

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



ORIGINAL

_____)
In the matter of:)
)
Jerk, LLC, a limited liability company,) DOCKET NO. 9361
)
Also d/b/a JERK.COM, and)
) PUBLIC
John Fanning,)
Individually and as a member of)
Jerk, LLC,)
)
Respondents.)
_____)

RESPONDENT JOHN FANNING’S MOTION *IN LIMINE*
TO EXCLUDE CONSUMER DECLARATIONS

Respondent John Fanning hereby moves this Court *in limine* to prohibit Complaint Counsel from offering testimony of proposed consumer witnesses through declarations, and objects to all consumer declarations identified by Complaint Counsel on its list of proposed trial exhibits (CX0001; CXCX0004; CX0005; CX0006; CX0007; CX0010; CX0011; CX0026; CX0027; CX0028CX0031; CX0032CX0036; CX0037;CX0038; CX0039; CX0040; CX0043).¹ In support of barring the declarations, Mr. Fanning states as follows:

1. While hearsay evidence may be received, the consumer declarations constitute inadmissible and unreliable hearsay, and must be excluded in the spirit of fairness and due process of law. “Evidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair.” 16 CFR §3.43(b) (emphasis

¹ Mr. Fanning has not attached the declarations or quoted any substance from the statements because Complaint Counsel designated all statements as confidential. Mr. Fanning is prepared to argue concerning specific statements in specific declarations as needed at the final prehearing conference, and requests the right to present oral argument as needed.

added). See also In the Matter of Polypore Int'l, Inc., 2010 WL 3053866, at *2 (FTC 2010) (“all relevant and material evidence— whether hearsay or not—is admissible, as long as it is reliable.”). The consumer declarations are replete with multiple level hearsay statements. Also, many offer opinions and impressions of the declarants, and rely upon rank speculation instead of personal knowledge. Notwithstanding the relaxed rules of evidence, the declarations offered by Complaint Counsel far exceed the limits of reliable, admissible testimony that should not be permitted to invade these proceedings. The Scheduling Order citing Fed. R. Ev. 602 expressly provides, “Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” The declarations do not survive this standard. At a minimum, all information contained in the declarations not based on personal knowledge, involving speculation or stating opinion, and/or founded upon multiple levels of hearsay must be redacted and excluded.

2. Moreover, the hearsay declarations must be excluded on grounds of relevance and materiality, as governed by the mandates of 16 CFR §3.43(b) which provides:

Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Statements offered by consumers concerning their alleged personal experiences with the Jerk site are not material to the claims or defenses.² How individual consumers may have reacted to postings or were caused to feel upon reading profiles on the site is not part of the proper analysis of deceptive conduct covered by Section 5 of the Act. The essential elements of

² For these same reasons, Mr. Fanning reserves the right to object to any live hearing testimony from consumer witnesses.

a deceptive act or practice covered by Section 5 are: (1) a representation that is (2) likely to mislead the consumer acting reasonably in the circumstances that is (3) material. See FTC Policy Statement on Deception, appended to In re Cliffdale Assocs., Inc., 103 F.T.C. 1, 10, appendix at pp. 175-84 (1984). Significantly, Complaint Counsel did not include any claim for “unfairness” under Section 5, because of the more stringent standard that applies in unfairness cases, including the required showing of actual substantial injury to consumers. In contrast, a deception claim is predicated on a reasonable consumer standard, not subjective impact on individual injury. POM Wonderful, LLC, 2013 LEXIS 6, at *20 (FTC 2013) (actionable representation to meet the deception standard is one that conveys a particular interpretation to a reasonable consumer). See also Cliffdale Assocs., 103 F.T.C. at 176.

3. Moreover, a “material” misrepresentation is one that involves information important to a reasonable consumer and that is therefore likely to affect a reasonable consumer’s choice of, or conduct regarding, a product. In re Novartis Corp., 127 F.T.C 580, 689 (1999). See also POM Wonderful, at *121 (“A misleading claim or omission in advertising will violate Section 5 . . . only if the omitted information would be a material factor in the consumer’s decision to purchase the product.”); Cliffdale Assocs., 103 F.T.C. at 165 (claim considered material if it “involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product.”). Even if individualized feelings and impressions of consumers were somehow probative, which they are not, none of the consumer statements submitted by Complaint Counsel prove that any consumer was caused to participate or not participate in Jerk.com based on any statement contained on the site concerning the origin of content, users, or otherwise. The mere fact that consumers who viewed content on the site believed that it was posted by a friend or family member or could not understand how the

information was posted does not establish inducement. Indeed, the consumer statements collected by Complaint Counsel show, in essence, that individuals were upset that the information they had posted on Facebook, and believed was private, was appearing on Jerk.com.

4. Complaint Counsel's purpose of including this irrelevant, unreliable information is to portray Mr. Fanning in a false negative light and to play upon the emotions of the finder of fact. Character evidence fails to prove facts to support a Section 5 claim. No basis for admissibility exists, and the consumer declarations must be barred.

CONCLUSION

For the foregoing reasons, Respondent John Fanning requests this Court to exclude Complaint Counsel from introducing or relying on as substantive evidence at trial any consumer declarations or similar consumer statements made under oath or otherwise.

Respectfully submitted,

JOHN FANNING,

By his attorneys,

/s/ Peter F. Carr, II

Peter F. Carr, II

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Dated: March 5, 2015

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2015, I caused a true and accurate copy of the foregoing to be served electronically through the FTC's e-filing system and I caused a true and accurate copy of the foregoing to be served as follows:

One electronic copy to the Office of the Secretary:

Donald S. Clark, Secretary
Federal Trade Commission
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Washington, DC 20580
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One electronic copy to the Office of the Administrative Law Judge:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
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One electronic copy to the Office of the Counsel for the Federal Trade Commission:

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

Dated: March 5, 2015

Notice of Electronic Service for Public Filings

I hereby certify that on March 05, 2015, I filed via hand a paper original and electronic copy of the foregoing Respondent John Fanning's Motion in limine to Exclude Complaint Counsel's Expert Witnesses, Respondent John Fanning's Motion in limine to Exclude Consumer Declarations, Respondent John Fanning's Motion in limine to Exclude or Limit Testimony by Deposition, with:

D. Michael Chappell
Chief Administrative Law Judge
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Washington, DC, 20580

Donald Clark
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I hereby certify that on March 05, 2015, I filed via E-Service of the foregoing Respondent John Fanning's Motion in limine to Exclude Complaint Counsel's Expert Witnesses, Respondent John Fanning's Motion in limine to Exclude Consumer Declarations, Respondent John Fanning's Motion in limine to Exclude or Limit Testimony by Deposition, with:

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I hereby certify that on March 05, 2015, I filed via other means, as provided in 4.4(b) of the foregoing Respondent John Fanning's Motion in limine to Exclude Complaint Counsel's Expert Witnesses, Respondent John Fanning's Motion in limine to Exclude Consumer Declarations, Respondent John Fanning's Motion in limine to Exclude or Limit Testimony by Deposition, with:

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