HELLRING LINDEMAN GOLDSTEIN & SIEGAL LLP Bruce S. Etterman, Esq. Attorneys for Richard B. Honig, Successor Chapter 11 Trustee One Gateway Center Newark, New Jersey 07102-5323 973.621.9020

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY

		Case No. 14-24874 (KCF)
In Re: CLOUDEEVA, INC. ¹ ,		Chapter 11 Proceeding
	D 14	Honorable Kathryn C. Ferguson
	Debtor.	(Jointly Administered)
		Hearing Date: March 1, 2016, at 10:00 a.m

DECLARATION OF RICHARD B. HONIG IN OPPOSITION TO MOTION OF FIRST TEK, INC.

Richard B. Honig, of full age, hereby declares as follows:

- 1. I am the Successor Chapter 11 Trustee (the "Trustee") of Cloudeeva, Inc. As such I am fully familiar with the facts and circumstances set forth herein. I submit this Declaration in opposition to the motion of First Tek, Inc. ("FTI") for an Order "compelling the enforcement of sale order and release of funds held by Chapter 11 Trustee and for enforcement of expenses in connection with this motion."
- 2. For the reasons stated below, FTI's motion should be denied. FTI is not entitled to reimbursement of health insurance premiums. The premiums were included as part of the closing adjustments between FTI and the Debtor which were negotiated and finalized at closing on April 10, 2015. FTI is entitled to payment of the accounts receivable

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's tax identification number, are: Cloudeeva, Inc., a Delaware Corporation (5326) and Cloudeeva, Inc., a Florida Corporation (2227).

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received from Randstaad and Pactera. I previously agreed to pay them. Finally, if any attorney's fees are awarded, they should be paid to the Trustee.

BACKGROUND FACTS REGARDING SALE TO FTI

- 3. Well before my appointment, Chrysalis Management, LLC, the Court appointed management company that operated the Debtor on a day-to-day basis, had established a document room at the Debtor's offices for potential purchasers to review the Debtor's financial statements, benefit plans, and other corporate and financial documents. FTI was one of the first interested parties, and thus had a full opportunity to review documents and understand the Debtor's workforce arrangements, including all health care benefits.
- 4. FTI signed a "stalking horse" Asset Purchase Agreement ("APA") dated as of March 9, 2015. That started a competitive bidding process, including an auction. At the auction conducted on April 7, 2015, I agreed to certain changes to the APA. One of the changes was a provision which allowed the purchaser to elect to close early, i.e. prior to April 23, 2015, the agreed upon closing date, and receive a reduction in the purchase price. Conversely, if the purchaser closed late, the purchase price would increase. The agreed upon changes were included in an addendum to the APA. The addendum states in relevant part: "For each business day that the transaction is closed prior to April 23, 2015, Buyer shall earn a credit of fifty thousand Dollars (\$50,000.00 USD) toward the Purchase Price. Should the transaction close after April 23, 2015, Buyer shall pay one-hundred thousand dollars (\$100,000.00) per business day until the date that the transaction is closed, in addition to the Purchase Price." A copy of the addendum is attached hereto as Exhibit "A".

- 5. At the auction sale, FTI emerged as the successful bidder with a final bid of \$7,550,000.00. Upon conclusion of the auction, FTI insisted that it wanted to close as soon as possible. Since the hearing on approval of the sale was scheduled for Thursday, April 9 at 2:00 p.m., Friday, April 10 was the earliest date we could close.
- 6. On April 8 and April 9, my professionals and representatives of FTI engaged in a constant exchange of emails and information to prepare for closing on April 10, 2015.
- 7. On April 9, 2015, this Court conducted a hearing and confirmed the auction and the sale to FTI as the highest bidder in the amount of \$7,550,000.00 subject to adjustments.
- 8. On the morning of April 10, 2015, representatives of both parties reviewed a pre-printed list of items which were to be paid or apportioned at the time of closing. While the APA contained detailed standards for how to apportion some items, others were included in the general catch-all "(v) all other items that reasonably require apportionment in accordance with local custom and practice to effectuate the transactions contemplated hereby." We spent a substantial period of time discussing and negotiating how particular items on the list should be apportioned. Among the items specifically apportioned was the health care costs for April 2015. Ultimately, agreement was reached for each proposed item to be apportioned, including the health care costs, and the closing was concluded.
- 9. In addition to the mutually agreed adjustments to the purchase price, as a result of the Herculean efforts to <u>finalize</u> the transaction and close within an extraordinarily short time frame, FTI received the benefit of a \$400,000.00 savings (\$50,000/business day x 8 business days).

HEALTH CARE COSTS, PAYROLL RUN AND FTI'S PRIOR DEMAND

- 10. The Debtor's health care plan was partially contributory. The Debtor would pay insurance premiums on the first day of the month, for the coming month, but the payroll checks and related payroll statements were issued the following month, generally on the fifteenth day of the month. The payment for health insurance made by the Debtor included both its portion and the employee's portion, which was then shown on the subsequent payroll check as a deduction from wages (the amount having already been paid).
- 11. At the closing and thereafter, the employee portion of health insurance premiums for April 2015 was not raised as an obligation due to FTI or to be apportioned between FTI and the Debtor, even though the Debtor had already paid the premium to the insurer in accordance with its standard practices prior to the closing.
- apportionments negotiated by the parties at the closing, payroll through April 10, 2015 was paid by Cloudeeva on May 15, 2015. A small supplementary payroll was paid on June 4, 2015. On those dates, the Debtor provided wage checks and wage statements to the employees reflecting, among other things, the amount it had paid from the employees' wages prior to closing for health insurance through April 30, 2015. The collective amounts paid for the employee portion of the health insurance had been \$39,005.10 as reported on the May 15 payroll and \$2,310.49 on the June 4 payroll. Thus, the Debtor did not, in fact, collect any funds from the employees post-closing.
- 13. Notwithstanding its knowledge of the health care insurance program and the Debtor's post-closing payrolls, FTI did not seek to obtain a further payment or adjustment from the Debtor on account of the payroll. FTI was fully aware that the health insurance premium payments were not obtained from any third party, but represented

amounts retained by the Debtor preclosing, and that all apportionments, including health care costs, had been finally resolved at closing.

- 14. On or about July 31, 2015, almost 4 months after the closing, FTI for the first time suggested that it was entitled to a payment related to these health insurance premiums. At that time, FTI demanded payment of two thirds of the total amount in question (\$39,005.10 +\$2,310.49 x 2/3), or \$27,543.73. FTI apparently asserted that the funds should be apportioned similarly to the original payment on account of health insurance premiums, as discussed in paragraph 15 of FTI's Motion. (Now FTI instead of seeking \$27,543.73 is changing its demand and seeks \$41,315.59.)
- 15. I rejected FTI's July 31 demand for the same reason that I reject their demand now, which is that the funds due to and from FTI, including those related to the health care plan, had been resolved as part of the adjustment to the purchase price at the closing. As stated above, the closing proceeded in an extremely expeditious manner at FTI's insistence so it could receive a \$400,000.00 reduction in the purchase price. Even though FTI received this extraordinary \$400,000 benefit, four months later it demanded more.

FTI'S CURRENT DEMAND FOR PAYMENT RELATED TO HEALTH INSURANCE

- 16. FTI now takes the position that, rather than being an item which should have been adjusted at closing, the funds retained by the Debtor for the employee portion of health insurance coverage are an account receivable which was sold to FTI pursuant to the APA. Clearly, this is not the case.
- 17. These funds were not collected from a third party (the employees) at the time of the payroll -- the payroll simply reflected that the sums had previously been paid as wages prior to the closing when the estate paid the employees' share of the health

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insurance premiums for April 2015. The funds thus were not an "account" upon which the Debtor could collect. They are not an asset of the Debtor to be transferred per the APA.

- health care costs be made between the Debtor and FTI at time of closing, but it did not do so. The purpose of a closing (as its name implies) is to achieve finality. The issue of how to apportion health care costs was specifically addressed in the closing adjustments taken, as was the \$400,000.00 reduction in the purchase price that FTI received for closing immediately and finally on April 10, 2015. The transaction is concluded and FTI cannot now try to renegotiate the price or the adjustments.
- 19. Assuming arguendo that the Court disagrees and finds that FTI is entitled to reapportion the health care costs now, we submit that the apportioned amount should be a Chapter 11 administrative claim to be paid at the time and in accordance with the percentage of claim amounts paid to the other numerous and substantial Chapter 11 administrative creditors.

RANDSTAAD AND PACTERA CLAIMS AND ENFORCEMENT EXPENSES

- 20. Upon receiving FTI's counsel's demand (Exhibit C to FTI's motion), I spoke with counsel for FTI and advised that I would pay the \$8,360 on account of the Randstaad and Pactera claims, but that I would not agree to the health insurance claim. I never had any further communication from counsel prior to the filing of FTI's motion on February 5, 2016. I do not dispute the Randstaad and Pactera claims and will pay them.
- 21. The estate should not be required to bear the burden of FTI's expenses on this motion because the relief sought as to the health insurance premiums is not appropriate and the motion as to Randstaad and Pactera was unnecessary. Instead, the estate

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should be entitled to its fees and expenses in responding to this motion, subject to the submission of a Declaration of Services in accordance with a directive from this Court.

I hereby declare under penalty of perjury that the foregoing statements are true and correct.

RICHARD B. HONIG

Dated: February 23, 2016

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EXHIBIT "A"

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ADDENDUM TO ASSET PURCHASE AGREEMENT

This agreement is the ADDENDUM TO THE ASSET PURCHASE AGREEMENT between FIRST TEK, INC., as Buyer and RICHARD B. HONIG, as Chapter 11 Trustee for the bankruptcy estate of Cloudeeva, Inc., as Seller ("Addendum").

The following provisions are incorporated into the March 9, 2015 Asset Purchase Agreement between First Tek, Inc. and Richard B. Honig, as amended by the March 9, 2015 addendum to the Asset Purchase Agreement (collectively, the "APA"). The terms of this Addendum shall apply to all matters addressed herein. In the event of conflict, the terms of this Addendum shall supersede any contrary ferms in the APA. All other provisions of the APA are unaffected by this Addendum.

The provisions are as follows:

Entire Agreement (APA Section 12.7)

The first sentence of APA Section 12.7 ("Entire Agreement") shall be replaced with the following sentence:

This Agreement (including all schedules and exhibits), and Confidentiality Agreement executed by Buyer--in addition to any Addendum to this Agreement executed before or after this Agreement -- constitute the entire agreement between the parties relating to the subject matter hereof and are the complete expression of their intent.

Purchase Price (APA Section 3.1)

The first sentence of APA section 3.1 ("Purchase Price") shall be replaced with the following sentence:

The Purchase Price for the Purchased Assets shall be the sum of seven million, five-hundred and fifty thousand Dollars (\$7,550,000.00 USD) (the "Purchase Price").

Change to Deposit Amount

The full amount deposited in Seller's account as a deposit for this transaction shall be 10% of the new purchase price described in this Addendum (\$755,000.00 total deposit).

Closing Date

The Closing Date of this transaction shall be April 10, 2015 or as soon thereafter as feasible.

Price Adjustment Based on Closing Date

For each business day that the transaction is closed prior to April 23, 2015, Buyer shall earn a credit of fifty thousand Dollars (\$50,000.00 USD) toward the Purchase Price. Should the transaction close after April 23, 2015, Buyer shall pay one-hundred thousand dollars (\$100,000.00) per business day until the date that the transaction is closed, in addition to the Purchase Price.

Access to Records

For a period of three (3) years following the Closing Date, for regulatory or litigation purposes, upon reasonable notice to Buyer, Buyer shall afford Seller access and the right to make extract or copies of any and all books, records, data, or other documents of Seller transferred to Buyer as part of the Asset Purchase, and Buyer shall preserve such books, records, data and other transferred documents throughout that period.

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Due/Accrued Liabilities

First Tek, Inc. shall not be liable for payment of any amount, whether payroll or other amounts (including payroll taxes, operating expenses, or any other amount whatsoever), due to any employee or other party as of the date of Closing or existing as an ongoing expense. Further, First Tek, Inc. shall not be responsible for payment of any amount, whether payroll liabilities or other amounts (including payroll taxes, operating expenses, or any other amount whatsoever), that exist as accrued amounts as of the date of Closing, or as an ongoing, accruing amount.

Employees (APA Section 7.6)

Section 7.6 of the APA shall be amended to state that all terms of Section 7.6 of the APA shall expire and be of no force and effect at the times set forth therein, or upon the passage of six months after the Closing Date, whichever is later.

Non-Disclosure Agreements with Participants in Bidding Process

Seller shall provide to Buyer a copy of the Confidentiality Agreements executed with any potential buyer that participated in any part of the bidding process for the assets of Cloudeeva, Inc. within ten (10) business days of the Closing Date.

Office Lease

Buyer is not assuming, and Seller will not assign to Buyer, the office lease with ML7 Windsor LLC for the Cloudeeva, Inc. office space at 104 Windsor Center Drive, Suite 300, East Windsor, New Jersey 08520 (the "Office Lease"). Seller has advised Buyer that Seller will reject the Office Lease as of May 26, 2015 and that occupancy beyond that date cannot be promised by Seller. Should Buyer wish to continue to use the office space on a brief, incremental basis, Buyer will contact ML7 Windsor, LLC in order to make appropriate arrangements for continued occupation. Buyer shall be responsible for all rent or other occupancy charges between the date of Closing and such date as Buyer shall actually end occupation of the Office Space.

Excluded Assets (APA Section 2.3, Section (e))

Section 2.3(e) of the APA shall be amended to state that any interest that Seller has in any subsidiary as well as any interest that Seller may have in any contract that it is currently pursuing to have returned to the Seller's Estate will be sold to Buyer as part of the Purchased Assets.

Assumed Contracts (Schedule 2.1(b) to APA)-MARKED COPY OF SCHEDULE ENCLOSED

Buyer is not assuming, and Seller is not assigning any contracts to Seller. However, Buyer shall be financially responsible for the following contracts between the date of Closing and the dates noted below, at which time Seller intends (and Buyer consents) that Seller shall terminate such contracts:

Through May 26, 2015

ML7 Windsor, LLC
Vonage America
Broadview Networks
Comcast-8499 05 245 0130684
Google Apps
Coverall of Southern New Jersey
Hinckley Springs
Village Office Supply
Quality Inn
Holiday Inn East Windsor

W

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Through April 30, 2015 (Employees will move to First Tek plans effective May 1, 2015):

Assurant Employee Benefits
Vision Service Plan
Sun Life Financial
United Healthcare Insurance Company
Sterling Health
Nationwide Trust Company, FSB

To be terminated at Closing (see notes):

Job Diva Inc. (full data backup of Seller's Job Diva data to be provided to Buyer prior to closing account)
DesiOpt.com
Abab Tech, LLC
Vnext Solutions, Inc.
ADP Workforce Now
Pitney Bowes Purchase Power

Immigration Matters:

As to any employees being transferred to Buyer in the United States under an immigration status whom Buyer will retain, Buyer will comply with all requirements of immigration law to maintain such employee's immigration status for so long as the employee remains employed, including but not limited to: (1) confirming to applicable agencies that the transferred employees job opportunity is the same offered on the labor certification and that Buyer will establish immigrant petition eligibility including the ability to pay the prospective proferred wage and if necessary file a new labor application, including any required new H-1B filings; (2) maintaining a list of all H-1B nonimmigrants transferred to the new employer; (3) maintaining in each employee's public access file a record of each affected LCA number and its date of certification, and actual wage system, and the related employer ID number; (4) providing a sworn statement executed by an authorized official from the new employer acknowledging the assumption of interests, obligations, liabilities, and undertakings contained in each certified and still effective LCA, including statements that the employer will: (a) abide by DOL's H-1B regulations applicable to the LCAs; (b) maintain a copy of the statement in the public access file; and (c) make the document available to any member of the public or DOL upon request.

Hereby agreed to this 10th day of April, 2015, by:

First Tek, Inc. (Buyer)

Satyakumar Bhavanasi

Its: President/C.E.O.

SELLER:

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By:

Richard B. Honig, as Chapter II Trustee for the bankruptcy estate of Cloudeeva, Inc.

OUNITED S	TATES BANK	KRUPTCY COURT	
DISTRICT	OF NEW JERS	SEY	
		I.J. LBR 9004-2(c)	
HELLRING	LINDEMAN	GOLDSTEIN &	
SIEGAL LL	P		
Bruce S. Ett	erman, Esq.		
Attorneys fo	or Richard B. H	onig, Chapter 11 Truste	e
One Gatewa	y Center		
Newark, Ne	w Jersey 07201	1-5323	
			Case No. 14-24874 KCF
In Re:			
			Chapter 11 Proceeding
CLOUDEE	VA, INC.,		
		Debtor. ¹	Honorable Kathryn C. Ferguson
			, c
			Jointly Administered
			·
			Hearing date: March 1, 2016
			at 10:00 a.m.
			<u> </u>
		CERTIFICATION (OF SERVICE
1. I, Bar	bara M. Johns	on:	
	represent the		in the above-captioned matter.
	am the secret	ary/paralegal for Bruce	S. Etterman, Esq., attorney for Richard B.
	Honig, Succe	essor Chapter 11 Trustee	in the above-captioned matter.
	am the	in th	e above case and am representing myself.
			1 2 3
2. On Fe	ebruary 23, 20	16, I sent a copy of the	following pleadings and/or documents to

the parties listed in the attached chart: Declaration of Richard B. Honig in

Opposition to Motion of First Tek, Inc.

The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's tax identification number, are: Cloudeeva, Inc., a Delaware Corporation (5326) and Cloudeeva, Inc., a Florida Corporation (2227).

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3.	I hereby certify under penalty of perjury that the above documents were sent using		
	the mode of service indicated.		
		/s/ BARBARA M. JOHNSON	
Date	d: February 23, 2016		
		BARBARA M. JOHNSON	

Name and Address of Party Served	Relationship of Party to the Case	Mode of Service	
U.S. Trustee's Office Mitchell B.Hausman, Esq.	U.S. Trustee		Hand-delivered
1 Newark Ctr., Suite 2100			Regular mail
Newark, NJ 07102			Certified Mail/RR
			Email
		\boxtimes	Notice of Electronic Filing (NEF)
			Other - FedEx
			(as authorized by the court*)
Richard B. Honig, Trustee Hellring Lindeman Goldstein	Chapter 11 Successor Trustee		Hand-delivered
& Siegal LLP	Successor Trustee		Regular mail
One Gateway Center Newark, NJ 07102			Certified Mail/RR
Newark, NJ 07102			Email
		\boxtimes	Notice of Electronic Filing (NEF)
			Other
			(as authorized by the court*)
The Kelly Firm PC Andrew J. Kelly, Esq.	Counsel for Cloudeeva India		Hand-delivered
Chryssa Yaccarino, Esq.	Private Limited		Regular mail
1011 Highway 71, Suite 200 Spring Lake, NJ 07762			Certified Mail/RR
Spring Lake, NJ 07702			Email
		\boxtimes	Notice of Electronic Filing (NEF)
			Other - FedEx
			(as authorized by the court*)
Fox Rothschild LLP Richard M. Meth, Esq.	Counsel to Bartronics, Creditor		Hand-delivered
75 Eisenhower Pky., Suite 200	Bartromes, Creditor		Regular mail
Roseland, NJ 07068			Certified Mail/RR
			Email
		\boxtimes	Notice of Electronic Filing (NEF)
			Other
			(as authorized by the court*)

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Name and Address of Party Served	Relationship of Party to the Case	Mode of Service
Law Offices of Paul B. Justi Paul B. Justi, Esq. 1981 N. Broadway, Suite 250 Walnut Creek, CA 94596 Norris McLaughlin & Marcus Gary N. Marks, Esq., Joseph R. Zapata, Jr., Esq. 721 Route 202-206 PO Box 5933 Bridgewater, NJ 08807-5933	Creditor, Norris, McLaughlin & Marcus	☐ Hand-delivered ☐ Regular mail ☐ Certified Mail/RR ☒ Email ☐ Notice of Electronic Filing (NEF) ☐ Other - FedEx (as authorized by the court*) ☐ Hand-delivered ☐ Regular mail ☐ Certified Mail/RR ☐ Email ☒ Notice of Electronic Filing (NEF)
Jeffrey A. Cooper, Esq. Jonathan Rabinowitz, Esq. Rabinowitz Lubetkin & Tully, LLC 293 Eisenhower Parkway, Suite 100 Livingston, NJ 07039	Counsel to Secured Creditor, Prestige Capital Corporation	 □ Other (as authorized by the court*) □ Hand-delivered □ Regular mail □ Certified Mail/RR □ Email ☑ Notice of Electronic Filing (NEF) □ Other (as authorized by the court*)
Gilbert B. Weisman, Esq. Becket & Lee LLP PO Box 3001 Malvern, PA 19355-0701	Counsel for American Express Travel Related Services Company, Inc.	

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Name and Address of Party Served	Relationship of Party to the Case	Mode of Service
Glenn R. Reiser, Esq. Lofaro & Reiser, L.L.P. 55 Hudson Street Hackensack, NJ 07601 Alan S. Maza, Esq., Senior Bankruptcy Counsel US Securities and Exchange Commission New York Regional Office 200 Vesey Street, Suite 400 New York, NY 10281	Counsel for Alliance Sourcing Network, Inc. Counsel for US Securities and Exchange Commission	☐ Hand-delivered ☐ Regular mail ☐ Certified Mail/RR ☐ Email ☐ Notice of Electronic Filing (NEF) ☐ Other (as authorized by the court*) ☐ Hand-delivered ☐ Regular mail ☐ Certified Mail/RR ☐ Email ☐ Notice of Electronic Filing (NEF) ☐ Other
Sherman Silverstein, Kohl Rose & Podolsky, P.A. Arthur J. Abramowitz, Esq. & Jerrold N. Poslusny, Jr., Esq. 308 Harper Dr., Suite 200 Moorestown, NJ 08057 Daniel M. Stolz, Esq. Wasserman Jurista & Stolz 225 Millburn Ave., Suite 207 Millburn, NJ 07041	Co-Counsel to Systems America, Inc. and Ratika Tyagi	(as authorized by the court*) ☐ Hand-delivered ☐ Regular mail ☐ Certified Mail/RR ☐ Email ☐ Notice of Electronic Filing (NEF) ☐ Other ☐ (as authorized by the court*) ☐ Hand-delivered ☐ Regular mail ☐ Certified Mail/RR
		 □ Email □ Notice of Electronic Filing (NEF) □ Other (as authorized by the court*)

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Name and Address of Party Served	Relationship of Party to the Case	Mode	e of Service
Shalom D. Stone, Esq. Brown, Moskowitz & Kallen, P.C.	Co-Counsel to Systems America,		Hand-delivered
180 River Road	Inc. and Ratika		Regular mail
Summit, NJ 07901	Tyagi		Certified Mail/RR
			Email
			Notice of Electronic Filing (NEF)
			Other
			(as authorized by the court*)
Michael W. Malter, Esq.	Counsel for Creditor, McManis		Hand-delivered
Binder & Malter,LLP 2775 Park Avenue	Faulkner		Regular mail
Santa Clara, CA 95050			Certified Mail/RR
			Email
			Notice of Electronic Filing (NEF)
			Other
			(as authorized by the court*)
Jerrold S. Kulback, Esq. Archer & G, PC	Counsel for First Tek		Hand-delivered
One Centennial Square	ICK		Regular mail
Haddonfield, NJ 08033			Certified Mail/RR
			Email
			Notice of Electronic Filing (NEF)
			Other
			(as authorized by the court*)

^{*} May account for service by fax or other means as authorized by the Court through the issuance of an Order Shortening Time.