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 ON COMPLAINT COUNSEL'S MOTION FOR SANCTIONS AND RELATED PENDING MOTIONS

I. Introduction

This Order addresses the following related motions submitted by the parties:

1. Motion of Federal Trade Commission ("FTC") Complaint Counsel for Sanctions Against Respondent Jerk, LLC ("Jerk"), filed February 5, 2015 ("Motion for Sanctions"). This motion seeks a variety of alternative sanctions for Jerk's failure to comply with certain court-ordered discovery. Respondent John Fanning ("Fanning") filed an Objection to the Motion for Sanctions on February 11, 2015 ("Fanning's Opposition to Motion for Sanctions"). Complaint Counsel filed a reply to the Fanning Opposition on February 20, 2015 ("Reply to Fanning's Opposition").

2. Jerk's Motion for Leave to File Late Opposition to Complaint Counsel's Motion for Sanctions, filed February 25, 2015 ("Motion for Leave"). Jerk's Motion for Leave was accompanied by Jerk's proffered opposition to the Motion for Sanctions ("Jerk's Opposition to Motion for Sanctions"). Complaint Counsel filed an Opposition to Jerk's Motion for Leave on February 27, 2015 ("Opposition to Motion for Leave"), which filing Complaint Counsel combined with a Motion to Strike, described below.

3. Complaint Counsel's Motion to Strike, filed February 27, 2015 ("Motion to Strike"). This motion, filed in combination with Complaint Counsel's Opposition to Jerk's Motion for Leave, seeks to strike certain discovery responses, further detailed *infra*, provided to Complaint Counsel by Jerk subsequent to Complaint Counsel's filing of the Motion for

Sanctions. Pursuant to an Order for Expedited Response issued February 27, 2015, Jerk filed its opposition to the Motion to Strike on March 6, 2015 ("Opposition to Motion to Strike").

As more fully explained below, Jerk's Motion for Leave is GRANTED. Complaint Counsel's Reply to Fanning's Opposition to the Motion for Sanctions, submitted without a motion for leave, will be considered.[1] Complaint Counsel's Motion for Sanctions is GRANTED IN PART AND DENIED IN PART. Complaint Counsel's Motion to Strike is DENIED.

II. Jerk's Motion for Leave

Before addressing Complaint Counsel's Motion for Sanctions, it must first be determined whether Jerk's Motion for Leave should be granted, thereby allowing consideration of Jerk's late-filed Opposition to the Motion for Sanctions.

Jerk states that at the time Complaint Counsel filed the Motion for Sanctions, Jerk was not represented by counsel and that Jerk remained without counsel until February 18, 2015, when counsel was retained. Jerk argues that allowing Jerk to file the Opposition will not prejudice Complaint Counsel because Jerk's Opposition incorporates the legal arguments in Fanning's Opposition to the Motion for Sanctions, which was timely filed, and Jerk's Opposition asserts no legal arguments not contained in Fanning's Opposition.

In opposing the Motion for Leave, Complaint Counsel argues that Jerk has failed to show good cause for failing to respond to the Motion for Sanctions within the 10-day period required by FTC Rule 3.22(d), and that where, as here, a motion to extend time is made after the expiration of the allowed time period, the rules contemplate a showing of "excusable neglect." *See* FTC Rule 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."). Complaint Counsel asserts that the fact that Jerk was unrepresented during the 10-day response period after the filing of the Motion for Sanctions is an insufficient reason to allow Jerk to file its Opposition late, particularly where, as here, Jerk has previously relied on its difficulties in retaining counsel to excuse previously missed deadlines in this case. Complaint Counsel further asserts that instead of allowing Jerk's Opposition, Jerk should be deemed to have consented to the Motion for Sanctions for failure to respond within 10 days, as authorized under FTC Rule 3.22(d) (Opposing party shall answer motion within 10 days of service or "be deemed to have consented to the granting of the relief asked for in the motion.").

Under Rule 3.22(d), the deadline for Jerk's Opposition to the Motion for Sanctions was February 16, 2015, at which time Jerk was unrepresented. Regardless of whether absence of counsel, without more, is a sufficient excuse for missing this deadline, the record shows that once Jerk retained counsel on February 18, counsel acted diligently and expeditiously in filing a Notice of Appearance in this matter on February 19; filing certain late discovery responses on February 20 (described *infra*); and filing the Motion for Leave and Jerk's Opposition to the

[1] FTC Rule 3.22(d) states in pertinent part: "The moving party shall have no right to reply, except for dispositive motions or as otherwise permitted by the Administrative Law Judge or the Commission." 16 C.F.R. § 3.22(d). In order to advance the resolution of the Motion for Sanctions, Complaint Counsel's Reply will be reviewed and considered.

Motion for Sanctions on February 25, 2015 – a delay of nine days from the original response deadline. Moreover, there is no unfair prejudice to Complaint Counsel in allowing Jerk to file its Opposition to the Motion for Sanctions, because it merely incorporates Fanning's Opposition, which was timely filed, and does not add any new legal arguments. In addition, given the extreme sanctions sought by Complaint Counsel in its Motion for Sanctions, including a default judgment and adverse inferences, under all the circumstances presented, it would be more unfair to Jerk to prohibit it from opposing the Motion. Accordingly, Jerk's Motion for Leave is GRANTED.

III. Motion for Sanctions and Motion to Strike

A. Background

Both Complaint Counsel's Motion for Sanctions and Motion to Strike arise in connection with Jerk's conduct in discovery in this case, the history of which is not in dispute.

On August 15, 2014, an Order was issued granting Complaint Counsel's Motion to Compel discovery from Jerk ("August 15 Order"). Specifically, Jerk was ordered to produce a corporate representative for deposition, in response to Complaint Counsel's previous Notice of Deposition, and to respond to Complaint Counsel's First Set of Interrogatories. Thereafter, on November 25, 2014, another Motion to Compel by Complaint Counsel was granted, and Jerk was ordered to provide responses to Complaint Counsel's Second Set of Interrogatories and to provide documents responsive to Complaint Counsel's Second Request for Production of Documents ("November 25 Order").

On December 15, 2014, Jerk filed a Motion to Extend the Time to respond to Complaint Counsel's Second Request for Admissions ("RFAs"). Jerk had failed to respond to the RFAs within the 10-day period allowed by FTC Rule 3.32(b), due to being unrepresented by counsel at the time, and, having since obtained new counsel, Jerk requested leave to file answers late, in order to avoid having the matters raised in the RFAs be deemed "conclusively established" against Jerk due to Jerk's failure to timely respond pursuant to FTC Rule of Practice 3.32.[2] Complaint Counsel's opposition to this motion argued that Jerk's failure to respond to the RFAs was unjustified and the matters should be deemed conclusively admitted by Jerk, including for purposes of Complaint Counsel's pending Motion for Summary Decision, filed September 29,

[2] Rule 3.32(b) provides that the subject matter of a request is deemed "admitted unless, within ten (10) days after service of the request, or within such shorter or longer time as the Administrative Law Judge may allow, the party to whom the request is directed serves upon the party requesting the admission, . . . a sworn written answer or objection addressed to the matter." 16 C.F.R. § 3.32(b). The Rule further provides:

> Any matter admitted under this rule is conclusively established unless the Administrative Law Judge on motion permits withdrawal or amendment of the admission. The Administrative Law Judge may permit withdrawal or amendment when the presentation of the merits of the proceeding will be subserved thereby and the party who obtained the admission fails to satisfy the Administrative Law Judge that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

16 C.F.R. § 3.32(c).

2014. Complaint Counsel also argued that Jerk should not be granted relief because Jerk had yet to comply with the discovery orders of August 15 and November 25, 2014.

On January 7, 2015, a First Revised Scheduling Order was issued ("Revised Scheduling Order"), in accordance with a proposal by the parties filed by joint motion on January 6, 2015, that set deadlines of: (1) January 13, 2015, for Jerk to provide outstanding interrogatory and document responses pursuant to the August 15 Order and the November 25 Order; and (2) January 30, 2015, for Jerk to produce a corporate designee, pursuant to the August 15 Order. On January 9, 2015, an Order was issued allowing Jerk to file responses to Complaint Counsel's RFAs ("January 9 Order"). The January 9 Order set a deadline of January 13, 2015 for Jerk to file its responses to the RFAs.

B. Overview of Arguments of the Parties

Complaint Counsel filed its Motion for Sanctions against Jerk on February 5, 2015, stating that Jerk had yet to provide court-ordered answers to Complaint Counsel's First and Second Set of Interrogatories and Second Request for Production of Documents; and that Jerk had failed to provide a corporate deponent for a duly noticed deposition on three separate occasions, most recently on January 30, 2015, notwithstanding that the date had been agreed to by Jerk. Complaint Counsel argues that Jerk's conduct has been willful, dilatory and obstructionist, and has prejudiced Complaint Counsel. As a sanction for Jerk's discovery failures, Complaint Counsel seeks the entry of a default judgment against Jerk. In the alternative, Complaint Counsel seeks: (1) the drawing of certain adverse inferences, detailed *infra*, to establish affirmative facts; (2) a prohibition against Jerk from introducing or relying on any evidence that Jerk has failed to produce in discovery; and (3) an order admitting all of Complaint Counsel's evidence relating to Jerk's "existence, composition and acts and practices . . . without objection" by Jerk, in order to prohibit Jerk from benefitting from the "best evidence rule" as to documents Jerk failed to produce.

Respondent Fanning filed an Objection to Complaint Counsel's Motion for Sanctions, asserting that, although the Motion for Sanctions is directed against only Jerk, the sanctions sought by Complaint Counsel could adversely affect Fanning's defense. For example, Fanning notes, Complaint Counsel's proposed sanction of adverse inferences directly, and adversely, affects Fanning's interest by treating as admitted disputed allegations such as "John Fanning has been the managing member of Jerk," and "John Fanning has had authority to control Jerk's acts and practices." Fanning urges that Complaint Counsel's request for sanctions against Jerk be denied. In the alternative, Fanning opposes ordering the entry of a default judgment or any other sanctions against Jerk until both the ruling by the Commission on Complaint Counsel's pending Motion for Summary Decision, and a final disposition of all claims following trial.

In support of this position that any ruling on sanctions should be deferred, Fanning argues that the Commission may rule, on Complaint Counsel's Motion for Summary Decision, that the Complaint fails to state a claim upon which relief can be granted, which would render a default judgment improper as a matter of law.[3] Fanning also argues that sanctions are improper because

[3] By Order dated March 4, 2015, the Commission extended the timetable for issuing its ruling on Complaint Counsel's Motion for Summary Decision to March 13, 2015.

Complaint Counsel has failed to present any evidence of tangible prejudice resulting from Jerk's asserted discovery failures, and in fact, Complaint Counsel has moved for summary decision, effectively conceding no prejudice from the lack of discovery.

In its Reply to Fanning's Opposition, Complaint Counsel argues that resolution of its Motion for Sanctions against Jerk need not await the Commission's ruling on Complaint Counsel's Motion for Summary Decision because, among other reasons, neither Respondent moved to dismiss the Complaint for failure to state a claim. Regarding whether the pending Motion for Summary Decision against Jerk demonstrates there has been no prejudice from Jerk's alleged discovery failures, Complaint Counsel asserts that it has amassed "overwhelming uncontroverted evidence against Jerk, which Complaint Counsel discovered in spite of Jerk's misconduct," which makes summary decision appropriate, but contends that "[d]efault, however, is a separate issue. It addresses Jerk's misconduct and its impact on this action, not the strength of Complaint Counsel's case." Reply to Fanning's Opposition at 2. Complaint Counsel further contends that it has been prejudiced by Jerk's asserted discovery failures because Jerk's conduct required Complaint Counsel to "incur unnecessary burdens and costs in resorting to third-party discovery for information and materials" that should have been provided by Jerk, and that "it remains unknown how much stronger Complaint Counsel's case would have been" absent Jerk's asserted discovery failures. Reply to Fanning's Opposition at 4-5.

Finally, Complaint Counsel argues that Fanning has provided no support for what Complaint Counsel describes as the "remarkable proposition" that the issuing of sanctions against one defendant hinges on the absence of any potential negative consequences against another and that if that were the test, sanctions in multiple-defendant actions would be a nullity. Reply to Fanning's Opposition at 5. Complaint Counsel asserts that the adverse inferences it seeks that would establish facts about Fanning's alleged managerial and/or controlling role with Jerk, are not prejudicial against Fanning because they are intended to bar only Jerk from denying the facts, and would not bar Fanning from demonstrating contrary facts.

Jerk's Opposition incorporates the substantive arguments of Fanning's Opposition, but further adds that on February 20, 2015, Jerk served Complaint Counsel with Jerk's Answers to Complaint Counsel's Second Set of Interrogatories and with Jerk's Responses to Requests for Admissions, which discovery responses are the subject of Complaint Counsel's Motion to Strike, addressed *infra*. The Opposition states that at the time the Motion for Sanctions was filed, Jerk was unrepresented by counsel and that promptly upon obtaining counsel on February 18, 2015, Jerk served the foregoing discovery responses and sought leave to oppose the Motion for Sanctions. Jerk's Opposition does not dispute that it has failed to provide answers to Complaint Counsel's First Set of Interrogatories or documents in response to Complaint Counsel's Second Request for Production of Documents. Jerk's Opposition further states that on or about February 24, 2015, Jerk's counsel offered to make a corporate designee available the following week, but that Complaint Counsel rejected the offer. Complaint Counsel acknowledges that it rejected the offer, on the ground that the January 30, 2015 deadline for such deposition, as set by the Revised Scheduling Order, had passed and Jerk had not sought or obtained any extension of this deadline. *See* Complaint Counsel's Opposition to Motion for Leave, at 4 n.6.

C. Applicable Law

The authority to impose discovery sanctions is delineated in Commission Rule 3.38(b), which states in pertinent part:

> If a party or an officer or agent of a party fails to comply with any discovery obligation imposed by these rules, upon motion by the aggrieved party, the Administrative Law Judge or the Commission, or both, may take such action in regard thereto as is just, including but not limited to the following:
>
> (1) Order that any answer be amended to comply with the request, subpoena, or order;
>
> (2) Order that the matter be admitted or that the admission, testimony, documents, or other evidence would have been adverse to the party;
>
> (3) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;
>
> (4) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, agent, expert, or fact witness, or the documents or other evidence, or upon any other improperly withheld or undisclosed materials, information, witnesses, or other discovery;
>
> (5) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;
>
> (6) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the party, or both.

16 C.F.R. § 3.38(b).

The record demonstrates that Jerk has failed to provide answers to Complaint Counsel's First Set of Interrogatories and failed to produce documents in response to Complaint Counsel's Second Request for Production of Documents, notwithstanding court orders to do so. The record further shows that Jerk has provided Complaint Counsel with answers to Complaint Counsel's Second Set of Interrogatories, although service on Complaint Counsel on February 20, 2015 was late under the January 9 Order. In addition, Jerk offered to produce a corporate designee deponent; however, Jerk made its offer on February 24, 2015, which was beyond the deadline for such deposition set by the Revised Scheduling Order. Accordingly, Complaint Counsel has demonstrated that Jerk has violated its discovery obligations for purposes of Rule 3.38(b).

Even where a discovery violation has been established, it does not necessarily follow that sanctions must be imposed. Sanctions may be imposed for failing to comply with a discovery obligation where the failure to comply was "unjustified and the sanction imposed 'is reasonable

in light of the material withheld and the purposes of Rule 3.38(b).'" *In re ECM BioFilms, Inc.*, 2014 FTC LEXIS 44, at *5 (Mar. 11, 2014) (quoting *In re IT&T*, 104 F.T.C. 280, 1984 WL 565367 at *127 (July 25, 1984)). Whether sanctions are warranted, and the form of any such sanctions, are discretionary determinations. *In re ECM BioFilms, Inc.*, 2014 FTC LEXIS 171, at *12-13 (Feb. 4, 2014). *See* 16 C.F.R. § 3.38(b) (providing that upon proof of discovery violation, "the Administrative Law Judge or the Commission, or both, *may* take such action in regard thereto as is just") (emphasis added). *See also In re USLife Credit Corp.*, 1978 FTC LEXIS 314, at *122-23 (Sept. 26, 1975) ("[T]he administrative law judges may properly exercise discretion in deciding what kind of sanction, if any, is warranted.").

As explained in *In re LabMD ,Inc* , 2014 FTC LEXIS 42, *9 (March 10, 2014), "Rule 3.38 is designed both to prohibit a party from resting on its own concealment and to maintain the integrity of the administrative process." *In re Grand Union Co.*, 102 F.T.C. 812, 1983 FTC LEXIS 61, at *594 (July 18, 1983). Thus, the explanation for a party's failure to comply with a discovery order "is crucial in determining whether to invoke the sanctions." *Id.*

D. Sanctions

As more fully discussed below, Complaint Counsel has failed to demonstrate that the extreme sanction of a default judgment is necessary or appropriate under the circumstances presented. Similarly, the record fails to justify the imposition of Complaint Counsel's requested adverse inferences. Jerk's discovery failures do, however, warrant sanctions, and under the circumstances, a just and reasonable sanction is to bar Jerk from introducing into evidence or otherwise relying, in support of any claim or defense, upon any improperly withheld or undisclosed materials, witnesses, or other discovery, as set forth in Section IV, *infra*. In addition, Jerk is estopped from objecting to Complaint Counsel's introduction and use of secondary evidence to show what any improperly withheld admission, testimony, documents, or other evidence would have shown, with regard to Jerk's existence, composition, or acts and practices. *Id.* Accordingly, Complaint Counsel's Motion for Sanctions is GRANTED IN PART AND DENIED IN PART.

1. Default Judgment

The role of sanctions is to "encourage discovery and to promote the production of relevant evidence" and thus courts "have generally been reluctant to impose sanctions that would dispose of a case without regard to the merits except in cases involving extreme contumacy against orders to produce evidence without which the elements of dispute cannot be determined on the merits." *In re R.J. Reynolds*, 1988 FTC LEXIS 88, at *5 (Oct. 28, 1988) (citations omitted). As the Supreme Court has noted, entry of a default judgment is "the most severe in the spectrum of sanctions" available. *National Hockey League v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976). *See also In re Rambus, Inc.*, 2003 FTC LEXIS 25, at *6-7 (Feb. 26, 2003) (characterizing default judgment as a "drastic sanction").

Complaint Counsel argues that the sanction of a default judgment, while admittedly extreme, is appropriate because Jerk's conduct has been "willful" and "has deprived Complaint Counsel of the opportunity to conduct effective pretrial discovery." Motion for Sanctions at 6.

However, Complaint Counsel cites no facts – other than the discovery failures themselves – from which it could be concluded that Jerk was behaving "willfully." Rather, the record shows that Jerk's discovery failures arise in connection with Jerk's difficulties in hiring, and keeping, legal counsel at certain critical junctures of this case. *See* Motion for Leave at 1; *see also* Jerk's Motion to Extend Time to Answer Complaint Counsel's Second Request for Admissions. Complaint Counsel does not contend that Jerk has failed to work diligently in retaining counsel, and according to the Declaration of Jerk's current counsel, at all times that Jerk has been without counsel, it has been actively in search of counsel. Declaration of Alexandria B. Lynn ("Lynn Declaration"), submitted with Jerk's Opposition, ¶ 4. While not an "excuse" for failing to meet deadlines, discovery failures due to the absence of counsel do not suggest "willfulness" or bad faith by Jerk. In addition, the fact that, in September 2014, Complaint Counsel moved for summary decision against Jerk, contending that there are no disputed facts and no need for a trial against Jerk, belies any conclusion that Complaint Counsel has been deprived of the ability to conduct adequate discovery. *See* Complaint Counsel's Motion for Summary Decision, at 32, 34 ("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 .... Through diligent discovery work Complaint Counsel have built a record of overwhelming uncontroverted evidence to support the Complaint's counts.").

In support of the requested default judgment sanction, Complaint Counsel relies on *In re Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 763 (Oct. 16, 1996), in which the Administrative Law Judge found two of the respondents to be in default. In that case, the respondents had failed to answer the complaint or otherwise participate in the proceedings, including responding to discovery. *Id.* at *2-5. As stated in *Automotive Breakthrough Sciences*, "'[a] defendant cannot be permitted to avoid or delay a plaintiff's right to judicial resolution of a dispute by ignoring the proceeding.'" *Id.* (quoting *Frank Keevan & Son v. Collier Steel Pipe & Tube*, 107 F.R.D. 665, 670 (1985)). Similarly, in *In re Spohn*, 2008 FTC LEXIS 163 (Nov. 5, 2008), the respondent had ignored the proceeding by failing to enter a notice of appearance, or to file an answer or any other pleading. *Id.* at *1-2. In *In re RustEvader Corp.*, 1996 FTC LEXIS 368 (Aug. 15, 1996), the respondent, after answering, had ceased to participate in proceedings, including discovery, and on motion, the ALJ struck the answer and entered a default judgment. *Id.* at 2-4. In contrast to the foregoing cases, Jerk filed an answer in this matter, filed an opposition to Complaint Counsel's Motion for Summary Decision, filed a Motion to Extend Time to Answer Complaint Counsel's RFAs, and provided at least some discovery, including documents and interrogatory answers, and offered to provide a corporate deponent.

Further, despite numerous conclusory assertions of prejudice, Complaint Counsel has failed to articulate how Jerk's conduct in discovery has so prejudiced Complaint Counsel that a default judgment is necessary or appropriate. Complaint Counsel alleges in its Reply to Fanning's Opposition that it has incurred unnecessary costs for third-party discovery to compensate for Jerk's discovery failures; however, Complaint Counsel fails to support these assertions. As noted above, in filing its Motion for Summary Decision, Complaint Counsel has effectively taken the position that Jerk's liability has been established pursuant to the record that existed at the time of that filing, in September 2014. It is difficult to conceive how Jerk's failure to provide more discovery to Complaint Counsel deprived Complaint Counsel of its ability to

build a case against Jerk. Indeed, Complaint Counsel declined Jerk's offer of a corporate deposition, and is moving to strike Jerk's answers to Complaint Counsel's Second Set of Interrogatories, which further belie the argument that Complaint Counsel's case is being prejudiced by Jerk's discovery failures. Complaint Counsel's assertion that its case against Jerk might have been stronger had Jerk fully complied with discovery is not only speculative, but Complaint Counsel also provides no legal authority for finding prejudice on that ground.

For all the foregoing reasons, Complaint Counsel's request for the entry of a default judgment against Jerk is DENIED.

2. Adverse Inferences

Complaint Counsel seeks an order that various facts be deemed admitted, on the basis of adverse inferences, as follows:

- Jerk has represented to consumers that the profiles displayed on Jerk.com were created by Jerk.com users and reflected the users' views of the profiled individuals;
- Jerk created the vast majority of profiles displayed on Jerk.com by taking information from Facebook;
- Jerk represented to consumers that they would receive additional benefits in exchange for purchasing a Jerk.com membership;
- Numerous consumers who purchased a Jerk.com membership received no additional benefits;
- [Respondent] John Fanning has been a managing member of Jerk;
- [Respondent] John Fanning has had authority to control Jerk's acts and practices; and
- NetCapital.com, LLC has been the majority shareholder of Jerk.

Motion for Sanctions at 7.

The adverse inference rule "provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *In re IT&T Corp.*, 104 F.T.C. 280, 1984 FTC LEXIS 44, at *382 (July 25, 1984).

> As Professor Wigmore has said: ". . . The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable

> to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also always open to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such inference in general is not doubted."

Int'l Union, United Auto. v. NLRB, 459 F.2d 1329, 1335-36 (D.C. Cir. 1972).

Complaint Counsel's requested "adverse inferences" are not mere "inferences," but affirmative facts that would conclusively establish Complaint Counsel's allegations as to Jerk's representations to consumers and their asserted falsity, as well as the role of Fanning in the management and control of Jerk. Such matters go well beyond a mere inference that withheld evidence would have been unfavorable to Jerk. Complaint Counsel acknowledges as much by asserting that the requested "adverse inferences" are facts that have been admitted by Jerk through its failure to timely respond to Complaint Counsel's RFAs. To justify its requested sanction as "adverse inferences," Complaint Counsel states that Jerk's interrogatory answers, document production, and deposition testimony "would have directly addressed" these matters. *Id.* at 7. This argument is unpersuasive.

In any event, even if Complaint Counsel's requested factual findings could be construed as "adverse inferences," they are unreasonable under the circumstances presented. Adverse inferences are a severe sanction, which should be imposed only in "extraordinary circumstances." *In re LabMD*, 2014 FTC LEXIS 42, at *9-10 (quoting *IT&T*, 1984 FTC LEXIS 44, at *413-14). In *LabMD*, Complaint Counsel's request for adverse inferences as a sanction for the respondent's untimely production of documents and incomplete interrogatory answers was denied on the ground, among others, that Complaint Counsel failed to demonstrate that respondent's discovery failures prejudiced Complaint Counsel in preparing its case. 2014 FTC LEXIS 42, at *14 n.4. In the instant case as well, as noted above, Complaint Counsel's assertions of prejudice are conclusory and unsupported, and it appears from the position taken by Complaint Counsel in its Motion for Summary Decision that Jerk's discovery failures have not unfairly prejudiced the preparation of Complaint Counsel's case against Jerk to the extent that the requested adverse inferences are merited.

For all the foregoing reasons, Complaint Counsel's requested sanction of adverse inferences is DENIED.

E. Motion to Strike

Complaint Counsel moves to strike Jerk's Answers to Complaint Counsel's Second Set of Interrogatories and Jerk's Responses to Complaint Counsel's RFAs, served on Complaint Counsel on February 20, 2015, on the ground that they were untimely.[4] Complaint Counsel asserts that these materials are "hopelessly delinquent," having been due by January 13, 2015, and that, given Jerk's prior delays in providing discovery, the delinquent discovery responses

[4] Although Complaint Counsel's Motion to Strike appears to encompass Jerk's Opposition to the Motion for Sanctions, it is more logically interpreted as a request to deny Jerk leave to file the Opposition in the first instance. The granting of Jerk's Motion for Leave herein therefore disposes of Complaint Counsel's objection to the Opposition.

should be stricken. Jerk opposes Complaint Counsel's Motion to Strike, arguing among other things, that there is no evidence Jerk has acted in bad faith.

1. Answers to Complaint Counsel's Second Set of Interrogatories

Complaint Counsel contends that the deadline for Jerk to provide Answers to Complaint Counsel's Second Set of Interrogatories ("Answers") was January 13, 2015, and that Jerk failed to file a motion for leave to submit its Answers late. Further, Complaint Counsel argues that "allowing [Jerk's Answers] into evidence would be prejudicial to Complaint Counsel because, with trial presently scheduled for March 23, 2015, Jerk's service of its Answers on February 20, 2015, gives Complaint Counsel no "practical ability to conduct the necessary discovery into Jerk's new assertions."

For several reasons, Complaint Counsel's arguments fail. First, contrary to Complaint Counsel's assertion, Jerk's Answers to Interrogatories have not been "allowed into evidence," or even offered into evidence. Accordingly, there is nothing to "strike" in this regard. The Answers constitute mere discovery provided to a party, to provide notice of intended claims, defenses, and evidence. The Answers do not constitute evidence unless and until they are admitted into evidence after being offered. Should Jerk seek to introduce the Answers into evidence, Complaint Counsel may object to their admission, including on the ground that the Answers were not timely served. Second, Complaint Counsel has not identified any "new assertions" in the Answers or the "necessary discovery" it would conduct had the Answers been timely served. Complaint Counsel's conclusion that the late service of the Answers is unduly prejudicial is therefore unsupported. Accordingly, Complaint Counsel's Motion to Strike the Answers is DENIED.

2. Responses to RFAs

Complaint Counsel contends that Jerk's Responses to Complaint Counsel's RFAs ("Responses") should be stricken because they were not filed by the January 13, 2015 deadline set by the January 9 Order. Accordingly, Complaint Counsel argues, the Responses are a nullity; the matters contained within the RFAs are conclusively admitted; and Jerk was obliged to file a motion under Rule 3.32(c) to withdraw or amend its "deemed" admissions.

As noted above, Jerk previously moved to submit late responses to Complaint Counsel's RFAs and that motion was granted by the January 9 Order. The January 9 Order held that "the presentation of the merits in this proceeding is served by allowing Jerk to defend on the basis of evidence, rather than to be bound by constructive admissions." January 9 Order at 4. Thus, the only new issue is whether Jerk should now be barred from defending "on the basis of evidence," and instead be "bound by constructive admissions" for the sole reason that the service of the Responses was untimely.

The reasoning for allowing Jerk to submit late Responses, as set forth in the January 9 Order, included that at the time the RFAs were served, Jerk was not represented by counsel; that it is preferable for litigation to be determined on the merits rather than "deemed admissions"; and that there was no undue prejudice to Complaint Counsel in allowing Jerk to respond to the

requested admissions. That reasoning has not been refuted by Complaint Counsel and still applies. Accordingly, these same considerations warrant denying Complaint Counsel's Motion to Strike Jerk's Responses. In particular, Complaint Counsel does not argue, much less demonstrate, that allowing the late Responses is prejudicial to Complaint Counsel. As noted previously, Complaint Counsel filed a Motion for Summary Decision against Jerk in September 2014, asserting that the record developed at that time established Jerk's liability and did not rely on any "deemed admissions" of Jerk.[5] Therefore, Complaint Counsel's Motion to Strike the Responses is DENIED.

IV. Summary and Order

For all the foregoing reasons, Jerk's Motion for Leave is GRANTED; Complaint Counsel's Motion to Strike is DENIED, and any deemed admissions of Jerk, pursuant to Rule 3.32(b), are hereby WITHDRAWN pursuant to Rule 3.32(c); Complaint Counsel's Motion for Sanctions is GRANTED IN PART AND DENIED IN PART, and it is further hereby ORDERED that:

(1) Jerk may not introduce into evidence or otherwise rely at trial, in support of any claim or defense, upon any improperly withheld or undisclosed materials, witnesses, or other discovery; and

(2) Jerk is precluded from objecting to the introduction and use of secondary evidence by Complaint Counsel to show what any withheld admission, testimony, documents, or other evidence would have shown, with regard to Jerk's existence, composition, or acts and practices challenged by the Complaint in this matter.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: March 11, 2015

[5] Although on November 25, 2014, Complaint Counsel filed a Motion to Supplement the Record on the Motion for Summary Decision with the "deemed admissions" of Jerk, it is Complaint Counsel's original position taken in its Motion for Summary Decision that is material for the purposes of the instant Motions.