PUBLIC

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

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

ORDER ON MOTION OF RESPONDENT JERK, LLC TO EXTEND TIME TO ANSWER COMPLAINT COUNSEL'S SECOND REQUEST FOR ADMISSIONS

I.

On January 5, 2015, Respondent Jerk, LLC ("Jerk") filed a Response to the Court's Order of December 22, 2014 ("Response"), which included a request to permit Jerk to file answers to Complaint Counsel's Second Request for Admissions no later than January 13, 2015. Jerk's request is treated as the renewal of its December 15, 2014 Motion to Extend Time to Answer Complaint Counsel's Second Request for Admissions ("December 15 Motion"), pursuant to the Order issued December 22, 2014 Order ("December 22 Order"), as modified by the Order issued December 30, 2014 ("December 30 Order").[1] Federal Trade Commission ("FTC") Complaint Counsel filed its Opposition on January 8, 2015 ("Opposition"). After reviewing the Response, Motion, Opposition, and the entire record on the issues presented, and as further explained below, the Respondent's renewed Motion to Extend Time to Answer Requests for Admissions ("Renewed Motion") is GRANTED.

II.

Requests for Admissions are authorized pursuant to FTC Rule of Practice 3.32, 16 C.F.R. § 3.32. Rule 3.32(b) provides that the subject matter of a request is deemed

[1] As more fully explained, *infra*, Jerk's previous motion to file late answers to Counsel's Second Request for Admissions was denied without prejudice by the December 22 Order, and, as modified by the December 30 Order, Jerk was permitted to renew the motion, no later than January 5, 2015, upon meeting certain conditions set out in the December 22 Order.

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

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

16 C.F.R. § 3.32(c).

The December 22 Order, as modified by the December 30 Order

As found in the December 22 Order, Complaint Counsel served a Second Request for Admissions (hereafter, "RFAs") on Jerk on November 4, 2014, by emailing the RFAs to Jerk's most recent counsel and by mailing a copy to Jerk's registered agent, which methods had been authorized by Order dated November 3, 2014. Jerk does not dispute that it was properly served with the RFAs and admits that it failed to respond within the ten days permitted by Rule 3.32(b). Thus, by operation of Rules 3.32(b) and 3.32(c), Jerk is deemed to have "conclusively" admitted the matters requested, unless the Administrative Law Judge permits withdrawal or amendment.

At the time the RFAs were served, Jerk was not represented by counsel because its counsel of record had withdrawn in July 2014 and Jerk had not yet obtained new counsel. The December 15 Motion averred that Jerk had now obtained new counsel, who was working with Jerk to defend this matter on the merits. However, because Jerk failed to adequately explain the reasons for its delay in retaining new counsel, or why such delay should be excused, and because Jerk was in default under two previously issued discovery orders, the December 15 Motion was denied without prejudice. The December 22 Order held that "no later than December 29, 2014, [Jerk] may renew its motion, and the request for relief will be reconsidered upon showing, in addition to any other requirements under 3.32(c): (1) an explanation for the delay in Jerk's obtaining new counsel, including all reasons therefor; and (2) an offer and detailed plan to promptly comply with the orders of August 15 [requiring Jerk to respond to interrogatories and document requests] and November 25, 2014 [requiring Jerk to provide a corporate designee for deposition]." December 22 Order at 3.

The December 30 Order extended Jerk's time to comply with the December 22 Order to January 5, 2015.

Jerk's Response to December 22 Order

On January 5, 2015, Jerk filed its Response to the December 22 Order, explaining the delay in obtaining new counsel by stating that prior counsel had been subjected to a deposition in this case, which "would make many attorneys less likely to take on Jerk's representation." Response at 1. Jerk further states that it was working with the other parties in the case on a revised scheduling order, to be submitted by joint motion, which would provide deadlines for Jerk to respond to outstanding interrogatories and document requests.[2] Jerk further proposed that it file its responses to the outstanding request for admissions within the same deadlines, and concluded with its request that its December 15 Motion be granted.

Complaint Counsel responds that Jerk's sole stated justification for delaying in obtaining new counsel – that the deposition of prior counsel would deter new counsel from taking Jerk's case – is not supported by any evidence and constitutes only speculation. Moreover, Complaint Counsel notes, the deposition of prior counsel occurred in October 2014, several months after prior counsel withdrew, and therefore cannot provide an excuse for Jerk's failure to obtain new counsel in the interim. Therefore, Complaint Counsel argues, Jerk has failed to provide any legitimate explanation for its delay in retaining new counsel, or to demonstrate why such delay should be excused, as required by the December 22 Order.

III.

Pursuant to Rule 3.32(c), a request to withdraw or amend admissions is allowable "when the presentation of the merits of the proceeding will be subserved thereby and the party who obtained the admission fails to satisfy the Administrative Law Judge that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." 16 C.F.R. § 3.32(c).

Jerk's arguments in support of allowing it to answer Complaint Counsel's request for admissions, and Complaint Counsel's counter-arguments thereto, are set forth in detail in the December 22 Order. By way of summary, Jerk argued that it is preferable to have disputes resolved on the merits, rather than by default, which would be the effect of allowing Jerk's constructive admissions – which arise solely from Jerk's failure to timely answer under Rule 3.32(b) -- to stand; that it is manifestly prejudicial to Jerk to bind it to constructive admissions of the factual allegations of the Complaint and of legal liability, instead of allowing Jerk to respond on the merits; and that Complaint Counsel will not be unduly prejudiced by allowing Jerk to respond to the RFAs.

In its opposition to Jerk's December 15 Motion, Complaint Counsel asserted that Jerk failed to demonstrate, as required for withdrawal or amendment of admissions under Rule 3.32(c), that "the merits of the action will be subserved" by allowing Jerk to provide

[2] This joint motion was filed, and is discussed below.

answers to the request for admissions. Complaint Counsel further argued that Jerk will rely on such answers, including denials of requested admissions, to conduct new discovery while at the same time depriving Complaint Counsel of the ability to obtain discovery to counter the denialsbecause the discovery deadline has passed and the evidentiary hearing was, at that time, scheduled for January 27, 2015.

Since the issuance of the December 22 Order, however, the Commission issued an Order rescheduling the evidentiary hearing in this matter from January 27, 2015 to March 23, 2015. Furthermore, on January 6, 2015, consistent with the representations of Jerk in its Response, the parties submitted a Joint Revised Scheduling Order, requiring, *inter alia*, that Jerk provide its answers to Complaint Counsel's interrogatories and document requests by January 13, 2014, and that Jerk produce a qualified corporate designee for deposition by January 30, 2015. *See* First Revised Scheduling Order, January 7, 2015. Finally, whether discovery may be reopened is governed by Rule 3.21(c), which allows extending the discovery deadline only upon a showing of good cause. 16 C.F.R. 3.21(c).

IV.

Based on the foregoing, Complaint Counsel has failed to demonstrate that it will be unduly prejudiced by permitting Jerk to answer the requested admissions. In addition, although Jerk's explanation for its delay in obtaining counsel is comparatively weak, the presentation of the merits in the proceeding is nevertheless served by allowing Jerk to defend on the basis of evidence, rather than to be bound by constructive admissions.

Accordingly, Jerk's December 15 Motion, as renewed by its Response of January 5, 2015, is GRANTED, and it is hereby ORDERED that Jerk may file answers to Complaint Counsel's Second Set of Request for Admissions, no later than January 13, 2015.

ORDERED:

D M Chappell

D. Michael Chappell
Chief Administrative Law Judge

Date: January 9, 2015