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

ORIGINAL

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

COMPLAINT COUNSEL'S COMBINED (1) OPPOSITION TO JERK, LLC'S MOTION FOR LEAVE AND (2) MOTION TO STRIKE JERK, LLC'S UNTIMELY FILINGS

Pursuant to Commission Rule of Practice ("Rule") 3.32(d), Complaint Counsel oppose Respondent Jerk, LLC's Motion For Leave to File an Opposition to Complaint Counsel's pending Motion for Sanctions. Additionally, pursuant to Rule 3.38(b)(6), Complaint Counsel move to strike Jerk, LLC's untimely filing of its Opposition to Complaint Counsel's Motion for Sanctions, as well as its untimely filing of documents styled as discovery responses.

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**

MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S COMBINED (1) OPPOSITION TO JERK, LLC'S MOTION FOR LEAVE AND (2) MOTION TO STRIKE JERK, LLC'S UNTIMELY FILINGS

I. INTRODUCTION

Complaint Counsel's prediction that Jerk, LLC's ("Jerk") dilatory behavior will continue to disrupt this case has materialized.[1] After first failing to comply with its discovery obligations and the Court's orders during discovery, and then failing to comply with the extensions granted in the Court's First Revised Scheduling Order—itself issued as an extraordinary remedy to address Jerk's prior noncompliance—Jerk once again seeks to present delinquent materials, less than four weeks before trial. This time, Jerk has filed untimely submissions of (1) Jerk's Opposition to Complaint Counsel's Motion for Sanctions (filed on February 25, 2015), and (2) Jerk's attempted responses to outstanding discovery (filed on February 20, 2015). Jerk filed both well past the deadlines ordered by the Court and required under the Commission's Rules of

[1] Complaint Counsel's Opposition to Respondent Jerk, LLC's Motion to Extend Time to Answer Complaint Counsel's Second Request for Admissions, p. 5 (Dec. 16, 2014).

Practice ("Rules"). Jerk has provided no showing of excusable neglect for its delinquency. Instead, once again, Jerk puts forward new counsel—its third—who, like previous counsel, promises the company's full compliance going forward. Such promises are unavailing. In addition to being untimely, Jerk's attempt to interject new evidence into this proceeding on the eve of trial, after withholding it for the duration of this litigation, is inexcusable, stands to severely prejudice Complaint Counsel, and threatens to undermine the orderly proceedings in this case. The Court should not condone Jerk's persistent misconduct. It should strike these materials.[2]

II. ARGUMENT

A. The Court Should Deny Jerk's Motion For Leave To Oppose Complaint Counsel's Sanctions Motion, And Should Strike Jerk's Untimely Opposition.

The Court should strike Jerk's filed Opposition to Complaint Counsel's pending sanctions motion ("Opposition") because Jerk filed it after the deadline required by the Rules, and without presenting a showing of excusable neglect. Rule 3.22(d) gives an opposing party 10 days after service to answer any written motion. 16 C.F.R. § 3.22(d). If the opposing party fails to do so, it "shall be deemed to have consented to the relief asked for in the motion." *Id*. Here, Complaint Counsel filed their motion for sanctions against Jerk on February 5, 2015.[3] Jerk's response was due on February 17. When Jerk failed to respond by that deadline, it was deemed

[2] Striking these materials would not necessarily conflict with any remedy that the Court may grant in response to Complaint Counsel's pending motion for sanctions against Jerk. Even if the Court grants default judgment against Jerk, it may still strike these filings, and should do so to ensure a clean record of this case.

[3] Complaint Counsel's Motion for Sanctions Against Jerk, LLC (Feb. 5, 2015).

under Rule 3.22(d) to have consented to the relief sought in Complaint Counsel's motion for sanctions. Jerk's Opposition, filed on February 25, does not negate this deemed consent.[4]

Additionally, because Jerk has not presented any excusable neglect for its attempted delinquent filing, the Court should deny Jerk's Motion For Leave to File the Opposition. Rule 4.3 permits the Court to extend Rule 3.22's ten-day limit only "[f]or good cause shown." 16 C.F.R. § 4.3(b). Moreover, where, as here, "a motion to extend is made after the expiration of the specified period, the motion may be considered where the filing was the result of excusable neglect." *Id.* To establish excusable neglect, Jerk must, at a minimum, provide "a satisfactory explanation" for its delinquency. *Graphic Communs. Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5 (1st Cir. 2001) (explaining that under the test announced by the Supreme Court in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380 (1993), "the reason-for-delay factor will always be critical to the inquiry" (internal citations and quotation marks omitted)). Jerk, however, has not presented *any* valid reason for its delinquency. The sole excuse it offers now is the same one it offered the last time it sought a do-over—Jerk's purported difficulty in securing yet another new lawyer.[5] Remarkably, while Jerk proffers this explanation in seeking leave, its new lawyer, in her declaration supporting that motion, concedes that "lack of legal representation may not excuse Jerk, LLC from having previously missed discovery deadlines."[6] Her concession is wise, since the Commission has

[4] Complaint Counsel have previously brought this deemed consent to the Court's attention. *See* Complaint Counsel's Response to John Fanning's Opposition to the Complaint Counsel's Motion for Sanctions Against Jerk, p. 1 n.1 (Feb. 20, 2015).

[5] *See* Motion of Respondent Jerk, LLC to Extend Time to Respond to Motion for Summary Decision and to Reschedule Evidentiary Hearing (Dec. 9, 2014).

[6] Declaration of Alexandria B. Lynn, p. 2 (Feb. 25, 2015). In addition to acknowledging that Jerk has no valid reason for its delinquency, Ms. Lynn's declaration suggests that Complaint Counsel

already unequivocally rejected this as a valid excuse, stating that "Jerk's failure to respond to discovery requests and other obligations cannot be excused simply because it had a difficult time finding legal representation."[7] Thus, because Jerk has not complied with Rule 4.3's requirement of providing "excusable" neglect, it should not be permitted to file its delinquent Opposition.[8]

B. The Court Should Strike Jerk's Filing of Untimely and Invalid Discovery Responses.

In conjunction with filing a delinquent Opposition to sanctions, Jerk also filed and served, on February 20, 2015, papers titled Responses to Complaint Counsel's Second Set of

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have elected to not depose a newfound representative of Jerk. *See id.* at ¶ 3 ("Complaint Counsel declined the opportunity to depose Mr. Robinson, stating that fact discovery is closed."). In fact, what Complaint Counsel actually articulated to Ms. Lynn is their inability to depose any Jerk representative *at this time* because the Court has set a deadline of January 30, 2015 for such a deposition. (Declaration of Kelly Ortiz, enclosed herewith ("Ortiz Dec.), Att. A); *see also* First Revised Scheduling Order (Jan. 7, 2015). That deadline passed with Jerk failing to produce a representative as ordered. (Ortiz Dec. ¶ 3) Jerk has not asked the Court or the Commission for leave to extend the trial schedule to permit a full and fair examination of its representative and matters discovered through his testimony.

[7] Commission Order Extending Time for Jerk, LLC to Respond to the Motion for Summary Decision, p. 2 (Dec. 22, 2014).

[8] Jerk's failure to provide a satisfactory reason for its delinquency is alone sufficient to strike its Opposition. However, to the extent that Jerk argues that Complaint Counsel will not be prejudiced by the filing of its belated Opposition, Jerk is wrong. The prejudice would be significant, since it would further delay the timeframe in which the Court must rule on Complaint Counsel's pending sanctions motion. With less than four weeks left before trial, any delay in learning what evidence will be excluded from the record, what facts will be deemed as established adversely to Jerk, or whether Jerk will be permitted to proceed to trial despite its persistent misconduct, significantly hampers Complaint Counsel's ability to prepare for trial. Jerk, on the contrary, does not stand to suffer any meaningful prejudice from having its Opposition stricken, as Jerk's opposition does not contain any argument whatsoever. Instead, it merely articulates Jerk's desire to mimic Respondent John Fanning's previously lodged objection to the pending sanctions motion, without advancing any arguments on Jerk's own behalf.

Interrogatories and Second Set of Requests for Admissions ("RFAs"). The Court should strike these untimely filings.[9]

These filings are hopelessly delinquent, and calculated to undermine the pending sanctions motion and prejudice Complaint Counsel at trial. In light of Jerk's record in this litigation, this maneuver should not stand. Jerk's persistent failures to respond to Complaint Counsel's discovery requests are well documented, consuming much of the Court's docket in this case and culminating in the pending sanctions motion against Jerk.[10] After numerous failures to respond to discovery and obey this Court's orders compelling responses, and after the Commission's intervention, the Court gave Jerk one last chance to come into compliance by responding to Complaint Counsel's RFAs, interrogatories, and document requests by January 13, 2015.[11] In doing so, the Court cautioned Jerk that "further delays will not be tolerated."[12]

Despite the Court's firm deadline and admonishment, January 13 came and went without any responses from Jerk.[13] Because Jerk failed to respond to the RFAs by this Court-ordered deadline, the matters requested in the RFAs became admitted by operation of the Rules. 16 C.F.R. § 3.32(b). Jerk has not sought (or received) leave to withdraw these admissions under Rule 3.32(c). Instead, on February 20, more than a month after the matters set forth in the RFAs became conclusively admitted, Jerk filed a document it styled as a response to the RFAs,

[9] Curiously, Jerk has neither filed nor served any attempted response to Complaint Counsel's First Set of Interrogatories or Complaint Counsel's Second Request for Documents.

[10] *See* Complaint Counsel's Motion for Sanctions Against Jerk, LLC, pp. 1-5 (Feb. 5, 2015).

[11] *See* Order on Motion of Respondent Jerk, LLC to Extend Time to Answer Complaint Counsel's Second Request for Admissions, p.4 (Jan. 9, 2015); First Revised Scheduling Order (Jan. 7, 2015).

[12] Order Granting Motion of Respondent Jerk, LLC, for Extension of Time to Respond to the Court's Order of December 22, 2014, p. 2 (Dec. 30, 2015).

[13] Ortiz Dec. ¶ 4.

containing only denials. In light of Jerk's already-established admissions, this filing is a nullity. It is not evidence, has no binding effect, and serves no purpose other than to muddy the record. *See Luick v. Graybar Electric Co.*, 473 F.2d 1360, 1362 (8th Cir. 1973) (holding that, under the Federal Rules of Civil Procedure, "[u]nanswered requests for admissions render the matter requested conclusively established for the purpose of that suit"); *see also United States* v. *2204 Barbara Lane*, 960 F.2d 126, 129 (11th Cir. 1992) (explaining that the rule for conclusively establishing unanswered admissions "is designed to expedite litigation, and it permits the party securing admissions to rely on their binding effect"). The Court should strike this filing.

Similarly, the Court should strike Jerk's February 20 filing of a document titled Jerk's Responses to Complaint Counsel Second Set of Interrogatories. Jerk has not sought (or received) an extension under Rule 4.3 to respond to interrogatories after the January 13 deadline ordered by the Court. Nor has Jerk provided any reason whatsoever for its delinquency. But even if Jerk had sought an extension, with less than four weeks remaining before trial and no practical ability to conduct the necessary discovery into Jerk's new assertions, allowing this filing to enter into evidence would be extremely prejudicial to Complaint Counsel. *See United States v. Holliday*, 2013 WL 6498984, at *3 (D. Kan. Dec. 11, 2013) (finding "significant prejudice[]" in defendant's untimely motion where trial was "only nine weeks away").

Jerk has already received several generous extensions to comply with its long-outstanding discovery obligations. It has ignored all of them. Giving Jerk further extensions to inject evidence of its choosing into the record, with Complaint Counsel having no practical

ability to challenge that evidence before trial, would be tantamount to endorsing a trial by ambush. The Court should not permit this.[14]

III. CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully request that the Court deny Jerk's Motion For Leave to file the Opposition, strike the Opposition, and strike Jerk's February 20, 2015 filing of documents styled as responses to Complaint Counsel's discovery requests.

Dated: February 26, 2015

Respectfully submitted,

Sarah Schroeder
Ken Abbe
Yan Fang
Boris Yankilovich
Western Region – San Francisco
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103

COMPLAINT COUNSEL

[14] Jerk's filings underscore the threat of a trial by ambush. The filings are undersigned by a "Titus Robinson" as "Authorized Representative" of Jerk. With Complaint Counsel's repeated requests for Jerk to produce a company representative, or even identify one, having gone unanswered since the start of this litigation, the appearance of a company representative on the eve of trial is both suspicious and prejudicial. Respondents have not listed Titus Robinson in their initial disclosures or final witness lists, or mentioned him in any of their discovery responses. No witness, including Fanning, mentioned Titus Robinson when deposed. Instead, according to Jerk's new counsel's declaration, Titus Robinson just happened to suddenly appear in the country from India a few weeks before trial. This surprise witness tactic, completely consistent with Jerk's overall conduct in this case, should not be accepted under the guise of belated discovery responses. *See In re. Automotive Breakthrough Services, Inc.*, 1996 FTC LEXIS 461, at *2 (Oct. 15, 1996) (criticizing "the last minute surprise listing of many new witnesses" as the type of "'game-playing' that has led the federal courts to exclude such last minute witnesses from testifying at trial").

STATEMENT CONCERNING MEET AND CONFER

With respect to the part of this Motion seeking to strike Jerk, LLC's untimely filings, on February 25, 2015, Complaint Counsel sent an email to Jerk's counsel, Alexandria Lynn, explaining that Jerk's recent filings were untimely and stating Complaint Counsel's intent to move to strike them unless Jerk agreed to withdraw them. On February 26, 2015, Ms. Lynn replied that Jerk would not be withdrawing anything it had filed, and would respond to Complaint Counsel's motion to strike as appropriate.

Dated: February 26, 2015

Respectfully submitted,

_____

Sarah Schroeder
Boris Yankilovich
Yan Fang
Kenneth Abbe

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

COMPLAINT COUNSEL

Notice of Electronic Service for Public Filings

I hereby certify that on February 26, 2015, I filed via hand a paper original and electronic copy of the foregoing COMPLAINT COUNSEL'S COMBINED (1) OPPOSITION TO JERK, LLC'S MOTION FOR LEAVE AND (2) MOTION TO STRIKE JERK, LLC'S UNTIMELY FILINGS, [PROPOSED] ORDER (1) DENYING RESPONDENT JERK, LLC'S MOTION FOR LEAVE TO FILE AN OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR SANCTIONS AND (2) GRANTING COMPLAINT COUNSEL'S MOTION TO STRIKE JERK, LLC'S UNTIMELY FILINGS, DECLARATION OF KELLY ORTIZ IN SUPPORT OF COMPLAINT COUNSEL'S COMBINED OPPOSITION TO JERK, LLC'S MOTION FOR LEAVE AND MOTION TO STRIKE JERK, LLC'S UNTIMELY FILINGS, with:

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

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

I hereby certify that on February 26, 2015, I filed via E-Service of the foregoing COMPLAINT COUNSEL'S COMBINED (1) OPPOSITION TO JERK, LLC'S MOTION FOR LEAVE AND (2) MOTION TO STRIKE JERK, LLC'S UNTIMELY FILINGS, [PROPOSED] ORDER (1) DENYING RESPONDENT JERK, LLC'S MOTION FOR LEAVE TO FILE AN OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR SANCTIONS AND (2) GRANTING COMPLAINT COUNSEL'S MOTION TO STRIKE JERK, LLC'S UNTIMELY FILINGS, DECLARATION OF KELLY ORTIZ IN SUPPORT OF COMPLAINT COUNSEL'S COMBINED OPPOSITION TO JERK, LLC'S MOTION FOR LEAVE AND MOTION TO STRIKE JERK, LLC'S UNTIMELY FILINGS, with:

Sarah Schroeder
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Complaint

I hereby certify that on February 26, 2015, I filed via other means, as provided in 4.4(b) of the foregoing COMPLAINT COUNSEL'S COMBINED (1) OPPOSITION TO JERK, LLC'S MOTION FOR LEAVE AND (2) MOTION TO STRIKE JERK, LLC'S UNTIMELY FILINGS, [PROPOSED] ORDER (1) DENYING RESPONDENT JERK, LLC'S MOTION FOR LEAVE TO FILE AN OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR SANCTIONS AND (2) GRANTING COMPLAINT COUNSEL'S MOTION TO STRIKE JERK, LLC'S UNTIMELY FILINGS, DECLARATION OF KELLY ORTIZ IN SUPPORT OF COMPLAINT COUNSEL'S COMBINED OPPOSITION TO JERK, LLC'S MOTION FOR LEAVE AND MOTION TO STRIKE JERK, LLC'S UNTIMELY FILINGS, with:

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

Sarah Schroeder
Attorney

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

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

[PROPOSED] ORDER (1) DENYING RESPONDENT JERK, LLC'S MOTION FOR LEAVE TO FILE AN OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR SANCTIONS AND (2) GRANTING COMPLAINT COUNSEL'S MOTION TO STRIKE JERK, LLC'S UNTIMELY FILINGS

This matter having come before the Chief Administrative Law Judge on February 25, 2015 upon a Motion For Leave by Respondent Jerk, LLC to Oppose Complaint Counsel's Motion For Sanctions Against Jerk, LLC, and on February 26, 2015 upon Complaint Counsel's Motion to Strike Jerk, LLC's Untimely Filings;

Having considered Jerk, LLC's and Complaint Counsel's Motions, the Memoranda in support thereof, and all supporting and opposing submissions, and for good cause appearing, Jerk's Motion for Leave is hereby DENIED, and the Court ORDERS that the following materials be stricken from the record:

- The document titled "Respondent Jerk LLC's Responses To Complaint Counsel's Second Set of Interrogatories," filed by Jerk, LLC on February 20, 2015;
- The document titled "Respondent Jerk LLC's Responses To Complaint Counsel's Second Requests For Admissions," filed by Jerk, LLC on February 20, 2015;
- The document titled "Opposition of Respondent Jerk, LLC to Complaint Counsel's Motion For Sanctions," filed by Jerk, LLC on February 25, 2015.

SO ORDERED:

_____
D. Michael Chappell
Chief Administrative Law Judge

Date:

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

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

DECLARATION OF KELLY ORTIZ IN SUPPORT OF COMPLAINT COUNSEL'S COMBINED OPPOSITION TO JERK, LLC'S MOTION FOR LEAVE AND MOTION TO STRIKE JERK, LLC'S UNTIMELY FILINGS

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the following is true and correct:

1. I am over 18 years of age, and I am a citizen of the United States. I am employed by the Federal Trade Commission ("FTC") as a Federal Trade Investigator in the FTC's Western Regional Office in San Francisco. I have worked and continue to work as an investigator for Complaint Counsel in the above-captioned matter, and I have personal knowledge of the facts set forth herein.

2. Attached hereto as **Attachment A** is a true and correct copy of Complaint Counsel's February 24, 2015 email to Jerk, LLC's current counsel of record.

3. Jerk, LLC failed to produce a company representative, on or before the January 30, 2015 deadline set by the First Revised Scheduling Order. Jerk, LLC further failed to produce a company representative for three depositions noticed pursuant to Commission Rule of Practice 3.33(c)(1) on July 28, 2014, August 15, 2014, and January 28, 2015.

4. Jerk, LLC did not provide responses to Complaint Counsel's Second Request for Admissions, First and Second Sets of Interrogatories, and Second Set of Requests For Documents on or before January 13, 2015.

Executed on February 26, 2015, in San Francisco, CA.

Kelly Ortiz

ATTACHMENT A

To: Alexandria B. Lynn (ab.lynn@outlook.com)[ab.lynn@outlook.com]
Cc: Peter Carr (PCarr@eckertseamans.com)[PCarr@eckertseamans.com]; Vicki A. Roy (VRoy@eckertseamans.com)[VRoy@eckertseamans.com]; Ortiz, Kelly[kortiz@ftc.gov]; Yankilovich, Boris[byankilovich@ftc.gov]; Fang, Yan[yfang@ftc.gov]; Abbe, Kenneth[KABBE@ftc.gov]
From: Schroeder, Sarah
Sent: Tue 2/24/2015 4:42:45 PM
Importance: **Normal**
Subject: follow-up

Dear Alex,

Thank you for meeting with us today. First, since we understand that you represent only Jerk, and not also Mr. Fanning, we encourage you to clarify this with the Court as soon as possible. You may want to file a notice of withdrawal for Fanning or contact the Secretary's Office for any other instructions. The email is secretary@ftc.gov.

Second, after conferring with the rest of our trial team, we cannot agree to any action that would disrupt proceedings at this very late stage. That includes any material or witness that Jerk may have now decided to submit, including Mr. Robinson. As I said on the phone, I don't think we would be able to depose anyone even if we wanted to without leave from the Court, since discovery has been closed for months. Judge Chappell did open a limited discovery period in January for Jerk to submit specific responses and to have its representative deposed, but that window also closed nearly a month ago.

Apart from the threshold issue of ability, our view is that allowing Jerk to put forward a new witness at this time – less than four weeks before trial – would be highly prejudicial to us. Even if it would be possible to depose Mr. Robinson over the next couple of weeks without creating a massive disruption to our trial preparation schedule, his deposition wouldn't be the end of it. This deposition would be the first time that we would be examining a witness who'd presumably be ready to answer the many questions (our deposition notice has 26 topics) we've asked Jerk to answer for more than half a year. Such a deposition would surely create the need for substantial follow-up discovery. Without postponing the trial for many additional months, there's simply no time for this.

I realize you just came to represent this client last week, but I'm sure you'll agree that we wouldn't need to deal with this twelfth hour issue if Jerk had properly participated in this case. Our position is simple: it's unfair and highly prejudicial for a litigant who ignores all discovery requests and all attempts at any contact for half a year, spanning

most of the discovery period, to then throw a new name into the mix on the eve of trial. If Mr. Robinson was a Jerk insider all along, I can't think of any reason for why Jerk hasn't produced him, or even disclosed him as a company representative, at any point during discovery. We filed our sanctions motion precisely because of such past misconduct, and at this late stage, no amount of make-up attempts will lead us to withdraw the motion and start over with the litigation.

You're obviously to free to seek from Judge Chappell whatever relief you want for your client, but if that relief would open the door for additional evidence from Jerk, we would not assent. Still, you're welcome to circulate a draft of whatever you intend to file for us to consider.

Lastly, I searched for but couldn't find an email exchange between me and Maria Speth about having a Jerk representative testify remotely. I do recall making that offer. Regardless, any notion that we're avoiding deposing Jerk's representative is clearly contradicted by the record in this case. We've scheduled Jerk's deposition at least three times. In fact, I think the deposition notice to Jerk last May was the very first depo notice / subpoena we issued in this case. More than half a year ago, I flew to Boston to depose Jerk's representative, but no one showed. After Ms. Speth told us that she ceased representing Jerk, we repeatedly asked for a point of contact at the company. We got no answer. We even took the extraordinary step of deposing Ms. Speth because John Fanning identified her as the person in the best position to describe Jerk. Had Jerk produced a designee back in July, when we initially noticed the deposition, I'm sure we would have deposed that person right away. Our problem isn't with deposing Jerk's representative. It's with our ability – or inability – to depose Jerk's representative during the appropriate time, not months after discovery has closed.

Best Regards,

Sarah

Sarah Schroeder, Attorney

Federal Trade Commission

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ATTACHMENT A