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	)	**DOCKET NO. 9361**
John Fanning, individually and as a member of Jerk, LLC.	)	**PUBLIC**

COMPLAINT COUNSEL'S RESPONSE TO JOHN FANNING'S OBJECTION TO THE PENDING MOTION FOR SANCTIONS AGAINST JERK, LLC

I. INTRODUCTION

Although Complaint Counsel moved for sanctions against only Respondent Jerk, LLC ("Jerk"), and although Jerk itself has not opposed that motion, Respondent John Fanning ("Fanning") has lodged an objection against it. The Court should not sustain Fanning's objection. It is predicated on misplaced arguments and false contentions. The sanctions Complaint Counsel seek are warranted in light of Jerk's severe misconduct in this action, and despite Fanning's rhetoric, are not calculated to unfairly prejudice him. If Fanning objects to being associated with Jerk, the blame lies with his involvement with the company and its conduct, not the pending motion.[1]

II. ARGUMENT

A. Default Judgment Is An Appropriate Sanction Against Jerk.

Fanning's argument that default against Jerk is inappropriate until after the case against

[1] Since Jerk has not filed an answer in opposition to Complaint Counsel's motion for sanctions within 10 days of the motion, it has been deemed to consent to it, 16 C.F.R. § 3.22(d), irrespective of Fanning's objection.

Jerk is resolved on the merits is ill-founded and illogical.

First, nothing in the Rules requires an otherwise appropriate default sanction to be put on hold while the case proceeds through litigation. On the contrary, this Court has routinely granted default judgment before resolving the case on the merits against the defaulted party. *See, e.g., In re Spohn*, 2008 FTC LEXIS 163, at *6 (Nov. 5, 2008); *In re Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 763, at *8 (Oct. 16, 1996); *In re Rustevader Corp., et al.*, 1996 FTC LEXIS 273, at *4 (May 24, 1996). Conversely, Fanning has not cited any authority supporting his contention that the default judgment sanction must be deferred until after the case is resolved on the merits. That is not surprising, since such an approach would render the sanction moot. *See Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 161 (2d Cir. 1992) ("If we were to allow a defaulting party to contest liability and interpose general set-offs at the damages inquest, we would eviscerate the rule governing defaults . . . .").

Second, contrary to Fanning's argument, the fact that Complaint Counsel moved for summary decision before seeking default does not subordinate the resolution of the request for default judgment to the outcome on summary decision. Complaint Counsel moved for summary decision last September. They sought default nearly five months later, only after the full extent of Jerk's misconduct and its impact on the case manifested itself. As explained in Complaint Counsel's sanctions motion, default against Jerk is appropriate because of Jerk's misconduct, which has significantly prejudiced Complaint Counsel in litigating this case. To be sure, summary decision against Jerk is also appropriate, not because of Jerk's misconduct, but because of the overwhelming uncontroverted evidence against Jerk, which Complaint Counsel discovered in spite of Jerk's misconduct. And the Commission may very well grant summary decision based on this evidence. Default, however, is a separate issue. It addresses Jerk's misconduct and its impact on this action, not the strength of Complaint Counsel's case. *Automotive Breakthrough*, 1996 FTC LEXIS 763 at *10 (The federal rules relating to default, on which the Rules are modeled, "provide for default judgment in order to allow the courts to manage their dockets efficiently and effectively." (citing *Merrill Lynch Mort. Corp. v. Narayan*, 908 F.2d 246, 252 (7th Cir. 1990)). In other words, default against Jerk is appropriate whether or not Jerk's liability is established on summary decision. Thus, the Court should not defer ruling on the pending sanctions motion until after the Commission rules on summary decision.

Third, Fanning's argument that it would be unjust to grant default when the Commission may find that the Complaint fails to state a claim as a matter of law is predicated on the faulty premise that the Commission would vacate its own complaint *sua sponte*, even though neither Respondent has moved to dismiss. Although Jerk has raised several grandiose defenses, including the First Amendment and abuse of statutory authority,[2] it has not moved to dismiss the

[2] *See* Answer of Respondent Jerk, LLC (May 19, 2014). Granting default judgment against Jerk would not preclude Fanning's ability to invoke his pleaded affirmative defenses.

Complaint on those grounds. Moreover, Jerk has refused to litigate its defenses by failing to participate in discovery.[3]

Fanning's suggestion that the Court cannot grant default because the Complaint is unlawful is rooted in similarly flawed logic, since it rests on a conclusory presumption of unlawfulness. Neither Respondent has moved to dismiss the Complaint for failing to state a claim as a matter of law, or on any other ground. If either Jerk or Fanning truly believed that the Complaint failed as a matter of law, they could have moved to dismiss the Complaint pursuant to Rule 3.22 at any point since the start of this case almost a year ago.[4] They have not. In light of this inaction, Fanning's nascent interest in protecting Jerk's right to seek dismissal of the Complaint as a matter of law is baseless and disingenuous.

Finally, Fanning's presented authority does not salvage his ill-founded argument. At most, that authority stands for the unremarkable proposition that "before granting a default judgment, the Court must first ascertain whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law." *Chanel, Inc. v. Gordashevsky*, 558 F. Supp. 2d 532, 536 (D.N.J. 2008) (internal citations and quotation marks omitted); *see also* Charles A. Wright, Arthur R. Miller & Mary Kay Kane, 10A Fed. Prac. and Proc. Civ. § 2688, at 58-59 (3d ed. 1998) (same).[5] But as explained, Respondents have not

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[3] For example, Complaint Counsel's deposition notices to Jerk listed "Jerk, LLC's affirmative defenses" as a deposition topic. (CX0296; CX0785) Jerk, by repeatedly failing to appear for deposition, has insulated itself from answering questions about its defenses.

[4] At the Scheduling Conference, the Court expressly reminded counsel of Respondents' ability to move to dismiss under the Rules. (CX0295–008:3-22)

[5] The cases Fanning marshals do not support his argument that default judgment against Jerk is inappropriate. In *J & J Sports Prods., Inc. v. Romenski*, the district court *granted* default judgment against nonparticipating defendants, even though it did not grant the full amount of damages that plaintiff sought. 845 F. Supp. 2d 703, 708 (W.D.N.C. 2012). *Greyhound Exhibitgroup* also tackled the question of post-default damages, not the propriety of default itself. 973 F.2d at 158 ("While a party's default is deemed to constitute a concession of all well pleaded allegations of liability, it is not considered an admission of damages."). The court cast no doubt on the propriety of granting default judgment. In *Bravado Int'l Grp. Merch. Servs., Inc. v. Ninna, Inc.*, the magistrate judge recommended *in favor* of granting default judgment against the corporate defendant, which, like Jerk, failed to obey court orders. 655 F. Supp. 2d 177, 189 (E.D.N.Y. 2009). The Massachusetts state court cases Fanning cites, to the extent they are instructive whatsoever, also fail to support his argument. *Prudential-Bache Sec., Inc. v. Comm'r of Revenue*, 412 Mass. 243 (1992) addressed standing, not default judgment. Its

provided any basis for doubting the Complaint's legitimacy as a matter of law. On the contrary, the Commission's decision to issue the Complaint connotes a presumption of legitimacy. *See* 15 U.S.C. § 45(b) (authorizing the Commission to issue complaints only if has "reason to believe" a violation of subsection 45(a) has occurred); *cf. Kuff v. U.S. Forest Serv.*, 22 F. Supp. 2d 987, 993 (W.D. Ark. 1998) (under the Administrative Procedures Act, "the agency's actions are presumed to be lawful and correct"). Thus, once the Complaint's well-pleaded factual allegations are accepted as true upon default judgment against Jerk, *Spohn*, 2008 FTC LEXIS 163 at *4, there will remain no genuine basis to question the Complaint's sufficiency.

B. Fanning's Argument That Jerk's Misconduct Has Not Prejudiced Complaint Counsel Is Based On Unsupported And False Contentions.

Complaint Counsel's motion for sanctions explains—in detail and with supporting facts—precisely how Jerk's misconduct has prejudiced both Complaint Counsel and the orderly proceeding of this case.[6] Although Jerk has not disputed this prejudice, Fanning's objection concludes that Complaint Counsel's motion is lacking in its showing of prejudice. Fanning is wrong. More insidiously, the contentions upon which Fanning bases his conclusion are demonstrably false.

First, Fanning's contention that "Complaint Counsel presents no evidence of tangible prejudice"[7] is proven false by Complaint Counsel's account of Jerk's misconduct, including failure to timely respond to interrogatories and document requests and to appear for deposition, as well how this misconduct has hindered Complaint Counsel's ability to obtain evidence. If Fanning means to suggest that Complaint Counsel have managed to obtain evidence to build a strong case against Jerk despite Jerk's misconduct, that is true, but beside the point. Jerk's misconduct has forced Complaint Counsel to incur unnecessary burdens and costs in resorting to third-party discovery for information and materials that Jerk should have turned over in the first

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invocation of a hypothetical default scenario, which is *dictum*, merely reaffirmed the trial court's duty to enter judgments that are lawful. *Id.* at 249. In *Productora E Importadora De Papel* v. *Fleming*, 376 Mass. 826 (1978), the state supreme court reversed the trial court's calculation of damages after default judgment was granted, but did not overturn the imposition of default judgment. On the contrary, it noted that in granting default judgment, the trial court "conformed exactly to the procedures . . . for sanctioning wilful failure to give discovery." *Id.* at 832.

[6] *See* Complaint Counsel's Motion For Sanctions (Feb. 5, 2015) (hereinafter, "Sanctions Motion").

[7] Objection of Respondent John Fanning to Motion For Sanctions Against Jerk, LLC (Feb. 11, 2015) (hereinafter "Obj."), p. 3.

place. Moreover, despite the strength of Complaint Counsel's evidence, it remains unknown how much stronger Complaint Counsel's case would have been had Jerk complied with the Rules and the Court's orders.

Second, Fanning's admonition that the Court must not overlook the purportedly "improper" and "abus[ive]" nature of Complaint Counsel's discovery requests is both false and irrelevant.[8] Any grievance Fanning may have about the breadth or scope of Complaint Counsel's discovery to Jerk does not excuse Jerk's misconduct. The appropriate remedies for overly burdensome or otherwise inappropriate discovery requests include lodging objections and seeking protective orders, not noncompliance. *See* 16 C.F.R. §§ 3.31(d); 3.33(g); 3.35(a); 3.37(b). Jerk, however, has neither timely objected to nor sought protective orders against any of the outstanding discovery requests upon which Complaint Counsel's sanctions motion is predicated. Since Jerk itself has not found Complaint Counsel's discovery sufficiently "improper" or "abus[ive]" to warrant such recourse, Fanning's conclusory contention of impropriety rings hollow.

Finally, Fanning's contention that "Complaint Counsel knows that Jerk, LLC (and Mr. Fanning) expressly denies core factual allegations which Complaint Counsel now requests this Court to deem admitted"[9] is simply false. As a threshold matter, Complaint Counsel are not asking the Court to admit Jerk's admissions. As explained in Complaint Counsel's pending motion for sanctions, Jerk's admissions became established by operation of the Rules when Jerk refused to answer Complaint Counsel's requests for admissions by the Court-ordered deadline.[10] Since the matters are now conclusively admitted, Complaint Counsel has no need to seek the Court's intervention to render the admissions established. Moreover, because Jerk has admitted the matters on which Complaint Counsel seek adverse inferences,[11] it is incorrect, and inappropriate, for Fanning to accuse Complaint Counsel of knowing otherwise. Indeed, as Complaint Counsel have argued in support of summary decision, even without Jerk's admissions, the remaining evidence indisputably establishes these matters as true.[12]

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[8] Obj. p. 3.

[9] Obj. p. 3.

[10] Sanctions Motion pp. 7-8 & n.34.

[11] *See id.* pp. 7-8.

[12] *See id.* p. 8 n.36; *see also* Complaint Counsel's Motion For Summary Decision (Sept. 29, 2014).

C. Fanning's Argument That Sanctions Against Jerk Would Prejudice Him Is Misplaced.

Fanning's final ground for objecting—that rendering the sanctions Complaint Counsel seek against Jerk would prejudice Fanning—is entirely misplaced. Complaint Counsel's motion does not seek to sanction Fanning, and his objection fails to specify how he believes he would be prejudiced. Moreover, despite Fanning's reproach that "[i]n no event should Mr. Fanning sustain any prejudice from any discovery sanctions that may enter against Jerk, LLC"[13], he provides no support for the remarkable proposition the issuing of sanctions against one defendant hinges on the absence of any potential negative consequences against another. If that were the test, sanctions in multiple-defendant actions would be rendered a nullity.

Fanning's concern about prejudice to him is misplaced. It is not Complaint Counsel's proposed sanctions against Jerk, but rather the facts and evidence, that stand to "bear negatively on Mr. Fanning's defense."[14] Moreover, contrary to Fanning's contention that Complaint Counsel seek "to convert blatant inadmissible evidence into admissible evidence at trial,"[15] the remedy Complaint Counsel actually seek is quite modest and necessary. Complaint Counsel seek to prevent Jerk (not Fanning) from introducing new evidence and to bar evidentiary objections only as to evidence relating to Jerk's (not Fanning's) existence, composition, and acts and practices. The need for this limited relief is obvious, since Jerk has refused to turn over evidence relating to these basic matters. If Jerk had complied with its discovery obligations and Court orders, the threshold authenticity and admissibility of the evidence Complaint Counsel seek to use against it would have been established through its own documents and testimony. But because Jerk has not complied, Complaint Counsel have had to seek and obtain this evidence from other sources, such as former Jerk insiders and investors, each of whom has certified the evidence as authentic business records under penalty of perjury.[16]

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[13] Obj. p. 2.

[14] Obj. p. 1.

[15] Obj. p. 4.

[16] *See* CX0739–03-10 (listing certifications and their respective CX numbers). Per the Court's Scheduling Order, Complaint Counsel turned over all third party materials, including the certifications of authenticity and business records, to Respondents promptly after receiving them. If Respondents doubted the authenticity or business record status of these materials, or anything else about them, they were free to depose the producing parties. They have not done so. Nor have they challenged their certifications. Indeed, neither Fanning nor Jerk even had their counsel attend the depositions of three Jerk insiders who provided such evidence. (*See* CX0181-007; CX0438-002; CX0463-004).

Having been forced to take such a circuitous road to obtain information and materials about Jerk's existence, composition, and business practices, Complaint Counsel would be unfairly prejudiced if required to fend off objections to this evidence on the threshold issues of authenticity and business record status. Respondents would still be free to challenge this evidence at trial on various other permissible grounds. But Jerk, as a result of its misconduct, should be deemed to have forfeited its ability to challenge the evidence's threshold admissibility. And unless Fanning is prepared to acknowledge that he authoritatively speaks for Jerk, and can thereby competently lodge authenticity or business records objections to this evidence, he too should not be allowed to singlehandedly derail admissibility on those grounds.[17]

Fanning's general concern about prejudice is also unavailing. To be sure, the evidence Complaint Counsel have gathered may well be detrimental to Fanning to the extent it demonstrates his deep involvement in every aspect of Jerk's business. That the evidence sufficiently implicates Fanning in Jerk's misconduct, however, is not a valid reason to deny the modest evidentiary sanctions Complaint Counsel seek. Whether or not evidence has a negative bearing on Fanning's defense is not the test for excluding it. *See Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir. 1980) (Fed. R. Evid. 403 "does not offer protection against evidence that is merely prejudicial, in the sense of being detrimental to a party's case."); *United States v. Mathison*, 2013 U.S. Dist. LEXIS 82457, at *10 (N.D. Iowa June 12, 2013) (citing *United States v. Myers*, 503 F.3d 676, 681 (8th Cir. 2007) ("evidence is not *unfairly* prejudicial [] simply because it is detrimental to" the defendants' contended defense). Fanning does not explain why any evidence is *unfairly* prejudicial to him. He does not even identify any such evidence. In any case, the sanctions Complaint Counsel seek will not prevent Fanning from moving to exclude specific evidence based on unfair prejudice to him at trial.

Finally, Fanning's fear that adverse inferences against Jerk stand to bind him is misplaced. Fanning contends that Complaint Counsel ask this Court to "find as established fact" the matters listed on page 7 of Complaint Counsel's sanctions motion, including matters relating to Fanning's role at the company.[18] Complaint Counsel seek to conclusively establish those matters against only Jerk, not Fanning. That two of the matters Complaint Counsel seek to have

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[17] Despite having been initially designated by Jerk as its representative for deposition, Fanning has denied his ability to speak on the company's behalf. *See* Complaint Counsel's Motion to Compel Discovery, p. 1 (Aug. 5, 2014); Respondent John Fanning's Objection to Complaint Counsel's Motion to Compel Discovery, p. 5 (Aug. 12, 2014) ("In no event can Mr. Fanning be compelled to testify on behalf of Jerk, LLC."). Accordingly, Fanning's competence to challenge evidence relating to Jerk on threshold authenticity and business record grounds is highly dubious, especially where contradicted by sworn statements by the records' custodians.

[18] Obj. p. 3.

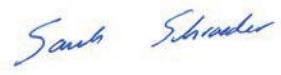
conclusively established against Jerk reference Fanning is a reflection of the facts in this case, not some ploy to bind Fanning through sanctions against Jerk. Complaint Counsel have consistently sought to determine Jerk's organizational makeup and structure, including who was ultimately in charge of the company. To that end, Complaint Counsel propounded interrogatories to Jerk and sought deposition testimony on those topics, to no avail.[19] Then, after the evidence Complaint Counsel discovered from other sources established that Fanning was Jerk's managing member and had authority to control the company's acts and practices, Complaint Counsel asked Jerk to admit these facts, which Jerk has done under the Rules. Complaint Counsel now seek to bar Jerk from attempting to re-litigate these (and five other, similarly established) matters through the imposition of adverse inferences. These adverse inferences against Jerk on matters that reference Fanning would not bar Fanning from arguing that, contrary to the weight of the evidence, he was not the person in charge of Jerk.[20]

III. CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Court not sustain Fanning's objection, and grant Complaint Counsel's pending motion for sanctions against Jerk, which Jerk does not oppose.

Dated: February 20, 2015

Respectfully submitted,



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[19] *See* Sanctions Motion Ortiz Dec. Exs. B, E.

[20] Fanning objects only to the use of the sought adverse inferences against him (Obj. p. 1), not to the use of underlying evidence that independently supports the adverse inferences. Even though the adverse inferences against Jerk will not bind Fanning, he still must confront the evidence.

Notice of Electronic Service for Public Filings

I hereby certify that on February 20, 2015, I filed via hand a paper original and electronic copy of the foregoing Complaint Counsel's Response to Respondent Fanning's Objection, with:

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