

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	)	DOCKET NO. 9361
	)	
John Fanning, individually and as a member of Jerk, LLC.	)	PUBLIC DOCUMENT
	)	
	)	
	)	

**COMPLAINT COUNSEL’S OPPOSITION TO  
RESPONDENT JOHN FANNING’S MOTION *IN LIMINE*  
TO EXCLUDE COMPLAINT COUNSEL’S EXPERT WITNESSES**

The Commissions Rule of Practice (“Rules”) require the admission of relevant, material, and reliable testimony, including that of experts. Complaint Counsel have introduced precisely that in the expert reports of Dr. Brian Rowe, Professor Paul Resnick, and Professor Mikołaj Jan Piskorski (collectively, the “Experts”). Complaint Counsel timely produced these reports to Respondents last December, and offered to make each Expert available for deposition during the expert discovery period, pursuant to Rule 3.31A(d).<sup>1</sup> Respondents, however, elected not to depose any Expert. Nor have they identified any experts of their own, including for rebuttal.<sup>2</sup> Instead, Fanning lodges conclusory accusations of irrelevance and unreliability as the basis for his Motion *In Limine* to exclude the Experts’ testimony (“Motion”). Fanning’s subjective disagreement with the Expert’s conclusions is no reason to exclude their testimony.

<sup>1</sup> Declaration of Kelly Ortiz, attached hereto (“Ortiz Dec.”) ¶¶ 2-3, Att. B.

<sup>2</sup> *Id.* ¶¶ 3-4.

## I. BACKGROUND

### A. The Experts Are Well-Qualified And Testify On Topics Directly Bearing On This Action.

#### 1. Brian Rowe, Ph.D.

Dr. Brian Rowe, an economist with the FTC's Bureau of Economics, is a well-qualified expert in statistics and data analysis. He holds an M.A. and a Ph.D. in Economics from the University of Michigan. Much of his work at the FTC has involved data analysis and statistics, including implementing statistical models and tests. Dr. Rowe is a published author and has taught Microeconometrics at Johns Hopkins University.

Applying his training, knowledge, and experience, as well as his review of the Jerk.com website, Dr. Rowe has concluded that as of November 2012: (1) there were an estimated 77.5 million Jerk.com profiles on the Internet; (2) an estimated 29 million of these profiles contained a photograph of a person; (3) an estimated 4.75 million of these profiles contained a photo of a child who appeared to be under age 10; and (4) an estimated 0.5 million of these profiles (0.64% total) contained any vote of the profiled person as a "Jerk" or "not a Jerk."

Dr. Rowe arrived at these conclusions through random sampling, a widely used statistical technique used to project conclusions about a broader population from a sample. Dr. Rowe took a random sample of 400 Jerk.com profiles—a sample generated using the unique 8-digit identifier associated with each Jerk.com profile.<sup>3</sup> He and his staff then determined whether the randomized identifier yielded an existing profile, and if so, recorded salient attributes about the profile, including whether the profile contained a photo of a person or had any votes. Dr. Rowe

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<sup>3</sup> Jerk correspondence confirms that each Jerk.com user ID has a unique identifier. See CX0307-002.

then applied a statistical model to the sample to project its attributes onto the broader population of Jerk.com profiles.<sup>4</sup>

## **2. Professor Paul Resnick, Ph.D.**

Professor Paul Resnick is a well-qualified expert in human computer interaction and social computing, including online communities, social networks, and recommender and reputation systems. He holds a Ph.D. in Computer Science from MIT. He has held faculty positions at MIT and Carnegie Mellon, and is currently a Professor at the University of Michigan School of Information. Professor Resnick has authored and co-authored more than sixty articles, reports, and publications. His influential paper “Reputation Systems” has been cited more than 2,100 times.

Applying his training, knowledge, and experience, as well as his review of the Jerk.com website, Professor Resnick has concluded that it is not plausible for most Jerk.com profiles to have been created by Jerk.com users. First, Professor Resnick’s analysis of Jerk.com’s features and functionality led him to conclude that the majority of Jerk.com users who manually create Jerk.com profiles would use the site’s functionality to label the profiled person a “Jerk” or “not a Jerk.” Professor Resnick arrived at this conclusion based on the “affordances” concept central to user interface analysis and design, which focuses on actual and perceived properties as providing clues about use. For instance, Jerk.com’s persistent and prominent placement of interactive “buttons” to vote the profiled person as a “Jerk” or “not a Jerk” naturally “affords” voting on a profile created by a user. Consequently, Professor Resnick concluded that many user-created Jerk.com profiles should have at least one vote on whether the profiled person is a “Jerk” or “not a Jerk.” Therefore, Dr. Rowe’s finding that only a tiny percentage of Jerk.com profiles had any

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<sup>4</sup> Expert Report of Brian Rowe, Ph.D. (CX0063).

votes led Professor Resnick to conclude that many Jerk.com profiles were likely created through some process other than manual creation by users.

Second, Professor Resnick's evaluation of the user visitation rates for Jerk.com led him to conclude that Jerk.com could not have had more than 5.5 million visitors between January 1, 2009 and November 29, 2012. His observed rate of profile-creation (57 seconds) meant that the number of Jerk.com profiles would not have exceeded 5.5 million during this timeframe. The fact that Jerk.com had 73.1 and 81.5 million profiles as of November 2012—and indeed admitted to having reached 85 million profiles as early as June 2010—also led Professor Resnick to conclude that these profiles could not have been the result of manual user generation.<sup>5</sup>

### **3. Professor Mikołaj Piskorski, Ph.D.**

Professor Mikołaj Jan Piskorski is a well-qualified expert in online social platforms and social interactions. He holds a Masters' degree in Economics and Politics from the University of Cambridge, and a Masters' degree in Sociology and a Ph.D. in Organizational Behavior from Harvard University. He has served as an Assistant and Associate Professor at Harvard Business School. He currently serves as Professor of Strategy and Innovation at IMD Business School in Lausanne, Switzerland. Professor Piskorski has authored and co-authored numerous academic articles and case studies on social media websites. His "Social Strategy: How We Profit from Social Media" is the first academic book on social interactions online; it establishes a theoretical framework for understanding people's social interactions over the Internet.

Applying his training, knowledge, and experience, as well as his review of the Jerk.com website, Professor Piskorski has concluded that the great majority of Jerk.com visitors would likely perceive Jerk.com profiles to have been created and populated by Jerk.com users. Only a

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<sup>5</sup> Expert Report of Paul Resnick, Ph.D. (CX0093).

small proportion of the most experienced and advanced Internet users would be able to deduce that many Jerk.com profiles were auto-generated. Professor Piskorski came to this conclusion by applying his analysis of Jerk.com's characteristics, features, and functionalities across a typography of Internet users supported by existing academic research, in conjunction with the average user's time spent visiting and interacting with Jerk.com.<sup>6</sup>

## II. ARGUMENT

### A. Legal Standard.

Rule 3.43 requires relevant, material, and reliable evidence to be admitted. 16 C.F.R. § 3.43(b). Rule's 3.43's permissive admissibility standard applies to expert testimony, which "shall be admissible" if it otherwise meets the standards for admissibility under the Rules. 16 C.F.R. § 3.43(b). When ruling on admissibility, courts consider "whether the expert is qualified in the relevant field and examine the methodology the expert used in reaching the conclusions at issue." *In re Basic Research*, 2006 FTC LEXIS 5, at \*11-12 (Jan. 10, 2006) (citing *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *Kumho Tire Co., v. Carmichael*, 526 U.S. 137, 153-54 (1999)); *see also* Fed. R. Evid. 702.2.<sup>7</sup> "The court's role as a 'gatekeeper,' pursuant to *Daubert*, to prevent expert testimony from unduly confusing or misleading a jury," however, "has little application in a bench trial," *In re McWane*, 2012 FTC LEXIS 142, at \*8 (Aug. 16, 2012), where "the judge is capable of assigning appropriate weight to evidence" and "the risk of prejudice from giving undue weight to marginally relevant evidence is minimal." *In re Daniel Chapter One*, 2009 FTC LEXIS 85, at \*19 (Apr. 20, 2009).

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<sup>6</sup> Expert Report of Mikołaj Jan Piskorski (CX0108).

<sup>7</sup> Because the Commission's Rules have not expressly adopted the Federal Rules of Evidence, the Court has discretion to decide whether to follow them and the *Daubert* standard in this administrative proceeding. *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469 (7th Cir. 2001).

“Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds.”<sup>8</sup>

**B. The Experts’ Testimony Is Relevant And Material.**

The Experts’ testimony is unquestionably relevant and material under Rule 3.43(b). Evidence is material if it has “some logical connection with the facts of consequence or the issues.” Black’s Law Dictionary 638 (9th ed. 2009). Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would otherwise be. Fed. R. Evid. 401. “[F]ederal courts are unanimous in holding that the definition of relevant is expansive and inclusive, and that the standard for admissibility is very low.” *Leinenweber v. Dupage County*, 2011 U.S. Dist. LEXIS 15017, at \*4 (N.D. Ill. Feb. 15, 2011) (collecting cases).

Each of the Experts’ testimony is material because it is connected to the content displayed on Jerk.com and the representation Jerk.com conveyed about the source of its content—facts at the heart of the Complaint. The testimony is also relevant because it directly bears on consequential facts about Jerk.com and its content. For example, Dr. Rowe’s testimony that as of November 2012, Jerk.com had an estimated 77.5 million profiles is relevant to establish, through Professor Resnick’s testimony and other evidence, the fact that actual Jerk.com users could not have manually generated so many profiles during that timeframe. Similarly, Dr. Rowe’s testimony that only an estimated 0.64% of Jerk.com profiles contained a vote about the profiled person undergirds Professor Resnick’s conclusion that the majority of Jerk.com profiles were not user generated. Professor Resnick’s testimony, in turn, directly bears on whether Jerk.com profiles were created by users. Combined, Dr. Rowe’s and Professor

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<sup>8</sup> May 28, 2014 Scheduling Order ¶ 9.

Resnick's testimony tend to make more probable the fact the Jerk.com profiles were not, in fact, created by Jerk.com users and reflective of their views of the profiled individuals.

Professor Piskorski's testimony concludes that Jerk.com's design, content, and functionality would lead the majority of Internet users to perceive Jerk.com profiles as created by real users, not auto-generated. This testimony supports the fact that Respondents, who designed and published Jerk.com, conveyed to consumers that Jerk.com profiles were created by Jerk.com users and reflected their views of the profiled individuals, as alleged in Count I.

Fanning's challenge on relevance appears to be that the Experts and their testimony "improperly invade the province of the fact finder, this tribunal, to determine facts."<sup>9</sup> This challenge is meritless. It is appropriate—indeed, indispensable—for experts to opine on facts and evidence, thereby assisting the factfinder's understanding of them. *See* Fed. R. Evid. 702 (permitting expert testimony "in the form of an *opinion* or otherwise" if the expert's ". . . knowledge will help the trier of fact to understand the evidence or to determine a fact in issue (emphasis added)); *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 592 (1993) ("an expert is permitted wide latitude to offer opinions"). If, as Fanning would have it, expert witnesses could not present their expert opinions about facts and evidence, their role as experts would be meaningless.

Fanning's attack on Professor Piskorski's testimony illustrates why his argument is untenable. Professor Piskorski has presented his expert opinion on how Jerk.com would be perceived by different types of Internet users. The Commission and federal courts accept such expert testimony on consumer perception, including expert opinion on website users'

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<sup>9</sup> Motion p. 3.

understanding and perception based on what the website displays. See *In re Thompson Medical Co.*, 104 F.T.C. 648, 790 (1981); *In re Kraft, Inc.*, 114 F.T.C. 40, 122 (1991); *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1068-69 (C.D. Cal. 2012). Fanning, however, ignores this precedent in summarily concluding that “[t]here exists no basis for an expert opinion regarding an individual person’s state of mind.”<sup>10</sup> Likewise, Fanning provides no support for his novel proposition to substitute the factfinder’s opinion based on “life experiences, common knowledge, and common sense” for the expert’s opinion on consumer perception.<sup>11</sup>

### C. The Experts’ Testimony Is Reliable.

This Court has assessed expert reliability under the Supreme Court’s *Daubert* test. *In re McWane, Inc.*, 2012 FTC LEXIS 142, at \*11-12 (Aug. 16, 2012). Applying this test, courts “consider whether the expert is qualified in the relevant field and examine the methodology the expert used in reaching the conclusions at issue.” *Id.* at \*8. While *Daubert* identified several factors that courts *may* use to evaluate “scientific” expert testimony—including testability, peer review and publication, rate or error, and general acceptance within the relevant scientific community—the Supreme Court later explained that the reliability assessment, particularly of “technical, or other specialized knowledge,” may focus on the expert’s “personal knowledge or experience.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999).

All of the Experts pass the test. Through their qualifications, personal knowledge, and experience—both academic and practical—as well thorough their descriptions of their methodologies, foundations, and assumptions, the Experts have established the reliability of their

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<sup>10</sup> Motion p. 6.

<sup>11</sup> *Id.*



opinions.<sup>12</sup> Moreover, to the extent that any “scientific” *Daubert* factors would apply to Dr. Rowe’s statistical analysis, Dr. Rowe explained that his analysis relies on basic and widely used statistical tools. *See In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 984 F. Supp. 2d 1021, 1036 (C.D. Cal. 2013) (rejecting reliability challenge where the expert employed “a widely accepted statistical technique”).

While the Experts’ have assiduously explained the foundation for their respective methodologies and conclusions, Fanning’s challenges their reliability based solely on the conclusory contentions that their methods are “pure guesswork,” “rank speculation,” and “ludicrous.”<sup>13</sup> Typically, such a challenge would present “a classic disagreement between experts that goes to the credibility of each expert’s opinions, not to the reliability of their methodology’ for purposes of admissibility,” and would therefore not result in exclusion at the threshold. *McWane*, 2012 FTC LEXIS 142, at \*10 (citing *Cook v. Rockwell Int’l Corp.*, 580 F. Supp. 2d 1071, 1092 (D. Colo. 2006)). What is remarkable here, however, is that Fanning does not present any expert opinion—whether by testimony, by textbook or learned treatise, or in any form—to support his conclusory accusations about the Experts’ methodologies. Excluding the Experts’ testimony based on Fanning’s personal opinion about their methodologies would be an unprecedented misstep.

### III. CONCLUSION

The Experts’ testimony is relevant, material, and reliable. The Court should not exclude it from the record.

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<sup>12</sup> *See* CX0063, CX0093, CX0108.

<sup>13</sup> Motion p. 6.

Dated: March 13, 2015

Respectfully submitted,



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Kenneth H. Abbe  
Federal Trade Commission  
Western Region – San Francisco  
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COMPLAINT COUNSEL

**CERTIFICATE OF SERVICE**

I hereby certify that on March 13, 2015, I served a true and correct copy of Complaint Counsel's Opposition to Respondent John Fanning's Motion *in Limine* to Exclude Expert Testimony on:

**The Office of the Secretary:**

Donald S. Clark  
Office of the Secretary  
600 Pennsylvania Avenue, N.W.  
Room H-172  
Washington, D.C. 20580

**The Office of the Administrative Law Judge**

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

**Counsel for John Fanning:**

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Dated: March 13, 2015



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

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

**DECLARATION OF KELLY ORTIZ  
IN SUPPORT OF COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT JOHN  
FANNING'S MOTION IN LIMINE TO EXCLUDE EXPERTS**

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. On December 1, 2014, Complaint Counsel's served on Respondents the expert reports, and related materials, prepared by Brian Rowe, Ph.D., Paul Resnick, Ph.D., and Mikolaj Jan Piskorski, Ph.D. Attachment A to this declaration is a true and correct copy of the email transmittal.

3. Attachment B to this declaration is a true and correct copy of Complaint Counsel's December 1, 2014 letter to Respondents proposing available dates for deposition of Drs. Rowe, Resnick, or Piskorski. Respondents did not respond to this letter's inquiry about their plans to depose any of these experts. They have not noticed the deposition of Drs. Rowe, Resnick, or Piskorski.

4. Respondents have not identified any expert witnesses, including any rebuttal witnesses to Drs. Rowe, Resnick, or Piskorski.

Executed on March 12, 2015, in San Francisco, CA.



Kery Ortiz

## **ATTACHMENT A**

**Cc:** Schroeder, Sarah[SSCHROEDER@ftc.gov]; Fang, Yan[yfang@ftc.gov]; Yankilovich, Boris[byankilovich@ftc.gov]; Abbe, Kenneth[KABBE@ftc.gov]; Burke, Beatrice[bburke@ftc.gov]  
**To:** pcarr@eckertseamans.com[pcarr@eckertseamans.com]; mcs@jaburgwilk.com[mcs@jaburgwilk.com]; dag@jaburgwilk.com[dag@jaburgwilk.com]; VRoy@eckertseamans.com[VRoy@eckertseamans.com]  
**From:** Ortiz, Kelly  
**Sent:** Mon 12/1/2014 2:25:33 PM  
**Importance:** Normal  
**Subject:** FTC Dkt#9361 - In the Matter of Jerk LLC - Prod 32

**You have received 1 secure file from kortiz@ftc.gov.**  
Use the secure link below to download.

Dear Counsel:

Please find the following attached documents:

- Expert Report of Brian Rowe
- Expert Report of Paul Resnick
- Expert Report of Mikołaj Jan Piskorski
- Materials reviewed by each expert
- Letter dated December 1, 2014 from Complaint Counsel to Respondents

Thank you,

Beatrice Burke

Paralegal

Western Region - San Francisco

U.S. Federal Trade Commission

ATTACHMENT A

Secure File Downloads:  
Available until: **05 December 2014**

Click link to download:

**Prod 032.zip**  
1,427,122.39 KB

You have received attachment link(s) within this email sent via the FTC Secure Mail system. To retrieve the attachment(s), please click on the link(s).

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**ATTACHMENT B**



United States of America  
FEDERAL TRADE COMMISSION  
WESTERN REGION

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December 1, 2014

Jerk, LLC  
c/o National Registered Agents, Inc.  
160 Greentree Drive, Suite 101  
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*Via Federal Express*

Jerk, LLC  
c/o Maria Crimi Speth  
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*Via Email: [mcs@jaburgwilk.com](mailto:mcs@jaburgwilk.com)*

John Fanning  
c/o Peter F. Carr, II, Esq.  
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*Via Email: [pcarr@eckertseamans.com](mailto:pcarr@eckertseamans.com)*

Re: *In the Matter of Jerk.com and John Fanning*, Dkt. 9361  
Notice of Production of Expert Report and Materials

Dear Jerk, LLC and Mr. Fanning:

Enclosed are the reports of our designated experts Brian Rowe, Paul Resnick, and Mikołaj Jan Piskorski. Pursuant to Commission Rule of Practice 3.31A and the May 28, 2014 Scheduling Order, we also enclose the materials reviewed by the experts in forming their opinions. We have not heard from you regarding whether you plan to hold expert depositions. In light of the upcoming holidays, and in the interest of making these experts reasonably available for deposition, we offer the following availability:

- Dr. Rowe is available to be deposed on 12/15/14, 12/16/14, or 12/17/14 in Washington, DC or by telephone conference;
- Dr. Resnick is available to be deposed on 12/11/14, 12/19/14, or 12/22/14 in Ann Arbor, MI or by telephone conference; and
- Dr. Piskorski is available to be deposed on 12/23/14, 12/27/14, or 12/28/14 in Denver, CO or by telephone conference.

I hope that the multiple dates and telephone options will allow for accommodation of all of our schedules. Please let me know if you plan to depose any of these experts.

Sincerely,

A handwritten signature in cursive script that reads "Sarah Schroeder".

Sarah Schroeder