NO. 9361

PUBLIC

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

~~PENDING MOTION FOR SANCTIONS~~

~~NST JERK, LLC~~

against only Respondent Jerk, LLC
otion, Respondent John Fanning

I. INTRODUCTION

Although Complaint Counsel moved for sanctions
("Jerk"), and although Jerk itself has not opposed that m
("Fanning") has lodged an objection to it. The C

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

First, nothing in the Rules requires an otherwise appropriate default sanction to be put on hold while the case proceeds through litigation. On the contrary, this Court has routinely granted default judgment before resolving the case on the merits against the defaulted party. *See, e.g., In re Spohn*, 2008 FTC LEXIS 163, at *6 (Nov. 5, 2008); *In re Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 763, at *8 (Oct. 16, 1996); *In re Rustevader Corp., et al.*, 1996 FTC

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

Fanning's suggestion that the Court cannot grant default because the Complaint is unlawful is rooted in similarly flawed logic, since it rests on a conclusory presumption of unlawfulness. Neither Respondent has moved to dismiss the Complaint for failing to state a claim as a matter of law, or on any other ground. If either Jerk or Fanning truly believed that the

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

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

Finally, Fanning's contention that "Complaint Counsel knows that Jerk, LLC (and Mr. Fanning) expressly denies core factual allegations which Complaint Counsel now requests this Court to deem admitted"[9] is simply false. As a threshold matter, Complaint Counsel are not asking the Court to admit Jerk's admissions. As explained in Complaint Counsel's pending motion for sanctions, Jerk's admissions became established by operation of the Rules when Jerk refused to answer Complaint Counsel's requests for admissions by the Court-ordered deadline.[10] Since the matters are now conclusively admitted, Complaint Counsel has no need to seek the Court's intervention to render the admissions established. Moreover, because Jerk has admitted the matters on which Complaint Counsel seek adverse inferences,[11] it is incorrect, and inappropriate, for Fanning to accuse Complaint Counsel of knowing otherwise. Indeed, as Complaint Counsel have argued in support

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

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

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

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[13] Obj. p. 2.

[14] Obj. p. 1.

[15] Obj. p. 4.

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

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

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

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

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

[18] Obj. p. 3.

conclusively established against Jerk reference Fanning is a reflection of the facts in this case, not some ploy to bind Fanning through sanctions against Jerk. Complaint Counsel have

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

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I hereby certify that on February 20, 2015, I filed via E-Service of the foregoing Complaint Counsel's Response to Respondent Fanning's Objection, with:

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