

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



ORIGINAL

\_\_\_\_\_  
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. )  
)  
)  
)  
)

) PUBLIC

**COMPLAINT COUNSEL'S MOTION FOR SANCTIONS AGAINST JERK, LLC**

Pursuant to Commission Rule of Practice 3.38(b), Complaint Counsel respectfully request that the Court enter sanctions against Jerk, LLC ("Jerk") for its failure to comply with numerous Court orders and discovery deadlines. Jerk's failure to appear at three noticed depositions, refusal to respond to interrogatory and documents requests, and utter defiance of this Court's orders justify the Court rendering a default decision against Jerk. If the Court does not enter a default decision, it should sanction Jerk by issuing adverse inferences, prohibiting Jerk from relying on withheld evidence, and ordering secondary evidence shedding light on issues to which Jerk has resisted discovery admissible without objection.

Dated: February 5, 2015

Respectfully submitted,

Sarah Schroeder  
Yan Fang  
Boris Yankilovich  
Kenneth H. Abbe  
Federal Trade Commission  
901 Market Street, Suite 570  
San Francisco, CA 94103  
Telephone: (415) 848-5100

*Complaint Counsel*

UNITED STATES OF AMERICA  
BEFORE THE 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. )

---

) DOCKET NO. 9361  
)  
)  
)  
)  
)

COMPLAINT COUNSEL’S MEMORANDUM IN SUPPORT OF MOTION  
FOR SANCTIONS AGAINST JERK, LLC

I. INTRODUCTION

Despite repeated Court orders, Respondent Jerk, LLC (“Jerk”) has failed to meet its basic obligations as a party to this litigation. Jerk’s obstructionist conduct, including its failures to appear for deposition three times and respond to crucial discovery requests, has severely prejudiced Complaint Counsel and irreparably disrupted these proceedings. Pursuant to Commission Rule of Practice (“Rule”) 3.38(b), the Court should sanction Jerk by rendering a default decision against the company. Alternatively, the Court should sanction Jerk by issuing adverse inferences, prohibiting Jerk from relying on withheld evidence, and prohibiting objections to secondary evidence shedding light on issues to which Jerk has resisted discovery.

II. JERK CONSISTENTLY FAILED TO COMPLY WITH DISCOVERY  
OBLIGATIONS AND COURT ORDERS

Jerk’s conduct in this litigation has been extraordinarily obstructionist and dilatory. Although Jerk filed an Answer to the Complaint and made an appearance through counsel, it has completely failed to participate in this litigation since mid-July 2014.<sup>1</sup> Since then, Jerk has not

---

<sup>1</sup> Declaration of Kelly Ortiz, attached hereto (“Ortiz Decl.”) ¶¶ 2, 3.

produced any documents in response to Complaint Counsel's second document request, did not respond to two sets of interrogatories, and did not provide a representative for noticed depositions.<sup>2</sup> In so doing, Jerk has violated numerous Court orders compelling Jerk to fulfill its discovery obligations.<sup>3</sup>

**A. Jerk failed to appear for its deposition as ordered by the Court.**

Jerk has failed to provide a representative for noticed depositions *three times*, despite this Court's orders requiring Jerk to do so. Initially, Complaint Counsel noticed Jerk's deposition for July 28, 2014 in Boston, MA, a date and location that Jerk's counsel requested.<sup>4</sup> Complaint Counsel travelled cross-country for the deposition, but no one appeared on Jerk's behalf.<sup>5</sup> On August 15, 2014, pursuant to Complaint Counsel's motion to compel, the Court ordered Jerk "to produce an individual to testify as to matters known or reasonably available to the organization . . ."<sup>6</sup> Pursuant to this order, Complaint Counsel noticed Jerk's deposition for August 27 in San Francisco, CA. Jerk again did not produce a representative to testify, without providing any explanation for its failure.<sup>7</sup>

When Jerk briefly reappeared in this litigation in December 2014 with new counsel, it promised to cure its discovery noncompliance, including by finally appearing for deposition.<sup>8</sup> Jerk stated that it "understands the discovery obligations imposed by the Commission's Rules of Practice and the Court's prior orders," and offered proposed deadlines for "Jerk's responses to outstanding interrogatories, document requests, and depositions . . ."<sup>9</sup> Based on Jerk's

---

<sup>2</sup> *Id.*

<sup>3</sup> See *Order on Complaint Counsel's Motion to Compel Discovery*, Aug. 15, 2014 ("First Discovery Order"); *Order on Complaint Counsel's Motion to Compel*, Nov. 25, 2014 ("Second Discovery Order"); and *First Revised Scheduling Order*, Jan. 7, 2015.

<sup>4</sup> *Complaint Counsel's Motion to Compel Discovery*, Aug. 5, 2015, pp. 1, 3.

<sup>5</sup> *Id.*, p. 3; CX0299 (transcript documenting Jerk's non-appearance).

<sup>6</sup> First Discovery Order, p. 5.

<sup>7</sup> See CX0258 (Ortiz Declaration) ¶ 44.

<sup>8</sup> *Respondent Jerk, LLC's Response to the Court's Order of December 22, 2014*, Jan. 5, 2015, p. 1.

<sup>9</sup> *Id.*

representation that it would come into compliance with the Court's orders and Commission rules, the Court permitted Jerk to file belated responses to Complaint Counsel's Second Request for Admissions ("RFAs"), despite the close of fact discovery, and entered a new scheduling order requiring Jerk to appear for deposition by January 30, 2015.<sup>10</sup> Complaint Counsel dutifully noticed Jerk's deposition for January 28, 2015, a date agreeable to Jerk.<sup>11</sup> Yet again, Jerk was a no show, thus depriving Complaint Counsel of the opportunity to question the corporate Respondent in this action.<sup>12</sup>

**B. Jerk failed to respond to interrogatories as ordered by the Court.**

Jerk also failed to respond to Complaint Counsel's two sets of interrogatories, despite the Court's orders that it must do so. On June 24, 2014, Complaint Counsel served their First Set of Interrogatories on Jerk.<sup>13</sup> Jerk did not respond, forcing Complaint Counsel to file a motion to compel.<sup>14</sup> On August 15, 2014, the Court ordered Jerk to respond to this First Set of Interrogatories by August 20, 2014.<sup>15</sup> To date, Jerk has not responded.<sup>16</sup>

On October 7, 2014, Complaint Counsel issued their Second Set of Interrogatories to Jerk.<sup>17</sup> Jerk also has not responded to these requests,<sup>18</sup> despite the Court's November 25, 2014 order requiring Jerk to do so.<sup>19</sup>

---

<sup>10</sup> *First Revised Scheduling Order*, Jan. 7, 2015; *Order on Motion for Respondent Jerk, LLC to Extend Time to Answer Complaint Counsel's Second Request for Admissions* ("Extension Order"), Jan. 9, 2015, p. 4.

<sup>11</sup> Ortiz Decl. ¶¶ 5, 9; Atts. B, F.

<sup>12</sup> *Id.* ¶ 6; Att. C.

<sup>13</sup> *Id.* ¶ 2

<sup>14</sup> *Id.*

<sup>15</sup> First Discovery Order, p. 6.

<sup>16</sup> Ortiz Decl. ¶ 2.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*; Second Discovery Order, p.1.

A month ago, Jerk promised the Court that it would finally comply with the Court's discovery orders, including producing its long overdue interrogatory responses.<sup>20</sup> The Court granted Jerk an extension and issued a new scheduling order requiring that Jerk respond by January 13, 2015.<sup>21</sup> Once again, Jerk did not comply.<sup>22</sup> Jerk's persistent refusal to answer the interrogatories, including basic factual questions such as who owns the company,<sup>23</sup> has severely interfered with Complaint Counsel's ability to litigate this case.

**C. Jerk failed to produce documents as ordered by the Court.**

On June 6, 2014 Complaint Counsel served on Jerk their First Set of Requests for Documents.<sup>24</sup> In response, Jerk provided only a small set of documents, consisting almost entirely of correspondence between its counsel and third parties.<sup>25</sup> Notably, with the exception of one barely visible screenshot, Jerk responded that it did not have in its possession, custody, or control screenshots or source code for Jerk.com, despite that fact that it was obligated to preserve such evidence after it received the Commission's civil investigative demand in 2012.<sup>26</sup>

In light of Jerk's sparse response, on October 7, 2014, Complaint Counsel served on Jerk their Second Set of Requests for Documents.<sup>27</sup> Jerk did not respond to this request at all,

---

<sup>20</sup> *Respondent Jerk, LLC's Response to the Court's Order of December 22, 2014*, Jan. 5, 2015.

<sup>21</sup> *First Revised Scheduling Order*, Jan. 7, 2015.

<sup>22</sup> Ortiz Decl. ¶ 2.

<sup>23</sup> *Id.* Att. E.

<sup>24</sup> *Id.* ¶ 4.

<sup>25</sup> *Id.* Att. A.

<sup>26</sup> *Id.* The Commission's CID instructed Jerk to "suspend any routine procedures for document destruction and take other measures to prevent the destruction of documents that are in any way relevant to this investigation." (CX0285-006) (emphasis in original). Jerk.com remained in operation until 2013, so it had access to screenshots and source code when it received the Commission's preservation instruction. (CX0258-005, ¶ 15-16). The fact that Jerk has not produced this evidence suggests that Jerk is withholding documents or engaging in spoliation of evidence.

<sup>27</sup> Ortiz Decl. ¶ 2.

prompting another motion to compel.<sup>28</sup> On November 25, 2014, the Court granted Complaint Counsel's motion and ordered Jerk to respond to Complaint Counsel's second document requests within seven days.<sup>29</sup> Jerk ignored the order.<sup>30</sup>

After Jerk's latest promise to respond to this outstanding document request, the Court gave it until January 13, 2015 to do so.<sup>31</sup> But again, Jerk ignored the Court's order; to date, it has not responded to these second document requests.<sup>32</sup> With less than seven weeks remaining before trial, Jerk's refusal to produce relevant documents has caused incurable prejudice to Complaint Counsel.

### III. SANCTIONS ARE NECESSARY TO REMEDY JERK'S VIOLATIONS

#### A. Legal Standard.

This Court has the authority to remedy a Respondent's misconduct by imposing sanctions. Rule 3.38(b) states that if a party fails to comply with any discovery obligation, the Administrative Law Judge may, among other things (1) order a matter deemed admitted; (2) order that the documents or other evidence would have been adverse to the party; (3) rule that a matter be taken as established adversely to a party; (4) rule that a party cannot introduce into evidence or otherwise rely upon withheld or undisclosed material; (5) rule that a party may not be heard to object to introduction and use of secondary evidence to show what the withheld evidence would have shown; and (6) render a decision of the proceeding against the party. 16 C.F.R. § 3.38(b). The sanction imposed must be "sufficient to compensate for withheld testimony, documents, or other evidence." 16 C.F.R. § 3.38(c).

"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.*, 1983 FTC LEXIS 61, \*594 (July 18, 1983). Without adequate sanctions, the procedures for discovery would be ineffective and future litigants would feel free to disobey court orders. *In re Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 763, \*10 (Oct. 16, 1996). In order to

---

<sup>28</sup> *Id.*

<sup>29</sup> Second Discovery Order, p. 1.

<sup>30</sup> Ortiz Decl. ¶ 2.

<sup>31</sup> *Respondent Jerk, LLC's Response to the Court's Order of December 22, 2014*, Jan. 5, 2015, p. 1; *First Revised Scheduling Order*, p. 1.

<sup>32</sup> Ortiz Decl. ¶ 2.

protect the hearing process, the Court has broad discretion to sanction discovery misconduct. *In re Int'l Tel. & Tel. Corp.*, 1984 FTC LEXIS 44, \*371 (July 25, 1984) (“the Commission wishes to strongly reaffirm the power of the Administrative Law Judges to impose such sanctions”).

#### **B. The Appropriate and Necessary Sanction is a Default Decision Against Jerk.**

The only effective sanction for Jerk’s prolonged and blatant misconduct is a default decision against the company. Although default is the most severe of Rule 3.38’s remedies, it is indispensable “in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.” *In re Automotive Breakthrough*, 1996 FTC LEXIS 763 at \*10 (citing *National Hockey League v. Met. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976)). This Court has recognized default judgment as the appropriate tool against a party’s attempt to “avoid or delay a plaintiff’s right to judicial resolution by ignoring the proceeding.” *In re Spohn*, 2008 FTC LEXIS 163, \*4 (Nov. 5, 2008) (internal citations and quotation marks omitted). This Court has also recognized that “default judgment is appropriate and necessary to ensure the functioning of the judicial process when a defendant’s actions or inactions amount to willful misconduct.” *In re Automotive Breakthrough*, 1996 FTC LEXIS 763 at \*12.

Jerk’s misconduct in this action is willful and has deprived Complaint Counsel of the opportunity to conduct effective pretrial discovery. Jerk has repeatedly failed to respond to interrogatories and document requests and appear for depositions, ignoring the Court’s orders and breaking the promises it made to the Court. This Court has defaulted respondents for similar repeat noncompliance with Court orders and the Commission’s discovery rules. *See In re Automotive Breakthrough Sciences*, 1996 FTC LEXIS 763 at \*11-12 (“[d]efendants’ repeated failure to comply with discovery, to obey court orders regarding the same, and to appear for their depositions clearly constitute contumacious conduct which seriously hampered [plaintiff’s] trial preparation.”); *In re Rustevader Corp., et al.*, 1996 FTC LEXIS 369, \*4 (1996) (granting default judgment where respondent failed to respond to discovery requests). Similar to the sanctioned respondents in those cases, Jerk has exhibited complete indifference to the Court’s orders and discovery rules, depriving Complaint Counsel of their right basic, legitimate discovery. Given Jerk’s flagrant bad faith and callous disregard of its discovery duties and the Court’s orders, default is warranted. Indeed, default is necessary, since all prior attempts to force Jerk to comply have failed.<sup>33</sup>

---

<sup>33</sup> Upon the Court’s request, Complaint Counsel can file proposed findings of fact and conclusions of law to support default judgment. Alternatively, the Court may rely on Jerk’s recent admissions that it violated the FTC Act as alleged in the Complaint. *See* p. 7, n. 34, *infra*.

**C. If the Court Does Not Enter Default, Lesser Sanctions Would Be Warranted.**

If the Court decides not to default Jerk, it should impose the following sanctions provided by Rule 3.38:

**1. Adverse Inferences Against Jerk.**

Adverse inference are an effective tool to remedy a party's destruction or withholding of evidence. Indeed, "[t]he drawing of an adverse inference . . . has been recognized to be an entirely proper and indeed necessary exercise of an administrative agency's adjudicative responsibilities . . . ." *In re Market Development Corp.*, 1980 FTC LEXIS 162, \*245-46 (1980) (citations omitted). "[W]hen 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 Int'l Tel.*, 1984 FTC LEXIS 44 at \*382. The adverse inference compensates the moving party for the other party's failure to comply. *In re Market Dev.*, 1980 FTC LEXIS 162 at \*246-47.

Jerk's flagrant misconduct warrants the drawing of the following adverse inferences:

- 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;
- John Fanning has been a managing member of Jerk;
- John Fanning has had authority to control Jerk's acts and practices; and
- NetCapital.com, LLC has been the majority shareholder of Jerk.

Jerk itself has recently admitted these facts by not responding to Complaint Counsel's Second Request For Admissions by the Court-ordered deadline.<sup>34</sup> Moreover, Jerk's interrogatory

---

<sup>34</sup> Complaint Counsel served their Second Request for Admissions ("RFAs") on Jerk on



responses, document production, and deposition testimony would have directly addressed these core issues. For example, Complaint Counsel requested a list of all present and past members of Jerk.<sup>35</sup> Because Jerk did not respond, it is a fair inference that John Fanning has served as a member of Jerk, in light of the evidence Complaint Counsel obtained from other sources,<sup>36</sup> in addition to Jerk's recent admission of this fact.

## **2. Prohibition Against Jerk's Reliance On Any Evidence Outside The Record.**

The Court should also prohibit Jerk from introducing into evidence or otherwise relying on withheld materials, information, and witnesses. 16 C.F.R. § 3.38(b)(4). "[I]t is standard practice that where a party to litigation refuses to respond to valid discovery orders, that party will not subsequently be allowed to introduce at trial documentary or testimonial evidence withheld during discovery." *In re Market Dev.*, 1980 FTC LEXIS 162 at \*250-51; *In re Int'l Tel.*, 1984 FTC LEXIS 44 at \*383. Where a Respondent has "refused repeatedly and without credible justification to be deposed with respect to any of the allegations of the complaint" it is "appropriate that he not be permitted to testify later." *In re Market Dev.*, 1980 FTC LEXIS 162 at \*251. Since Jerk has repeatedly refused to respond to discovery and obey the Court's orders, the Court should prohibit Jerk from relying on documents, testimony, or any other evidence, except for the limited set of documents it has produced to Complaint Counsel during discovery.

## **3. Prohibition Against Objections To Complaint Counsel's Evidence Against Jerk.**

Finally, if the Court does not grant default against Jerk, it should prohibit any objection to

---

November 4, 2014. (Ortiz Decl. ¶ 7; Att. D) After Jerk failed to respond by the 10-day deadline prescribed by Rule 3.32(b), the Commission permitted Jerk to seek relief from this Court to remedy this failure. *Comm'n Order*, Dec. 5, 2014. When Jerk did so, this Court ordered Jerk to respond to the RFAs no later than January 13, 2015. *Extension Order*, p. 4. Despite that order, Jerk did not respond to the RFAs at all (Ortiz Dec. ¶ 7), and therefore has conclusively admitted to the matters therein. *See* 16 C.F.R. § 3.32(b). Moreover, in light of these circumstances, Jerk's failure to respond to the RFAs a second time—after seeking and obtaining leave from the Court—can only be construed as deliberate.

<sup>35</sup> Ortiz Decl. ¶ 8, Att. E.

<sup>36</sup> *See, e.g.*, CX0115, CX00119, CX0133, CX0139, CX0181 at 52:11-18, CX0187, CX0210, CX0368, CX0411, CX0466, CX0507. Additional evidence on this matter is listed in *Complaint Counsel's Statement of Material Facts As To Which There Is No Genuine Issue For Trial*, Sept. 26, 2014 ("CCSMF"), pp. 43-65.

the “introduction and use of secondary evidence to show what the withheld admission, testimony, or other evidence would have shown.” 16 C.F.R. § 3.38(b)(5). The Court’s decision to allow the “introduction of secondary evidence without objection to shed light on issues as to which discovery had been resisted [are] . . . proper exercises of the trial judge’s discretionary authority to maintain the integrity of the adjudicative process in the face of the respondents’ recalcitrance.” *In re Market Dev.*, 1980 FTC LEXIS 162 at \*252; *see also In re Griffin Systems, Inc.*, 1993 FTC LEXIS 167, \*3 (June 30, 1993) (finding that, because of their failure to comply with outstanding discovery requests, “the named respondents may not be heard to object to the use of secondary evidence to show what the withheld evidence would have shown”).

As a result of Jerk’s obstructionist behavior, Complaint Counsel were forced to resort to evidence from other sources for information and materials that Jerk should have readily provided, including Jerk.com screenshots, incorporation records, business plans, financial records, and communications among Jerk staff. For example, Respondents’ refusal to identify the members of Jerk forced Complaint Counsel to seek, *inter alia*, incorporation records, a declaration from Jerk’s original registered agent, and deposition testimony from Jerk’s current agent.<sup>37</sup> Similarly, Jerk’s refusal to provide internal communications forced Complaint Counsel to seek them from other sources, such as former Jerk staffers and investors.<sup>38</sup> As a sanction for Jerk’s evasion of pretrial discovery and willful misconduct, the Court should order all Complaint Counsel’s evidence relating to Jerk’s existence, composition, and acts and practices admitted without objection.

#### IV. CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Court grant this motion and impose the sanctions listed in the attached Proposed Order.

---

<sup>37</sup> *See, e.g.*, CX0041 (declaration from Jerk’s original registered agent); CX0737-738 (Jerk incorporation documents); CX0741 (deposition transcript from Jerk’s most recent registered agent).

<sup>38</sup> *See, e.g.*, CX0079, CX0080, CX0112, CX0117, CX0153, CX0202, CX0306, CX0307, CX0344, CX0352, CX0357, CX0397, CX0360, CX0640, CX0664, CX0670, CX0724. Many additional Jerk communications are identified in the CCSMF.

**PUBLIC**

Dated: February 5, 2015

Respectfully submitted,



---

Sarah Schroeder  
Yan Fang  
Boris Yankilovich  
Ken Abbe  
Federal Trade Commission  
901 Market Street, Suite 570  
San Francisco, CA 94103  
Telephone: (415) 848-5100

*Complaint Counsel*

**PUBLIC**

**STATEMENT CONCERNING MEET AND CONFER**

On January 28, 2015, Complaint Counsel sent an email discussing the relief sought in this motion to Respondents' counsel of record – Peter Carr, Maria Speth, David Duncan, and David Russcol. Complaint Counsel offered to meet with Respondents' counsel to resolve the outstanding discovery issues. Respondents' counsel have not responded to Complaint Counsel's request and have offered no position on this motion.

Dated: February 5, 2015

Respectfully submitted,



---

Sarah Schroeder  
Boris Yankilovich  
Yan Fang  
Kenneth Abbe

Federal Trade Commission  
901 Market Street, Suite 570  
San Francisco, CA 94103  
Phone: (415) 848-5100  
Fax: (415) 848-5184

COMPLAINT COUNSEL

Notice of Electronic Service for Public Filings

**I hereby certify that on February 05, 2015, I filed via hand a paper original and electronic copy of the foregoing COMPLAINT COUNSEL'S MOTION FOR SANCTIONS AGAINST JERK, LLC, [PROPOSED] ORDER GRANTING COMPLAINT COUNSEL'S MOTION FOR SANCTIONS AGAINST JERK, LLC, DECLARATION OF KELLY ORTIZ IN SUPPORT OF COMPLAINT COUNSEL'S MOTION FOR SANCTIONS AGAINST JERK, LLC, with:**

D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Ave., NW  
Suite 110  
Washington, DC, 20580

Donald Clark  
600 Pennsylvania Ave., NW  
Suite 172  
Washington, DC, 20580

**I hereby certify that on February 05, 2015, I filed via E-Service of the foregoing COMPLAINT COUNSEL'S MOTION FOR SANCTIONS AGAINST JERK, LLC, [PROPOSED] ORDER GRANTING COMPLAINT COUNSEL'S MOTION FOR SANCTIONS AGAINST JERK, LLC, DECLARATION OF KELLY ORTIZ IN SUPPORT OF COMPLAINT COUNSEL'S MOTION FOR SANCTIONS AGAINST JERK, LLC, with:**

Sarah Schroeder  
Attorney  
Federal Trade Commission  
sschroeder@ftc.gov  
Complaint

Yan Fang  
Attorney  
Federal Trade Commission  
yfang@ftc.gov  
Complaint

Kerry O'Brien  
Attorney  
Federal Trade Commission  
kobrien@ftc.gov  
Complaint

Maria Speth  
Attorney  
Jaburg & Wilk, P.C.  
mcs@jaburgwilk.com  
Respondent

Boris Yankilovich  
Attorney  
Federal Trade Commission  
byankilovich@ftc.gov  
Complaint

Kenneth H. Abbe  
Attorney  
Federal Trade Commission  
kabbe@ftc.gov  
Complaint

David Duncan  
Zalkind Duncan & Bernstein LLP  
dduncan@zalkindlaw.com  
Respondent

David Russcol  
Zalkind Duncan & Bernstein LLP  
drusscol@zalkindlaw.com  
Respondent

**I hereby certify that on February 05, 2015, I filed via other means, as provided in 4.4(b) of the foregoing COMPLAINT COUNSEL'S MOTION FOR SANCTIONS AGAINST JERK, LLC, [PROPOSED] ORDER GRANTING COMPLAINT COUNSEL'S MOTION FOR SANCTIONS AGAINST JERK, LLC, DECLARATION OF KELLY ORTIZ IN SUPPORT OF COMPLAINT COUNSEL'S MOTION FOR SANCTIONS AGAINST JERK, LLC, with:**

Peter F. Carr, II  
Attorney  
Eckert Seamans Cherin & Mellott, LLC  
pcarr@eckertseamans.com  
Respondent

Sarah Schroeder  
Attorney

**UNITED STATES OF AMERICA  
BEFORE THE 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.**

**DOCKET NO. 9361**

**PUBLIC**

**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL’S MOTION FOR  
SANCTIONS AGAINST JERK, LLC**

This matter having come before the Chief Administrative Law Judge on February 5, 2014 upon a Motion for Sanctions Against Jerk, LLC (the “Motion”) filed by Complaint Counsel pursuant to Commission Rule 3.38(b);

Having considered Complaint Counsel’s Motion, the Memorandum in Support of the Motion, and all supporting and opposing submissions, and for good cause appearing, Complaint Counsel’s Motion is hereby GRANTED, and the Court ORDERS that:

- [ ] A decision of this proceeding is hereby rendered against Jerk, LLC, and the Notice Order filed with Complaint Counsel’s Administrative Complaint on April 7, 2014 is hereby entered against Jerk, LLC.
- [ ] The matters listed on page 7 of the Memorandum in Support of the Motion are hereby established adversely to Jerk, LLC.
- [ ] Jerk, LLC may not introduce into evidence or otherwise rely upon documents, testimony, or any other evidence, except for the documents it has previously produced to Complaint Counsel during discovery.
- [ ] All Evidence introduced by Complaint Counsel relating to Jerk’s existence, composition, and acts and practices shall be admitted without objection.

SO ORDERED:

\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Date:

**UNITED STATES OF AMERICA  
BEFORE THE 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.**

**DOCKET NO. 9361**

**PUBLIC**

**DECLARATION OF KELLY ORTIZ IN SUPPORT OF  
COMPLAINT COUNSEL'S MOTION FOR SANCTIONS AGAINST JERK, LLC**

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 Federal Trade Investigator in the FTC's Western Regional Office in San Francisco. I have worked and continue to work as an investigator for Complaint Counsel in the above-captioned matter, and I have personal knowledge of the facts set forth herein.

2. To date, Respondent Jerk, LLC: has not responded to Complaint Counsel's Second Set of Requests For Documents, which Complaint Counsel served on Jerk, LLC on October 7, 2014; has not responded to Complaint Counsel's First and Second Sets of Interrogatories, which Complaint Counsel served on Jerk, LLC on June 24, 2014 and October 7, 2014, respectively; and has not produced a company representative to appear for depositions noticed by Complaint Counsel for July 28, 2014, August 15, 2014, and January 28, 2015.

3. Jerk, LLC's last response to Complaint Counsel's propounded discovery was its July 7, 2014 response to Complaint Counsel's First Set of Requests for Documents. Since then, Jerk, LLC has not, in response to Complaint Counsel's discovery requests, served on Complaint



Counsel any documents, interrogatory responses, or responses to Requests for Admissions, and has neither produced nor identified any company designee to appear for deposition on Jerk, LLC's behalf.

4. Attached hereto as **Attachment A** is a true and correct copy of Jerk, LLC's response to Complaint Counsel's First Set of Requests for Documents (served on Jerk, LLC on June 6, 2014), excluding the produced documents except "JERK 00455." Jerk, LLC's production in response to this request consisted of approximately 300 pages of documents, almost all of which were emails and other correspondence between Jerk, LLC's counsel and third parties. Many of these 300 pages consisted of multiple sets of duplicates.

5. Attached hereto as **Attachment B** is a true and correct copy of Complaint Counsel's deposition notice served on Jerk, LLC on January 20, 2015, noticing the deposition of Jerk, LLC's representative(s) for January 28, 2015.

6. Attached hereto as **Attachment C** is a true and correct copy of the Affidavit of Reporter Re Nonappearance of Witness prepared after Complaint Counsel's January 28, 2015 scheduled deposition of Jerk, LLC's representative(s).

7. Attached hereto as **Attachment D** is a true and correct copy of Complaint Counsel's Second Request For Admissions, which Complaint Counsel served on Jerk, LLC on November 4, 2014. To date, Jerk, LLC has not responded to this Second Request For Admissions.

8. Attached hereto as **Attachment E** is a true and correct copy of Complaint Counsel's First Set of Interrogatories, served on Jerk, LLC on June 24, 2014.

9. Attached hereto as **Attachment F** is a true correct copy of an email trail between Complaint Counsel Sarah Schroeder and Respondents' counsel.

**Executed on February 5, 2015, in San Francisco, CA.**

  
Kelly Ortiz

# **ATTACHMENT A**

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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. )

---

**JERK, LLC’S RESPONSES TO COMPLAINT COUNSEL’S  
FIRST SET OF REQUESTS FOR DOCUMENTS TO RESPONDENTS JERK,  
LLC AND JOHN FANNING**

Pursuant to Rule 3.37(b), Jerk, LLC (“Jerk”) provides the following responses  
to Complaint Counsel’s First Requests for Production of Documents:

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

**Objection—relevancy:** “documents relating to the relationship between Jerk, LLC and Net Capital” 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. *See* Rule 3.31(c)(1).

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

**Responsive materials are not in the possession, custody or control of Jerk, LLC without Jerk, LLC requesting such documents from its registered agent.**

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.

**Objection—relevancy: “documents relating to the relationship between Jerk, LLC and Net Capital” 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. See Rule 3.31(c)(1).**

**Notwithstanding the objection Jerk, LLC responds that other than the materials attached as exhibits to Matt Pattenau's Declaration produced by the FTC, responsive materials are not in the possession, custody or control of Jerk. See Rule 3.37(a).**

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

**Responsive materials are not in the possession, custody or control of Jerk, LLC.**

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

**See Jerk.com 00455 and materials produced by the FTC. No other responsive materials are not in the possession, custody or control of Jerk. See Rule 3.37(a).**

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

**Other than the materials produced by the FTC, responsive materials are not in the possession, custody or control of Jerk. See Rule 3.37(a).**

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

**Responsive materials are not in the possession, custody or control of Jerk, LLC.**

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.

**Responsive materials are not in the possession, custody or control of Jerk, LLC.**

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.

**Responsive materials are not in the possession, custody or control of Jerk, LLC.**

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.

**Objection—ambiguous: the term “profile” is undefined and ambiguous. See Rule 3.37(a). Responsive materials are not in the possession, custody or control of Jerk, LLC.**

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.

**Responsive materials are not in the possession, custody or control of Jerk. See Rule 3.37(a).**

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

**No other responsive materials are in the possession, custody or control of Jerk. See Rule 3.37(a).**

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.

**Objections: (1) attorney-client privilege, "[a]ll documents" which include attorney-client communications "relating to any acts or omissions by third parties..." are protected by the attorney-client privilege; and (2) reasonable particularity, this request is not specified with reasonable particularity. See Rule 3.37(a).**

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

**See The United States Constitution (Jerk.com 00456-00466).**

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.

**See Documents Jerk previously produced to the FTC Jerk.com 00001-00156.**

**See also Jerk.com 00157-00454.**

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

**Other than the materials produced by the FTC, responsive materials are not in the possession, custody or control of Jerk. See Rule 3.37(a).**

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

**Other than the materials produced by the FTC, responsive materials are not in the possession, custody or control of Jerk. See Rule 3.37(a).**

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

**No responsive materials are in the possession, custody or control of Jerk. See Rule 3.37(a).**

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.

**No responsive materials are in the possession, custody or control of Jerk. See Rule 3.37(a).**

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

**No responsive materials are in the possession, custody or control of Jerk. See Rule 3.37(a).**

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

**No responsive materials are in the possession, custody or control of Jerk. See Rule 3.37(a).**

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

**No responsive materials are in the possession, custody or control of Jerk. See Rule 3.37(a).**

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.

**No responsive materials are in the possession, custody or control of Jerk. See Rule 3.37(a).**

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

**Objection—attorney-client privilege: some “e-mails sent to and from the support@jerk.com email account” were with counsel.**

**Responsive documents are included within documents Jerk produced to the FTC Jerk.com 00001-00156 and Jerk.com 00157-00454.**

25. All documents identifying any person who has access to or has corresponded through the [support@jerk.com](mailto:support@jerk.com) email account.

**No responsive materials are in the possession, custody or control of Jerk. See Rule 3.37(a).**

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

**No responsive materials are in the possession, custody or control of Jerk. See Rule 3.37(a).**

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.

**Responsive documents are included within documents Jerk produced to the FTC Jerk.com 00001-00156 and Jerk.com 00157-00454**

28. All correspondence from consumers regarding Jerk.com.

**Responsive documents are included within documents Jerk produced to the FTC Jerk.com 00001-00156 and Jerk.com 00157-00454**

29. All correspondence between Jerk, LLC and Facebook.

**See Jerk.com 063-065, 116-119.**

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

**Responsive documents are included within documents Jerk produced to the FTC Jerk.com 00001-00156 and Jerk.com 00157-00454**

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.

**Responsive documents are included within documents Jerk produced to the FTC Jerk.com 00001-00156 and Jerk.com 00157-00454**

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

**Objections: (1) attorney-client privilege. “[A]greements retaining or otherwise securing the provision of legal services for Jerk, LLC in this matter” are: (1) protected by the attorney-client privilege; and (2) Objection—relevancy: 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. See Rule 3.31(c)(1).**

Respectfully submitted,

**JERK, LLC**

By its attorneys,

/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 7, 2014



CX0546-001

# **ATTACHMENT B**

**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 January 28, 2015 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: January 20, 2015

/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

# **ATTACHMENT C**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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. )  
\_\_\_\_\_ )

AFFIDAVIT OF REPORTER RE NONAPPEARANCE OF WITNESS

Wednesday, January 28, 2014  
901 Market Street  
San Francisco, California



Statement of Nonappearance

Jerk, LLC, et al.

1/28/2015

1 APPEARANCES:  
2 ON BEHALF OF THE FEDERAL TRADE COMMISSION:  
3 SARAH SCHROEDER, 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: sschroeder@ftc.gov  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

For The Record, Inc.  
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

## Statement of Nonappearance

Jerk, LLC, et al.

1/28/2015

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

2 MS. SCHROEDER: Complaint Counsel for the  
3 Federal Trade Commission and attorneys for Jerk, LLC  
4 agreed that a representative for Jerk, LLC would appear  
5 for a deposition during the last week of January 2015.  
6 Pursuant to this to this agreement, Complaint Counsel  
7 served a Rule 3.33(c)(1) Deposition Notice on Jerk, LLC,  
8 setting a deposition for January 28th, 2015 at 9:30 a.m.  
9 Pacific time at the Federal Trade Commission's office at  
10 901 Market Street, Suite 570, San Francisco, California  
11 94103. Complaint Counsel noticed Jerk, LLC by serving  
12 the deposition notice on Jerk, LLC's registered agent and  
13 by e-mailing it to three attorneys who entered an  
14 appearance for Jerk, LLC in this matter, Maria Speth,  
15 David Duncan, and David Russcol.

16 Today's date is January 28th, 2015. The time is  
17 approximately 9:32 a.m. Pacific time. We are at 901  
18 Market Street, Suite 570, San Francisco, California,  
19 94103. A representative from Jerk, LLC is not present  
20 for the deposition. No one from Jerk, LLC has notified  
21 Complaint Counsel for any reason for the absence of a  
22 representative at this deposition. Because no  
23 representative from Jerk, LLC is present, this deposition  
24 is concluded.

25 (Time noted: 9:32 a.m.)

For The Record, Inc.  
(301) 870-8025 - www.frrinc.net - (800) 921-5555

CX0774-03

Statement of Nonappearance

Jerk, LLC, et al.

1/28/2015

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER: 9361  
CASE TITLE: FTC vs. JERK, LLC; JOHN FANNING  
DATE: 1/28/15

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

DATED: 1/30/2015



THERESA A. NARDELLO  
CALIFORNIA CSR 9966

For The Record, Inc.  
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

# **ATTACHMENT D**

**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** )  
                                 **Jerk, LLC.** )  
                                 )  
                                 )

---

**COMPLAINT COUNSEL'S SECOND REQUEST FOR ADMISSIONS TO  
RESPONDENT JERK, LLC**

Pursuant to Commission Rule of Practice 3.32, Complaint Counsel request that Respondent Jerk, LLC admit the truth of the statements set forth below within ten (10) days after service of this Request.

**INSTRUCTIONS**

For the purposes of this Request for Admissions, each paragraph constitutes a separate statement and is to be admitted or denied separately.

Pursuant to Rule 3.32(b), you must specifically admit or deny the requested admission, or set forth in detail the reasons why you cannot admit or deny the matter. A denial must fairly meet the substance of the requested admission, and when good faith requires that you qualify your answer or deny only a part of the requested admission, you must specify what portion of it is true and qualify or deny the remainder. In addition, you may not give lack of information or knowledge as a reason for failure to admit or deny unless you state that you have made reasonable inquiry and that the information known or readily obtainable by you is insufficient to enable you to admit or deny.

Rule 3.32(b) requires that your responses be sworn to under oath.

It is not grounds for objection that the requested admission relates to opinions of fact or the application of law to fact. Your belief that the matter on which an admission is requested

presents a genuine issue for trial does not, on that ground alone, provide a valid basis for objection.

For the purposes of this Request for Admissions, the term "profile" shall mean a page on the website Jerk.com that displayed a person's name, picture (or a blank square or avatar in lieu of a picture), buttons to vote the profiled person a "jerk" or "not a jerk," a tally of the vote results, and a space to enter comments and add other information about the profiled person.

Unless otherwise specified, the relevant time period is from January 1, 2008 to the date of full and complete compliance with this Request for Admissions.

### ADMISSION REQUESTS

Complaint Counsel requests the following admissions:

1. Paragraphs 4 through 14 of the Federal Trade Commission's Complaint in this action (the "Complaint") accurately describe Jerk, LLC's acts and practices.
2. Jerk, LLC has made deceptive representations in violation of Section 5(a) of the Federal Trade Commission Act as described in Paragraphs 15 through 19 of the Complaint.
3. John Fanning has been a managing member of Jerk, LLC.
4. John Fanning has had authority to control Jerk, LLC's acts and practices.
5. NetCapital.com, LLC has been the majority shareholder of Jerk, LLC.
6. Jerk, LLC does not currently carry out any activities, including any ongoing business.
7. Jerk, LLC does not currently have any place of business.
8. Jerk, LLC does not currently have any members, officers, directors, managers, or employees.

Date: November 4, 2014

/s/ Sarah Schroeder  
Sarah Schroeder  
Federal Trade Commission  
Bureau of Consumer Protection  
901 Market Street, Suite 570  
San Francisco, CA 94103  
Phone: (415) 848-5100

# **ATTACHMENT E**





7. State the total number of profiles displayed on the Jerk websites during the years 2009 through 2013, and the number of these profiles that have (i) featured a photograph or other pictorial representation of the profiled person; (ii) depicted or indicated that the profiled person is under 13 years of age; or (iii) reflected a 0/0 vote for the Jerk/Not a Jerk votes tally.
8. Identify and describe in detail all methods by which profiles on the Jerk websites have been created or displayed, and state the number of profiles created by each such method during the years 2009 through 2013.
9. Identify all sources, including, but not limited to, websites or social media platforms, from which Jerk, LLC or the Jerk websites have obtained content, information, or images that have been displayed in profiles on the Jerk websites, and state the number of profiles containing such content from each identified source.
10. State how the Facebook Directory, identified in Respondents' Initial Disclosures section II.A, is relevant to this case.
11. Describe in detail each company, server, and person where Jerk LLC, John Fanning, or any persons or entities acting at either Respondent's direction or on its behalf, has stored content, including web development content such as code as well as images and other depictions, displayed in profiles on the Jerk websites.
12. Describe in detail each service, product, feature, or benefit that Jerk, LLC has provided to consumers who paid for a monthly membership offered by or through the Jerk websites that was not made available to consumers who did not make such payment.
13. Describe in detail Jerk, LLC's policies, procedures, and practices relating to consumers' requests to remove content from profiles displayed on the Jerk websites, including, but not limited to, requests to remove copyrighted content.
14. Identify all persons with authority or ability to remove from the Jerk websites profiles or information, images, or depictions in profiles displayed on the Jerk websites.
15. Describe John Fanning's past and present title(s), function(s), and responsibilities at or in connection with Jerk, LLC and the Jerk websites.
16. Identify all companies, business, ventures, or other entities that relate to the electronic creation, collection, storage, display, or use of information about persons, including, but not limited to, profiles of persons, with which John Fanning has been involved or connected in any capacity since 2009.
17. State all categories listed on Complaint Counsel's May 29, 2014 Deposition Notice to Jerk, LLC for which Jerk, LLC can provide responsive testimony, and for each such category identify the person(s) who can provide responsive testimony on behalf of Jerk, LLC.

18. State Jerk, LLC's annual revenue and profit for the years 2009 through 2013.

## DEFINITIONS

- A. **“And,”** as well as **“or,”** shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any specification in this Schedule all information that otherwise might be construed to be outside the scope of the specification.
- B. **“Any”** includes the word **“all,”** and **“all”** includes the word **“any.”**
- C. **“Document”** means the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, filmed, punched, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including but not limited to any advertisement, book, pamphlet, periodical, contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, agenda, minute, code book or label. **“Document”** includes Electronically Stored Information.
- D. **“Each”** includes the word **“every,”** and **“every”** includes the word **“each.”**
- E. **“FTC”** or **“Commission”** means the Federal Trade Commission.
- F. **“Identify”** or **“the identity of”** shall be construed to require identification of (a) natural persons by name, title, present business affiliation, present business address and telephone number, or if a present business affiliation or present business address is not known, the last known business and home addresses; and (b) businesses or other organizations by name, address, identities of natural persons who are officers, directors or managers of the business or organization, and contact persons, where applicable.
- G. **“Include”** or **“including”** means “without limitation,” or “including but not limited to,” so as to avoid excluding any information that might otherwise be construed to be within the scope of any specification
- H. **“Person”** or **“Persons”** means all natural persons, corporations, partnerships or other business associations, and all other legal entities, including all members, officers, predecessors assigns, divisions, affiliates, and subsidiaries.
- I. **“Referring to”** or **“relating to”** means discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.
- J. **“Respondents”** mean Jerk, LLC and John Fanning.

- K. “You” and “Your” means Respondents.
- L. The use of the singular includes the plural, and the plural includes the singular, so as to have the broadest meaning whenever necessary to bring within the scope of the Interrogatory that which might otherwise be construed to be outside its scope.
- M. The use of a verb in any tense shall be construed as the use of the verb in all other tenses, so as to have the broadest meaning whenever necessary to bring within the scope of the Interrogatory that which might otherwise be construed to be outside its scope.

### INSTRUCTIONS

- A. The time period covered by an Interrogatory is not limited and all information responsive to the Interrogatory, regardless of dates or time period involved, must be provided.
- B. Provide separate and complete sworn responses for each Interrogatory and subpart.
- C. Answer each Interrogatory fully and completely based on the information and knowledge currently available to you, regardless of whether you intend to supplement your response. Your answers to any Interrogatory herein must include all information within your possession, custody or control, including information reasonably available to you and your agents, attorneys or representatives.
- D. State if you are unable to answer any of the Interrogatories herein fully and completely after exercising due diligence to secure the information necessary to make full and complete answers. Specify the reason(s) for your inability to answer any portion or aspect of such Interrogatory, including a description of all efforts you made to obtain the information necessary to answer the Interrogatory fully.
- E. To the extent that an Interrogatory may be answered by referencing a document, it is permissible to attach the document as an exhibit to the answer and refer to the document in the answer. If any such document contains more than one page, you must refer to the page and section where the relevant reference(s) can be found. 16 C.F.R. § 3.35(c).
- F. If in answering any of the Interrogatories you claim any ambiguity in either the Interrogatory or any applicable definition or instruction, identify in your response the language you consider ambiguous and state the interpretation you are using in responding.
- G. All objections to any Interrogatory must be raised in your initial response or otherwise waived.
- H. If you object or otherwise decline to set forth in your response any of the information requested by any Interrogatory, set forth the precise grounds upon which you rely with specificity so as to permit the Administrative Law Judge or other administrative or

judicial entity to determine the legal sufficiency of your objection or position, and provide the most responsive information you are willing to provide without an order.

- I. If you object to any Interrogatory or any portion of any Interrogatory on the ground that it requests information that is privileged (including the attorney-client privilege) or falls within the attorney work product doctrine, state the nature of the privilege or doctrine you claim and provide all other information as required by 16 C.F.R. § 3.38A.
- J. Each Interrogatory herein is continuing and requires prompt amendment of any prior response if you learn, after acquiring additional information or otherwise, that the response is in some material respect incomplete or incorrect. *See* 16 C.F.R. § 3.31(e).
- K. None of the Definitions or Interrogatories set forth herein shall be construed as an admission relating to the existence of any evidence, to the relevance or admissibility of any evidence, or to the truth or accuracy of any statement or characterization in the Definition or Interrogatory.

Date: June 24, 2014

/s/ Sarah Schroeder  
Sarah Schroeder  
Yan Fang  
Boris Yankilovich  
Federal Trade Commission  
Bureau of Consumer Protection  
901 Market Street, Suite 570  
San Francisco, CA 94103  
Phone: (415) 848-5100

# **ATTACHMENT F**

---

**From:** David Duncan <dduncan@zalkindlaw.com>  
**Sent:** Tuesday, January 06, 2015 10:26 AM  
**To:** Schroeder, Sarah; Peter Carr; Vicki A. Roy; David Russcol  
**Cc:** Ortiz, Kelly; Yankilovich, Boris; Fang, Yan; Abbe, Kenneth  
**Subject:** RE: Jerk, LLC - Proposed joint motion to extend deadlines

Yes.

David Duncan  
Zalkind Duncan & Bernstein LLP  
65A Atlantic Avenue  
Boston, MA 02110  
(617) 742-6020  
[www.zalkindlaw.com](http://www.zalkindlaw.com)

---

**From:** Schroeder, Sarah [<mailto:SSCHROEDER@rtc.gov>]  
**Sent:** Tuesday, January 06, 2015 12:30 PM  
**To:** 'Peter Carr'; Vicki A. Roy; David Russcol; David Duncan  
**Cc:** Ortiz, Kelly; Yankilovich, Boris; Fang, Yan; Abbe, Kenneth  
**Subject:** RE: Jerk, LLC - Proposed joint motion to extend deadlines

Thanks. I have a conflict on January 26<sup>th</sup>, so propose changing the date range for Jerk's deposition to January 27<sup>th</sup> – 30<sup>th</sup>. Please let me know if you assent and we will file the attached motion today.

---

**From:** Peter Carr [<mailto:PCarr@eckertseamans.com>]  
**Sent:** Tuesday, January 06, 2015 9:22 AM  
**To:** Schroeder, Sarah; Vicki A. Roy; David Russcol ([drusscol@zalkindlaw.com](mailto:drusscol@zalkindlaw.com)); David Duncan ([dduncan@zalkindlaw.com](mailto:dduncan@zalkindlaw.com))  
**Cc:** Ortiz, Kelly; Yankilovich, Boris; Fang, Yan; Abbe, Kenneth  
**Subject:** RE: Jerk, LLC - Proposed joint motion to extend deadlines

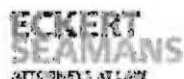
Sarah-

Assent to the joint motion.

Thanks.

PFC

**Peter F. Carr, II**  
**ECKERT SEAMANS CHERIN & MELLOTT, LLC**  
Two International Place • 16<sup>th</sup> Floor • Boston, MA 02110  
Direct (617) 342.6857 | Facsimile (617) 342.6899  
[pcarr@eckertseamans.com](mailto:pcarr@eckertseamans.com)  
[eckertseamans.com](http://eckertseamans.com) | [bio](#) | [vCard](#)



---

**From:** Schroeder, Sarah [<mailto:sschroeder@ftc.gov>]

**Sent:** Monday, January 05, 2015 4:12 PM

**To:** Peter Carr; Vicki A. Roy; David Russcol ([drusscol@zalkindlaw.com](mailto:drusscol@zalkindlaw.com)); David Duncan ([dduncan@zalkindlaw.com](mailto:dduncan@zalkindlaw.com))

**Cc:** Ortiz, Kelly; Yankilovich, Boris; Fang, Yan; Abbe, Kenneth

**Subject:** Jerk, LLC - Proposed joint motion to extend deadlines

Dear Counsel,

For your consideration, I've attached a proposed joint motion to extend certain deadlines in the Jerk, LLC matter. If you assent, we can file the motion today. If you have any edits please send them to me right away so we can file this by the end of this week.

I've also attached a certification and errata sheet from Aaron Zinman, which Complaint Counsel received after it submitted its final exhibit list. Please let me know by January 9<sup>th</sup> if you object to adding this as an exhibit.

Finally, can you please let me know by January 13<sup>th</sup> who Jerk will be designating to appear at its deposition and what deposition date(s) you prefer. For your convenience, I've attached Complaint Counsel's deposition notice outlining the categories of testimony.

Please feel free to call me if you have any questions or wish to discuss any matters in this case.

Best Regards,  
Sarah

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

---

This e-mail message and any files transmitted with it are subject to attorney-client privilege and contain confidential information intended only for the person(s) to whom this email message is addressed. If you have received this e-mail message in error, please notify the sender immediately by telephone or e-mail and destroy the original message without making a copy. Thank you.

Neither this information block, the typed name of the sender, nor anything else in this message is intended to constitute an electronic signature unless a specific statement to the contrary is included in this message.