The identities of persons who have had an ownership interest or investments in Jerk, LLC since 2009.
9. The identities of employees (including interns), independent contractors, and agents of Jerk, LLC since 2009, and their respective roles or duties at Jerk, LLC.
10. Respondent John Fanning's involvement with, work performed for or on behalf of, or connection to Jerk, LLC.
11. Jerk, LLC's use of and/or control over the Jerk.com domain name since 2009.
12. Jerk, LLC's use of and/or control over the www.jerk.com, www.jerk.be, and www.jerk.org URLs (collectively, the "Jerk.com website(s)") since 2009.
13. The number of unique visitors to the Jerk.com website(s), in aggregate and on a monthly and/or annual basis since 2009.
14. Technical information about the operation of and the display of individuals' profiles on the Jerk.com website(s).
15. The source of individuals' profiles, including statements, images, and other content associated with profiles, displayed on the Jerk.com website(s) since 2009.
16. The number of individuals' profiles displayed on the Jerk.com website(s) since 2009 containing content that was generated by Jerk.com users not associated with Jerk, LLC and/or the Jerk.com website(s).
17. Jerk, LLC's representations about the source of individuals' profiles, including statements, images, and other content associated with user profiles, displayed on the Jerk.com website(s) since 2009.
18. Jerk, LLC's policies, procedures, and practices for displaying images of children in profiles on the Jerk.com website(s).
19. Jerk, LLC's role and/or work as a third-party application developer for the Facebook platform.
20. Jerk, LLC's access to and use of Facebook users' profiles.
21. Means by which consumers could contact Jerk, LLC to complain about content displayed on the Jerk.com website(s) or request that content be removed from the Jerk.com website(s).
22. Jerk, LLC's policies, procedures, and practices for responding to and/or addressing consumers' complaints about content displayed on the Jerk.com website(s) and/or consumers' requests that content be removed from the Jerk.com website(s).

23. The benefits or features promised and/or delivered to consumers who purchased membership subscriptions from the Jerk.com website(s).
24. The identities of consumers who purchased membership subscriptions from the Jerk.com website(s).
25. The identities of consumers who paid money to contact Jerk, LLC through the Jerk.com website(s).
26. The revenues, costs, and profits, including sources thereof, of Jerk, LLC since 2009.

This deposition will be held on July 28, 2014 at 8:30 a.m. (ET) at the United States Attorney's Office, John Joseph Moakley Federal Courthouse, 1 Courthouse Way, Suite 9200, Boston, Massachusetts, or at such other time or place as the parties agree, before a person authorized to administer oaths, and will be recorded by stenographic and videographic means.

Date: July 2, 2014

/s/ Sarah Schroeder
Sarah Schroeder (sschroeder@ftc.gov)
Yan Fang (yfang@ftc.gov)
Boris Yankilovich (byankilovich@ftc.gov)
Western Region – San Francisco
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, California 94103
Telephone: (415) 848-5100
Facsimile: (415) 848-5184
COMPLAINT COUNSEL

T A B

F

6. Respondent Fanning objects to the requests to the extent they seek information in the possession, custody, or control of a person, entity or other third-party over which Fanning does not have any control or authority.
7. Respondent Fanning objects to the requests to the extent they seek information that is not reasonably calculated to lead to the discovery of admissible evidence or otherwise seeks irrelevant materials in violation of the Commissions' procedures and the regulatory authority granted to the Commission.
8. Respondent Fanning objects to the requests to the extent they state legal conclusions or require Fanning to engage in a legal analysis.
9. Respondent Fanning objects to the requests to the extent they do not differentiate from Respondent Fanning and Respondent Jerk, LLC and imply that Respondent Fanning and Respondent Jerk LLC are one and the same.
10. Respondent Fanning objects to the requests to the extent they seek to harass or annoy Fanning, or otherwise interfere with his business or professional relationships.

RESPONSES

1. All documents relating to the relationship between Jerk, LLC and NetCapital.

Response No. 1

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

2. All correspondence between any Respondent and Jerk, LLC's registered agents.

Response No. 2

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

3. All documents prepared for third parties relating to investment in or funding of Jerk.com, including business and investment plans, proposals, slides, presentations, brochures, press releases, video news releases, displays, and earnings projections.

Response No. 3

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

4. All documents relating to the formation or ownership of Jerk, LLC, including but not limited to incorporation records and corporate filings.

Response No. 4

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

5. All copies of Jerk.com, including printouts, screenshots, source code, log files, and archived versions of the website.

Response No. 5

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

6. All copies of Jerk.org, including printouts, screenshots, source code, log files, and archived versions of the website.

Response No. 6

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

7. All documents stating, describing, or summarizing the number of visitors to Jerk.com.

Response No. 7

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

8. All documents relating to the statement “millions of people who already use Jerk” on Jerk.com, *see* Complaint Exhibit C, including but not limited to all documents demonstrating, supporting, or calling into question that statement.

Response No. 8

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

9. All documents relating to the statement “Less than 5% of the millions of people on Jerk are jerks” on Jerk.com, *see* Complaint Exhibit G, including but not limited to all documents demonstrating, supporting, or calling into question that statement.

Response No. 9

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

10. All documents relating to (1) the number of profiles maintained or displayed on Jerk.com; (2) the number of profiles featuring a photograph of the profiled person; (3) the number of profiles where the age or depiction of the person indicates that the person is less than 13 years of age; or (4) the number of Jerk.com profiles that reflect a 0/0 vote for the Jerk/Not a Jerk votes tally.

Response No. 10

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

11. All documents relating to each method by which a Jerk.com profile has been created for display on Jerk.com, including but not limited to how any Respondent obtained information, images, and depictions displayed in Jerk.com profiles that were not created or submitted through the “post a jerk” feature.

Response No. 11

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

12. All documents relating to the directory produced to Complaint Counsel with Respondents’ Initial Disclosures on May 27, 2014.

Response No. 12

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

13. All documents relating to any acts or omissions by third parties, including but not limited to Facebook, Software Assist, or any third-party hackers, alleged in any Respondent's Answer to the Complaint.

Response No. 13

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

14. All documents relating to any First Amendment defense asserted in any Respondent's Answer to the Complaint.

Response No. 14

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

15. All documents relating to any Respondent's right to or control over any of the following domains: Jerk.com, Jerk2.com, Jerk3.com, Jerk4.com, Jerk.be, jerk.la, and Jerk.org.

Response No. 15

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

16. All documents relating to any service or feature offered to consumers who have paid for Jerk.com customer service.

Response No. 16

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

17. All documents relating to any service or feature offered to consumers who have paid for a Jerk.com membership.

Response No. 17

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

18. All documents relating to consumers who received “Fast notifications of postings about you,” as described on Jerk.com. *See* Complaint Exhibit C.

Response No. 18

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

19. All documents relating to consumers who received “Updates on people you know and are tracking,” as stated on Jerk.com. *See* Complaint Exhibit C.

Response No. 19

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

20. All documents relating to consumers who entered “comments and reviews,” as stated on Jerk.com. *See* Complaint Exhibit C.

Response No. 20

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

21. All documents relating to consumers who “create[d] a dispute,” as stated on Jerk.com. *See* Complaint Exhibit H.

Response No. 21

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

22. All documents relating to consumers who “post[ed] a Jerk,” as stated on Jerk.com. *See* Complaint Exhibit E.

Response No. 22

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

23. All documents relating to the following applications on Facebook: Jerk.com, Jerk2.com, Jerk3.com, Jerk4.com, Jerk.be, jerk.la, and Jerk.org.

Response No. 23

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

24. All emails sent to and from the support@jerk.com email account.

Response No. 24

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

25. All documents identifying any person who has access to or has corresponded through the support@jerk.com email account.

Response No. 25

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

26. All documents identifying any person who has access to or has posted through each Twitter account used by Jerk, LLC.

Response No. 26

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

27. All documents relating to Jerk, LLC's policies and procedures on consumers' requests to remove a Jerk.com profile or content from a Jerk.com profile, including a consumer's request to remove copyrighted content from Jerk.com.

Response No. 27

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

28. All correspondence from consumers regarding Jerk.com.

Response No. 28

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

29. All correspondence between Jerk, LLC and Facebook.

Response No. 29

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

30. All correspondence relating to Jerk.com or Jerk, LLC between any Respondent and any software developer, including but not limited to Software Assist.

Response No. 30

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

31. All correspondence between any Respondent and any government agency or consumer protection organization, including but not limited to state attorneys general, local law enforcement, the Better Business Bureau, and government agencies outside of the United States relating to Jerk.com or Jerk, LLC.

Response No. 31

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

32. All agreements retaining or otherwise securing the provision of legal services for Jerk, LLC in this matter.

Response No. 32

After a diligent search, Respondent Fanning is not able to locate any responsive documents in his possession, custody or control. Respondent Fanning will supplement responsive documents in the event that he locates any documents in the future.

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)

pcarr@eckertseamans.com

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2014, I caused a true and accurate copy of the foregoing document entitled Respondent John Fanning's Responses to Complaint Counsel's First Requests for Documents 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, and one copy through the FTC's e-filing system:

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: oyalj@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:

Maria Crimi Speth
Jaburg & Wilk, P.C.
3200 N. Central Ave., Suite 2000
Phoenix, AZ 85012

/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: July 11, 2014

TAB

G

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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.**

DOCKET NO. 9361

**COMPLAINT COUNSEL'S NOTICE OF
RULE 3.33(c)(1) DEPOSITION OF RESPONDENT JERK, LLC**

PLEASE TAKE NOTICE that, pursuant to Rule 3.33(c)(1) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings (16 C.F.R. § 3.33(c)(1)), Complaint Counsel will take the deposition of Jerk, LLC on the matters set forth below. Jerk, LLC is required to designate to testify on its behalf one or more officers, directors, managing agents, or other persons who have knowledge on the matters specified below. Pursuant to Rule 3.33(c)(1) and other applicable authority, Jerk, LLC's designee(s) must testify regarding all information known or reasonably available to Jerk, LLC.

1. The allegations in the Complaint.
2. The statements made in Jerk, LLC's Answer.
3. Any and all bases for Jerk, LLC's refusal to unequivocally admit every allegation in the Complaint where Jerk, LLC has not done so.
4. Jerk, LLC's affirmative defenses.
5. Any and all objections to the conduct relief Complaint Counsel seeks to obtain.
6. Jerk, LLC's responses and documents produced in response to the Federal Trade Commission's July 27, 2012 Civil Investigative Demand.
7. The identities of persons who have formulated, controlled, directed, or had authority to control Jerk, LLC since 2009.

8. The identities of persons who have had an ownership interest or investments in Jerk, LLC since 2009.
9. The identities of employees (including interns), independent contractors, and agents of Jerk, LLC since 2009, and their respective roles or duties at Jerk, LLC.
10. Respondent John Fanning's involvement with, work performed for or on behalf of, or connection to Jerk, LLC.
11. Jerk, LLC's use of and/or control over the Jerk.com domain name since 2009.
12. Jerk, LLC's use of and/or control over the www.jerk.com, www.jerk.be, and www.jerk.org URLs (collectively, the "Jerk.com website(s)") since 2009.
13. The number of unique visitors to the Jerk.com website(s), in aggregate and on a monthly and/or annual basis since 2009.
14. Technical information about the operation of and the display of individuals' profiles on the Jerk.com website(s).
15. The source of individuals' profiles, including statements, images, and other content associated with profiles, displayed on the Jerk.com website(s) since 2009.
16. The number of individuals' profiles displayed on the Jerk.com website(s) since 2009 containing content that was generated by Jerk.com users not associated with Jerk, LLC and/or the Jerk.com website(s).
17. Jerk, LLC's representations about the source of individuals' profiles, including statements, images, and other content associated with user profiles, displayed on the Jerk.com website(s) since 2009.
18. Jerk, LLC's policies, procedures, and practices for displaying images of children in profiles on the Jerk.com website(s).
19. Jerk, LLC's role and/or work as a third-party application developer for the Facebook platform.
20. Jerk, LLC's access to and use of Facebook users' profiles.
21. Means by which consumers could contact Jerk, LLC to complain about content displayed on the Jerk.com website(s) or request that content be removed from the Jerk.com website(s).
22. Jerk, LLC's policies, procedures, and practices for responding to and/or addressing consumers' complaints about content displayed on the Jerk.com website(s) and/or consumers' requests that content be removed from the Jerk.com website(s).

23. The benefits or features promised and/or delivered to consumers who purchased membership subscriptions from the Jerk.com website(s).
24. The identities of consumers who purchased membership subscriptions from the Jerk.com website(s).
25. The identities of consumers who paid money to contact Jerk, LLC through the Jerk.com website(s).
26. The revenues, costs, and profits, including sources thereof, of Jerk, LLC since 2009.

This deposition will be held on August 27, 2014 at 9:30 a.m. (PT) at the Federal Trade Commission, 901 Market Street, Suite 570, San Francisco, CA 94103, or at such other time or place as the parties agree, before a person authorized to administer oaths, and will be recorded by stenographic means.

Date: August 18, 2014

/s/ Sarah Schroeder
Sarah Schroeder (sschroeder@ftc.gov)
Yan Fang (yfang@ftc.gov)
Boris Yankilovich (byankilovich@ftc.gov)
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Federal Trade Commission
901 Market Street, Suite 570
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COMPLAINT COUNSEL

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
JERK, LLC, a limited liability company,)
also d/b/a JERK.COM, and) Docket No. 9361
JOHN FANNING,)
individually and as a member of)
JERK, LLC,)
_____)

Wednesday, August 27, 2014
901 Market Street, San Francisco, California

The above-entitled matter came on for
investigational hearing, pursuant to notice, at 9:33 a.m.

1 APPEARANCES:

2 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

3 YAN FANG, ATTORNEY
4 Federal Trade Commission
5 901 Market Street, Suite 570
6 San Francisco, California 94103
7 415.848.5100 Fax 415.848.5184
8 E-mail: yfang@ftc.gov

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1 P R O C E E D I N G S

2

3 MS. FANG: Complaint counsel for the Federal
4 Trade Commission served a Rule 3.33(C)(1) deposition
5 notice on Jerk LLC setting a deposition for August 27,
6 2014 at 9:30 a.m. Pacific time at the Federal Trade
7 Commission's office at 901 Market Street, Suite 570,
8 San Francisco, California 94103.

9 Along with the deposition notice complaint
10 counsel included a copy of Chief Judge Chappell's August
11 15, 2014 order instructing that Jerk LLC is still
12 required to produce an individual to testify as to the
13 matters known or reasonably available to the organization
14 in response to complaint counsel's 3.33(C)(1) deposition
15 notice.

16 Complaint counsel noticed Jerk LLC by serving
17 the notice package with the deposition notice and Chief
18 Judge Chappell's order on Jerk LLC's registered agent,
19 National Registered Agents, Inc. via Federal Express at
20 160 Greentree Drive, Suite 101, in Dover, Delaware,
21 19904. The package to National Registered Agents was
22 signed for on August 20th, 2014.

23 Complaint counsel also sent the notice package
24 to Jerk LLC by certified mail to Jerk LLC's address at
25 P.O. Box 5277, Hingham, Massachusetts 02043, and by

1 Federal Express to Jerk LLC's address at 165 Nantasket
2 Avenue, Hull, Massachusetts 02043.

3 In addition, complaint counsel e-mailed the
4 notice to Maria Speth, counsel who previously entered an
5 appearance for Jerk LLC. Complaint counsel also e-mailed
6 the notice to Peter Carr, counsel for John Fanning.
7 During discovery Maria Speth had designated John Fanning
8 as a person with some knowledge about the matters
9 specified in complaint counsel's deposition notice.

10 Today's date is August 27th, 2014. The time is
11 9:33 a.m. Pacific time. We are at 901 Market Street,
12 Suite 570, San Francisco, California 94103. A
13 representative from Jerk LLC is not present for the
14 deposition. No one from Jerk LLC has notified complaint
15 counsel of any reason for the absence of a representative
16 at this deposition. Because no representative from Jerk
17 LLC is present, this deposition will now conclude at
18 9:34.

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1 CERTIFICATION OF REPORTER
2 DOCKET/FILE NUMBER: 9361
3 CASE TITLE: FTC vs. JERK, LLC; JOHN FANNING
4 DATE: 8/27/14

5
6 I HEREBY CERTIFY that the transcript contained
7 herein is a full and accurate transcript of the notes
8 taken by me at the hearing on the above cause before the
9 FEDERAL TRADE COMMISSION to the best of my knowledge and
10 belief.

11

12 DATED: 8/28/2014

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17

THERESA A. NARDELLO

18

CALIFORNIA CSR 9966

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TAB

I

1 A ER 1.6 prohibits me from answering that
2 question.

3 Q Do you know whether there's a connection
4 between Jerk, LLC and the website jerk.com?

5 A ER 1.6 prohibits me from answering that
6 question.

7 Q Have you at some point in time served as
8 counsel for Jerk, LLC?

9 A ER 1.6 prohibits me from answering that
10 question.

11 Q Did you at any point in time have any other
12 relationship with Jerk, LLC?

13 A No.

14 Q Do you know when you first became aware of
15 Jerk, LLC?

16 A ER 1.6 prohibits me from answering that
17 question.

18 Q Can you state when you first had contact with
19 Jerk, LLC?

20 A ER 1.6 prohibits me from answering that
21 question.

22 Q Was your connection with Jerk, LLC exclusively
23 in providing Jerk, LLC with legal counsel or advice?

24 A Yes.

25 Q Have you ever communicated with Jerk, LLC

1 about Jerk, LLC's business strategy?

2 A ER 1.6 prohibits me from answering that
3 question.

4 Q Have you ever communicated with Jerk, LLC
5 about its company structure?

6 A ER 1.6 prohibits me from answering that
7 question.

8 Q Have you ever been involved in Jerk, LLC's
9 compliance with the Digital Millennium Copyright Act?

10 A ER 1.6 prohibits me from answering that
11 question.

12 Q Did you report to anyone at Jerk, LLC when
13 providing work for Jerk, LLC?

14 A ER 1.6 prohibits me from answering that
15 question.

16 Q Were you the only attorney at your law firm
17 working or who has ever worked for Jerk, LLC?

18 A ER 1.6 prohibits me from answering that
19 question.

20 Q Has anyone ever assisted you in your work for
21 Jerk, LLC?

22 A ER 1.6 prohibits me from answering that
23 question.

24 Q Have you received any payment or other forms
25 of compensation for your work for Jerk, LLC?

1 A ER 1.6 prohibits me from answering that
2 question.

3 Q Did you ever stop your working relationship
4 for Jerk, LLC?

5 A I don't currently represent Jerk, LLC.

6 Q But you did in the past, is that right?

7 A Yes.

8 Q So does that mean at some point you stopped
9 representing Jerk, LLC?

10 A Yes.

11 Q When was that?

12 A ER 1.6 prohibits me from answering that
13 question.

14 Q When you're talking about your representation
15 of Jerk, LLC, are you talking about any particular
16 matter?

17 A I'm not talking about my representation of
18 Jerk, LLC. I am refusing to answer questions about my
19 representation of Jerk, LLC.

20 Q Okay. Let me put it another way. Can you
21 describe in what capacity you represented Jerk, LLC?

22 A No. ER 1.6 prohibits me from answering that
23 question.

24 Q Okay. Can you state why you stopped
25 representing Jerk, LLC?

1 A ER 1.6 prohibits me from answering that
2 question.

3 Q Have you represented Jerk, LLC in this matter,
4 FTC versus Jerk, LLC, et al?

5 A Yes.

6 Q Do you currently represent Jerk, LLC in this
7 matter, FTC versus Jerk, et al?

8 A No.

9 Q When did you stop representing Jerk, LLC in
10 this matter?

11 A ER 1.6 prohibits me from answering that
12 question.

13 Q Have you ever represented anyone else besides
14 Jerk, LLC in this matter?

15 A No.

16 Q Do you know when Jerk, LLC started operating?

17 A I don't.

18 Q Do you know if Jerk, LLC still operates today?

19 A I don't.

20 Q Do you know if Jerk, LLC exists in any way
21 today?

22 A I don't know. That was "know," K-N-O-W. I
23 don't know.

24 Q Does Jerk, LLC currently have a corporate
25 headquarters?

1 A I don't know.

2 Q Do you know if it ever had a corporate
3 headquarters?

4 A I don't know.

5 Q Do you know where Jerk, LLC has done business?

6 A ER 1.6 prohibits me from answering that
7 question.

8 Q Do you know where Jerk, LLC may be doing
9 business now?

10 A I don't.

11 Q Do you know if there's a location for Jerk,
12 LLC's corporate records?

13 A I don't know.

14 Q Do you know if there's ever been a location
15 for Jerk, LLC's corporate records?

16 A ER 1.6 prohibits me from answering that
17 question.

18 Q Do you know if there is a location for service
19 of process upon Jerk?

20 A I don't know.

21 Q Do you know if there has ever been a location
22 for service of process upon Jerk?

23 A ER 1.6 prohibits me from answering that
24 question.

25 Q Do you know if Jerk, LLC currently has any

1 assets?

2 A I don't know.

3 Q Do you know if Jerk, LLC has ever had any
4 assets?

5 A ER 1.6 prohibits me from answering that
6 question.

7 Q Do you know if Jerk, LLC has any managers?

8 A I don't know.

9 Q Do you know if Jerk, LLC has ever had any
10 managers?

11 A ER 1.6 prohibits me from answering that
12 question.

13 Q Do you know if Jerk, LLC has any officers?

14 A Currently?

15 Q Currently.

16 A I don't know.

17 Q Do you know if Jerk, LLC has ever had any
18 officers?

19 A ER 1.6 prohibits me from answering that
20 question.

21 Q Do you know if Jerk, LLC has any directors?

22 A I don't know.

23 Q Do you know if Jerk, LLC has ever had any
24 directors?

25 A ER 1.6 prohibits me from answering that

1 question.

2 Q Do you know if Jerk, LLC currently has any
3 members?

4 A I don't know.

5 Q Do you know if Jerk, LLC has ever had any
6 members?

7 A ER 1.6 prohibits me from answering that
8 question.

9 Q Do you know if Jerk, LLC currently carries out
10 any ongoing business?

11 A I don't know.

12 Q Do you know if Jerk, LLC ever carried out any
13 ongoing business?

14 A ER 1.6 prohibits me from answering that
15 question.

16 Q Do you know if Jerk, LLC currently engages in
17 any activities of any type?

18 A I don't know.

19 Q Do you know if Jerk, LLC has ever engaged in
20 any activities of any type?

21 A ER 1.6 prohibits me from answering that
22 question.

23 Q Do you know if Jerk, LLC is actively engaged
24 in this litigation?

25 A I don't know.

- 1 Q Do you know if Jerk, LLC has any counsel?
- 2 A I don't know.
- 3 Q Do you know if Jerk, LLC has any counsel in
4 the past besides yourself and your law firm?
- 5 A ER 1.6 prohibits me from answering that
6 question.
- 7 Q Do you know what type of company Jerk, LLC is?
- 8 A I don't know.
- 9 Q Do you know if Jerk, LLC is incorporated?
- 10 A I don't know.
- 11 Q Do you know who founded Jerk, LLC?
- 12 A ER 1.6 prohibits me from answering that
13 question.
- 14 Q Do you know if Jerk, LLC currently has any
15 employees?
- 16 A I don't know.
- 17 Q Do you know if Jerk, LLC has ever had any
18 employees?
- 19 A ER 1.6 prohibits me from answering that
20 question.
- 21 Q Are you able to identify any past or present
22 employee of Jerk, LLC?
- 23 A ER 1.6 prohibits me from answering that
24 question.
- 25 Q Are you able to identify any officer or

1 manager, director or member of Jerk, LLC?

2 A Currently?

3 Q Currently.

4 A No.

5 Q What about in the past?

6 A ER 1.6 prohibits me from answering that
7 question.

8 Q Do you know if anyone has ever invested money
9 or anything else of value in Jerk, LLC?

10 A ER 1.6 prohibits me from answering that
11 question.

12 Q Are you able to identify any, anyone who
13 invested anything in Jerk, LLC?

14 A ER 1.6 prohibits me from answering that
15 question.

16 Q Now, to be clear, Jerk, LLC was a client of
17 yours in the past, right?

18 A Yes.

19 Q And was Jerk, LLC a client of yours personally
20 or of yours as well as Jaburg Wilk's?

21 A I guess the firm as well.

22 Q But Jerk, LLC is currently not a client of
23 either you nor your firm?

24 A That's correct.

25 Q And you cannot state when that relationship

1 ended?

2 A I don't believe the rules permit me to answer
3 that question.

4 Q Okay. Are you able to state whether anyone
5 has instructed you not to answer that question?

6 A Yes.

7 Q Who has instructed you not to answer that
8 question?

9 A The Arizona State Bar.

10 Q Anyone else?

11 A No.

12 Q Have you communicated with Jerk, LLC as part
13 of your representation of Jerk, LLC?

14 A I'm sorry, can you repeat the question?

15 Q Sure. Have you communicated with Jerk, LLC as
16 part of your representation of Jerk, LLC?

17 A ER 1.6 prohibits me from answering the
18 question.

19 Q Are you aware of any means of communication
20 currently used by Jerk, LLC?

21 A No.

22 Q Are you aware of any means of communication,
23 by that I mean e-mail, phone number, mail, or any other
24 means used by Jerk, LLC in the past?

25 A ER 1.6 prohibits me from answering that