

UNITED STATES OF AMERICA

BEFORE
OFFICE

1

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

Document to Commission Rule of Practice 2.28(a) Complete Counselment (Full File)

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S RENEWED MOTION
TO COMPEL DISCOVERY FROM JOHN FANNING**

Last week, Complaint Counsel moved to compel Respondent John Fanning ("Fanning")

discovery.¹

BACKGROUND

On October 7, 2014, Complaint Counsel served the Interrogatories and RFPs on Fanning. (Burke Dec. ¶¶ 2-3, Att. A-B.) Fanning did not respond by the November 7, 2014 deadline; nor did he provide any justification for his failure to respond. (Burke Dec. ¶ 4, Att. C.) He ignored Complaint Counsel's repeated attempts to meet and confer about his delinquency, forcing

JFC ("Lack?") by stating that he did not provide any copies to Lack. [REDACTED]

(Id.)

Three days later, on November 21, Fanning's counsel asked Complaint Counsel whether they intended to withdraw their then-pending motion to compel in light of Fanning's responses to

[REDACTED]

ARGUMENT

3.35(a)(2)'s mandate that each interrogatory is to be answered "fully."² Fanning responded to

Interrogatories 1, 2, 3, and 4 with one line: "I am unsure of the answers to this." [REDACTED]

Dec., Att. D.) "I am unsure" is not a valid or adequate response to discovery in litigation. *See Hicks v. Mercedes-Benz U.S. Int'l, Inc.*, 877 F. Supp. 2d 1161, 1170 n.5 (N.D. Ala. 2012)

(Finding court's "unsure" response to be insufficient for purposes of Fed. R. Civ. P. 37(b)(1).) [REDACTED]

provided services to Jerk, since he already testified so at his deposition. (See CX0092, filed with

Complaint Council's Motion for Summary Decision.) He cannot now attempt to

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

inquiry into the scope of that work by invoking some artificial distinction between his conduct in

~~CONFIDENTIAL~~

The undersigned counsel certifies that Complaint Counsel conferred with Respondent John Fanning's counsel, Peter Carr, by email correspondence on November 21, 2014, regarding the definition in Respondent Fanning's late discovery response.

~~CONFIDENTIAL~~

Dated: November 26, 2014

Respectfully submitted,



Sarah Schroeder
Yan Fang
Boris Yankilovich
Ken Abbe
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 November 26, 2014, I served a true and correct copy of Complaint Counsel's Renewed Motion to Compel Discovery From John Fanning on:

The Office of the Secretary:

Donald S. Clark
Office of the Secretary
600 Pennsylvania Avenue, N.W.

[REDACTED]

Room H-172
Washington, DC 20580

The Office of the Administrative Law Judge
[REDACTED]

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Avenue, N.W
Room H-106
Washington, DC 20580

[REDACTED]

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

_____)

_____)

MOTION TO COMPEL DISCOVERY

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

[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL'S RENEWED

This matter having come before the Chief Administrative Law Judge on November 26,
2014 upon Complaint Counsel's Renewed Motion to Compel Discovery (the "Motion") to

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

DECLARATION OF BEATRICE BURKE

[REDACTED]

Fanning.

5. On November 18, 2014, Complaint Counsel received via email from Respondent John Fanning's counsel a copy of a document titled "Respondent John Fanning's Answers to

Complaint Counsel's Second Set of Interrogatories" Attached [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

/s/ Beatrice Burke
Beatrice Burke

ATTACHMENT A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
Julie Brill



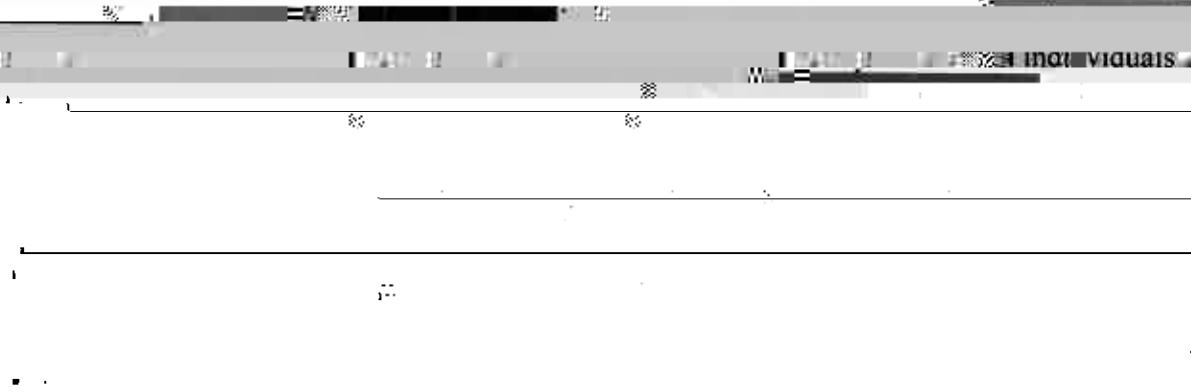
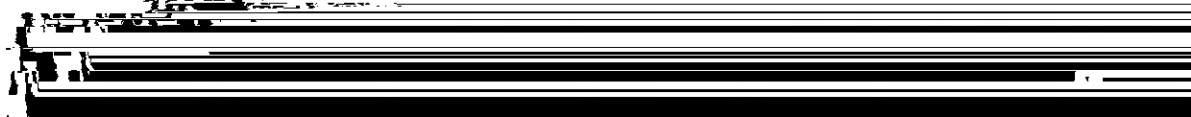
Joshua D. Wright
Terrell McSweeney

In the Matter of)

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

John Fanning,)
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DOCKET NO. 9361



- 7 Describe the "Find People I Know" feature on Jerk.com, including what happened when consumers logged in to Jerk.com using their Facebook credentials.

DEFINITIONS

[REDACTED]

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 all copies of the same, including all

[REDACTED]

J. "You" and "Your" means Respondents.

[REDACTED]

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.

L. 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.

M.

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

PUBLIC

ATTACHMENT B

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMPLAINT COUNSEL'S SECOND SET OF REQUESTS FOR DOCUMENTS
TO RESPONDENTS JERK, LLC AND JOHN FANNING

~~Document 44 Filed 02/27/09 Page 1 of 1~~

[REDACTED]

[REDACTED]

[REDACTED]

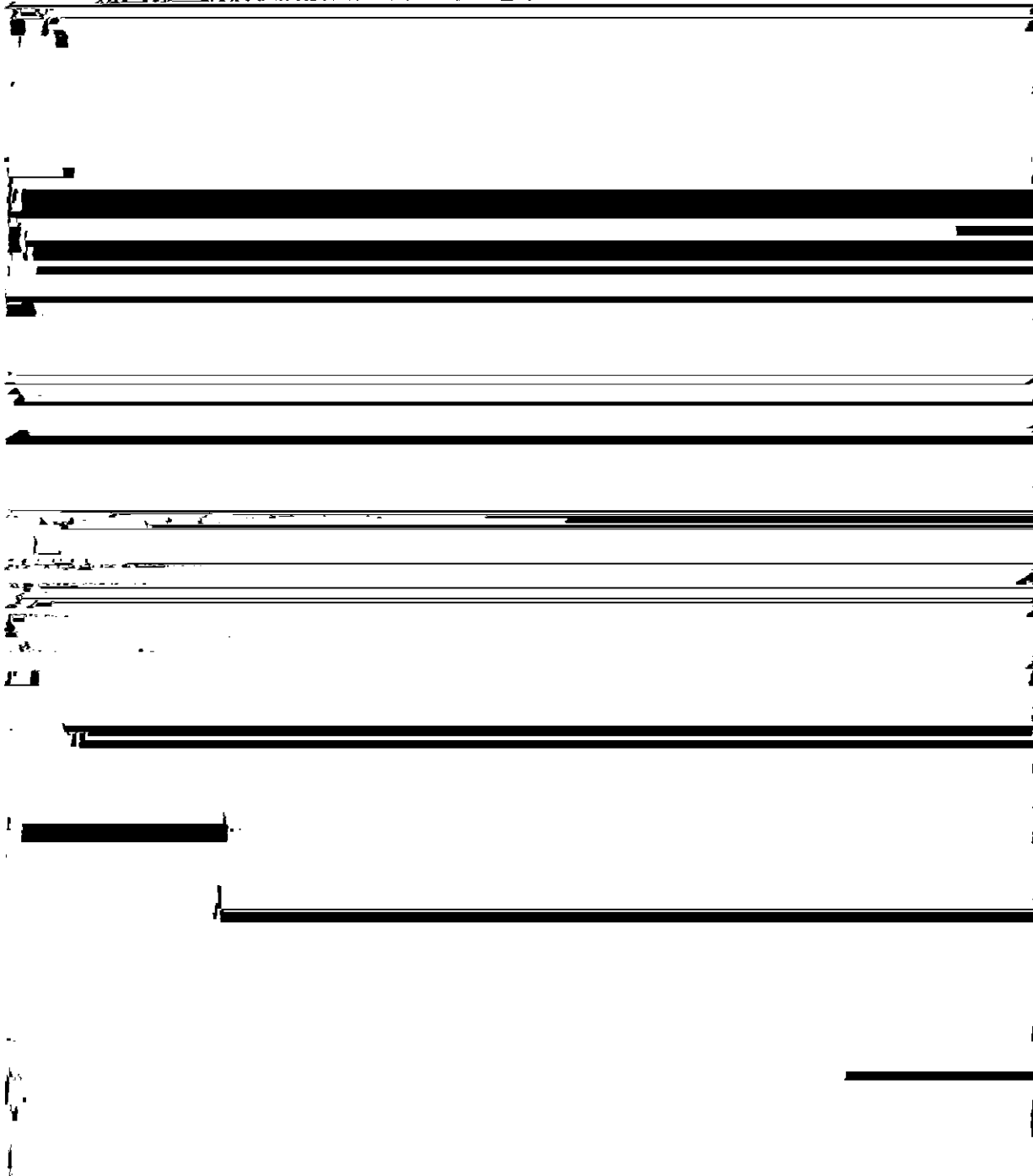
[REDACTED]

[REDACTED]

[REDACTED]

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



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,

[REDACTED]

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.

[REDACTED]

ATTACHMENT C

It is an exercise in futility with you. Typical.

PFC

Sent with Good (www.good.com)

From: Schroeder, Sarah <SSCHROEDER@ftc.gov>
Sent: Monday, November 17, 2014 6:36:17 PM
To: Peter Carr; Orence, Violet B.; 'mcs@jaburgwilk.com'
Cc: Yankilovich, Boris; Fang, Yan; Abbe, Kenneth; Burke, Beatrice

[REDACTED]

[REDACTED]

[REDACTED]

meet about interrogatory

<mailto:PCarr@eckertseamans.com>

[REDACTED]

[REDACTED]

[REDACTED]

Peter,

www.good.com

If you are referring to our firm (PFC) call on November 12th I was waiting at my desk for a half hour and never

SSCHROEDER@ftc.gov

[REDACTED]

[REDACTED]

<mailto:PCarr@eckertseamans.com>

[REDACTED]

www.good.com

[\[REDACTED\]](#)

[REDACTED]

77 88 88 88

[REDACTED]

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.

Neither this information block, the typed name of the sender, nor anything else in this message is intended to

constitute an electronic signature unless a specific statement to the contrary is included in this message.

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

[REDACTED]

ATTACHMENT D

3. Identify all individuals who have sent messages from the email account

Answer to Int. 3

I am unsure of the answer to this question.

4. Identify (1) each Twitter account that the Company has used, and (2) for each such account, each person who has used that account to post a message from that account.

Answer to Int. 4

I am unsure of the answer to this question.

5. Describe in detail any service or work that Respondent John Fanning has provided to Jerk, LLC.

Answer to Int. 5

I did not provide services to Jerk, LLC in my personal capacity.

6. Describe how Jerk.com grew to have 85 million profiles within a few months of the website's launch.

Answer to Int. 6

I do not know the answer to this question.

[REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2014, I caused a true and accurate copy of the

[REDACTED]

Sarah Schroeder

Federal Trade Commission
[REDACTED]

/s/ Peter F. Carr, II

Peter F. Carr, II

EXPERT SEAMANS CURRIE & MELLOTT, LLC

[REDACTED]

Dated: November 18, 2014

ATTACHMENT E

Abbe, Kenneth

From: Schroeder, Sarah
Sent: Friday, November 21, 2014 1:06 PM

Cc: Yankilovich, Boris; Fang, Yan; Abbe, Kenneth; Ortiz, Kelly
Subject: RE: FTC Docket #9361 - Complaint Counsel's Motion to Compel Discovery

Follow Up Flag: Follow up
Flag Status: Flagged

Peter,

We can't withdraw our motion because it covers both Respondents' failure to provide timely

e-vo

PFC

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

pcarr@eckertseamans.com

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

REPLY

<mailto:SSCHROEDER@ftc.gov>

Direct (617) 342.6857 | Facsimile (617) 342.6899

eckertseamans.com

20

11/17

11/17/2011

From: Schroeder, Sarah [mailto:PCarr@eckertseamans.com]

RE

www.good.com

SSCHROEDER@ftc.gov

To: Peter Carr; Orence, Violet B.; 'mcs@jaburgwilk.com'
Cc: Yankilovich, Boris; Fang, Yan; Abbe, Kenneth; Burke, Beatrice
Subject: RE: FTC Docket #9361 - Complaint Counsel's Motion to Compel Discovery

Peter,

Although you still have not identified any alleged deficiencies in our interrogatory response, and we strongly believe that our response was thorough and appropriate, to avoid unnecessary litigation we will provide

We filed a motion to compel Mr. Fanning's discovery responses because despite repeated requests you provided no justification for the delay and gave no indication that his overdue responses were forthcoming.

Regarding your accusation of stonewalling, we have produced thousands of documents in response to Respondents' document requests. If you still want to meet and confer about your planned motion to compel additional responses, I'm available tomorrow from 9-10am (PT), Wednesday from 11am-5pm (PT), and Thursday from 9-10am and 11am-2pm (PT). Like I said, depending on what it is that you're seeking, we may be able to supplement, but we need to know what the dispute is about first.

From: Peter Carr [mailto:PCarr@eckertseamans.com]
Sent: Monday, November 17, 2014 4:10 PM

To: Schroeder, Sarah; Orence, Violet B.; 'mcs@jaburgwilk.com'
Cc: Yankilovich, Boris; Fang, Yan; Abbe, Kenneth; Burke, Beatrice
Subject: RE: FTC Docket #9361 - Complaint Counsel's Motion to Compel Discovery

Then why file the motion you did and why stonewall the discovery.

PFC

www.good.com

Sent with Good (SSCHROEDER@ftc.gov)

From: Schroeder, Sarah < >
Sent: Monday, November 17, 2014 6:44:09 PM
To: Peter Carr; Orence, Violet B.; 'mcs@jaburgwilk.com'
Cc: Yankilovich, Boris; Fang, Yan; Abbe, Kenneth; Burke, Beatrice

Peter,

If you are referring to our 9am (PT) call on November 13th, I was waiting at my desk for a half hour and you did not call.

You still have not notified us of your concerns. We are sorry that we have not been able to resolve your concerns. We are sorry that we have not been able to resolve your concerns.

<mailto:PCarr@eckertseamans.com>

We are sorry that we have not been able to resolve your concerns. We are sorry that we have not been able to resolve your concerns.

We are sorry that we have not been able to resolve your concerns. We are sorry that we have not been able to resolve your concerns.

www.good.com

SSCHROEDER@ftc.gov

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We are sorry that we have not been able to resolve your concerns. We are sorry that we have not been able to resolve your concerns.

Sarah

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

[REDACTED]

www.good.com

VORENCE@ftc.gov

To: Orence, Violet B.; 'mcs@jaburgwilk.com'

[REDACTED]

[REDACTED]

[REDACTED]

Subject: RE: FTC Docket #9361 - Complaint Counsel's Motion to Compel Discovery

Sarah-

What happened to our call

Neither this information block, the typed name of the sender, nor anything else in this message is intended to constitute an electronic signature unless a specific statement to the contrary is included in this message.

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

[Redacted]

[Redacted]

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,

DOCKET NO. 9361
PUBLIC DOCUMENT

**RESPONDENT JOHN FANNING'S RESPONSES TO
SECOND SET OF REQUESTS FOR DOCUMENTS**

Respondent John Fanning ("Fanning") responds to Complaint Counsel's Second Set of

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

[Redacted content]

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

[REDACTED]

RESPONSES

[REDACTED]

authority granted to the Commission

[REDACTED]

- 4. All communications regarding Jerk, LLC or Jerk.com, other than communications with Complaint Counsel.

Response No. 4

Respectfully submitted,

JOHN

By his attorneys,

/s/ Peter F. Carr, II
Peter F. Carr, II

~~CONFIDENTIAL AND PROPRIETARY~~

I hereby certify that on November 24, 2014, I caused a true and accurate copy of the foregoing document entitled Respondent John Fanning's Responses to Complaint Counsel's

~~_____~~
~~_____~~
~~_____~~

Sarah Schroeder
Federal Trade Commission
901 Market Street, Suite 670
San Francisco, CA 94103
Email: sschroeder@ftc.gov

/s/ Peter F. Carr, II
Peter F. Carr, II
~~ROBERT SEAMANS, CURRIE & MELLOTT, LLC~~
~~_____~~

Dated: November 24, 2014