

Aquaforest TIFF Junction Evaluation

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 DOCUMENT

ORIGINAL

COMPLAINT COUNSEL'S MOTION TO COMPEL DISCOVERY

Pursuant to Rule 3.38(a), and for the reasons stated in the supporting Memorandum filed herewith, Complaint Counsel respectfully requests that the Court order Respondents John Fanning ("Fanning") and Jerk, LLC ("Jerk") to appear for deposition testimony, which both respondents failed to do pursuant to Complaint Counsel's deposition notices; Jerk to provide responses to Complaint Counsel's First Set of Interrogatories; and Fanning to produce documents responsive to Complaint Counsel's First Requests For Production.

Specifically, Complaint Counsel asks the Court to: (i) compel Fanning to appear for depositions on behalf of himself and as the representative of Jerk at the FTC's office in San Francisco on two business days between August 21 and 27; (ii) Jerk to respond to Complaint Counsel's Interrogatories at least three business days before the compelled Jerk deposition; and (iii) Fanning to produce documents at least five business days before his compelled deposition.

Dated: August 5, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sarah Schroeder".

Sarah Schroeder
Kerry O'Brien
Yan Fang
Boris Yankilovich
Western Region – San Francisco
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103

COMPLAINT COUNSEL

Aquaforest TIFF Junction Evaluation

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

In the Matter of)

Jerk, LLC, a limited liability company,)
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John Fanning,)
individually and as a member of)
Jerk, LLC.)

DOCKET NO. 9361

PUBLIC DOCUMENT

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S MOTION TO
COMPEL DISCOVERY**

After diligent attempts to resolve multiple discovery disputes among the parties, Complaint Counsel now faces no choice but to seek the Court's assistance for the following three failures by Respondents. First, Respondent John Fanning ("Fanning") failed to appear for his deposition as Respondent Jerk, LLC's ("Jerk") designated corporate representative, and again for his personal deposition the following day. Second, Jerk failed to provide any response to Complaint Counsel's Interrogatories. Third, Fanning produced no documents in response to Complaint Counsel's Requests for Production ("RFPs"), even though documents provided by others establish that Fanning has responsive documents. Accordingly, Complaint Counsel moves the Court to compel testimony from both parties, Interrogatory responses from Jerk, and the production of documents from Fanning.

BACKGROUND

Complaint Counsel noticed Jerk's deposition for July 28 and Fanning's deposition for July 29. (Declaration of Kelly Ortiz ("Ortiz") Attchs. A-C.) Jerk's counsel designated Fanning as the person who would testify on Jerk's behalf. (Declaration of Sarah Schroeder ("Schroeder") Attch. E.) Complaint Counsel also served Respondents with their first sets of RFPs and Interrogatories. (Ortiz Attchs. D, E.)

In the meanwhile, Complaint Counsel attempted repeatedly to engage Respondents in good faith settlement discussions. In April, Complaint Counsel sent Respondents a proposed order, which Respondents' counsel characterized as "not acceptable" during the May 28 scheduling conference. (Schroeder ¶2; Ortiz Attch. J.) Despite that rejection, Complaint Counsel continued to attempt settlement discussions, modifying the order language based on Respondents' various concerns. (Schroeder ¶2.) On July 18, Complaint Counsel again sent Fanning's counsel a draft order containing substantial modifications to the Notice Order. (*Id.*) Fanning's counsel did not respond to that proposal until the afternoon before Fanning's deposition. (*Id.*)

The weeks leading up to Jerk's and Fanning's depositions were mired with delay and discovery non-compliance. First, Fanning did not respond to Complaint Counsel's RFPs by the July 7 deadline. He responded four days later, provided no explanation for the delay, and failed to produce a single document—an inexplicable result given Jerk's own production of several emails to or copying Fanning, plus hundreds of pages of emails produced by third parties addressed to, from, or copying Fanning. (*Id.* ¶5, ¶13, ¶14, Attch. G.) Moreover, Jerk never responded to Complaint Counsel's Interrogatories, due July 24. Jerk did not provide a reason for its non-response. (*Id.* ¶12.) Fanning also failed to respond to the Interrogatories by the July 24 deadline. (*Id.* ¶8.) His counsel asked for a one-day extension, but still failed to respond on July 25. (Schroeder Attch. H.) Fanning responded only on July 30, the day *after* his deposition. (Ortiz Attch. G.)

Second, on July 18—ten days before Jerk's scheduled deposition—the company's counsel, Maria Crimi Speth, alerted Complaint Counsel that, effective immediately, she no longer represented Jerk. (Schroeder Attch. G.) Ms. Speth wrote that she considered her email to Complaint Counsel as effectuating her removal from this matter. (*Id.*) Despite repeated attempts by Complaint Counsel to encourage Ms. Speth to alert the Court of her intended withdrawal to facilitate an orderly transition, she refused to do so until July 30. (*Id.*) She has also refused to

identify new counsel for Jerk or anyone at the company with whom Complaint Counsel could communicate in the absence of counsel. (*Id.*)

Third, Fanning failed to show up at both his deposition as Jerk's corporate representative on July 28 and his personal deposition on July 29. At Fanning's request, both depositions were scheduled for Boston. (Schroeder ¶4; Ortiz Attchs. A-C.) Complaint Counsel traveled there from San Francisco. (Schroeder ¶7.) Fanning did not show on behalf of Jerk on July 28. (*Id.* ¶7; Ortiz Attch. H.) Neither Jerk nor its counsel provided any justification for his failure to appear. (Schroeder ¶7.)

Fanning's failure to appear on July 29 for his personal deposition was also unjustified. On the afternoon of July 28, Fanning's counsel, Peter F. Carr, called Complaint Counsel's Sarah Schroeder asking to reengage settlement discussions in hope of avoiding the time and expense of having Fanning appear at his personal deposition the next day. (*Id.* ¶8.) Mr. Carr was now ready to propose changes to Complaint Counsel's proposed order, offered initially in April and re-sent, after further modifications, on July 18. (*Id.* ¶8.) Since Ms. Schroeder was already in Boston, away from her office, she asked Mr. Carr to email his counterproposal to Complaint Counsel Kerry O'Brien and Boris Yankilovich. (*Id.* ¶8.)

Ms. O'Brien and Mr. Yankilovich received Mr. Carr's counterproposal and spoke with him by phone later that afternoon. (Declaration of Kerry O'Brien ("O'Brien") ¶5-¶6, Attch. A.) They expressed willingness to consider this counterproposal, but cautioned that, given its eleventh-hour presentation and Fanning's requested changes, there probably was no way to reach a settlement on Fanning's terms before his deposition in the morning. (*Id.* ¶7.) Nonetheless, to avoid having Fanning undergo a deposition if a speedy settlement could be reached, Ms. O'Brien and Mr. Yankilovich told Mr. Carr that they could propose two options. (*Id.* ¶8-¶10.) First, Complaint Counsel could incorporate some additional order language changes sought by Fanning and email that revised order to Mr. Carr for Fanning to sign before his deposition in the morning. In that event, Complaint Counsel would adjourn the deposition indefinitely. (*Id.*)

Second, if Fanning would not sign that order as is, but wanted more time to resolve any remaining issues and questions about the order language, Complaint Counsel could reschedule his deposition to a later date in August or September at the FTC's San Francisco office. (*Id.*) Ms. O'Brien and Mr. Yankilovich explained that they would propose specific dates after conferring with Ms. Schroeder about her availability to take Fanning's deposition in San Francisco. (*Id.*) They stated that they would make their proposal to Mr. Carr in writing via email later that evening, and would need Mr. Carr's written acceptance of one of the proposed options sufficiently in advance of the 9 am deposition. (*Id.*) Without such acceptance, Fanning's deposition would proceed as scheduled. (*Id.*) Mr. Carr was amenable to this approach, and Complaint Counsel advised him, repeatedly, to look for their proposal by email later that evening. (*Id.*)

Complaint Counsel did as they promised. After conferring with Ms. Schroeder about her availability for rescheduling Fanning's deposition, they emailed Mr. Carr their proposal a couple hours after speaking with him. (*Id.* ¶11, Attch. B.) That email attached a revised order and presented three options: (1) Fanning could sign that order as is, on condition that he confirm, as his counsel represented, that Jerk is a defunct company, and agree to cooperate in any default action against Jerk; (2) if Fanning needed more time, Complaint Counsel could postpone the next day's deposition if Fanning agreed to appear for a rescheduled deposition in San Francisco on August 6, 7, or 14; or (3) the deposition would proceed as scheduled in the morning. (*Id.*) Complaint Counsel's email expressly cautioned that if, instead of accepting one of the options presented, Fanning attempted to propose some other course, the deposition would proceed as scheduled in the morning. (*Id.*)

Fanning did not accept any of the options presented. Instead, the next morning, Mr. Carr wrote back that he would agree only to terms "outlined over the phone yesterday," but not to the ones actually offered to him in writing. (Schroeder Attch. I.) He would also singlehandedly adjourn the deposition. (*Id.*) Given that Mr. Carr attempted to propose some unspecified option

not presented by Complaint Counsel, Ms. Schroeder promptly responded, nearly three hours before the deposition start time, stating, “we will proceed with Mr. Fanning’s deposition today as scheduled.” (*Id.*) Undeterred, Mr. Carr replied: “I am not proceeding today.” (*Id.*)

Ms. Schroeder proceeded with Fanning’s deposition as scheduled. She opened the deposition at 9 am on July 29 at the noticed place. (Ortiz Attch. I.) Fanning did not show up; Mr. Carr did. Ms. Schroeder noted Fanning’s absence for the record. Mr. Carr then attempted to excuse his client’s failure to appear based on purportedly reaching “general[] terms” for adjourning the deposition. (*Id.* at 7:15–8:1.) Yet he acknowledged that the two sides did not reach an agreement on anything, including rescheduling the deposition, during their conversation the evening before, because Complaint Counsel did not offer any dates for a rescheduled deposition during that conversation and Mr. Carr still needed to confer with his client before agreeing to anything. (*Id.* at 8:23–9:14.) Ms. Schroeder confirmed that no agreement was reached to reschedule Fanning’s deposition, and noted that Fanning’s absence was unjustified. (*Id.* at 16:10-15, 26:7-15.)

The next day, Fanning served responses to Complaint Counsel’s Interrogatories. (Ortiz Attch. G.) When Ms. Schroeder asked for justification for Fanning’s responses being nearly a week late, Mr. Carr responded that he construed Complaint Counsel’s continued demands for the responses even after the deadline had run as a grant of an extension. (Schroeder Attch. J.) No such extension was granted. (*Id.*) Mr. Carr went on to accuse Ms. Schroeder of abusing government authority, but still did not provide any justification for his client’s delay. (*Id.*)

ARGUMENT

A. Legal Standard.

Rule 3.31(a) permits parties to obtain discovery by deposition testimony, written interrogatories, and the production of documents. Rule 3.38(a) permits parties to move to compel discovery, including for deposition testimony, interrogatory responses, and production of documents.

B. Respondents Should Provide Deposition Testimony at a Time and Place Convenient for Complaint Counsel.

Fanning's failure to appear for the two scheduled depositions warrants an order compelling his appearance to testify on the dates and at the location convenient to Complaint Counsel. The failures to appear were inexcusable. Fanning, the sole person designated by Jerk as its corporate representative, failed to appear at his July 28 deposition on behalf of Jerk without any excuse whatsoever. He then failed to appear at his personal deposition on July 29, ostensibly because his counsel claimed he reached an agreement with Complaint Counsel to postpone the deposition. The record plainly demonstrates, however, that no such agreement was reached. Mr. Carr himself admitted that no agreement to reschedule was reached during his July 28 phone conversation with Complaint Counsel, since the key material term for any rescheduling agreement—the date to which the deposition would be rescheduled—had not been agreed upon during that call, but was to be presented by Complaint Counsel later by email, and Fanning would still need to approve any rescheduling. (Ortiz Attch. I at 9:7-14.) He further acknowledged that Complaint Counsel's proposal would come by email later that evening, which it did, even though Mr. Carr claims not to have received it until the following morning. (*Id.* 9:22–10:6.)

Given his own acknowledgements, Mr. Carr must have known that the deposition was not rescheduled. It is inconceivable that anyone, let alone an experienced attorney, would conclude that an agreement to reschedule had already been reached when expressly told to wait for the offer in writing. But, even if Mr. Carr genuinely believed that, Ms. O'Brien's email a couple hours later—stating their proposed terms and warning him that any attempt to deviate would negate the offer—should have disabused him of his misunderstanding. (O'Brien Attch. B.) If that were not enough, Ms. Schroeder confirmed to Mr. Carr in the morning that, given his failure to accept the terms actually offered, the deposition would proceed as scheduled. (Schroeder Attch. I.) Under these circumstances, there was no justification for Fanning not to

appear at his deposition, especially when he was purportedly ready to appear and testify. (Ortiz Attch. I at 5:21-25.)

Compelling deposition appearance on Complaint Counsel's terms is the appropriate remedy for Fanning's unjustified failures to appear at the Jerk and his personal depositions. *See In re MSC Software*, 2002 WL 509706, at *2 (F.T.C. Jan. 17, 2002); *PNC Bank, N.A. v. Smith*, No. 2:10-cv-1916, 2014 U.S. Dist. LEXIS 32174, at *3 (E.D. Cal. Mar. 7, 2014); *Bullion v. Ramsaran*, No. 07-61463, 2008 U.S. Dist. LEXIS 65829, at *2 (S.D. Fla. July 7, 2008). Complaint Counsel seeks dates between August 21 and 27. These dates should pose little burden to Fanning, as his counsel has already represented Fanning's general availability in late August (Ortiz Attch. I at 12:8-13.) Indeed, as Mr. Carr previously informed Complaint Counsel that Fanning was unavailable during the entire month of September (and all of October, except one afternoon), late August is the only viable option. (Schroeder Attch F.)

The location should be the FTC's office in San Francisco. Mr. Carr already expressed Fanning's willingness to be deposed there as part of any potential rescheduling agreement. (Ortiz Attch. I at 12:9-13, 28:4-10.) Moreover, scheduling makeup depositions in Boston would be highly prejudicial to Complaint Counsel, who already traveled cross-country only to be stood up by Fanning. Given Fanning's history of failing to show up for hearings and his counsel's stated belief that the Commission has no right to compel him to appear before the government (*Id.* at 33:22-34:6), Complaint Counsel faces a high risk of another no-show.¹

C. Jerk Should Respond to Complaint Counsel's Interrogatories.

Jerk should be compelled to respond to Complaint Counsel's First Set of Interrogatories. Jerk provided no justification for its non-response. Its counsel—now-former counsel—has refused to discuss the issue with Complaint Counsel, tell Complaint Counsel whom it can ask for responses, or provide a single point of contact at the company apart from Fanning. (Schroeder

¹ In a recent federal court case, Fanning also offered baseless arguments to avoid or delay having his deposition taken. *Results ByIQ LLC v. NetCapital.com, LLC*, No. C-11-0550, 2013 WL 2436333, at *4 (N.D. Cal. May 7, 2013).

Attch. G.) Under these circumstances, an order compelling responses is appropriate. *See Haworth v. Patel*, No. 1:06-cv-1373, 2007 WL 1834696, at *3 (E.D. Cal. June 26, 2007).

D. Fanning Should Produce Responsive Documents.

Fanning's failure to produce a single document in response to Complaint Counsel's 32 RFPs warrants an order compelling production. Fanning's sole response to every RFP was that "[a]fter a diligent search" he was "not able to locate any responsive documents in his possession, custody, or control." (Ortiz Attch. F.) His response is not credible. Documents produced by third parties in response to Complaint Counsel's subpoenas seeking materials relating to Jerk or Fanning include hundreds of pages of emails authored by or addressed to Fanning. (Ortiz ¶14.) Even Jerk produced several emails addressed to Fanning or copying him in response to the same RFPs. (*Id.* ¶13.) These facts demonstrate that Fanning should have many responsive documents in his possession, custody, or control. Fanning's assertion that he was unable to locate a single one reveals either a failure to conduct a diligent search or a refusal to produce. Whatever the cause, the appropriate remedy is to compel production. *See Zhang v. ING Direct*, No. 07-555, 2009 WL 351006, at *1 (D. Del. Feb. 10, 2009).

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully asks the Court to grant the relief set out in the Proposed Order attached hereto.

Dated: August 5, 2014

Respectfully submitted,



Sarah Schroeder
Kerry O'Brien
Yan Fang
Boris Yankilovich
Western Region – San Francisco
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103

COMPLAINT COUNSEL

STATEMENT CONCERNING MEET AND CONFER

The undersigned counsel certifies that Complaint Counsel conferred in person with Respondent John Fanning's counsel, Peter Carr, on July 29, 2014, at approximately 9:40am regarding Complaint Counsel's intention to file a Rule 3.38 motion for discovery sanctions. FTC attorney Eric Edmondson was present for the meet and confer. Complaint Counsel has attempted to confer with Respondent Jerk, LLC. However, Jerk's counsel, Maria Crimi Speth, filed a Notice Regarding Representation and has not responded to Complaint Counsel's requests for a meet and confer. Complaint Counsel also sent an email to Mr. Carr and Ms. Speth on August 1, 2014 detailing the issues in this motion and proposing to resolve these issues without seeking the Court's intervention. A copy of this email and Mr. Carr's response on August 1 is attached as Attachment K to the Declaration of Sarah Schroeder filed herewith.

Dated: August 5, 2014

Respectfully submitted,



Sarah Schroeder
Kerry O'Brien
Yan Fang
Boris Yankilovich
Western Region – San Francisco
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103

COMPLAINT COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2014, I caused a true and correct copy of the foregoing to be served as follows:

One electronic copy through the FTC's e-filing system, as well as one electronic courtesy copy and one paper copy with the original signatures to the **Office of the Secretary:**

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Room H-159
Washington, DC 20580
Email: secretary@ftc.gov

One electronic copy to the **Office of the Administrative Law Judge:**

The Honorable D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW, Room H-110
Washington, DC 20580

One electronic copy to counsel for **John Fanning:**

Peter F. Carr, II
Eckert, Seamans, Cherin & Mellott, LLC
Two International Place, 16th Floor
Boston, MA 02110
Phone: (617) 342-6800
Email: pcarr@eckertseamans.com

One electronic copy to counsel who entered an appearance for **Jerk, LLC:**

Maria Crimi Speth, Esq.
Jaburg & Wilk, P.C.
3200 N. Central Ave., Suite 2000
Phoenix, AZ 85012
Phone: (602) 248-1089
Email: mcs@jaburgwilk.com

I further certify that I possess a paper copy of the signed original of the foregoing document that is available for review by the parties and the adjudicator.

Date: August 5, 2014

*Beatrice Burke / with permission
B.C.*

Beatrice Burke (bburke@ftc.gov)
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103
Phone: 415-848-5183
Fax: 415-848-5184

10. Attachment I hereto is a true and correct copy of a transcript of Respondent John Fanning's July 29, 2014 deposition.

11. Attachment J hereto is a true and correct copy of a transcript of the May 28, 2014 scheduling conference in this matter.

12. To date, Complaint Counsel has not received an answer to its request for interrogatory responses from Jerk, LLC.

13. On July 11, 2014, Respondent Jerk, LLC produced approximately 300 pages of material in response to Complaint Counsel's request for production of documents. I have reviewed these documents. Several emails in Jerk, LLC's production that discuss the jerk.com website are addressed to or copy John Fanning.

14. During the discovery period in this matter, Complaint Counsel has received thousands of pages of emails from third parties in response to requests for materials relating to Respondents Jerk, LLC and John Fanning. I reviewed a large portion of the emails produced by these third parties and found hundreds of emails relating to Jerk addressed to, from, or copying, John Fanning.

Executed this August 5, 2014 in San Francisco, CA.



Kelly Ortiz
FTC Investigator

ATTACHMENT
A

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

In the Matter of

**Jerk, LLC, a limited liability company,
also d/b/a JERK.COM, and**

**John Fanning,
individually and as a member of Jerk, LLC.**

DOCKET NO. 9361

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

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

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

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

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

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

Date: July 2, 2014

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

**ATTACHMENT
B**

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
Office of Administrative Law Judges**

In the Matter of

JERK LLC, et al.

Docket No. 9361

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE that, pursuant to Rule 3.33(a) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings (16 C.F.R. § 3.33(a)), Complaint Counsel will take the deposition of Respondent John Fanning. This deposition will be conducted before a person authorized to administer oaths and will be recorded by stenographic and videographic means. The testimony will be taken at the United States Attorney's Office, John Joseph Moakley Federal Courthouse, 1 Courthouse Way, Suite 9200, Boston, Massachusetts, on July 29, 2014 at 9:00 a.m. (ET).

Date: June 3, 2014

/s/ Sarah Schroeder
Sarah Schroeder
Yan Fang
Western Region – San Francisco
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, California 94103
Telephone: (415) 848-5100
Facsimile: (415) 848-5184
Electronic Mail: sschroeder@ftc.gov;
yfang@ftc.gov
Complaint Counsel

**ATTACHMENT
C**

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
Office of Administrative Law Judges**

**In the Matter of
JERK LLC, et al.**

Docket No. 9361

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE that, pursuant to Rule 3.33(a) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings (16 C.F.R. § 3.33(a)), Complaint Counsel will take the deposition of Respondent John Fanning. This deposition will be conducted before a person authorized to administer oaths and will be recorded by stenographic and videographic means. The testimony will be taken at Eckert Seamans Cherin & Merllo, LLC, Two International Place, 16th Floor, Boston, Massachusetts, on July 29, 2014 at 9:00 a.m. (ET).

Date: July 25, 2014

/s/ Sarah Schroeder
Sarah Schroeder
Yan Fang
Western Region – San Francisco
Federal Trade Commission
901 Market Street, Suite 570
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Facsimile: (415) 848-5184
Electronic Mail: sschroeder@ftc.gov;
yfang@ftc.gov
Complaint Counsel

**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 FIRST SET OF REQUESTS FOR DOCUMENTS
TO RESPONDENTS JERK, LLC AND JOHN FANNING**

Pursuant to Rule 3.37 of the Federal Trade Commission’s Rules of Practice, 16 C.F.R. § 3.37, and the Court’s *Scheduling Order* dated May 28, 2014, Complaint Counsel requests that Respondents Jerk, LLC and John Fanning produce the following documentary material within 30 days.

DOCUMENTS REQUESTED

1. All documents relating to the relationship between Jerk, LLC and NetCapital.
2. All correspondence between any Respondent and Jerk, LLC’s registered agents.
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.
4. All documents relating to the formation or ownership of Jerk, LLC, including but not limited to incorporation records and corporate filings.
5. All copies of Jerk.com, including printouts, screenshots, source code, log files, and archived versions of the website.

6. All copies of Jerk.org, including printouts, screenshots, source code, log files, and archived versions of the website.
7. All documents stating, describing, or summarizing the number of visitors to Jerk.com.
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.
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.
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.
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.
12. All documents relating to the directory produced to Complaint Counsel with Respondents’ Initial Disclosures on May 27, 2014.
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.
14. All documents relating to any First Amendment defense asserted in any Respondent’s Answer to the Complaint.
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.
16. All documents relating to any service or feature offered to consumers who have paid for Jerk.com customer service.
17. All documents relating to any service or feature offered to consumers who have paid for a Jerk.com membership.

18. All documents relating to consumers who received “Fast notifications of postings about you,” as described on Jerk.com. *See* Complaint Exhibit C.
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.
20. All documents relating to consumers who entered “comments and reviews,” as stated on Jerk.com. *See* Complaint Exhibit C.
21. All documents relating to consumers who “create[d] a dispute,” as stated on Jerk.com. *See* Complaint Exhibit H.
22. All documents relating to consumers who “post[ed] a Jerk,” as stated on Jerk.com. *See* Complaint Exhibit E.
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.
24. All emails sent to and from the support@jerk.com email account.
25. All documents identifying any person who has access to or has corresponded through the support@jerk.com email account.
26. All documents identifying any person who has access to or has posted through each Twitter account used by Jerk, LLC.
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.
28. All correspondence from consumers regarding Jerk.com.
29. All correspondence between Jerk, LLC and Facebook.
30. All correspondence relating to Jerk.com or Jerk, LLC between any Respondent and any software developer, including but not limited to Software Assist.
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.
32. All agreements retaining or otherwise securing the provision of legal services for Jerk, LLC in this matter.

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. “**Complaint**” means the Complaint issued by the Federal Trade Commission in the above-captioned matter issued on April 2, 2014.
- D. “**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.
- E. “**Electronically Stored Information**” or “ESI” means the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise), regardless of origin or location, of any information created, manipulated, communicated, stored, or utilized in digital form, requiring the use of computer hardware or software. This includes, but is not limited to, electronic mail, instant messaging, videoconferencing, and other electronic correspondence (whether active, archived, or in a deleted items folder), word processing files, spreadsheets, databases, and video and sound recordings, whether stored on: cards; magnetic or electronic tapes; disks; computer hard drives, network shares or servers, or other drives; cloud-based platforms; cell phones, PDAs, computer tablets, or other mobile devices; or other storage media. “ESI” also includes such technical assistance or instructions as will enable conversion of such ESI into a reasonably usable form.
- F. “**Each**” includes the word “**every**,” and “**every**” includes the word “**each**.”
- G. “**FTC**” or “**Commission**” means the Federal Trade Commission.
- H. “**Include**” or “**including**” means “without limitation,” or “including but not limited to,” so as to avoid excluding any documents that might otherwise be construed to be within the scope of any specification.
- I. “**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.

- J. **“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.
- K. **“You” and “Your”** means John Fanning and Jerk, LLC.

INSTRUCTIONS

- A. **Response Date:** All documents must be produced within 30 days from the date of service.
- B. **Applicable time period:** Unless otherwise directed in the specifications, the applicable time period for the request is from January 1, 2008 to present.
- C. **Supplemental Production:** The requests herein are continuing in nature and must be supplemented in the event that additional documents responsive to this request are created, prepared, or received between the time of any Respondent’s initial response and trial.
- D. **Scope of Search:** The requests herein cover documents and information in your possession or under your actual or constructive custody or control including, but not limited to, documents and information in the possession, custody, or control of your attorneys, accountants, directors, officers, employees, and other agents and consultants, whether or not such documents and information were received from or disseminated to any person or entity.
- E. **Document Production:** You must produce the documentary material by making all responsive documents available for inspection and copying at your principal place of business. Alternatively, you may elect to send all responsive documents to **Kelly Ortiz, Federal Trade Commission, Western Region, 901 Market Street, Suite 570, San Francisco, CA 94103**. Notice of your intended method of production shall be given by email or telephone to Sarah Schroeder, (415) 848-5100, at least five days prior to the return date. Please see the Bureau of Consumer Protection Production Guide provided to you on May 21, 2014 for detailed instructions for submitting ESI or digitally imaged hard copies. Please mark the exterior of all packages containing electronic media sent through the U.S. Postal Service or other delivery services as follows:

**MAGNETIC MEDIA- DO NOT X-RAY
MAY BE OPENED FOR POSTAL INSPECTION.**

- F. **Document Identification:** Documents that may be responsive to more than one specification of this subpoena need not be submitted more than once; however, your response should indicate, for each document submitted, each specification to which the document is responsive. If any documents responsive to this subpoena have been previously supplied to the Commission, you may comply with this subpoena by identifying the document(s) previously provided and the date of submission. Documents should be produced in the order in which they

appear in your files or as electronically stored and without being manipulated or otherwise rearranged; if documents are removed from their original folders, binders, covers, containers, or electronic source in order to be produced, then the documents must be identified in a manner so as to clearly specify the folder, binder, cover, container, or electronic media or file paths from which such documents came. In addition, number by page (or file, for those documents produced in native electronic format) all documents in your submission, preferably with a unique Bates identifier, and indicate the total number of documents in your submission.

G. Production of Copies: Unless otherwise stated, legible photocopies (or electronically rendered images or digital copies of native electronic files) may be submitted in lieu of original documents, provided that the originals are retained in their state at the time of receipt of this set of requests. Further, copies of originals may be submitted in lieu of originals only if they are true, correct, and complete copies of the original documents; provided, however, that submission of a copy will constitute a waiver of any claim as to the authenticity of the copy should it be necessary to introduce such copy into evidence in any Commission proceeding or court of law; and provided further that you will retain the original documents and produce them to Commission staff upon request. Copies of marketing materials and advertisements must be produced in color, and copies of other materials must be produced in color if necessary to interpret them or render them intelligible.

H. A complete copy of each document should be submitted even if only a portion of the document is within the terms of the document request. The document must not be edited, cut, or expunged and must include all covering letters and memoranda, transmittal slips, appendices, tables or other attachments.

I. Each request includes any and all copies of the responsive document and, to the extent applicable, preliminary drafts or documents that differ in any respect from the original or final draft or from each other (e.g., by reason of differences in form or content or by reason of handwritten notes or comments having been added to one copy of a document but not the original or other copies thereof).

J. In the event that any document covered by this set of requests was in your possession or actual or constructive custody or control and has been lost or destroyed, the document is to be identified in writing as follows: addressee, person who prepared or authored the document, date of preparation or transmittal, substance of the document and its subject matter, number of pages, attachments, or appendices, all persons to whom distributed, shown or explained, date of loss or destruction, and, if destroyed, the manner of destruction, the reason for destruction, the persons authorizing destruction, and the persons who destroyed the document.

K. If an objection is made to any request herein, all documents covered by the request not subject to the objection should be produced. Similarly, if an objection is made to production of a document, the portion of that document not subject to objection should be produced with the portion objected to redacted and clearly indicated as redacted.

L. All objections to these requests or to any individual request must be raised in the initial response or are otherwise waived.

M. **Claims of Privilege:** Pursuant to Federal Trade Commission Rules of Practice 3.38A, 16 C.F.R. § 3.38A, if any documents are withheld from production on a claim of privilege or any similar claims, you must provide, not later than the date set for production of materials, a schedule that describes the nature of the documents, communications, or tangible things not produced or disclosed with sufficient detail to enable Complaint Counsel to assess the claim of privilege. The schedule must state individually for each item withheld:

1. The custodian of the document;
2. The type of document, including any attachments (e.g., letter, memorandum);
3. The date of the document;
4. The general subject matter of the document;
5. The sender, author, and all recipients of the document; and
6. The basis on which you contend you are entitled to withhold the document from production.

If only a part of a responsive document is privileged, all non-privileged parts must be submitted.

L. **Sensitive Personally Identifiable Information:** If any material called for by these requests contains sensitive personally identifiable information or sensitive health information of any individual, please contact us before sending those materials to discuss ways to protect such information during production.

For purposes of these requests, sensitive personally identifiable information includes: an individual's Social Security number alone; or an individual's name or address or phone number in combination with one or more of the following: date of birth, Social Security number, driver's license number or other state identification number, or a foreign country equivalent, passport number, financial account number, credit card number, or debit card number. Sensitive health information includes medical records and other individually identifiable health information relating to the past, present, or future physical or mental health or conditions of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

Date: June 6, 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**

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

**COMPLAINT COUNSEL’S FIRST SET OF INTERROGATORIES
TO RESPONDENTS JERK, LLC, AND JOHN FANNING**

Pursuant to Rule 3.35 of the Federal Trade Commission’s Rules of Practice, 16 C.F.R. § 3.35, and the Court’s *Scheduling Order* dated May 28, 2014, Complaint Counsel requests that Respondents respond to the following Interrogatories within 30 days from the date of service.

1. Identify all current and past members, officers, directors, principals, owners, shareholders, employees, agents, consultants, volunteers, unpaid or paid developers, project managers, collaborators, and other persons working for or on behalf of Jerk, LLC.
2. Identify all persons who, acting for or on behalf of Jerk, LLC, have met or communicated with Jerk, LLC’s legal counsel about this matter.
3. Identify all persons who, acting for or on behalf of Jerk, LLC, have made, agreed to, or promised to make any payment or other consideration to Jerk, LLC’s legal counsel for services relating to this matter.
4. State the dates during which Jerk.com, Jerk.org, and Jerk.be (collectively, the “Jerk websites”) were publicly accessible.
5. State the dates during which the Jerk websites permitted users to upload photographs or other pictorial representations when creating profiles on the Jerk websites.
6. State the total number of annual unique visitors to the Jerk websites for the years 2009 through 2013.

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**

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)

John Fanning,)
individually and as a member of Jerk,)
LLC.)

DOCKET NO. 9361
PUBLIC DOCUMENT

**RESPONDENT JOHN FANNING’S RESPONSES TO
FIRST SET OF REQUESTS FOR DOCUMENTS**

Pursuant to Rule 3.37 of the Federal Trade Commission’s Rules of Practice, 16 C.F.R.
§ 3.37, and the Court’s *Scheduling Order* dated May 28, 2014, Respondent John Fanning
respond to Complaint Counsel’s First Set of Request for Documents as follows.

GENERAL OBJECTIONS

1. Respondent Fanning objects to the requests to the extent they seek information protected by the attorney-client privilege or other recognized privilege.
2. Respondent Fanning objects to the requests to the extent they seek information protected by the attorney work product doctrine.
3. Respondent Fanning objects to the requests to the extent they seek confidential or private information.
4. Respondent Fanning objects to the requests to the extent they seek information that is more readily accessible to the Commission through other means.
5. Respondent Fanning objects to the requests to the extent they seek information already in the possession, custody, or control of the Commission.

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

RESPONSES

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

Response No. 1

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

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

Response No. 2

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

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

Response No. 3

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

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

Response No. 4

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

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

Response No. 5

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

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

Response No. 6

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

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

Response No. 7

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

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

Response No. 8

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

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

Response No. 9

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

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

Response No. 10

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

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

Response No. 11

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

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

Response No. 12

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

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

Response No. 13

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

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

Response No. 14

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

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

Response No. 15

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

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

Response No. 16

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

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

Response No. 17

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

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

Response No. 18

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

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

Response No. 19

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

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

Response No. 20

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

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

Response No. 21

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

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

Response No. 22

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

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

Response No. 23

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

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

Response No. 24

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

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

Response No. 25

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

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

Response No. 26

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

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

Response No. 27

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

28. All correspondence from consumers regarding Jerk.com.

Response No. 28

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

29. All correspondence between Jerk, LLC and Facebook.

Response No. 29

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

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

Response No. 30

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

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

Response No. 31

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

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

Response No. 32

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

Respectfully submitted,
JOHN FANNING,
By his attorneys,

/s/ Peter F. Carr, II _____

Peter F. Carr, II
ECKERT, SEAMANS, CHERIN & MELLOTT, LLC
Two International Place, 16th Floor
Boston, MA 02110
617.342.6800
617.342.6899 (FAX)
pcarr@eckertseamans.com

CERTIFICATE OF SERVICE

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

One electronic copy to the Office of the Secretary, and one copy through the FTC's e-filing system:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room H-159
Washington, DC 20580
Email: secretary@ftc.gov

One electronic copy to the Office of the Administrative Law Judge:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Avenue, N.E., Room H-110
Washington, DC 20580
Email: oalj@ftc.gov

One electronic copy to the Office of the Counsel for the Federal Trade Commission:

Sarah Schroeder
Yan Fang
Kerry O'Brien
Federal Trade Commission
901 Market Street, Suite 670
San Francisco, CA 94103
Email: sschroeder@ftc.gov
yfang@ftc.gov
kobrien@ftc.gov

One electronic copy to counsel for Jerk, LLC:

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

/s/ Peter F. Carr, II
Peter F. Carr, II
ECKERT, SEAMANS, CHERIN & MELLOTT, LLC
Two International Place, 16th Floor
Boston, MA 02110
617.342.6800
617.342.6899 (FAX)

Dated: July 11, 2014

**ATTACHMENT
G**

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the matter of:)
Jerk, LLC, a limited liability company,) DOCKET NO. 9361
Also d/b/a JERK.COM, and)
John Fanning,)
Individually and as a member of)
Jerk, LLC,)
Respondents.)

**RESPONDENT JOHN FANNING'S ANSWERS TO COMPLAINT COUNSEL'S
FIRST SET OF INTERROGATORIES**

Pursuant to Rule 3.35 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.35, and the Court's Scheduling Order dated May 28, 2014, Respondent John Fanning provides the following answers to Complaint Counsel's First set of Interrogatories:

1. Identify all current and past members, officers, directors, principals, owners, shareholders, employees, agents, consultants, volunteers, unpaid or paid developers, project managers, collaborators, and other persons working for or on behalf of Jerk, LLC.

Answer to Interrogatory No. 1

Objection. The question seeks a legal conclusion, as the determination as to whether an individual is an employee, consultant, agent or maintains other status involves issues of law. Further, the question seeks information that is not reasonably calculated to lead to the discovery of admissible evidence or irrelevant and immaterial matters in violation of the FTC rules of procedure. Also, the question is vague and ambiguous, as the terms collaborator or working on behalf of Jerk are indefinite.

Without waiving and subject to said objection, Fanning responds as follows:

I do not specifically recall any employees of Jerk or know whether Jerk had any employees. Yosi Amram and Joe Abrams may have made funds available to Jerk, but I do not recall specifically.

2. Identify all persons who, acting for or on behalf of Jerk, LLC, have met or communicated with Jerk, LLC's legal counsel about this matter.

Answer to Interrogatory No. 2

Objection. The question seeks a legal conclusion, as the determination as to whether counsel was serving as legal counsel, and whether any person was acting on behalf of Jerk. Further, the question seeks information that is not reasonably calculated to lead to the discovery of admissible evidence or irrelevant and immaterial matters in violation of the FTC rules of procedure.

Without waiving and subject to said objection, Fanning responds as follows:

I have communicated with Maria Speth, counsel for Jerk.

3. Identify all persons who, acting for or on behalf of Jerk, LLC, have made, agreed to, or promised to make any payment or other consideration to Jerk, LLC's legal counsel for services relating to this matter.

Answer to Interrogatory No. 3

Objection. The question seeks a legal conclusion, as the determination as to whether counsel was serving as legal counsel, and whether any person was acting on behalf of Jerk. Further, the question seeks information that is not reasonably calculated to lead to the discovery of admissible evidence or irrelevant and immaterial matters in violation of the FTC rules of procedure.

4. State the dates during which Jerk.com, Jerk.org, and Jerk.be (collectively, the "Jerk websites") were publicly accessible.

Answer to Interrogatory No. 4

The answer to this question is unknown to me.

5. State the dates during which the Jerk websites permitted users to upload photographs or other pictorial representations when creating profiles on the Jerk websites.

Answer to Interrogatory No. 5

The answer to this question is unknown to me.

6. State the total number of annual unique visitors to the Jerk websites for the years 2009 to 2013.

Answer to Interrogatory No. 6

The answer to this question is unknown to me.

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/Note a Jerk votes tally.

Answer to Interrogatory No. 7

The answer to this question is unknown to me.

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.

Answer to Interrogatory No. 8

The answer to this question is unknown to me.

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.

Answer to Interrogatory No. 9

The answer to this question is unknown to me.

10. State how the Facebook Directory, identified in Respondents' Initial Disclosures section II.A, is relevant to this case.

Answer to Interrogatory No. 10

Objection. The question seeks information protected by the attorney-client privilege or as attorney work product.

Without waiving the objection, Fanning states as follows:

I believe that the Facebook Directory shows that it can be accessed by the public without agreeing to Facebook's terms of service thereby making the content publicly available.

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.

Answer to Interrogatory No. 11

Objection. The question seeks information that is not reasonably calculated to lead to the discovery of admissible evidence or irrelevant and immaterial matters in violation of the FTC rules of procedure.

Without waiving the objection, Fanning states as follows:

The answer to this question is unknown to me.

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.

Answer to Interrogatory No. 12

I did not personally provide consumers with any service, product, feature or benefit.

13. Describe in detail all 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.

Answer to Interrogatory No. 13

I have no specific recollection of any such policies, procedures or practices. I do recall hearing or reading that Jerk removed content when requested, including all requested by the FTC and all properly noticed DMCA notices.

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.

Answer to Interrogatory No. 14

The answer to this question is unknown to me.

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.

Answer to Interrogatory No. 15

I served as an advisor concerning Jerk.

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.

Answer to Interrogatory No. 16

Objection. The question seeks information that is not reasonably calculated to lead to the discovery of admissible evidence or irrelevant and immaterial matters in violation of the FTC rules of procedure. The question is also harassment and an abuse of governmental and regulatory authority, and impinges upon constitutional rights.

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.

Answer to Interrogatory No. 17

The answer to this question is unknown to me.

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

Answer to Interrogatory No. 18

The answer to this question is unknown to me, but my understanding is that any amounts were nominal.

SWORN TO AND SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY
THIS 30th DAY JULY, 2014.

John Fanning
John Fanning

AS TO OBJECTIONS,

/s/ Peter F. Carr II
Peter F. Carr, II
Eckert, Seamans, Cherin & Mellott, LLC
Two International Place, 16th Floor
Boston, MA 02110
617.342.6800
617.342.6899 (FAX)
pcarr@eckertseamans.com

Date: July 30, 2014

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2014, I caused a true and accurate copy of the foregoing document entitled Respondent John Fanning's Answers to Complaint Counsel's First Set of Interrogatories to be served electronically through the FTC's e-filing system and I caused a true and accurate copy of the foregoing to be served as follows:

One electronic copy electronic courtesy copy to the Office of the Secretary:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room H-159
Washington, DC 20580
Email: secretary@ftc.gov

One paper copy and one electronic copy to the Office of the Administrative Law Judge:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Avenue, N.E., Room H-110
Washington, DC 20580
Email: oalj@ftc.gov

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

Sarah Schroeder
Yan Fang
Kerry O'Brien
Federal Trade Commission
901 Market Street, Suite 670
San Francisco, CA 94103
Email: sschroeder@ftc.gov
yfang@ftc.gov
kobrien@ftc.gov

One paper copy and one electronic copy to counsel for Jerk, LLC:

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

/s/ Peter F. Carr, II
Peter F. Carr, II
ECKERT, SEAMANS, CHERIN & MELLOTT, LLC
Two International Place, 16th Floor
Boston, MA 02110
617.342.6800
617.342.6899 (FAX)

Dated: July 30, 2014

**ATTACHMENT
H**

1 FEDERAL TRADE COMMISSION

2 I N D E X

3 WITNESS: EXAMINATION:
4 STATEMENT BY MS. SCHROEDER 4

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6 E X H I B I T:
7 Ex. No. Description Page
8 NONE

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of
Jerk, LLC, a limited liability
company, also d/b/a JERK.COM, and
John Fanning,
Individually and as a member of
Jerk, LLC,

Monday, July 28, 2014
John Joseph Moakley
U.S. Federal Courthouse
1 Courthouse Way
Boston, MA
8:30 a.m.

The above-entitled matter came on for
deposition, pursuant to notice, at 8:30
a.m.

1 APPEARANCES:
ON BEHALF OF THE FEDERAL TRADE COMMISSION:
2 SARAH SCHROEDER, ESQ., Federal Trade
Commission, 901 Market Street, Ste 570,
3 San Francisco, CA 94103, 415-848-5186,
sschroeder@ftc.gov

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

2 MS. SCHROEDER: Counsel for the
3 Federal Trade Commission served a
4 deposition notice on Jerk, LLC, setting a
5 deposition for July 28th, 2014, at 8:30
6 a.m. at 1 Courthouse Way, Ste 9200, in
7 Boston, Massachusetts.

8 Counsel for Jerk, LLC, represented
9 that Mr. John Fanning would attend the
10 deposition as Jerk, LLC's corporate
11 representative.

12 Today's date is July 28th, 2014.
13 The time is approximately 8:55 a.m. We
14 are at 1 Courthouse Way, Suite 9200, in
15 Boston, Massachusetts. A representative
16 from Jerk, LLC, is not present for the
17 deposition. This concludes the
18 deposition.

19 (The proceedings adjourned
20 at 9:04 a.m.)

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CERTIFICATION OF REPORTER

DOCKET NUMBER: 9361
CASE TITLE: 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,

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: July 29, 2014

CAROL DiFAZIO,
CSR, RPR

**ATTACHMENT
I**

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FEDERAL TRADE COMMISSION

In the Matter of *
Jerk, LLC, a limited liability *
company, also d/b/a JERK.COM, *
and John Fanning, individually * Docket No. 9361
and as a member of Jerk, LLC, *
Respondents *

* * * * *

Tuesday, July 29, 2014
Eckert Seamans
Cherin & Mellott, LLC
Two International Place
16th Floor
Boston, MA 02110

The above-entitled matter came on for deposition,
pursuant to notice, at 9:00 AM.

1 APPEARANCES:

2 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

3 Sarah Schroeder, Esq.
Eric Edmondson, Esq.
4 Federal Trade Commission
Western Region - San Francisco
5 901 Market Street
Suite 570
6 San Francisco, California 94103
(415) 848-5186
7 sschroeder@ftc.gov

8 ON BEHALF OF RESPONDENT (JOHN FANNING):

9 Peter F. Carr, II, Esq.
Eckert Seamans Cherin & Mellott, LLC
10 Two International Place
16th Floor
11 Boston, Massachusetts 02110
(617) 342-6857
12 pcarr@eckertseamans.com

13 ALSO PRESENT:

14 Dina Moeller
Fade to Black Productions

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

2 MS. MOELLER: Here begins
3 videotape No. 1 in the deposition of John
4 Fanning in the matter of Jerk, LLC,
5 Limited Liability Company also doing
6 business as Jerk.Com and John Fanning
7 individually and as a member of Jerk, LLC,
8 for the Federal Trade Commission in the
9 matter of docket No. 9361. Today's date
10 is July 29, 2014. The time on the video
11 monitor is 9:01 AM.

12 The video operator today is Dina
13 Moeller of For The Record. This video
14 deposition is taking place at Eckert
15 Seamans, Two International Place in
16 Boston, Massachusetts. This was noticed
17 by Sarah Schroeder of the FTC. The court
18 reporter today is Elaine Buckley of For
19 The Record.

20 Counsel, please identify yourselves
21 and state whom you represent.

22 MS. SCHROEDER: Sarah Schroeder
23 for the Federal Trade Commission.

24 MR. EDMONDSON: Eric Edmondson for
25 the Federal Trade Commission.

1 MR. CARR: Good morning. Peter
2 Carr with the law firm of Eckert Seamans
3 Cherin & Mellott, Boston, Massachusetts,
4 representing the witness John Fanning, the
5 respondent John Fanning.

6 MS. MOELLER: Normally we would
7 swear the witness in here.

8 MS. SCHROEDER: We are here for
9 the deposition of John W. Fanning.
10 Counsel for the Federal Trade Commission
11 served a deposition notice on Mr. Fanning
12 setting his deposition for July 29, 2014,
13 at 9:00 A.M. at Mr. Fanning's attorney's
14 office located at Two International Place,
15 16th Floor, Boston, Massachusetts.

16 Two FTC attorneys, myself and Eric
17 Edmondson, have flown from San Francisco
18 to be here for the deposition. Today is
19 July 29, 2014. The time is approximately
20 9:01 A.M. We are at Two International
21 Place, the 16th Floor, Boston,
22 Massachusetts.

23 John Fanning is not present for the
24 deposition. Complaint counsel received no
25 notice that he is ill or otherwise unable

1 to attend his deposition.

2 Now I believe Mr. Fanning's attorney
3 has a comment he would like to make for
4 the record.

5 MR. CARR: Are you completed,
6 counsel?

7 MS. SCHROEDER: I might respond
8 to what you say.

9 MR. CARR: This is Attorney Peter
10 Carr representing John Fanning in this
11 action. I have been involved in this
12 action on behalf of Mr. Fanning from the
13 commencement.

14 It is the case that the deposition was
15 noticed for Mr. Fanning for today, July
16 29, 2014. In fact it was a date that
17 Mr. Fanning had proposed to the FTC to
18 make himself available. I have also made
19 my offices available for this deposition
20 to take place today.

21 It was always the intent and purpose
22 of Mr. Fanning to appear today. He was
23 prepared to appear today and testify under
24 oath and answer the questions that were
25 posed to him.

1 Yesterday I had communications with
2 the Federal Trade Commission about
3 potential resolution through a consent
4 decree order without admission of
5 liability.

6 I contacted counsel for the FTC,
7 Ms. Schroeder, advised her of the fact and
8 then had further communications,
9 substantive communications with FTC
10 counsel Boris -- I don't recall Boris'
11 last name, and I have my e-mail. I will
12 get it in one second. The only reason I
13 don't want to say Boris' last name is so I
14 don't mess it up -- Attorney Kerry O'Brien
15 and Boris Yankilovich yesterday evening.
16 They were in San Francisco and I was in
17 Boston. The conversation occurred by
18 telephone somewhere approximately 5:30 in
19 the evening Boston time.

20 Again, prior to that substantive
21 conversation I had sent communications to
22 counsel about potential resolution and the
23 effort to try to resolve the case on
24 behalf of Mr. Fanning individually again
25 making it crystal clear I did not

1 represent the company that is named the
2 respondent in the case.

3 During the course of those substantive
4 conversations, particularly with Boris, I
5 indicated to Boris that part of the intent
6 or purpose of trying to reach a settlement
7 in the case was to avoid the further cost
8 and expense of litigation. It was not
9 intended to delay or postpone or interfere
10 with the deposition, however, that a
11 deposition all day today would certainly
12 increase the cost and expense and would
13 co-militate against a settlement in the
14 case.

15 Boris said he understood that and so
16 we reached generally terms in which we
17 would adjourn the deposition and in part,
18 at Boris' suggestion, that the deposition
19 would be postponed for today, it would be
20 adjourned for today provided that
21 Mr. Fanning would agree to appear at a
22 deposition on a future date at the end of
23 August or the beginning of September in
24 San Francisco if, in fact, the parties
25 could not resolve the case through a

1 negotiated consent order.

2 Boris also indicated that he had
3 forwarded up the chain my proposed
4 language to a substantive provision of the
5 consent order, particularly Section 8
6 about compliance monitoring, and that he
7 was not able to obtain any feedback from
8 higher-up management at the FTC at that
9 point in time because the day was over, he
10 was in San Francisco and they were in
11 Washington but expected to have that
12 commentary or comments to my comments back
13 this morning early.

14 It was further discussed that we would
15 endeavor to reach agreement on language in
16 the consent decree promptly, that we were
17 not going to delay. I made it clear to
18 Boris that I had not had any intent to
19 delay or to prolong these proceedings in
20 any way, if we couldn't find middle ground
21 we would proceed. If we could we would
22 resolve it.

23 Based on that outline of the substance
24 of an agreement, I obviously had to speak
25 with my client to get his accord to the

1 general terms which would be let's try to
2 negotiate a resolution, in the short term
3 adjourn the deposition. If we were not
4 able to, then we would reschedule it for
5 San Francisco in the end of August,
6 beginning of September.

7 In fact Boris indicated he would
8 follow up with an e-mail to me that had
9 some proposed dates at the end of August,
10 beginning of September, we would pick from
11 one of those dates.

12 I told him if my client was amenable
13 to that I would send an e-mail back
14 confirming, and he also indicated he would
15 send to me a revised draft of the consent
16 agreement to remove Jerk, LLC, because the
17 company would not be signing, it was just
18 Mr. Fanning individually. I spoke with my
19 client, ran through all the options and
20 received his consent to proceed according
21 to the lines that Boris had outlined.

22 I waited for the e-mail last evening,
23 did not get it. I checked my e-mail up
24 until around nine o'clock last night. I
25 did not receive anything. I woke this

1 morning early and saw that there was an
2 e-mail from counsel for the FTC, Kerry
3 O'Brien. It was apparently sent at 9:17
4 P.M. last night, although I have no record
5 of getting it at that point. I did get it
6 this morning.

7 I responded back somewhere between
8 5:00, 5:30 this morning advising that what
9 counsel had put in her e-mail was not
10 consistent with what we had discussed and
11 agreed to as I understood it on the terms
12 of adjourning this deposition this morning
13 in an effort of trying to settle the case.

14 In particular counsel's e-mail
15 indicated that -- and in fact her e-mail
16 did set forth a proposed revised draft
17 consent order to remove Jerk, LLC; but in
18 her e-mail counsel indicated that in order
19 to get this moving along that Mr. Fanning
20 would have to sign an affidavit stating
21 that he is a member of the LLC and that
22 Jerk is defunct and indicated that I had
23 made a representation to that effect. It
24 also requested Mr. Fanning's agreement to
25 cooperate with The Commission in any

1 default action against Jerk.

2 None of those conditions were
3 discussed in the call with counsel earlier
4 that day. There was not any conditions
5 placed of such on us entering into
6 settlement discussions with respect to a
7 consent order, and none of those
8 conditions were discussed as a basis for
9 adjourning this morning's deposition.

10 In addition in the e-mail from counsel
11 there were dates for a proposed deposition
12 of Mr. Fanning in San Francisco if, in
13 fact, we were not able to resolve the
14 matter. Those dates that were proposed
15 were August 6, 7 or 14. In contrast to
16 the representations by counsel that we
17 would look to dates at the end of August,
18 beginning of September, these dates are
19 actually next week, which also flies in
20 the face of the discussion with counsel
21 about whereas we would not try in any way
22 to prolong the matter in discussions, we
23 would proceed promptly to negotiations and
24 hopeful resolution, that we would need
25 some time to engage in such discussions.

1 So the proposed dates for next week is
2 contrary to what we discussed on the
3 phone. So I sent an e-mail back to
4 counsel indicating that I did not agree to
5 those terms that were different than what
6 had been stated on the phone and
7 represented to me in the telephone call
8 last evening but that I would, in fact,
9 look at the revised draft, I would, in
10 fact, agree to have Mr. Fanning appear in
11 San Francisco if his deposition needed to
12 be taken and the case was not resolved at
13 the end of August, beginning of September.

14 I did, in fact, say that I would
15 review the revised draft and I would
16 comment on it; and I did, in fact, say
17 that in essence I would wait for any
18 further comments back from the FTC this
19 morning with respect to some of the
20 commentary or revisions I proposed last
21 evening. I have since that time -- and I
22 reconfirmed that so -- strike that.

23 I made that statement early this
24 morning. I then had communications with
25 Attorney Schroeder by e-mail this morning.

1 Attorney Schroeder's position was that
2 because I did not accept the terms and
3 conditions that were stated in the e-mail
4 from Attorney O'Brien last evening that we
5 would go forward with the deposition this
6 morning of Mr. Fanning.

7 I told counsel that Mr. Fanning would
8 not appear today because that was not my
9 understanding of the terms we agreed to,
10 that I was -- and, again, I believe I said
11 I am working on the consent agreement.
12 Whatever the e-mail says, it says.

13 Counsel came here and put on the
14 record that Mr. Fanning is not appearing.
15 I want to say again that Mr. Fanning is
16 not here today because I told him last
17 night not to appear today because I was
18 relying upon what was said to me by
19 counsel for the FTC with respect to an
20 effort to resolve this case and to adjourn
21 the deposition for this morning so we
22 could focus on resolution of the case.

23 That is the only reason Mr. Fanning is
24 not here today, based upon that discussion
25 I had with counsel last night. It in fact

1 was suggested by counsel to the FTC as we
2 could proceed in this matter when I said
3 that going forward with the deposition may
4 impact the ability to resolve the case.

5 But for the fact that that was
6 represented to me, I can say unequivocally
7 that Mr. Fanning would be here today to
8 testify, and that was always the intent
9 and the purpose. I had the entire day on
10 my calendar set aside for the deposition
11 today. I have accommodated everybody in
12 this room. It's not a pretext or made up.

13 We were prepared to go forward and to
14 the extent that somehow the FTC is now
15 going to take the position that
16 Mr. Fanning has violated or flouted the
17 rules of The Commission or is in default,
18 that would be inappropriate and it would
19 be unfair.

20 That is my statement. I would like
21 counsel to know that I am not upset at
22 counsel necessarily because I had to be
23 here anyway. I am disappointed. I think
24 we should be spending the time to try to
25 narrow, resolve the dispute to see if we

1 can settle the case. I know counsel has
2 said that to me all along in this case and
3 I don't -- I understand that is their
4 position and have had reach-out from The
5 Commission to try to resolve it for
6 months. I get that. I understand that
7 but, nonetheless, I think that the time
8 would be better well served in trying to
9 find a way to resolve the case.

10 I marked up the consent decree that
11 was sent to me last night and received
12 this morning. I sent it back to my client
13 for comment; and once I get final approval
14 from him, I intend to send that to The
15 Commission this morning.

16 That is my statement, and I am not
17 trying to argue with counsel. I am not
18 trying to take any hard-line positions
19 with counsel. I really did rely upon what
20 was said to me last night on the
21 telephone. I am not trying to hide the
22 ball in any way. I am not trying to
23 prolong the proceedings. I don't mean to
24 make counsel fly out here from San
25 Francisco for no reason. I have no

1 involvement with the company. I have
2 nothing to do with what went on yesterday
3 at the deposition, zero.

4 So this is not personal. It's not
5 intended to cause harm to counsel that
6 came this far to appear today. It really
7 was for the purpose to try and find a
8 resolution of this case. That is my
9 statement.

10 MS. SCHROEDER: Counsel for the
11 FTC was very clear that this depo would
12 proceed unless there was a signed
13 settlement or a set date for a deposition
14 in San Francisco. Neither of those things
15 have happened.

16 We offered a settlement back in April,
17 and there was no counter-response until
18 late in the evening yesterday. Counsel
19 for Mr. Fanning contacted us around 4:00
20 P.M. wanting to talk about the settlement.
21 We quickly talked to people back in D.C.
22 Unfortunately most people were
23 unavailable. I am now going to read the
24 e-mail chain from Ms. Kerry O'Brien to
25 Mr. Peter Carr.

1 The first one begins at 9:12 P.M.
2 yesterday, Monday, July 28. "Dear Peter,
3 as promised please find attached a draft
4 order that we have revised for
5 Mr. Fanning's signature alone. We usually
6 disfavor separate settlements for
7 different respondents and would ordinarily
8 not settle with Mr. Fanning alone without
9 Jerk."

10 "In this case, given your
11 representation that Jerk is a defunct
12 company, we can proceed with this approach
13 on the condition that Mr. Fanning provides
14 a sworn affidavit stating as a member of
15 the LLC that Jerk is, in fact, defunct and
16 that he agrees to cooperate with the FTC
17 in any default against Jerk."

18 "You indicated on the phone that you
19 and your client may need additional time
20 to consider entering into a consent order
21 and that you wish to avoid the cost you
22 will incur at tomorrow's deposition of
23 Mr. Fanning. Per your request to give you
24 more time we are willing to reschedule
25 tomorrow's deposition to one of the

1 following dates, August 6, 7, or 14 at our
2 office in San Francisco."

3 "Having already spent a considerable
4 time and expense of flying Sarah to Boston
5 to depose Mr. Fanning tomorrow and in
6 light of today's no-show at the Jerk, LLC,
7 deposition we would grant this extension
8 only on the express condition that
9 Mr. Fanning come to San Francisco for his
10 deposition on one of these dates and
11 during regular business hours starting at
12 9:00 or 9:30 A.M. Pacific."

13 "If you do not agree to this proposal,
14 we are ready to proceed with the
15 deposition as scheduled at 9:00 AM
16 tomorrow. Alternatively if Mr. Fanning
17 decides to sign the attached consent order
18 before tomorrow's deposition, this will
19 likely spare everyone future time and
20 expense. The choice is yours."

21 "Please let us know in writing no
22 later than 7:00 AM Eastern tomorrow
23 whether, one, Mr. Fanning plans to sign
24 the order before the deposition tomorrow,
25 two, you wish to reschedule the deposition

1 on the terms laid out in the e-mail or,
2 three, you wish to proceed with tomorrow's
3 deposition as originally scheduled."

4 "If we do not receive a response by
5 7:00 A.M. or if you propose some other
6 option, we will proceed with the
7 deposition tomorrow as scheduled. We will
8 follow up internally with our colleagues
9 in D.C. about the language you raised in
10 the compliance monitoring section."

11 "Please bear in mind, however, that the
12 Bureau of Consumer Protection is highly
13 unlikely to approve any further changes to
14 the Commission's standard order language.
15 Moreover, as I mentioned on the phone to
16 resolve this litigation both the Bureau of
17 Consumer Protection and The Commission
18 will need to approve of any consent
19 agreement that Mr. Fanning signs.
20 Regards, Kerry."

21 This morning Mr. Carr responded at
22 5:15 AM Eastern time. "Kerry, this is not
23 what we discussed with Boris. I will
24 agree to terms Boris outlined by phone
25 yesterday. We will adjourn the deposition

1 scheduled for today. I will review the
2 draft CO. I will wait for comments from
3 you concerning proposed changes and
4 perhaps discuss other changes to the
5 language. If you do not -- if we do not
6 resolve, the deposition of Mr. Fanning
7 will take place in SF. Boris said late
8 August, early September. I will wait for
9 those dates from you. Thanks, Peter."

10 Then I responded this morning at
11 approximately 6:18 Eastern time. "Peter,
12 if you did not agree to the terms Kerry
13 laid out in her e-mail, we will proceed
14 with Mr. Fanning's deposition today as
15 scheduled. I will see you around 8:45."

16 As Mr. Fanning is not here, this now
17 concludes the deposition.

18 MR. CARR: Wait a second. I
19 didn't get off the record. It doesn't
20 conclude anything because counsel did a
21 couple of things.

22 Counsel was not privy -- Counsel
23 Schroeder was not privy to my discussions
24 with Counsel Boris and Counsel Kerry last
25 evening on the phone, and there has been

1 no explanation given to me why those terms
2 were changed between 5:30 P.M. when I was
3 on the phone with Boris and 9:15 P.M. when
4 the e-mail was purportedly sent. That is
5 No. 1.

6 No. 2, it was Boris that suggested the
7 process to adjourn the deposition for
8 today when I indicated that we didn't want
9 to spend the money and time today to do
10 this deposition in hopes of trying to
11 resolve the case. He was the one that
12 suggested late August, early September;
13 and he was the one that said he would put
14 that in writing to me and I told him I
15 would agree to those dates if my client
16 agreed in San Francisco.

17 He also made it clear, as Kerry says
18 in her e-mail, that they were still
19 waiting for comments back to my comments
20 to the consent order that was previously
21 sent before the further changes were made
22 and received today this morning at 5:00
23 o'clock, not last night. I didn't have my
24 e-mail at 9:15. That indicates that we
25 did have the call where they said that we

1 need time, we need time, The Commission,
2 to review your comments internally and
3 will not have them back to you until late
4 this morning, this morning. So there is
5 no way that the deposition could be going
6 forward today while The Commission was
7 still reviewing those comments as agreed.

8 Further, I sent an e-mail back to
9 Sarah, to Ms. Schroeder in response to her
10 e-mail this morning which she did not
11 read, and I said to her as follows -- and
12 this was at 7:43 AM -- "I am not
13 proceeding today. I agreed to the terms
14 Boris set forth last night."

15 MS. SCHROEDER: If you could
16 clarify, you started reading your e-mail.

17 MR. CARR: I am reading my e-mail
18 to Sarah. "I am not proceeding today. I
19 agreed to the terms Boris set forth last
20 night. Those are the ones that I conveyed
21 to my client and we agreed. It was never
22 mentioned any affidavit or otherwise.
23 Boris also said late August, early
24 September in California."

25 "My client agrees to that schedule, to

1 appear in California if we are not able to
2 resolve. August 6 is next week. The
3 understanding is that we would adjourn to
4 give some reasonable time to discuss
5 resolution in hopes that we could resolve
6 the matter."

7 "I said clearly that the purpose is
8 not delay, but next week is not consistent
9 with what we discussed. I am relying on
10 the discussion I had last night which I
11 conveyed to my client. Based on those
12 discussions, Mr. Fanning will not be
13 appearing today and we will work on the
14 resolution."

15 "I am waiting to hear back from Boris
16 this morning on the comments I sent. As
17 was also discussed last evening on the
18 call, Mr. Fanning will agree to appear for
19 a depo in California in late August, early
20 September if we are not able to resolve."

21 "I also object to the statement that I
22 represented that Jerk was a defunct
23 company. I have no knowledge of the
24 company's status and never made such a
25 statement. I said that I understood that

1 the Jerk site is not operating and could
2 possibly get some statement from
3 Mr. Fanning in the settlement document
4 that he has discontinued performing any
5 services concerning Jerk. I never stated
6 anything about the company."

7 "If you still plan to appear, I will
8 put on the record the substance of my
9 discussions last evening with counsel and
10 my reliance thereon in adjourning the
11 deposition today. That seems like a huge
12 waste of resources."

13 That was at 7:43 to Ms. Schroeder with
14 no response. I then sent another e-mail
15 just to be clear, and this was at 7:45.
16 "By the way, I did not get the e-mail last
17 evening until this morning. I checked my
18 e-mail until 9:00 o'clock and then was not
19 available. I do not know when it came
20 into my e-mail. I responded immediately
21 this morning when received."

22 I don't understand -- that is the end
23 of the e-mail communications. I don't
24 understand the position of The Commission.
25 I don't understand why the deal terms

1 changed from last night to 9:15, and I am
2 disappointed.

3 To the extent that again The
4 Commission is going to use this record
5 against Mr. Fanning's interests, it's
6 unfair, it's unjust, it's unreasonable and
7 I understand you may be upset that you had
8 to come out here.

9 That is not my issue. I was clear
10 with counsel last night. I agreed to what
11 was laid out. Nobody ever mentioned any
12 sort of affidavit, and The Commission
13 knows that Mr. Fanning has taken the
14 position throughout this litigation that
15 he is not a member of Jerk, LLC, and now
16 to put a condition on that to negotiate a
17 settlement and adjourn the deposition that
18 he has to admit something that they know
19 has been contested is just not right.

20 So I hope we can get the resolution
21 back on track. I hope that we actually
22 can negotiate in good faith. I hope that,
23 in fact, we can get responses back to what
24 I sent yesterday in an effort to resolve
25 the case starting the discussions

1 yesterday, and I hope that The Commission
2 will not try to use this deposition or
3 non-appearance of Mr. Fanning in some way
4 to the prejudice of his rights because
5 that would be unjust. I have nothing
6 further.

7 MS. SCHROEDER: This is all a
8 distraction. The main point is that the
9 FTC has always been clear that this
10 deposition would proceed as scheduled
11 unless there was a signed order or a set
12 date for future deposition of Mr. Fanning.

13 Neither of those have happened and so
14 he was scheduled to appear and he did not
15 appear. Close the record.

16 MR. CARR: That is not accurate.
17 That is a misstatement of what was
18 discussed last night with Boris and Kerry.
19 That is not accurate, counsel.

20 Boris said either we could resolve it
21 through a negotiated consent order,
22 however, I'm not sure that we can change
23 the standard language but there may be
24 other things we can discuss or Mr. Fanning
25 can sign the agreement as written that I

1 am going to get to you for your review.

2 I got that agreement that was the
3 other option at 9:17 last night, not this
4 morning when I opened it up.

5 MS. SCHROEDER: Counsel --

6 MR. CARR: Let me finish, please.
7 I didn't get it until this morning. How
8 am I supposed to in good faith review an
9 agreement at 5:30 this morning when I got
10 in the office at 6:15, turn it around,
11 talk to my client, get his input and have
12 him sign it between now and 9:00 o'clock?

13 That is unreasonable and it doesn't
14 make any sense. Mr. Boris was the one who
15 said that we could negotiate, and that is
16 what I relied upon. Had you sent me an
17 e-mail, had somebody from The Commission
18 sent me an e-mail offering or proposing
19 dates at the end of August, beginning of
20 September that was represented to me, I
21 would have sent back an e-mail confirming
22 one of those dates in California. That is
23 what I would have done.

24 But you sent me an e-mail, The
25 Commission, last night that I got this

1 morning looking for a deposition date for
2 next week. I didn't even have time to
3 talk to my client. That is unreasonable.

4 So don't make it out that we have not
5 agreed to produce him in California. That
6 is false. I would have agreed to produce
7 him if we didn't settle the case at the
8 end of August, beginning of September like
9 it was represented to me, and that was not
10 done.

11 This is nothing more than they changed
12 the terms on me to then say if he doesn't
13 appear -- if you don't agree to these
14 terms and he doesn't appear tomorrow, he
15 is in default. That is not fair. That is
16 not fair; and frankly, counsel, you were
17 not on the call. So I don't think you can
18 make any commentary about what was said or
19 not said, but I'm telling you as an
20 officer of the court that what was in
21 counsel's e-mail to me late last night is
22 not consistent with what was discussed on
23 the phone, and that is not fair.

24 It's not fair to me, and it's
25 primarily not fair to my client because

1 now you're blaming me for Mr. Fanning's
2 non-appearance today, and that is not
3 fair, counsel, and you know it's not fair.

4 MS. SCHROEDER: This is a good
5 show. The fact is complaint counsel
6 submitted a settlement offer to
7 Mr. Fanning back in April. At the 11th
8 hour last night Mr. Carr, Mr. Fanning's
9 attorney, began to talk about settlement
10 negotiations.

11 There is no signed settlement today.
12 The deposition is proceeding as scheduled.
13 Mr. Fanning has a history of not appearing
14 for depositions. He did not appear at the
15 investigational hearing for this matter.
16 He did not appear at a deposition in
17 another matter called Results by IQ. This
18 is a show to show that Mr. Fanning, to get
19 him out of appearing for a deposition in
20 this case.

21 He has also not produced his
22 interrogatory responses, his comments. He
23 has also not produced any relevant
24 documents in this case.

25 MR. CARR: Again, I don't want to

1 debate on this record, but what you just
2 said is false.

3 MS. SCHROEDER: Did he appear for
4 an investigational hearing?

5 MR. CARR: He doesn't have an
6 obligation to appear. He has Civil
7 Rights. He does not have to appear before
8 The Commission -- let me finish. He did
9 not -- if he did not appear, that does not
10 mean he didn't appear for a deposition,
11 okay.

12 You have just said that he refuses to
13 appear here today, and that is false. He
14 also did not refuse to appear at a
15 deposition in that other matter. I know
16 that for a fact. So those statements are
17 not true and, furthermore, as I indicated,
18 I didn't want to spend time on
19 interrogatory answers because I wanted to
20 spend time on the consent agreement as I
21 indicated previously which is a better use
22 of resources. Okay. That is what I had
23 said and further --

24 MS. SCHROEDER: We granted an
25 extension for the interrogatories.

1 MR. CARR: And further, and
2 further, okay, there was nothing to sign
3 because Boris said, "Don't worry about the
4 prior order. I have to change it to get
5 the company out. I have to revise it and
6 I will send you the revised document for
7 you to look at."

8 That is what came over at 9:15. I did
9 send back proposed revised language to
10 Section 8 of the prior version of the
11 consent order yesterday afternoon before
12 5:00 o'clock. It went over and I got -- I
13 then called Counsel Schroeder to discuss
14 it. I didn't get Counsel Schroeder. I
15 left a voice message. I was advised that
16 Counsel Schroeder had personal commitments
17 and was not available to discuss the
18 matter further.

19 I then got the call from Boris. I
20 then immediately called him back. I then
21 had a conversation with him via cell phone
22 in my car while I was driving home to my
23 family in a pouring rainstorm, okay, and
24 even offered to have further
25 communications last evening.

1 So I have bent over backwards.
2 Granted it was -- you know, there has been
3 time delay. I don't contest that, that
4 you sent it over and that we have gone
5 back and forth. I made it clear to Boris
6 and he said he understood that my request
7 to try to engage in discussions to resolve
8 the case was not going to be construed,
9 inferred by anybody that Mr. Fanning
10 wanted to avoid his deposition today, and
11 Boris said, "I totally understand that. I
12 don't take it that way."

13 Now you're turning it around on me?
14 This isn't a show. I'm not on camera. I
15 am on a record, but you are counsel to the
16 FTC and so are your colleagues and I have
17 a right to rely upon what they tell me.
18 You told me to talk to Kerry because she
19 was the one that had authority. You told
20 me that yesterday, and Boris said that he
21 had authority and I relied upon what they
22 said. That is the case.

23 Now, if I was wrong in relying upon
24 what other lawyers told me, if that is the
25 case, I apologize and I'm guilty and I

1 will be responsible; but I don't think
2 that I should be held and my client should
3 be held accountable in any way, shape or
4 form; and all those other things you
5 talked about are false and have nothing to
6 do with today.

7 But if you want to hold my client
8 accountable because I mistakenly believed
9 I could trust the word of your colleagues,
10 then I guess that is what is going to
11 happen, will happen.

12 MS. SCHROEDER: You mentioned
13 that Mr. Fanning did not appear for the
14 investigational hearing because it
15 violated his Civil Rights. Can you
16 explain that?

17 MR. CARR: No, I am not going
18 to -- I said that Mr. Fanning -- you put
19 on the record that he refused and that
20 somehow evidenced that he is trying to
21 avoid his obligation.

22 I don't recall that the law requires
23 an individual to appear at a conference
24 before the FTC merely because they want to
25 talk to somebody. I don't think that they

1 have to, and I don't think you have the
2 right to make him or even draw the
3 inference with respect to anything, the
4 fact that an individual citizen of the
5 United States chose not to go and speak to
6 the government.

7 If you believe that the government has
8 a right to compel somebody to appear to a
9 meeting and then hold that against them if
10 they don't, then I would like to know what
11 that is. I am not going to debate the law
12 with you. I am not going to, but if
13 you're upset, if The Commission is upset
14 because they think that Mr. Fanning
15 thumbed his nose at them, that is not
16 really a professional attitude. He was
17 going to be here today. He was going to
18 be here today.

19 MS. SCHROEDER: My understanding
20 is he intentionally did not come to the
21 investigational hearing, he intentionally
22 ignored a civil investigative demand from
23 The Commission, is that correct?

24 MR. CARR: No, I did not say that.
25 There's no personal knowledge.

1 MS. SCHROEDER: This concludes the
2 deposition of Mr. Fanning.

3 MR. CARR: Thank you.

4 MS. MOELLER: Hold on for one
5 second. This concludes the deposition of
6 John Fanning. The number of disks used
7 were one. The original will be retained
8 by For The Record. We are going off video
9 record. The time is 9:33 A.M.

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1 C E R T I F I C A T E

2 COMMONWEALTH OF MASSACHUSETTS:

3 PLYMOUTH, SS.:

4 I, ELAINE M. BUCKLEY, a Notary Public in
5 and for the Commonwealth Massachusetts, do
6 hereby certify:7 That the said proceeding was taken before
8 me as a Notary Public at the said time and
9 place and was taken down in shorthand
10 writing by me;11 That I am a Registered Professional
12 Reporter, that the said proceeding was
13 thereafter under my direction transcribed
14 into computer-assisted transcription, and
15 that the foregoing transcript constitutes
16 a full, true, and correct report of the
17 proceedings which then and there took
18 place;19 IN WITNESS WHEREOF, I have hereunto
20 subscribed my hand and affixed my official
21 seal this 30th day of July 2014.22 _____
23 ELAINE M. BUCKLEY24 My commission expires:
25 November 19, 2015

**ATTACHMENT
J**

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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,)
Respondents.)
-----)

May 28, 2014
9:33 a.m.

PRETRIAL SCHEDULING CONFERENCE

BEFORE THE HONORABLE D. MICHAEL CHAPPELL
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C.

Reported by: Josett F. Whalen, RMR-CRR

1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

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15

16 ON BEHALF OF RESPONDENT (JOHN FANNING):

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25

1 APPEARANCES: (continued)

2

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

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3 JUDGE CHAPPELL: This is Docket 9361,
4 In Re Jerk, LLC, et al.

5 Good morning, everyone.

6 I'm going to start by taking appearances of the
7 parties, government first.

8 MS. SCHROEDER: Good morning, Your Honor.

9 Sarah Schroeder with the
10 Federal Trade Commission.

11 And with me on the phone is Boris Yankilovich,
12 Yan Fang and Kerry O'Brien in our San Francisco office.
13 And thank you for letting them appear via telephone.

14 JUDGE CHAPPELL: Those are all attorneys?

15 MS. SCHROEDER: They are.

16 JUDGE CHAPPELL: And him?

17 MR. KENNEDY: My name is Joseph Kennedy,
18 Your Honor. I'm an investigative assistant with the
19 FTC.

20 JUDGE CHAPPELL: Okay. Thank you.

21 And for respondents?

22 MR. CARR: Good morning, Your Honor.

23 Peter Carr representing respondent John Fanning.

24 MS. SPETH: And Your Honor, on the telephone,
25 this is Maria Speth representing the respondent

1 Jerk, LLC. And I appreciate the court's assistance in
2 helping me get on the phone in light of the fact that my
3 flight was canceled last night.

4 JUDGE CHAPPELL: Yes. We had some exciting
5 thunderstorms last night in the area.

6 Can you turn that phone up, please.

7 All right. We e-mail courtesy copies of orders
8 to the parties. These are just courtesy copies.
9 Official service is made by the Office of the Secretary.

10 I'll need each party to designate no more than
11 two individuals to receive communications from the
12 OALJ. And please send an e-mail to my assistant,
13 Dana Gross -- and that's the oalj.ftc.gov Web site --
14 to inform her of the e-mail addresses of the
15 individuals you wish to designate to receive
16 communications from our office.

17 There will be times when more than two will get
18 the communication because we will simply "reply all,"
19 but we want a maximum of two for e-mails that we send
20 out.

21 A scheduling order was provided, a proposed
22 scheduling order, to the parties with a request to
23 provide any modification requests by 11:00 a.m.
24 yesterday. I got no such requests, so I'm intending to
25 issue the scheduling order as previously provided to the

1 parties no later than Friday.

2 Any objection to that?

3 MS. SCHROEDER: No, Your Honor.

4 MR. CARR: No, Your Honor.

5 I just want to note that I wanted to raise with
6 the court at some point, there's nothing in there with
7 respect to any motion dates, and I just wanted to
8 address that with the court at some point in time. But
9 there is no objection from Mr. Fanning.

10 JUDGE CHAPPELL: What type of motion phase?

11 MR. CARR: Well, Your Honor, there are a few
12 issues that particularly with respect to Mr. Fanning
13 and the individual claims against Mr. Fanning
14 individually that I believe would be ripe for some
15 motion practice before Your Honor. And I can get into
16 that now or I can talk about that later, whatever
17 Your Honor would prefer.

18 Specifically, there's -- the claims against
19 Mr. Fanning in the complaint as alleged, there's not
20 one single factual allegation that Mr. Fanning engaged
21 in any individual conduct.

22 There's no factual allegation that Mr. Fanning,
23 for instance, made any misrepresentation or made any
24 communication to consumers or made any statements at
25 all.

1 And so on that grounds, at least the intention
2 at the end of discovery, I would probably be filing some
3 sort of a summary motion for Your Honor's consideration
4 on those issues.

5 JUDGE CHAPPELL: It sounds like something like a
6 12(b)(6) motion?

7 MR. CARR: Either a 12(b)(6) or a rule 56,
8 Your Honor. If Your Honor would consider 12(b)(6), I
9 would certainly do that early on in this stage here. I
10 would not let it linger very long.

11 I just am concerned about the lack of any
12 specific allegation against Mr. Fanning, as I indicated,
13 in this generalized allegation, early on in the
14 complaint, that Mr. Fanning is a member and a manager of
15 Jerk and that he directed, controlled and was able to
16 control the activities, and that being the sole basis
17 for liability asserted against the individual is in
18 essence the argument by the FTC, that any acts of the
19 company are imputed to Mr. Fanning merely because he
20 allegedly had control of the company, which we would
21 probably dispute that as we go from a factual basis.
22 However, it is not a fact actually Mr. Fanning is a
23 member of the LLC.

24 But in any event, I have concern about those
25 types of claims proceeding against an individual under

1 some sort of a vicarious liability theory that is being
2 espoused by the FTC in this case.

3 JUDGE CHAPPELL: Well, those sound like motions
4 to dismiss. And for whatever reason, a number of years
5 ago, when the rules were changed, by a general counsel
6 who is no longer here and by no commissioners who are
7 still here, so that the commission wants to hear motions
8 to dismiss directly. And if you want to look up the
9 history of that, it might be interesting.

10 But those motions before the start of evidence
11 are filed directly with the commission, and I might add
12 the same commission that voted out the complaint against
13 your client. But that's the way it works here at this
14 time.

15 So I would advise you just to look over the
16 rules. There are certain motions some would call
17 dispositive, some would not, that go directly to the
18 commission for a number of reasons, but that's just the
19 way the rules are, so maybe that will help you.

20 MR. CARR: Thank you, Your Honor.

21 JUDGE CHAPPELL: I believe it's rule 3.22(a) as
22 in alpha.

23 Pursuant to rule 3.41(b), also a recent rule,
24 the hearing is limited to no more than 210 hours. And
25 that's to be divided among the parties, and they're

1 required to keep track of trial time.

2 Let's talk about settlement discussions.

3 Who wants to provide the status?

4 MS. SCHROEDER: Thank you, Your Honor.

5 Complaint counsel submitted a proposed
6 settlement to respondents but has not received a
7 response.

8 MR. CARR: Your Honor, that is correct.

9 We are still reviewing the settlement proposed
10 by the commission. I've indicated to counsel that we
11 would like to have a continuing dialogue on a potential
12 resolution. However, what has been proposed at this
13 point in time is not acceptable.

14 I'm trying to work with my client to see if
15 there's something we can propose back in some
16 additional or revised language on the consent order
17 that the commission is seeking, but as it currently
18 stands, it's not something that my client is able to
19 accept.

20 JUDGE CHAPPELL: So although you haven't given
21 a definitive answer, the current proposal will be
22 rejected. Did I hear that right? The current
23 settlement proposal is not acceptable?

24 MR. CARR: That is correct, Your Honor, it is
25 not acceptable. It has not been formally rejected, but

1 I'm telling the court that in the form that I received,
2 it was not acceptable, and we would probably, if we
3 thought there was language that Mr. Fanning, from
4 Mr. Fanning's perspective, could propose back, we would
5 do that in the near term or continue to have conferences
6 with counsel.

7 JUDGE CHAPPELL: Okay. What about from the
8 other respondent's counsel? If you want to speak, just
9 jump in, and we will listen to you.

10 MS. SPETH: Yes, I agree with Mr. Carr. The
11 settlement proposal is not acceptable. And I guess I
12 would go as far as to say I think it is in fact
13 rejected, but we haven't made a counterproposal yet.

14 JUDGE CHAPPELL: All right. Thank you.

15 At this time I allow the parties to present an
16 overview of the case.

17 Will there be two speaking for respondent or
18 only one?

19 MR. CARR: Your Honor, there's --

20 MS. SPETH: Your Honor, we represent the
21 respondents. I represent the company, and Mr. Carr
22 represents Mr. Fanning individually, so yes.

23 JUDGE CHAPPELL: Okay. We're having difficulty
24 hearing, and Madam Court Reporter is having some
25 difficulty transcribing what's coming over the phone.

1 We'll do the best we can.

2 But I'll start with the government, and if you
3 would like to, you can present your overview limited to
4 no more than ten minutes.

5 Go ahead.

6 MS. SCHROEDER: Thank you, Your Honor.

7 With your permission, I'd like to use some
8 slides to illustrate the theory of our case. I can
9 provide a copy of the slides to opposing counsel and to
10 Your Honor and the clerk.

11 JUDGE CHAPPELL: As long as I can see them, I'm
12 fine.

13 Do you want a copy?

14 MR. CARR: I would like one, Your Honor.

15 JUDGE CHAPPELL: It should be on your monitor
16 also.

17 MS. SCHROEDER: From 2009 until 2013,
18 respondents Jerk, LLC and John Fanning operated
19 Jerk.com, a social networking Web site that encouraged
20 users to rate people a jerk or not a jerk. The Web site
21 contained millions of unique consumer profiles.

22 Although respondents represented to consumers
23 that users created the millions of profiles on Jerk, in
24 fact the respondents created the vast majority of
25 profiles using information obtained from Facebook in

1 violation of Facebook's policies.

2 In addition to misleading consumers about the
3 source of content on Jerk, respondents misrepresented to
4 consumers the benefits of a paid Jerk membership.

5 This is a standard FTC deception case. The
6 complaint alleges two violations of section 5 of the
7 FTC Act.

8 First, the respondents misrepresent -- misled
9 consumers about the source of content on Jerk.com.

10 Specifically, the respondents falsely
11 represented that all content on Jerk.com was
12 user-generated.

13 This deception was important to consumers
14 because it led some consumers to believe that someone
15 who's familiar with them created their profile and that
16 it reflected that person's views of them.

17 This deception also misled consumers at large,
18 some of whom mistakenly believed that Jerk was an
19 organic social Web site and that people with profiles on
20 Jerk had been labeled "jerks" by their peers.

21 The second count is that respondents misled
22 consumers about the benefits of a \$30 membership fee.

23 JUDGE CHAPPELL: Is it the government's
24 position that all the alleged conduct is ongoing at
25 this time?

1 MS. SCHROEDER: Your Honor, it seems that the
2 Web site has been down since 2013.

3 JUDGE CHAPPELL: Completely down.

4 MS. SCHROEDER: Respondents have moved the data
5 to different Web sites. It was moved from Jerk.be to
6 Jerk.com to Jerk.org. At the present time, it doesn't
7 appear to be on the Internet.

8 JUDGE CHAPPELL: All right.

9 MS. SCHROEDER: The best way to understand
10 respondents' deceptive practices is to walk through a
11 typical consumer's experience.

12 Most consumers discovered that they had a
13 Jerk.com profile when they entered their name into an
14 Internet search engine, such as Google. In many
15 instances, an individual's Jerk profile was one of the
16 top results on Google.

17 When consumers clicked on the link listed on
18 Google, they were directed to their Jerk.com profile.

19 Every profile contained a person's first and
20 last name, buttons for users to vote whether the person
21 was a jerk or not, and fields for users to enter
22 personal information about the profiled subject, such
23 as age, address, e-mail, employer, license plate
24 number.

25 Many profiles also contained a large photo of

1 the profiled subject.

2 Most profiles contained no data beyond a name
3 and photo, and over 99 percent of Jerk profiles did not
4 contain a vote of jerk or not a jerk.

5 A small percentage of profiles did contain what
6 appear to be user-generated comments about the profiled
7 subject.

8 Complaint counsel will present evidence showing
9 that in 2012 Jerk.com contained between 73 and
10 81 million profiles.

11 JUDGE CHAPPELL: How did you come up with that
12 number, Counselor?

13 MS. SCHROEDER: We had an economist from BE
14 look at the Web site and take a sample of 400 profiles
15 and then evaluated them based on whether they had a
16 photo, whether there was a photo of a child, and that
17 economist will be presenting evidence to Your Honor.

18 JUDGE CHAPPELL: All right.

19 MS. SCHROEDER: Millions of these profiles
20 featured a photo of a child who appeared to be under age
21 ten.

22 Many consumers were upset about the existence
23 of their profile on Jerk.com, especially parents of
24 young children, stalking victims, teenagers, job
25 seekers, and people who were concerned about their

1 online reputation.

2 JUDGE CHAPPELL: So were some of these young
3 children designated jerks on the Web site?

4 MS. SCHROEDER: The way the Web site works, the
5 heading was Jerk, and then below the photo it would
6 sometimes say "is not a jerk" or other things, but the
7 overall heading was Jerk.

8 Many consumers were particularly alarmed by
9 their profiles because their impression was that
10 someone familiar with them created their Jerk.com
11 profile.

12 Respondents made numerous representations that
13 reinforced this belief, including "Content made
14 available through Jerk.com are those of their respective
15 authors and not of Jerk, LLC and "Join the millions of
16 people who use Jerk for important updates for business,
17 dating and more" and "Find out what your 'friends' are
18 saying about you behind your back."

19 However, respondents, not users, actually
20 created the vast majority of profiles on Jerk.com using
21 information from Facebook.

22 Evidence will show that respondents' agent
23 registered as an application developer with Facebook,
24 gained access to Facebook's application programming
25 interfaces, and downloaded names and photos of Facebook

1 users.

2 You'll also hear testimony --

3 JUDGE CHAPPELL: Just so I'm clear -- I've read
4 the complaint as well -- this part of the government's
5 allegation is that this obtaining the data or
6 information from Facebook was unlawful?

7 MS. SCHROEDER: Yes, Your Honor.

8 And that's important because that's the
9 mechanism through which Jerk populated its Web site.

10 You'll also hear testimony that computer
11 programmers at Jerk discussed, quote, bulk-loading user
12 information from Facebook to Jerk.

13 And Facebook sent Jerk, LLC a cease and desist
14 letter in 2012, but respondents continued their
15 violative practices.

16 After viewing their profile, many consumers
17 wanted to remove it from Jerk.com. However, when
18 consumers clicked on the "contact us" link on Jerk.com,
19 respondents required them to pay \$25 to contact the
20 company. Often consumers received no response to their
21 inquiry.

22 Consumers then searched for other ways to
23 remove their profile and discovered Jerk's paid
24 memberships.

25 Respondents advertised that its paid premium

1 features would allow consumers to dispute information on
2 Jerk.com.

3 Many consumers also assumed that a membership
4 would enable them to delete their profile. However,
5 consumers who purchased the \$30 membership received no
6 additional services or benefits.

7 JUDGE CHAPPELL: Can you go back to the -- well,
8 two slides back?

9 MS. SCHROEDER: The \$25 "contact us" fee?

10 JUDGE CHAPPELL: Before this one.

11 On this slide, beside the yellow arrow, is that
12 an official symbol or logo?

13 MS. SCHROEDER: I believe it is, Your Honor.

14 JUDGE CHAPPELL: What appears to be a joker or
15 something?

16 MS. SCHROEDER: It was used on a presentation
17 that was given to potential investors, and it is a
18 joker.

19 JUDGE CHAPPELL: And what is that joker doing
20 with his left hand?

21 MS. SCHROEDER: Yeah, I didn't look that
22 closely, Your Honor. We can try to enlarge it.

23 JUDGE CHAPPELL: All right. Go ahead.

24 MS. SCHROEDER: The FTC opened this
25 investigation in 2012. However, respondents did not

1 cooperate with the commission's investigation.

2 Jerk, LLC produced only a handful of documents
3 in response to the commission's civil investigative
4 demand.

5 In addition, a Jerk, LLC representative and
6 John Fanning both failed to appear at investigational
7 hearings.

8 In fact, counsel for Jerk, LLC still refuses to
9 identify the owner of Jerk, LLC or identify anyone who
10 controls the company.

11 This is a company that availed itself of U.S.
12 laws and was incorporated in the U.S. and now that
13 they're being brought before a court have become
14 phantom.

15 JUDGE CHAPPELL: And how do you connect this to
16 Mr. Fanning?

17 MS. SCHROEDER: So the next -- despite
18 respondents' refusal to reveal Jerk, LLC's owner,
19 evidence will show that John Fanning controlled the acts
20 and practices alleged in the complaint.

21 The types of evidence that complaint counsel
22 will be presenting to the court include bank records,
23 payment processor records, P.O. box application,
24 testimony from Jerk's registered agent, testimony from
25 vendors who did business with Jerk, and testimony from

1 individuals who worked with John Fanning.

2 Respondents' answers to the complaint raised
3 several improper defenses.

4 For example, Mr. Fanning claims that
5 allegations in the complaint are moot. However, it is
6 well-established that voluntary cessation of illegal
7 activity does not render a case moot. As courts have
8 noted, otherwise, the defendant is free to return to his
9 old ways.

10 This is particularly true here where respondents
11 routinely removed and then reposted the Web site under
12 different names.

13 Respondents also assert the requested relief is
14 not in the public interest.

15 Judge McGuire struck a similar defense in the
16 Basic Research case, stating that the commission's
17 public interest determination can only be reviewed for
18 abuse of discretion or extraordinary circumstances.

19 Respondents also claim the commission has
20 exceeded and abused its statutory authority. However,
21 courts have long recognized that Congress gave the FTC
22 broad authority to prevent deceptive practices. And
23 courts have affirmed the FTC's authority to bring
24 privacy cases.

25 Respondents also raise the First Amendment

1 defense. However, deceptive commercial speech is not
2 protected.

3 As the Supreme Court noted in
4 Central Hudson Gas, the government may ban forms of
5 communication more likely to deceive the public than to
6 inform it.

7 The relief the commission is seeking is very
8 reasonable and will prevent further consumer harm. The
9 commission is not seeking any monetary relief. Rather,
10 the notice order prohibits misrepresentations and
11 requires respondents to delete the data used in
12 violation of Facebook's policies.

13 Thank you, Your Honor.

14 JUDGE CHAPPELL: Thank you.

15 Who goes first for respondent?

16 MR. CARR: Your Honor, I'll proceed first
17 because I think I'll probably be shorter than Ms. Speth
18 on the other line.

19 Thank you, Your Honor. I appreciate the
20 opportunity to be here today.

21 As I indicated, I represent Mr. Fanning
22 individually. I do not represent Jerk, LLC. Ms. Speth
23 represents the company.

24 As the allegations go, the only claim is that
25 Mr. Fanning was in control of Jerk, LLC and, in quotes,

1 allegedly formulated, directed, controlled or had
2 authority to control the acts.

3 We submit that the evidence will show that
4 Mr. Fanning in fact did not formulate, direct, control
5 or have authority to control the acts of the company.

6 We further submit that the evidence will show
7 that Mr. Fanning is not a member of Jerk, LLC, and I'll
8 make that representation to the court that he's not.

9 JUDGE CHAPPELL: What do you mean by "a member"?

10 MR. CARR: The -- Jerk is a limited liability
11 company. The owners of a limited liability company are
12 called members as opposed to stockholders.

13 JUDGE CHAPPELL: This is a Delaware corp?

14 MR. CARR: Yes, it is. And he is not a member
15 of that Delaware corporation.

16 JUDGE CHAPPELL: Do you know who is?

17 MR. CARR: Excuse me?

18 JUDGE CHAPPELL: Do you know who is?

19 MR. CARR: I do not know.

20 JUDGE CHAPPELL: Do you know how many members
21 there are?

22 MR. CARR: I do not know.

23 JUDGE CHAPPELL: Is that information available
24 in the filing in the state of Delaware?

25 MR. CARR: It is not. The members are not

1 listed.

2 My understanding is that the members are not
3 required to be listed in the Delaware Secretary of
4 State's Office, in large part again -- now, I'm kind of
5 going off a little bit -- but because there's a
6 recognition that the public does not necessarily have a
7 right to know who the members of an LLC are.

8 So the allegations against Mr. Fanning that he
9 was the one behind all the activities of this company
10 we submit will not be able to be proven, and they're
11 just rank allegations at this point by the commission.

12 And our position, Mr. Fanning's position, is
13 that it's very simple. If you look at the proposed
14 relief sought by the commission in this case,
15 Your Honor, it's to -- it's really to restrain
16 Mr. Fanning.

17 The commission in this case seeks to monitor
18 Mr. Fanning and all of his activities going forward I
19 believe it was for a ten-year period, every business he
20 owns, every transaction he engages in. That's what the
21 commission wants to do. And that's why they've named
22 Mr. Fanning without a basis in law or in fact to bring
23 these charges individually against him. That's what our
24 case will be.

25 JUDGE CHAPPELL: And just so we're clear, all

1 the connections to Jerk.com that we heard some moments
2 ago, those are going to prove to be false? Or it's
3 going to be insufficient to connect it?

4 MR. CARR: It's insufficient -- the mere fact
5 that -- for example, there's an allegation that
6 Mr. Fanning hired engineers that I think was in one of
7 the slides we just saw. That does not mean that
8 Mr. Fanning is liable for the actions of the company.

9 JUDGE CHAPPELL: Are you going to deny that he
10 was at least an agent for Jerk?

11 MR. CARR: I don't believe he was an agent,
12 Your Honor. I don't deny that he was involved with the
13 project, but I don't know that he was an agent of Jerk.

14 I don't know how to quantify Mr. Fanning
15 necessarily because his role may have been different at
16 different times. He's no longer -- and you've heard,
17 the Web site -- Ms. Speth will speak to this further --
18 but the Web site has been down for some significant
19 amount of time. Mr. Fanning has no involvement
20 whatsoever right now, my understanding is, with Jerk.com
21 because it doesn't exist.

22 JUDGE CHAPPELL: Did he make any money off the
23 Web site?

24 MR. CARR: I don't believe he did, Your Honor.
25 I don't believe he did.

1 So to the -- if the commission comes to this
2 court and says that an individual has personal
3 responsibility, liability, for violations of federal
4 law merely because they helped the company open a bank
5 account, merely because they hired people to work on
6 content, merely because they hired a Web design
7 company, whatever that may be -- and I'm talking
8 generically now -- I cannot imagine -- I cannot
9 imagine, notwithstanding the broad authority that the
10 Congress has provided to the FTC, that that is within
11 the statutory and regulatory authority granted to the
12 FTC.

13 And I do concede that the FTC does have broad
14 authority. However, it cannot exceed its regulatory
15 authority.

16 And I do not believe and I will argue at the
17 close of the evidence that the FTC does not have the
18 authority to regulate the conduct of Mr. Fanning
19 individually, as they seek in this case, without
20 specific evidence that Mr. Fanning is personally
21 responsible for the conduct that they've claimed to
22 consumers in this case.

23 And Your Honor, furthermore on that point, if
24 you look at the complaint -- and they've -- I think
25 we've narrowed it down to basically two issues, this

1 content of consumers issue and the issue of payments
2 made by consumers.

3 Mr. Fanning didn't receive those payments. The
4 company received those payments.

5 The evidence will show that Mr. Fanning did not
6 place content into the Jerk.com Web site.

7 Notwithstanding that, Your Honor, there's no
8 allegation that Mr. Fanning personally made any
9 misrepresentation of material fact to any consumer to
10 induce a consumer to act to its detriment individually
11 or at large.

12 And even if you look at count 1 of the charge,
13 Your Honor, there's not even an allegation in that
14 count 1 of any consumer inducement. It's a count
15 alleging that somehow there was a violation of
16 Facebook's contractual obligations or rights with its
17 consumers, and I'll have Ms. Speth address that.

18 But I'm here on behalf of Mr. Fanning. That's
19 essentially the case that we intend to put on,
20 Your Honor, but I would also say this.

21 To the extent -- to the extent that there would
22 be a finding -- and I'm not saying there would -- that
23 Mr. Fanning was involved with content on the Internet,
24 where I do not disagree with counsel that the FTC has
25 some ability to regulate speech, some ability to

1 regulate speech, but not to quash speech.

2 And to the extent that this content that was on
3 the Internet and was generated by Mr. Fanning, which
4 again they'd have to prove up -- and I submit there
5 would not be the evidence to do so -- Mr. Fanning has
6 an absolutely First Amendment right to post content on
7 the Internet that is not a violation of individual
8 rights.

9 And that -- and the evidence I think will
10 show -- and Ms. Speth will speak to this more
11 specifically -- that many of the postings that were
12 issued on Jerk.com were -- came -- that did come from
13 Facebook were obtained via public means. There was no
14 invasion of privacy. There was no hacking.

15 There's no allegations of hacking, especially
16 with respect to Mr. Fanning. There's none of those
17 allegations here.

18 So what this is, Your Honor, is a case where
19 you have information in the Internet, on the Internet
20 or in cyberspace, accessible to the public, that's
21 being brought out of the public domain and put onto a
22 public Web site called Jerk.com.

23 That is First Amendment through and through.
24 And not even the FTC has the authority to regulate or
25 quash that type of speech.

1 And that's the case we intend to prove up to
2 Your Honor, in a nutshell.

3 JUDGE CHAPPELL: So you're saying that even if
4 the allegations are true, there's no violation of law.

5 MR. CARR: That's correct, Your Honor.

6 JUDGE CHAPPELL: All right. Thank you.

7 MR. CARR: And Your Honor, I would add to that
8 that it would be Mr. Fanning's position that it would be
9 an abuse of the regulatory authority of the FTC, so that
10 would be a violation of law.

11 Thank you, Your Honor.

12 JUDGE CHAPPELL: All right.

13 MS. SPETH: Thank you, Your Honor. I will do my
14 best to speak up and to speak slowly and because I
15 understand that you are having a little bit of a hard
16 time hearing me, so is this better at this -- if I speak
17 louder and slower?

18 JUDGE CHAPPELL: Yes. Thank you.

19 MS. SPETH: Okay. I'll do my best.

20 Your Honor, I think it's important factually to
21 start with the understanding that Jerk, LLC is not the
22 registrant of the domain name Jerk.com. It has never
23 been the registrant of that domain name.

24 The domain name is registered to someone named
25 Louis Lardas. It has always been registered to someone

1 named Louis Lardas.

2 JUDGE CHAPPELL: Could you spell that name.

3 Could you spell the last name, please.

4 MS. SPETH: I'm sorry, Your Honor?

5 JUDGE CHAPPELL: Could you spell that last name.

6 MS. SPETH: L-A-R-D-A-S.

7 And this past year, Jerk, LLC filed a lawsuit
8 against Mr. Lardas because Mr. Lardas will not provide
9 any access to that domain name to Jerk, LLC.

10 There was at one time an option agreement for
11 Jerk, LLC to purchase that domain name; however, that
12 option agreement was breached by Mr. Lardas, which
13 resulted in a dispute and a lawsuit. Mr. Lardas will
14 not give anyone associated with Jerk, LLC any access to
15 that Web site right now.

16 But one of the reasons that it is impossible to
17 respond to a settlement proposal that proposes that
18 certain changes be made is because there is absolutely
19 no ability to control the content that is displayed at
20 that Web site right now.

21 In fact, the content displayed at that Web site
22 right now is content that is incredibly offensive, was
23 intended by Mr. Lardas to be incredibly offensive so
24 that it would hurt the domain name. But that's a whole
25 another litigation. But it is important that he has

1 always had that control.

2 JUDGE CHAPPELL: Let me clarify something.

3 Is it your position then that the government is
4 suing the wrong party?

5 MS. SPETH: Not exactly, Your Honor.

6 It's the position of Jerk, LLC that the content
7 at that Web site that is currently there is certainly
8 not their responsibility in any way, shape, or form.

9 The content that was there before, the content
10 that Ms. -- that the FTC has pointed to, was put on
11 during the time where Jerk, LLC did have involvement in
12 what that content would look like.

13 So we're not saying that we never had any input
14 into that content, but we are saying that we certainly
15 do not right now.

16 So the important aspects from a legal
17 perspective of what the FTC has alleged and the
18 responses to that are as follows.

19 First of all, the FTC says -- and there's really
20 only two allegations here. It's really quite a simple
21 case.

22 The first allegation is that Jerk, LLC
23 misrepresented that all content was created by users.

24 That is simply not correct. There's nothing --
25 there was nothing on the Web site, there was nothing

1 publicly available where there was any representation
2 made, express or implied, that all content on the
3 Web site was in fact created by users.

4 The FTC says that consumers complained that
5 their photographs and other information about them on
6 Jerk.com were originally posted by them on Facebook and
7 that they had used the controls that Facebook has to
8 enable those users to designate material only to a
9 limited group and that the information was not for
10 designated public viewing.

11 So I think it's just as simple as I've got a
12 Facebook profile, I tell Facebook I don't want the
13 world to see my photos, I only want my friends to see
14 my photos, and I believe that I -- being the consumer,
15 I believe that if I have designated my information as
16 friends only, then it should be in fact friends only.

17 And the FTC has alleged that people believed
18 that and that Jerk, LLC somehow obtained photographs
19 that were designated as friends only.

20 In reality -- and the evidence is
21 crystal-clear -- the allegation that Jerk, LLC accessed
22 Facebook's data beyond the terms of use makes no sense
23 on two different levels.

24 First, consumers were misled by Facebook to
25 believe that their photos of their profiles could only

1 be viewed by friends.

2 In reality -- and we have proof and we will
3 provide that proof in the case -- approximately
4 five billion Facebook profile photos were readily
5 available at facebook/directory.com. And this
6 information has been disclosed to the FTC.

7 Now, at this early stage, it's unclear whether
8 a developer accessed Facebook's data and downloaded
9 names and photographs onto Jerk.com. It's also unclear
10 whether the developers were directed to do so by anyone
11 at Jerk, LLC.

12 But the determination of that fact is not
13 material to the outcome of this matter at all because
14 it's not a deceptive practice to in fact violate
15 Facebook's terms, if that did happen. And again, I'm
16 not saying that happened, but if it did happen, it is at
17 most a breach of contract dispute between Facebook and
18 the developers and Jerk, LLC.

19 And I don't -- I don't know how the FTC could
20 have regulatory power over a breach of contract over the
21 violation of terms of service.

22 JUDGE CHAPPELL: Is there a contract breach
23 dispute between your client and Facebook?

24 MS. SPETH: I'm sorry, Your Honor?

25 JUDGE CHAPPELL: Is there a current breach of

1 contract dispute going on between your client and
2 Facebook?

3 MS. SPETH: I don't know how I would define
4 "current." Approximately -- I'm going to guess
5 approximately two years ago, maybe longer -- I'd have
6 to look at the date -- Facebook sent a demand letter to
7 Jerk, LLC and argued that Jerk, LLC had violated its
8 terms of use.

9 And Facebook basically kicked Jerk off of
10 Facebook as an app, you know, because there was -- at
11 one time there was an app on Facebook, a Jerk app on
12 Facebook. And they terminated that and said we
13 violated the terms of service.

14 The demand letter was responded to
15 approximately two years ago, and that was the end of
16 it, so I don't know that I would consider that a
17 current dispute.

18 JUDGE CHAPPELL: Okay.

19 MS. SPETH: But then shortly after responding
20 to the demand letter, the FTC contacted Jerk with
21 similar allegations, to which my response has always
22 been: I don't know why the FTC is acting on behalf of
23 Facebook.

24 And the FTC has told us that they're not,
25 quote, carrying Facebook's water, but it appears to us

1 that that is what is going on, because the main claim
2 in this case seems to have always been that we violated
3 Facebook's terms of use, which again I don't understand
4 the regulatory authority over that claim.

5 But perhaps even more importantly or as
6 importantly, you or I or anyone with an Internet
7 connection, even someone who does not have a Facebook
8 account and has never agreed to Facebook's terms of
9 service, can easily access all five billion names and
10 photographs at facebook/directory.com.

11 It is -- if I were in the court, I could do a
12 demonstration for you and show you exactly where all
13 these names are. I've produced it to the FTC.

14 And so if I can easily do that, why would I
15 have to violate anyone's terms of use to do that?

16 So the allegation is that it was done violating
17 the terms of use, and what I'm saying is, you can do
18 that easily without ever agreeing to terms of use.

19 So again, I don't at this point without
20 discovery know exactly what the developers did. But
21 either way, number one, it's not a violation of the
22 deceptive acts -- deceptive practices act; and number
23 two, there would just be no reason to violate the terms
24 of service because you can easily get it.

25 So that's the first allegation. The first

1 allegation -- well, actually, I'm sorry, Your Honor.

2 The first allegation is that -- not that they
3 violated Facebook's terms of use but that they took all
4 of these names and profiles and put them on Jerk and
5 led consumers to believe that it had been done by
6 users.

7 Well, the exact quote on the Web site was:
8 "Opinions, advice, statements, offers or other
9 information or content made available through Jerk.com
10 are those of their respective authors and not of
11 Jerk, LLC."

12 That's the quote that the FTC lays its entire
13 case upon to argue that Jerk, LLC represented that
14 users had put all of the content on Jerk, LLC.

15 That quote doesn't say that. That is a typical
16 legal disclaimer.

17 There's nothing about that statement that
18 represents or even implies that every name and photo was
19 placed on Jerk.com by someone who knew the person, and
20 yet the allegation is that it was represented to the
21 public that if they're on Jerk.com, somebody thinks
22 they're a jerk. That was never ever represented by
23 Jerk, LLC, but FTC -- the FTC argues that that's the
24 misrepresentation.

25 The other misrepresentation that the FTC claims

1 in this case is that consumers who paid \$30 for a
2 membership received nothing.

3 Now, I've not seen the evidence that the FTC
4 relies on. I can tell you that Jerk, LLC earned only
5 \$2,000 in its best year. It never had very many
6 members. And if a member paid \$30, it received
7 services.

8 Now, is it possible that a member signed up and
9 didn't get, you know, either a password or some service
10 or maybe some sort of technical issue? I would imagine
11 that's possible, and I would imagine that the FTC must
12 have some evidence of that or they would not have
13 claimed it. But, you know, a technical problem with one
14 membership is not a deceptive practice.

15 There are, you know -- there were not that many
16 members, and the members that there were received the
17 services of membership.

18 And in fact, hundreds, perhaps -- perhaps
19 thousands of profiles were removed at the request of
20 members and at the request of nonmembers if they were
21 under age.

22 The other argument that's been made by the FTC,
23 not today so much but in the complaint, is that
24 respondents made it difficult to contact Jerk.

25 Well, that's not a deceptive practice. Even if

1 it's completely true that it was difficult to contact
2 Jerk, that's simply not a deceptive practice. As
3 anybody who has ever used an Internet Web site knows,
4 it's often incredibly difficult to contact a person on a
5 Web site.

6 Although none of the actual claims are that
7 there were children, that certainly has been a theme of
8 the FTC's case. And it seems to be there to prejudice
9 the court against Jerk, LLC to make it look like,
10 you know, that it's a really bad practice because
11 really nobody obviously wants children's photos to be
12 profiled on this Web site. And although it's not one of
13 the claims brought, it's been talked about so much that
14 I do want to address it.

15 It is a violation and was a violation of
16 Jerk, LLC's terms to post about a child. It was
17 absolutely a violation.

18 Children's profiles were on Facebook, and some
19 of those profiles made it from Facebook to Jerk.

20 Many, many parents post their children's
21 profiles on Facebook and think that that's just fine,
22 but those same parents were very unhappy when somebody
23 then put them on Jerk, even though it was exactly the
24 same name and photo.

25 Every single child's photo and name that was

1 brought to the attention of Jerk, LLC that I know of at
2 least -- and I believe we can show every one of them --
3 was removed when it was brought to the attention of the
4 company.

5 JUDGE CHAPPELL: You said they made it to Jerk.
6 How did they make it to Jerk, LLC, these photos?

7 MS. SPETH: I'm sorry, Your Honor. I'm going to
8 ask you to repeat that.

9 JUDGE CHAPPELL: Hang on a second. I'm looking
10 at the notes here.

11 You said that "Children's profiles were on
12 Facebook, and some of those profiles made it from
13 Facebook to Jerk."

14 How did they make it from Facebook to Jerk?

15 MS. SPETH: Well, that's not -- that's what's
16 not clear at this point. The profiles, they were --
17 the profiles and names seem to have been bulk-loaded
18 onto Facebook. And the evidence -- at this stage, the
19 evidence is unclear, to me at least, whether that was
20 done by a developer who worked for Jerk or whether that
21 was done by an independent party.

22 There was an independent party who posted a
23 bunch of profiles onto Jerk that were -- that -- and we
24 never did figure out who it was. The person posted
25 anonymously and bulk-loaded many, many names and photos.

1 And that person was ultimately banned from Jerk.com
2 because of this activity.

3 So it's not clear to me whether the -- you know,
4 whether -- and it may be a mixture. It may be that some
5 of them were posted by people who individually posted
6 them, it may be that some were posted by developers who
7 were hired by Jerk, and it may be that some were posted
8 by developers who were unhappy with Jerk and wanted
9 to -- and in fact, we know in several instances of --
10 I'm going to call him a developer, although I don't
11 exactly know what his role was, but somebody posted bulk
12 content on Jerk that was content that we believe was
13 intended to basically, you know, make Jerk look bad with
14 the FTC.

15 And so we're investigating that, so it's not
16 really clear where all of these profiles came from.

17 What is clear from looking at them is that they
18 match the Facebook photos.

19 So, you know, we do not deny that they appear to
20 come from Facebook. They come from the open, public
21 Facebook directory in many, many, many instances.

22 As soon as it was brought to the attention of
23 Jerk, LLC that they were children or that some of them
24 were children, the children were removed.

25 In fact, I requested a list of children's names

1 and -- from FTC counsel or from complaint counsel,
2 you know, as to which ones were children. I received a
3 list. My memory is it was approximately a hundred,
4 approximately 100 or 150 names. And every single one of
5 those were removed. And then I asked for more and
6 didn't, you know, get more. And the response that I got
7 from complaint counsel was, we can't possibly tell you
8 all of them, and not that they didn't want to but just
9 that it was too numerous.

10 And Jerk, LLC has the same problem. It's --
11 there are millions of profiles on the Web site, and it
12 is impossible to go through and figure out how many are
13 children. But every time one is found that's a child,
14 it is removed at least while the Web site -- at least
15 while the removal was within the control of Jerk, LLC,
16 which it's not and hasn't been for some time.

17 JUDGE CHAPPELL: You're going to need to wrap it
18 up, Counselor. Even with my questions, you're way past
19 the ten-minute deadline.

20 MS. SPETH: Okay. Then I'll be done,
21 Your Honor.

22 JUDGE CHAPPELL: You're finished?

23 MS. SPETH: I'm sorry?

24 JUDGE CHAPPELL: Did you say you're finished?

25 THE WITNESS: Oh, well, I thought you said I was

1 finished.

2 JUDGE CHAPPELL: I said you need to wrap it up.

3 I'll give you another minute if you need it.

4 MS. SPETH: Oh. Thank you, Your Honor.

5 So the only thing I would add is that there's a
6 serious free speech issue here.

7 You know, is the Web site controversial? Yes.
8 It was intended to be.

9 One of the purposes of the Web site was to shed
10 light on the issue of what is private and what is public
11 on the Internet.

12 One of the purposes of the Web site is to make
13 people understand that when you post a photo on the
14 Internet, it is a public photo. It is not necessarily
15 only going to be posted where you would think it's going
16 to be posted. That is absolutely a free speech issue.

17 Also the ability to say, Hey, I went on a date
18 with this guy last night and he treated me bad, that's a
19 free speech issue.

20 Calling someone a jerk is absolutely free
21 speech.

22 And you know, I think the FTC sort of cringes
23 and says, Oh, you shouldn't do that, but it's a free
24 speech issue.

25 And with that, I'll wrap up, Your Honor.

1 JUDGE CHAPPELL: All right. Thank you.

2 Anything further from any party?

3 MR. CARR: Not at this time, Your Honor.

4 MS. SCHROEDER: No, Your Honor. Thank you.

5 JUDGE CHAPPELL: All right. Hearing nothing
6 further, until our next session we are adjourned.

7 (Whereupon, the foregoing pretrial scheduling
8 conference was concluded at 10:20 a.m.)

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1 C E R T I F I C A T I O N O F R E P O R T E R

2

3 DOCKET/FILE NUMBER: 9361

4 CASE TITLE: Jerk, LLC and John Fanning

5 HEARING DATE: May 28, 2014

6

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

12

13 DATED: JUNE 4, 2014

14

15

16 JOSETT F. WHALEN, RMR

17

18

19 C E R T I F I C A T I O N O F P R O O F R E A D E R

20

21 I HEREBY CERTIFY that I proofread the transcript
22 for accuracy in spelling, hyphenation, punctuation and
23 format.

24

25

ELIZABETH M. FARRELL

4. Attachment F attached hereto is a true and correct copy of an email string between parties' counsel dated June 24, 2014, to July 2, 2014, discussing dates for John Fanning's deposition. We noticed the Jerk and Fanning depositions in Boston based on a request by John Fanning's counsel, Peter Carr, because that location would be most convenient to Mr. Fanning, who lives in the Boston area.

5. Attachment G attached hereto is a true and correct copy of an email exchange between me and Maria Speth dated July 18, 2014 to July 30, 2014, regarding Ms. Speth's withdrawal as Jerk, LLC's counsel. On July 31, 2014, Ms. Speth filed a Notice Regarding Representation with the Court. She has not yet identified new counsel for Jerk, LLC, or anyone at the company to whom Complaint Counsel can send correspondence.

6. Attachment H attached hereto is a true and correct copy of a July 23, 2014 email exchange between me and counsel for Respondent John Fanning discussing a one-day extension to Mr. Fanning's interrogatory response.

7. On July 27, 2014, I traveled to Boston to depose Jerk, LLC and John Fanning in his personal capacity. On July 28, 2014, I appeared at the U.S. Attorney's Office in Boston prepared to depose the designated corporate representative of Jerk, LLC. No one appeared for the deposition. Neither Jerk nor its counsel offered any justification for the failure to appear.

8. On the afternoon of July 28, 2014, I received a call from Mr. Carr. Mr. Carr and I discussed logistics for Mr. Fanning's personal deposition the following day. I inquired about Mr. Fanning's overdue interrogatory responses and Mr. Carr indicated that he would produce them that evening in time for me to read them before Mr. Fanning's 9:00 am deposition. Mr. Carr also stated that he received permission from Mr. Fanning to engage in settlement discussions and planned to send Complaint Counsel a counterproposal to our July 18, 2014 offer. He said he wanted to try to settle the case quickly to avoid the time and expense of having his client sit for a deposition the next day. I told Mr. Carr that we were happy to receive his counterproposal, but warned him that Commission staff has very little flexibility in modifying standard order language. Mr. Carr was particularly concerned about amending the proposed order to have Mr. Fanning sign on his own behalf, not for Jerk, LLC. I said that was a possibility, but that any settlement agreement in this matter would have to include a resolution with Jerk, LLC, possibly through an uncontested default action. Due to the late time in Boston and my personal plans for the evening, I suggested that Mr. Carr continue settlement negotiations with Kerry O'Brien, Assistant Regional Director of the Western Region, who was in San Francisco. I did not speak with Mr. Carr again until the following morning.

9. I called Ms. O'Brien after speaking with Mr. Carr, and informed her about my conversation with Mr. Carr and the status of settlement discussions. I asked Ms. O'Brien to review whatever counterproposal would be forthcoming from Mr. Carr and to lead any discussions with him that evening in my absence. Later that evening, I received a phone call from my colleague, FTC attorney Mr. Yankilovich, who informed me that there may be a possibility to adjourn or postpone Mr. Fanning's deposition to give Mr. Fanning time to review another revised order we would be sending Mr. Carr shortly. Mr. Yankilovich asked me about possible dates in August or September to which I could reschedule Mr. Fanning's deposition for San Francisco. After reviewing my calendar on the phone with Mr. Yankilovich, we arrived at

three dates: August 6, 7, and 14. Mr. Yankilovich told me that he or Ms. O'Brien would be sending a written proposal to Mr. Carr later that evening, and advised me to check my email for Mr. Carr's written response early in the morning.

10. When I checked my email in the morning of July 29, I saw Ms. O'Brien's email proposal from the previous evening and Mr. Carr's reply from earlier that morning. It was clear from the face of Mr. Carr's email that he did not accept either the proposal to adjourn or to reschedule the deposition as presented in Ms. O'Brien's email, but instead attempted to propose a postponement on some other, unspecified terms. I promptly responded to Mr. Carr at 6:19 am (ET), stating that in light of Ms. O'Brien's express proposal and Mr. Carr's response, Mr. Fanning's deposition would proceed as scheduled. Attachment I hereto is a true and correct copy of this email string between Ms. O'Brien, Mr. Carr, and me on July 28 and 29, 2014.

11. Attachment J hereto is a true and correct copy of a July 30, 2014 email exchange between me and Respondent John Fanning's counsel discussing the late filing of Mr. Fanning's interrogatory response.

12. Attachment K hereto is a true and correct copy of an August 1, 2014 email exchange between me and Mr. Carr regarding Complaint Counsel's attempt to find a solution that would negate the need for court intervention.

Executed August 5, 2014, in San Francisco, CA.



Sarah Schroeder
Complaint Counsel

ATTACHMENT
A

From: Schroeder, Sarah
Sent: Tuesday, April 29, 2014 3:46 PM
To: Peter Carr
Cc: O'Brien, Kerry; Fang, Yan
Subject: proposed consent agreement
Attachments: Comparison to notice order.pdf; Proposed Settlement.4-29-2014.docx; Joint Motion to Withdraw from Adjudication.docx

Peter,

It was a pleasure speaking with you today. Per our discussion, I have attached a proposed settlement in the Jerk, LLC matter. I modified provisions V and VIII to address your concerns and have attached a comparison to the original notice order. If Mr. Fanning finds these terms agreeable and signs the consent agreement, then we would enter the attached Joint Motion to Withdraw from Adjudication while the Commission votes on the proposed settlement.

Please feel free to contact me if you have any questions.

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

**ATTACHMENT
B**

From: Schroeder, Sarah
Sent: Monday, May 05, 2014 2:40 PM
To: mcs@jaburgwilk.com
Cc: Yankilovich, Boris; Fang, Yan
Subject: proposed consent agreement in Jerk LLC
Attachments: Comparison to notice order.pdf; Proposed Settlement.4-29-2014.docx

Maria,

It was a pleasure speaking with you today. Attached please find the proposed settlement agreement.

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

**ATTACHMENT
C**

From: Schroeder, Sarah
Sent: Friday, June 06, 2014 8:44 AM
To: Maria Crimi Speth; 'Peter Carr (PCarr@eckertseamans.com)'
Cc: Fang, Yan; Yankilovich, Boris; Ortiz, Kelly; O'Brien, Kerry
Subject: RE: Redline of Proposed consent order

Maria:

Thank you for sharing your redline of the proposed consent order. Given the evidence in this matter and the corporate status of Jerk, LLC, any settlement must include John Fanning. We are happy to discuss Mr. Fanning's concerns about the reporting provisions. If you believe it would be productive, we can ask Judge Chappell to host a settlement conference.

Best Regards,
Sarah

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

From: Maria Crimi Speth [<mailto:mcs@jaburgwilk.com>]
Sent: Thursday, June 05, 2014 11:50 AM
To: Schroeder, Sarah; 'Peter Carr (PCarr@eckertseamans.com)'
Cc: Fang, Yan; Yankilovich, Boris; Ortiz, Kelly
Subject: Redline of Proposed consent order

Sarah:

Attached is a redline of the proposed consent order that I prepared back when we were talking about a resolution. I finally got approval to present it to you. Jerk, LLC is willing to enter into the attached consent agreement contingent on the remaining matter being dismissed as against John Fanning.

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

602-248-1089
602-248-0522 (fax)

www.jaburgwilk.com

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**ATTACHMENT
D**

From: Peter Carr <PCarr@eckertseamans.com>
Sent: Friday, July 18, 2014 4:21 PM
To: Schroeder, Sarah
Subject: RE: Proposed consent order

Thanks. You too.

PFC

Sent with Good (www.good.com)

From: Schroeder, Sarah <SSCHROEDER@ftc.gov>
Sent: Friday, July 18, 2014 7:08:26 PM
To: Peter Carr; Vicki A. Roy
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry
Subject: Proposed consent order

Peter,

It was nice speaking with you today. I've attached the most recent proposed consent order for the Jerk, LLC matter. I've also attached a comparison to the original order. As you may recall, we discussed changes to the order in April and I obtained permission to make certain modifications. I'm happy to discuss narrowing the language in Provision VIII (compliance monitoring), but do not have authority to make further changes to the other provisions.

Let's plan to talk again on Wednesday after you've conferred with your client. I hope you have a good weekend.

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

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**ATTACHMENT
E**

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

Boris:

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

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

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

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

MARIA CRIMI SPETH | Shareholder | 602.248.1089

JABURG | WILK
Attorneys at Law



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

Hi Maria,

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

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

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

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

Sarah:

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

MARIA CRIMI SPETH | Shareholder | 602.248.1089

JABURG | WILK
Attorneys at Law



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

Maria:

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

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

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

Best Regards,
Sarah

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

Sarah:

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

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

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

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

602-248-1089
602-248-0522 (fax)

www.jaburgwilk.com

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**ATTACHMENT
F**

From: Schroeder, Sarah
Sent: Wednesday, July 02, 2014 8:53 AM
To: Peter Carr; mcs@jaburgwilk.com
Cc: Yankilovich, Boris; Fang, Yan; Ortiz, Kelly; Burke, Beatrice
Subject: RE: Deposition schedule

Peter,

While we were hoping to modify the date of Mr. Fanning's deposition, it seems this is not feasible given Mr. Fanning's very limited available in September and October. Accordingly, we will keep the original schedule for Jerk, LLC (July 28) and Mr. Fanning (July 29). I have attached the deposition notices so there is no confusion.

Best Regards,
Sarah

From: Peter Carr [mailto:PCarr@eckertseamans.com]
Sent: Tuesday, July 01, 2014 5:31 PM
To: Schroeder, Sarah; mcs@jaburgwilk.com
Cc: Yankilovich, Boris; Fang, Yan; Ortiz, Kelly; Burke, Beatrice
Subject: RE: Deposition schedule

Sarah-

My client is available on October 28 starting at 1:00 PM. Let me know if you need a different reporter who can work in the evening. I can arrange. See you then.

Thanks.

PFC

Sent with Good (www.good.com)

From: Schroeder, Sarah <SSCHROEDER@ftc.gov>
Sent: Tuesday, July 1, 2014 4:27:24 PM
To: Peter Carr; mcs@jaburgwilk.com
Cc: Yankilovich, Boris; Fang, Yan; Ortiz, Kelly; Burke, Beatrice
Subject: RE: Deposition schedule

Thanks Peter. October 28th works for us, but we need to start at 9am so the court reporter doesn't have to stay into the evening. If Mr. Fanning is not available all day on October 28th, then please select one of the following alternatives:

- September 16-18, 9am (ET)
- September 23-25, 9am (ET)
- September 30-October 2, 9am (ET)

- October 7-9, 9am (ET)
- October 14-16, 9am (ET)
- October 21-23, 9am (ET)
- October 29, 9am (ET)

Best Regards,
Sarah

From: Peter Carr [<mailto:PCarr@eckertseamans.com>]
Sent: Tuesday, July 01, 2014 11:37 AM
To: Schroeder, Sarah; mcs@jaburgwilk.com
Cc: Yankilovich, Boris; Fang, Yan; Ortiz, Kelly; Burke, Beatrice
Subject: RE: Deposition schedule

Sarah-

Mr. Fanning is available to be deposed on October 28, 2014 starting at 1:00 PM in my offices in Boston.

Thanks.

PFC

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



From: Schroeder, Sarah [<mailto:SSCHROEDER@ftc.gov>]
Sent: Tuesday, June 24, 2014 11:09 AM
To: Peter Carr; mcs@jaburgwilk.com
Cc: Yankilovich, Boris; Fang, Yan; Ortiz, Kelly; Burke, Beatrice
Subject: Deposition schedule

Peter and Maria,

Please see the following information about depositions for the Jerk, LLC matter.

John Fanning – September/October

We need to postpone Mr. Fanning's July 29th deposition until the fall. Please send me the dates that Mr. Fanning is unavailable in September and October. I recognize that the date change is a minor inconvenience for Mr. Fanning so as a courtesy we will hold his deposition in Peter's office as you requested.

Jerk, LLC – July 29th

To accommodate another witness, we are moving the Jerk, LLC deposition to July 29th. Because Mr. Fanning is Jerk, LLC's designated representative and was already planning to testify on July 29th in his individual

capacity, this date change should not pose a burden on him. Please see the attached deposition notice, which states that the Jerk, LLC depo will begin at 8:30am (ET) at the U.S. Attorney's Office in Boston and will be videotaped.

Boston Witness – July 28th

We are working out the details for another witness to appear on July 28th and will forward you the *subpoena ad testificandum* when it is final.

Additional Witnesses – September/October

As we have discussed, we plan to depose multiple fact witnesses in this matter. Accordingly, please send me any dates that you are unavailable for depositions in September and October.

Please feel free to call me anytime to discuss the deposition schedule.

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

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

In the Matter of

**Jerk, LLC, a limited liability company,
also d/b/a JERK.COM, and**

**John Fanning,
individually and as a member of Jerk, LLC.**

DOCKET NO. 9361

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

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

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

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

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

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

Date: July 2, 2014

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

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
Office of Administrative Law Judges**

In the Matter of

JERK LLC, et al.

Docket No. 9361

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE that, pursuant to Rule 3.33(a) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings (16 C.F.R. § 3.33(a)), Complaint Counsel will take the deposition of Respondent John Fanning. This deposition will be conducted before a person authorized to administer oaths and will be recorded by stenographic and videographic means. The testimony will be taken at the United States Attorney's Office, John Joseph Moakley Federal Courthouse, 1 Courthouse Way, Suite 9200, Boston, Massachusetts, on July 29, 2014 at 9:00 a.m. (ET).

Date: June 3, 2014

/s/ Sarah Schroeder

Sarah Schroeder

Yan Fang

Western Region – San Francisco

Federal Trade Commission

901 Market Street, Suite 570

San Francisco, California 94103

Telephone: (415) 848-5100

Facsimile: (415) 848-5184

Electronic Mail: sschroeder@ftc.gov;

yfang@ftc.gov

Complaint Counsel

**ATTACHMENT
G**

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

Follow Up Flag: Follow up
Flag Status: Flagged

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

MARIA CRIMI SPETH | Shareholder | 602.248.1089

JABURG | WILK
Attorneys at Law



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

Maria,

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

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

Sarah:

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

MARIA CRIMI SPETH | Shareholder | 602.248.1089

JABURG | WILK
Attorneys at Law



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

Maria,

I hope you had a good vacation.

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

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

Best Regards

Sarah

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

Sent: Wednesday, July 30, 2014 12:19 AM

To: Schroeder, Sarah; Ortiz, Kelly; 'pcarr@eckertseamans.com' (pcarr@eckertseamans.com) <pcarr@eckertseamans.com>; Debra A. Gower <dag@jaburgwilk.com>; vroy@eckertseamans.com <vroy@eckertseamans.com>

Cc: Yankilovich, Boris; Fang, Yan; Abbe, Kenneth; O'Brien, Kerry

Subject: RE: Motion to withdraw as counsel

Sarah:

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

MARIA CRIMI SPETH | Shareholder | 602.248.1089

JABURG | WILK
Attorneys at Law



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

Sent: Monday, July 21, 2014 10:27 AM

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

Cc: Yankilovich, Boris; Fang, Yan; Abbe, Kenneth; O'Brien, Kerry

Subject: Motion to withdraw as counsel

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

Best Regards,
Sarah

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

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

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

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

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

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

Counsel:

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

MARIA CRIMI SPETH | Shareholder | 602.248.1089

JABURG | WILK
Attorneys at Law



**ATTACHMENT
H**

From: Peter Carr <PCarr@eckertseamans.com>
Sent: Wednesday, July 23, 2014 8:19 AM
To: Schroeder, Sarah; Vicki A. Roy
Cc: Yankilovich, Boris
Subject: RE: Zinman document production

Probably let me do what can.

PFC

Sent with Good (www.good.com)

From: Schroeder, Sarah <SSCHROEDER@ftc.gov>
Sent: Wednesday, July 23, 2014 11:17:12 AM
To: Peter Carr; Vicki A. Roy
Cc: Yankilovich, Boris
Subject: RE: Zinman document production

Can you send the response tomorrow? I'm in transit on Friday.

From: Peter Carr [<mailto:PCarr@eckertseamans.com>]
Sent: Wednesday, July 23, 2014 8:14 AM
To: Schroeder, Sarah; Vicki A. Roy
Cc: Yankilovich, Boris
Subject: RE: Zinman document production

Thanks. I had them due on Friday. Is that a problem.

PFC

Sent with Good (www.good.com)

From: Schroeder, Sarah <SSCHROEDER@ftc.gov>
Sent: Wednesday, July 23, 2014 11:10:33 AM
To: Peter Carr; Vicki A. Roy
Cc: Yankilovich, Boris
Subject: RE: Zinman document production

Thanks Peter. I'm available at 2pm (ET) today.

Also, just a reminder that Mr. Fanning's interrogatory responses are due today.

**ATTACHMENT
I**

From: Peter Carr <PCarr@eckertseamans.com>
Sent: Tuesday, July 29, 2014 4:45 AM
To: Schroeder, Sarah; O'Brien, Kerry
Cc: Yankilovich, Boris
Subject: RE: Proposed consent order

Follow Up Flag: Follow up
Flag Status: Flagged

By the way, I did not get the email from last evening until this morning. I checked my email until 9:00 PM and then was not available. I do not know when it came into my email. I responded immediately this morning when received.

PFC

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



From: Peter Carr
Sent: Tuesday, July 29, 2014 7:43 AM
To: 'Schroeder, Sarah'; O'Brien, Kerry
Cc: Yankilovich, Boris
Subject: RE: Proposed consent order

I am not proceeding today. I agreed to the terms Boris set forth last night. Those are the ones that I conveyed to my client and we agreed. It was never mentioned any affidavit or otherwise. Boris also said late August/early September in CA. My client agrees to that schedule to appear in CA if we are not able to resolve. August 6 is next week. The understanding is that we would adjourn to give some reasonable time to discuss resolution in hopes that we could resolve the matter. I said clearly that the purpose is not delay, but next week is not consistent with what we discussed.

I am relying on the discussion I had last night which I conveyed to my client. Based on those discussions, Mr. Fanning will not be appearing today and we will work on the resolution. I am waiting to hear back from Boris this morning on the comments I sent, as was also discussed last evening on the call. Mr. Fanning will agree to appear for depo in CA in late August/early September if we are not able to resolve.

I also object to the statement that I represented that Jerk was a defunct company. I have no knowledge of the company status, and never made such a statement. I said that I understood that the Jerk site is not operating,

and could possibly get some statement from Mr. Fanning in the settlement document that he has discontinued performing any services concerning Jerk. I never stated anything about the company.

If you still plan to appear, I will put on the record the substance of my discussions last evening with counsel and my reliance thereon in adjourning the deposition today. That seems like a huge waste of resources.

Thanks.

PFC

Peter F. Carr, II
ECKERT SEAMANS CHERIN & MELLOTT, LLC

Two International Place • 16th Floor • Boston, MA 02110

Direct (617) 342.6857 | Facsimile (617) 342.6899

pcarr@eckertseamans.com

eckertseamans.com | [bio](#) | [vCard](#)



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

Sent: Tuesday, July 29, 2014 6:19 AM

To: Peter Carr; O'Brien, Kerry

Cc: Yankilovich, Boris

Subject: Re: Proposed consent order

Peter,

As you did not agree to the terms Kerry laid out in her email, we will proceed with Mr. Fanning's deposition today as scheduled. I'll see you around 8:45am.

Sarah

From: Peter Carr [<mailto:PCarr@eckertseamans.com>]

Sent: Tuesday, July 29, 2014 05:16 AM

To: O'Brien, Kerry

Cc: Yankilovich, Boris; Schroeder, Sarah

Subject: RE: Proposed consent order

Kerry-

This is not what we discussed with Boris.

I will agree to terms Boris outlined by phone yesterday. We will adjourn the deposition scheduled for today. I will review the revised draft CO. I will wait for comments from you concerning my proposed changes and perhaps discuss other changes to the language. If we do not resolve the deposition of Mr. Fanning will take place in SF. Boris said late August/early September. I will wait for this dates from you.

Thanks.

PFC

Sent with Good (www.good.com)

From: O'Brien, Kerry <KOBRIEN@ftc.gov>
Sent: Monday, July 28, 2014 9:12:47 PM
To: Peter Carr
Cc: Yankilovich, Boris; Schroeder, Sarah
Subject: FW: Proposed consent order

Dear Peter,

As promised, please find attached a draft order that we have revised for Mr. Fanning's signature alone. We usually disfavor separate settlements with different respondents, and would ordinarily not settle with Mr. Fanning alone without Jerk. In this case, given your representation that Jerk is a defunct company, we can proceed with this approach on the condition that Mr. Fanning provides a sworn affidavit stating as a member of the LLC that Jerk is in fact defunct and that he agrees to cooperate with the FTC in any default action against Jerk.

You indicated on the phone that you and your client may need additional time to consider entering into the consent order and that you wish to avoid the costs that you will incur at tomorrow's deposition of Mr. Fanning. Per your request to give you more time, we are willing to reschedule tomorrow's deposition to one of the following dates – August 6, 7, or 14 – at our office in San Francisco. Having already spent the considerable time and expense of flying Sarah to Boston to depose Mr. Fanning tomorrow, and in light of today's no-show at the Jerk LLC deposition, we would grant this extension only on the express condition that Mr. Fanning come to San Francisco for his deposition on one of these dates and during regular business hours (starting at 9 or 9:30 am Pacific). If you do not agree to this proposal, we are ready to proceed with the deposition as scheduled at 9 am tomorrow. Alternatively, if Mr. Fanning decides to sign the attached consent order before tomorrow's deposition, this will likely spare everyone further time and expense. The choice is yours.

Please let us know in writing no later than 7 am Eastern tomorrow whether (i) Mr. Fanning plans to sign the order as is before the deposition tomorrow; (ii) you wish to reschedule the deposition on the terms laid out in this email, or (iii) you wish to proceed with tomorrow's deposition as originally scheduled. If we do not receive a response by 7 am or if you propose some other option, we will proceed with the deposition tomorrow as scheduled.

We will follow up internally with our colleagues in DC about the language you raised in the Compliance Monitoring section. Please bear in mind, however, that the Bureau of Consumer Protection is highly unlikely to approve any further changes to the Commission's standard order language. Moreover, as I mentioned on the phone, to resolve this litigation, both the Bureau of Consumer Protection and the Commission will need to approve of any consent agreement that Mr. Fanning signs.

Regards,

Kerry

Kerry O'Brien
Assistant Regional Director
Federal Trade Commission
Western Region – San Francisco
901 Market Street, Suite 570

San Francisco, CA 94103
(415) 848-5189
(415) 848-5184 (fax)

From: Yankilovich, Boris
Sent: Monday, July 28, 2014 3:23 PM
To: 'Peter Carr'
Cc: O'Brien, Kerry; Schroeder, Sarah; Vicki A. Roy
Subject: RE: Proposed consent order

Peter,

I spoke with Sarah earlier today and I know she had something personal lined up in Boston for the evening. If this is about the draft order, Kerry and I are available to speak this pm. Just let me know when and where to call you.

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

From: Peter Carr [<mailto:PCarr@eckertseamans.com>]
Sent: Monday, July 28, 2014 2:45 PM
To: Schroeder, Sarah; Vicki A. Roy
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry
Subject: RE: Proposed consent order

Sarah-

Got your voice message. Are you available to speak.

PFC

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



From: Schroeder, Sarah [<mailto:SSCHROEDER@ftc.gov>]
Sent: Friday, July 18, 2014 7:08 PM
To: Peter Carr; Vicki A. Roy
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry
Subject: Proposed consent order

Peter,

It was nice speaking with you today. I've attached the most recent proposed consent order for the Jerk, LLC matter. I've also attached a comparison to the original order. As you may recall, we discussed changes to the order in April and I obtained permission to make certain modifications. I'm happy to discuss narrowing the language in Provision VIII (compliance monitoring), but do not have authority to make further changes to the other provisions.

Let's plan to talk again on Wednesday after you've conferred with your client. I hope you have a good weekend.

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

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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.

**ATTACHMENT
J**

From: Peter Carr <PCarr@eckertseamans.com>
Sent: Wednesday, July 30, 2014 4:50 PM
To: Schroeder, Sarah
Cc: Yankilovich, Boris; O'Brien, Kerry; Fang, Yan
Subject: RE: Fanning Answers to Ints

Not my understanding. Again what is the prejudice. What is the real issue Sarah. Leverage? Abuse of governmental authority?

Just so I know where you stand.

PFC

Sent with Good (www.good.com)

From: Schroeder, Sarah <SSCHROEDER@ftc.gov>
Sent: Wednesday, July 30, 2014 7:43:43 PM
To: Peter Carr
Cc: Yankilovich, Boris; O'Brien, Kerry; Fang, Yan
Subject: RE: Fanning Answers to Ints

Peter,

Your statement that I gave you an extension yesterday is false -- my repeated request for the overdue interrogatory responses is not assent to an extension. As a courtesy, we did grant Mr. Fanning an extension on his document production.

From: Peter Carr [<mailto:PCarr@eckertseamans.com>]
Sent: Wednesday, July 30, 2014 4:24 PM
To: Schroeder, Sarah
Cc: Yankilovich, Boris; O'Brien, Kerry; Fang, Yan
Subject: RE: Fanning Answers to Ints

You gave me an extension I believed since you asked for them yesterday. How late do you contend they are. What is the prejudice. Where is the courtesy? And please stop threatening sanctions and other threats.

PFC

Sent with Good (www.good.com)

From: Schroeder, Sarah <SSCHROEDER@ftc.gov>
Sent: Wednesday, July 30, 2014 7:03:30 PM
To: Peter Carr

Cc: Yankilovich, Boris; O'Brien, Kerry; Fang, Yan

Subject: RE: Fanning Answers to Ints

Peter,

I'm confirming that we received John Fanning's interrogatory responses this afternoon. Please note that they were due last Thursday. What is your justification for the delay?

From: Peter Carr [<mailto:PCarr@eckertseamans.com>]

Sent: Wednesday, July 30, 2014 2:00 PM

To: Schroeder, Sarah

Subject: Fanning Answers to Ints

Sarah-

Here you go. I have not yet filed but wanted to get them out to you.

PFC

Peter F. Carr, II
ECKERT SEAMANS CHERIN & MELLOTT, LLC

Two International Place • 16th Floor • Boston, MA 02110

Direct (617) 342.6857 | Facsimile (617) 342.6899

pcarr@eckertseamans.com

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From: Schroeder, Sarah
Sent: Tuesday, August 05, 2014 10:18 AM
To: Peter Carr
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry; Vicki A. Roy; Debra A. Gower (dag@jaburgwilk.com); mcs@jaburgwilk.com
Subject: RE: motion to compel
Attachments: Proposed consent order

Peter,

I'm not sure what I need to respond to since this email was supposed to be a meet and confer about our motion to compel, but so you know that I'm not ignoring you, here are my answers to your questions.

Kerry O'Brien already replied to your proposed order language changes on July 30th. In case you did not receive her email, I'm attaching it here. As we have said repeatedly, Kerry is your point of contact for settlement discussions.

It's absolutely true that Mr. Fanning refused to show up at his deposition on July 29. You telling us a few hours before the deposition that he wasn't going to show doesn't change that fact.

My supervisor is Kerry O'Brien, the FTC's Assistant Regional Director for the San Francisco Office.

-Sarah

From: Peter Carr [<mailto:PCarr@eckertseamans.com>]
Sent: Monday, August 04, 2014 6:35 PM
To: Schroeder, Sarah; Vicki A. Roy; Debra A. Gower (dag@jaburgwilk.com); mcs@jaburgwilk.com
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry
Subject: RE: motion to compel

Sarah-

Please respond as requested.

PFC

Sent with Good (www.good.com)

From: Peter Carr
Sent: Friday, August 1, 2014 11:39:56 AM
To: Schroeder, Sarah; Vicki A. Roy; Debra A. Gower (dag@jaburgwilk.com); mcs@jaburgwilk.com
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry
Subject: RE: motion to compel

Sarah-

Please advise as to the status of the comments to the proposed consent decree.

You also know that it is false that Mr. Fanning refused to appear on July 29.

Please also provide me with the name of your supervisor or boss.

Thanks you.

PFC

Peter F. Carr, II
ECKERT SEAMANS CHERIN & MELLOTT, LLC

Two International Place • 16th Floor • Boston, MA 02110

Direct (617) 342.6857 | Facsimile (617) 342.6899

pcarr@eckertseamans.com

eckertseamans.com | [bio](#) | [vCard](#)



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

Sent: Friday, August 01, 2014 11:12 AM

To: Peter Carr; Vicki A. Roy; Debra A. Gower (dag@jaburgwilk.com); mcs@jaburgwilk.com

Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry

Subject: motion to compel

Peter, Maria:

I'm writing in an attempt to meet and confer on a motion to compel we plan to file. Since I already discussed the overarching issues with Peter on Tuesday, and given that Maria appears to be no longer authorized by Jerk to act on behalf of the company, I am laying out the meet and confer terms in this email. Maria, I ask that you please forward this to your former client, or let me know with whom I should communicate.

We plan to ask the Court to compel the deposition of Mr. Fanning on August 14 and the deposition of Jerk, LLC on August 15, both at our office in San Francisco, as a remedy to their failure to appear on the designated dates of July 28 and 29 in Boston. We also plan to ask the Court to compel Jerk to provide responses to our interrogatories and to compel Mr. Fanning to produce documents in response to our requests for production, both on or before August 8. Please let me know if you agree to comply with these requests voluntarily by 2 pm (ET) tomorrow. Let me add for the record that while I'm willing to work toward a solution that would negate the need for court intervention, I am not interested in entertaining responses attacking the justification for us having to move to compel this discovery. That justification is well documented and will be outlined in our motion.

-Sarah

Sarah Schroeder, Attorney
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103
Phone: (415) 848-5186

Email: sschroeder@ftc.gov

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

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

**DECLARATION OF KERRY O'BRIEN IN SUPPORT OF COMPLAINT COUNSEL'S
MOTION TO COMPEL DISCOVERY**

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 Assistant Regional Director for the FTC's Western Regional Office in San Francisco. I am an attorney of record in the above-captioned matter, and I have personal knowledge of the facts set forth herein.

2. On the afternoon of Monday, July 28, 2014, I received a phone call from FTC staff attorney Sarah Schroeder, another attorney of record in the above-captioned matter. Ms. Schroeder was calling from Boston, to where she traveled from San Francisco to depose Jerk LLC on July 28 and John Fanning on July 29. Ms. Schroeder told me that after no one appeared for the Jerk LLC deposition, Mr. Fanning's counsel, Peter F. Carr, contacted her to attempt to reengage settlement discussions.

3. According to Ms. Schroeder, she had sent Mr. Carr our latest draft order for settlement purposes on July 18. Mr. Carr promised to review and respond with a counterproposal, but had not done so. According to Ms. Schroeder, Mr. Carr now planned to respond to our draft order and planned to send his proposed language by email. Ms. Schroeder also explained to me that an issue of importance to Mr. Carr was revising the order so that Mr. Fanning could sign it on his own behalf, but not on behalf of the company.

4. Ms. Schroeder had plans for that evening in Boston and asked if Boris Yankilovich, another FTC attorney of record, and I could review Mr. Carr's proposal when it arrived. She also asked me to revise the draft order so that it applied to Mr. Fanning alone and to speak with Mr. Carr to determine whether the case could be settled expeditiously. I agreed to help.

5. Mr. Carr sent us his proposed order language via email at 1:41 pm Pacific / 4:41 pm Eastern that afternoon. A true and correct copy of that email is attached hereto as Attachment A.

6. I reviewed Mr. Carr's proposed order language carefully and discussed it with colleagues. Mr. Yankilovich and I then called Mr. Carr from Mr. Yankilovich's office at approximately 3:40 pm Pacific / 6:40 pm Eastern. We spoke for approximately twenty minutes.

7. During that phone call, Mr. Carr stated that he wanted to see if there was any way to resolve this case without having Mr. Fanning incur the time and expense of sitting for a deposition. We responded that settling was highly unlikely before Mr. Fanning's deposition in the morning, especially because Mr. Carr's proposed order language deviated a great deal from the Commission's typical language. Nonetheless, we explained that we would be willing to discuss that language with management and colleagues in Washington DC, but since they were likely gone for the day, we would likely not be able to resolve our different positions on this language before the deposition.

8. Mr. Yankilovich and I told Mr. Carr that, in order to avoid having Mr. Fanning undergo a deposition if a speedy settlement between the parties was possible, we could propose two options. Under the first option, we could amend our latest proposed order to have it apply to Mr. Fanning alone, and not have Mr. Fanning sign on behalf of Jerk. Mr. Carr responded positively to that. He said that Mr. Fanning could not sign an order on Jerk's behalf anyway because the company was now defunct. We explained that we would email that revised order to Mr. Carr later that evening. If Mr. Fanning would sign that order in advance of his deposition, we would adjourn the deposition indefinitely and begin the settlement process, by initiating settlement review by the Bureau of Consumer Protection.


9. Our second option was to postpone Mr. Fanning's deposition if he needed more time to resolve any remaining issues and questions about the language in the order we would be proposing. Under that option, we would reschedule the deposition to later in August or September, contingent on Ms. Schroeder's availability. We explained to Mr. Carr that since Ms. Schroeder was unavailable at the moment in Boston, we would need to first reach her to confer about available dates before proposing them to Mr. Fanning as part of this option to reschedule. We would endeavor to propose several dates to give Mr. Fanning some options. After doing so, we would include those dates in the forthcoming email in which we would be sending Mr. Carr the revised order. Mr. Yankilovich and I made it clear that any rescheduled deposition would have to take place at our offices in San Francisco on one of the dates that we would be proposing. Mr. Carr appeared amenable to this approach, but told us that he would first need to get the dates from us and then confer with his client about his availability.

10. Finally, we explained to Mr. Carr that in light of the late hour, we would need to move quickly. We told him that we would send him our proposal via email later that evening, after amending the order language and reaching Ms. Schroeder about potential rescheduling dates. We also told Mr. Carr that we would need his response in writing at least a couple hours before the start of Mr. Fanning's deposition at 9 am. We explained that Ms. Schroeder, having already traveled to Boston, was fully prepared to proceed with the deposition in the morning. We told Mr. Carr that, if our forthcoming proposal was unacceptable or if Mr. Carr failed to

respond in time, Ms. Schroeder would take Mr. Fanning's deposition as scheduled. Mr. Carr agreed to proceed along these lines. Mr. Yankilovich reminded him repeatedly to look for our email later in the evening.

11. Sometime after concluding our call with Mr. Carr, Mr. Yankilovich came to my office and told me that, after reaching and conferring with Ms. Schroeder, the following dates were available for a rescheduled Fanning deposition in San Francisco: August 6, 7, and 14. I then sent Mr. Carr an email at 6:17 pm Pacific / 9:17 pm Eastern laying out our proposed options for either adjourning or postponing Mr. Fanning's deposition, or proceeding as scheduled. I attached to that email the revised order, which Mr. Yankilovich and I revised to apply to Mr. Fanning alone. A true and correct copy of that email (without the attached order) is attached hereto as Attachment B.

Executed this 4th day of August 2014 in San Francisco, CA.


Kerry O'Brien
Complaint Counsel

ATTACHMENT
A

From: Peter Carr <PCarr@eckertseamans.com>
Sent: Monday, July 28, 2014 1:41 PM
To: Schroeder, Sarah; Vicki A. Roy
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry
Subject: RE: Proposed consent order
Attachments: FANNING-FTC- CONSENT ORDER PROVISION (K0552615).docx

Follow Up Flag: Follow up
Flag Status: Flagged

Sarah-

Please see my revised proposed language for Section VIII of the Consent Decree. I want to review the balance in closer detail but wanted to get started on this provision. Let me know if we can discuss. We should focus on this instead of the depo if possible.

Thanks.

PFC

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



From: Schroeder, Sarah [<mailto:SSCHROEDER@ftc.gov>]
Sent: Friday, July 18, 2014 7:08 PM
To: Peter Carr; Vicki A. Roy
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry
Subject: Proposed consent order

Peter,

It was nice speaking with you today. I've attached the most recent proposed consent order for the Jerk, LLC matter. I've also attached a comparison to the original order. As you may recall, we discussed changes to the order in April and I obtained permission to make certain modifications. I'm happy to discuss narrowing the language in Provision VIII (compliance monitoring), but do not have authority to make further changes to the other provisions.

Let's plan to talk again on Wednesday after you've conferred with your client. I hope you have a good weekend.

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

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**ATTACHMENT
B**

From: O'Brien, Kerry
Sent: Monday, July 28, 2014 6:13 PM
To: 'PCarr@eckertseamans.com'
Cc: Yankilovich, Boris; Schroeder, Sarah
Subject: FW: Proposed consent order
Attachments: Proposed Settlement.7-28-2014.docx

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Peter,

As promised, please find attached a draft order that we have revised for Mr. Fanning's signature alone. We usually disfavor separate settlements with different respondents, and would ordinarily not settle with Mr. Fanning alone without Jerk. In this case, given your representation that Jerk is a defunct company, we can proceed with this approach on the condition that Mr. Fanning provides a sworn affidavit stating as a member of the LLC that Jerk is in fact defunct and that he agrees to cooperate with the FTC in any default action against Jerk.

You indicated on the phone that you and your client may need additional time to consider entering into the consent order and that you wish to avoid the costs that you will incur at tomorrow's deposition of Mr. Fanning. Per your request to give you more time, we are willing to reschedule tomorrow's deposition to one of the following dates – August 6, 7, or 14 – at our office in San Francisco. Having already spent the considerable time and expense of flying Sarah to Boston to depose Mr. Fanning tomorrow, and in light of today's no-show at the Jerk LLC deposition, we would grant this extension only on the express condition that Mr. Fanning come to San Francisco for his deposition on one of these dates and during regular business hours (starting at 9 or 9:30 am Pacific). If you do not agree to this proposal, we are ready to proceed with the deposition as scheduled at 9 am tomorrow. Alternatively, if Mr. Fanning decides to sign the attached consent order before tomorrow's deposition, this will likely spare everyone further time and expense. The choice is yours.

Please let us know in writing no later than 7 am Eastern tomorrow whether (i) Mr. Fanning plans to sign the order as is before the deposition tomorrow; (ii) you wish to reschedule the deposition on the terms laid out in this email, or (iii) you wish to proceed with tomorrow's deposition as originally scheduled. If we do not receive a response by 7 am or if you propose some other option, we will proceed with the deposition tomorrow as scheduled.

We will follow up internally with our colleagues in DC about the language you raised in the Compliance Monitoring section. Please bear in mind, however, that the Bureau of Consumer Protection is highly unlikely to approve any further changes to the Commission's standard order language. Moreover, as I mentioned on the phone, to resolve this litigation, both the Bureau of Consumer Protection and the Commission will need to approve of any consent agreement that Mr. Fanning signs.

Regards,

Kerry

Kerry O'Brien
Assistant Regional Director

Federal Trade Commission
Western Region – San Francisco
901 Market Street, Suite 570
San Francisco, CA 94103
(415) 848-5189
(415) 848-5184 (fax)

From: Yankilovich, Boris
Sent: Monday, July 28, 2014 3:23 PM
To: 'Peter Carr'
Cc: O'Brien, Kerry; Schroeder, Sarah; Vicki A. Roy
Subject: RE: Proposed consent order

Peter,

I spoke with Sarah earlier today and I know she had something personal lined up in Boston for the evening. If this is about the draft order, Kerry and I are available to speak this pm. Just let me know when and where to call you.

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

From: Peter Carr [<mailto:PCarr@eckertseamans.com>]
Sent: Monday, July 28, 2014 2:45 PM
To: Schroeder, Sarah; Vicki A. Roy
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry
Subject: RE: Proposed consent order

Sarah-

Got your voice message. Are you available to speak.

PFC

Peter F. Carr, II
ECKERT SEAMANS CHERIN & MELLOTT, LLC
Two International Place • 16th Floor • Boston, MA 02110
Direct (617) 342.6857 | Facsimile (617) 342.6899
pcarr@eckertseamans.com
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From: Schroeder, Sarah [<mailto:SSCHROEDER@ftc.gov>]
Sent: Friday, July 18, 2014 7:08 PM
To: Peter Carr; Vicki A. Roy
Cc: Yankilovich, Boris; Fang, Yan; O'Brien, Kerry
Subject: Proposed consent order

Peter,

It was nice speaking with you today. I've attached the most recent proposed consent order for the Jerk, LLC matter. I've also attached a comparison to the original order. As you may recall, we discussed changes to the order in April and I obtained permission to make certain modifications. I'm happy to discuss narrowing the language in Provision VIII (compliance monitoring), but do not have authority to make further changes to the other provisions.

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Best Regards,
Sarah

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