

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

ORIGINAL



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

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

Complaint Counsel’s final exhibit list includes 18 sworn declarations from consumers who interacted with the Jerk.com website or purchased Jerk.com memberships. Complaint Counsel intend to call some, although not all, of these consumers to testify at the upcoming evidentiary hearing. Complaint Counsel produced all 18 declarations to Respondents nine months ago. Fanning has elected to not depose any of these consumers, and has not objected to their declarations, until now. Last week, Fanning lodged a sweeping motion *in limine* to exclude these consumers’ declarations from evidence.¹ Fanning “objects to *all* consumer declarations,” but fails to identify a single example of allegedly improper testimony.² He also moves to

¹ John Fanning’s Motion *in Limine* to Exclude Consumer Declarations (“Motion”), March 5, 2015, p. 1-2, n.2. Fanning’s failure to meet and confer with Complaint Counsel prior to filing this motion, as required by Paragraph 4 of the Scheduling Order, is an independent and sufficient basis to deny his motion.

² Motion p. 1 (emphasis added). Mr. Fanning claims that he did not cite specific examples of alleged inadmissible statements because the declarations are confidential. However, pursuant to the Court’s February 23, 2015 Order on Motions for *In Camera* Treatment, only consumer

preserve an unspecified objection to having these consumers present live testimony, even before such testimony has been offered.³ Because the consumers' declarations constitute reliable, material, and highly relevant evidence bearing on Respondents' violations of Section 5 of the FTC Act, Fanning's motion should be denied.

I. ARGUMENT

A. Legal Standard.

Motions *in limine* are disfavored in this Court, and for good reason. As the Court stated in the Scheduling Order, "the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence."⁴ In fact, motions *in limine* should only be used to "ensure evenhanded and expeditious management of trials by eliminating evidence that is clearly inadmissible." *In re Telebrands Corp.*, 2004 FTC LEXIS 270, at *5 (F.T.C. Apr. 26, 2004); *see also In re Rambus*, 2003 WL 21223850, at *1 (F.T.C. Apr. 21, 2003) (motions *in limine* are appropriate only in extreme circumstances where there will "eliminate plainly irrelevant evidence."). The moving party bears the burden on such motions and must "clearly articulate[] the evidence sought to be excluded [and] the reasons therefor." *In re Basic Research, LLC*, 2006 WL 159736, at *8 (F.T.C. Jan. 10, 2006). Motions should be denied if they are "too sweeping in scope" and fail to identify with "sufficient specificity" evidence that should be

names and other personally identifiable information are confidential. In fact, Complaint Counsel cite to consumer statements in this Opposition, under a good faith belief that the statements themselves do not violate the Court's Order. Moreover, Fanning could have filed his motion *in camera*. Either way, Fanning could have easily identified specific consumer testimony that he seeks to exclude.

³ Motion p. 2, n.2

⁴ May 28, 2014 Scheduling Order ¶ 9.

excluded. *See Weiss v. La Suisse, Societe d' Assurances sur la Vie*, 293 F. Supp. 2d 397, 407 (S.D.N.Y. 2003) (denying a motion *in limine* for being overly broad).

B. The Consumer Declarations Are Relevant And Material.

Rule 3.43(b) requires the admission of “[r]elevant, material, and reliable evidence.” 16 C.F.R. § 3.43(b). Evidence is material if it has “some logical connection with the facts of consequence or the issues.”⁵ 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 be without the evidence. 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) (citations omitted). The consumer declarations easily meet this standard.

The consumer declarations are relevant and material to consequential facts in this case. For example, many of the consumer declarations describe the Jerk.com website, including what it displayed and what representations it made to them:

- “I visited the website . . . The jerk.com profile contained a Facebook photo of me and displayed my first and last name.” (CX0010 ¶ 3);
- “When I visited jerk.com, I found a profile of me that had a photograph of my cousin and me that I posted to Facebook. . . . A true and correct copy of this profile is attached to this declaration.” (CX0028 ¶¶ 3-4; CX0029).
- “The profile displayed an old Facebook photo of me. Each time I refreshed the page, new questions would pop up on my profile, like ‘Do you think [consumer’s

⁵ Fanning confuses the materiality standard for evidentiary purposes with the materiality prong in an FTC deception case. Motion p. 3. Contrary to his assertion, each declaration does not need to discuss the materiality element of the claim in Count I to be admissible.

name] is a jerk,’ ‘Is [consumer’s name] a bad friend?’ . . . I looked around the website and there were photos of young people and children.” (CX0004 ¶¶ 3, 6);

- “I clicked on the ‘Remove Me’ tab . . . the following was displayed . . . Jerk is where you find out if someone is a jerk, is not a jerk, or is a saint in the eyes of others.” (CX0032 ¶ 7);
- “I looked at Jerk’s ‘About Us’ and ‘Remove Me’ pages, but these pretty much said that Jerk would not do anything about the profile. It also said that you would have to pay \$25 to remove the profile.” (CX0031 ¶ 5);
- “I read a statement on jerk.com that indicated I could remove information from my profile by joining jerk.com.” (CX00038 ¶ 4).

The Jerk.com website is the centerpiece of this case, and first-hand evidence about its content, appearance, and features is relevant and material. Indeed, consumers’ description of Respondents’ statements displayed on Jerk.com, as well as screenshots of the website, constitute, in addition to the FTC investigational captures of the site, the best evidence of the representations that Respondents conveyed to consumers. This evidence is especially important given Respondents’ refusal to produce screenshots or code for Jerk.com.⁶

In addition to showing that Jerk.com contained the statements alleged in the Complaint, the declarations support the allegation that Respondents populated Jerk.com profiles with photos taken from Facebook profiles. Numerous consumers testify that the photo on their Jerk profile had been posted as “private” on Facebook. For example, one consumer declaration states:

⁶ Declaration of Kelly Ortiz (“Ortiz Decl.”) ¶ 2. *See FTC v. Magazine Solutions*, 2009 WL 690613, at *2 (W.D. Pa., Mar. 16, 2009) (admitting consumer evidence because defendants did not keep complete records and the evidence offered by consumers could not be obtained elsewhere through reasonable efforts).

The photo used on my Jerk.com profile was clearly taken from my Facebook page even though my Facebook privacy settings were set so that my profile was only accessible to people I had accepted as friends. (CX0036 ¶ 4)

This testimony supports the allegation that Respondents populated Jerk.com profiles by taking consumers' personal images from their Facebook profiles.

The declarations also demonstrate materiality. Consumers spent considerable time and energy attempting to interact with Jerk.com, and also paid customer service or membership fees, because they perceived Jerk.com as an organic social network, and were concerned that others, including potential employers, would view Jerk.com that way too. (CX0001 ¶¶ 2-3; CX0004-001 ¶ 5; CX0005-001 ¶ 5; CX0006-001 ¶ 5-6; CX0007-001 ¶ 4; CX0011 ¶¶ 3, 17; CX0026-001-002 ¶ 6; CX0027-001 ¶ 6-7; CX0028-001-002 ¶¶ 3, 6, 8; CX0031-001-002 ¶ 5; CX0036 ¶¶ 3, 9; CX0037 ¶¶ 3, 7; CX0038-001 ¶ 4; CX0040-001 ¶ 6).

In addition, consumer declarants testified that they purchased Jerk.com memberships based on representations about getting benefits, and then did not receive the promised benefits. For example, one consumer's declaration states:

My impression from the membership description on jerk.com was that I would receive a password that would enable me to delete content on my profile . . . After I paid the fee, nothing changed . . . The membership was a complete waste. (CX0038 ¶ 4)

In the face of the obvious relevant and material nature of the consumers' declarations, Fanning's generalized assertions of irrelevancy and immateriality fail.

C. The Consumer Declarations Are Reliable.

In addition to being relevant and material, the consumer declarations are reliable because they are sworn under the penalty of perjury, based on personal knowledge, and made by independent third party consumers who have no incentive to fabricate their statements. The declarations are based on the consumer's personal knowledge and perceptions—for example, the

consumers recount visiting Jerk.com, describe what they saw on the website, and discuss their purchase of a Jerk membership. Indeed, the declarations state at the outset: “The following statement are within my personal knowledge.” Thus, Fanning’s conclusory contention that the declarations rely on “rank speculation” is baseless.

Because of their inherent reliability, courts routinely accept such consumer declarations as reliable in FTC cases, notwithstanding hearsay objections, especially where the opponent fails to specify any aspect of the declaration as untrue or unreliable. *See FTC v. Direct Benefits Group, LLC*, 2012 U.S. Dist. LEXIS 162696, at *4 (M.D. Fl. 2012) (admitting declarations because defendants did “not identify any aspect of the declarations as being untrue or unreliable”); *see also FTC v. Kuykendall*, 312 F.3d 1329, 1343 (10th Cir. 2002) (consumer declarations admissible at trial where they were made under oath and reasonable efforts could not have produced more probative evidence); *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 576 (7th Cir. 1989) (consumer affidavits admissible because they were made under oath and it would be unnecessarily cumbersome and expensive to bring consumers from across the country to testify).⁷

Any hearsay concerns are even less prominent here because the Commission’s Rules expressly permit the admission of hearsay evidence as long as it meets the relevance, reliability, and materiality factors. *See* 16 C.F.R. 3.43(b) (“Evidence that constitutes hearsay may be admitted”); *In re Polypore Int’l, Inc.*, 2010 WL 3053866, at *2 (F.T.C. July 28, 2010) (admitting

⁷ In fact, federal courts frequently admit consumer complaints under the residual hearsay rule because it is the most efficient method of delivering probative evidence to the court. *See FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 608 (9th Cir. 1993) (consumer complaint letters admissible under the residual hearsay rule); *FTC v. Magazine Solutions, LLC*, 2009 WL 690613, at *1-2 (W.D. Pa. Mar. 16, 2009) (same); *FTC v. Cyberspace.com, LLC*, 2002 WL 32060289, at *3, n.5 (W.D. Wash. July 10, 2002) (consumer e-mails and complaint letter admissible).

four affidavits into evidence because “it is long settled that hearsay evidence is not to be out of hand rejected or excluded by administrative tribunals”). In light of the Commission’s Rules and longstanding judicial practice of admitting similar consumer declarations, Fanning’s unspecified and unsupported contention that the declarations contain “unreliable hearsay” is unavailing.

D. Requiring Live Testimony From All Consumer Declarants Would Be Overly Burdensome And Inefficient.

Given the inherent reliability of their sworn declarations, ordering each consumer declarant to testify at the upcoming hearing in Washington, DC would be unnecessary and overly burdensome. The declarants are ordinary people who live all across the country. They include parents, business owners, and job seekers. They have already volunteered considerable time and effort in submitting their sworn declarations. Their narratives about their experiences with Jerk.com, although independent, are remarkably similar. Requiring them to travel to testify on similar experiences would be not only a significant disruption to their lives, but also an unnecessary use of time and resources that “would not necessarily result in testimony that is any more trustworthy than the complaints themselves.” *Cyberspace.com*, 2002 WL 32060289, at *3, n.5; *Figgie*, 994 F.2d at 608–09; *Amy Travel*, 875 F.2d at 576 (“it would be cumbersome and unnecessarily expensive to bring all consumers in for live testimony.”).

Any concern Fanning may raise about not being able to cross-examine all the declarants is muted by his declination to do so throughout the discovery. Fanning had ample notice of the consumer declarations, their status as evidence, and the declarants’ availability to be examined as part of the discovery process. Complaint Counsel produced the declarations to Respondents on June 3, 2014.⁸ The letter accompanying that production explained Complaint Counsel’s

⁸ Ortiz Decl. ¶ 3.

intention to use the declarations at trial:

Pursuant to Commission Rule of Practice § 3.43, Complaint Counsel intends to offer these statements as evidence during this proceeding. We are providing reasonable notice of our intent to designate these declarations as exhibits so that you have fair opportunity to question any declarant. Please contact me to arrange a deposition with any consumer witness.⁹

Fanning and Jerk had ample time and opportunity to depose the consumer declarants, but they declined to do so. They did not depose a single consumer declarant. They did not even appear (through counsel, or otherwise) at the one consumer declarant deposition noticed by Complaint Counsel, which made holding additional consumer depositions seem wasteful.¹⁰ Especially under these circumstances, admitting of the declarations into the record is appropriate and fair. See *Kuykendall*, 312 F.3d at 1343 (upholding admission of consumer declarations and noting the party received notice of the declarations and had the opportunity to subpoena the individual consumers); *Amy Travel Service, Inc.*, 875 F.2d at 576 (“Defendants were also given proper notice of the affidavits—they even had the chance to question the affiants themselves, but they chose not to avail themselves of the opportunities.”).

Particularly in an administrative hearing, where the Court is capable of assigning appropriate weight to evidence, the consumers’ testimony should not be excluded simply because it is in the form of a sworn declaration. The more efficient and less burdensome approach would be for the Court to hear live testimony from the subset of these 18 consumer declarations who have agreed to testify at trial, and then decide what weight to allocate to the remaining consumers’ declarations.

⁹ Ortiz Decl. ¶ 3, Att. A (June 3, 2014 letter from Complaint Counsel to Peter Carr and Maria Speth).

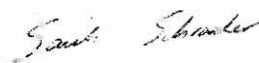
¹⁰ Ortiz Decl ¶ 4.

II. CONCLUSION

The consumer declarations constitute relevant, material, and reliable testimony, and Fanning has fallen far short of his burden to show otherwise. They should not be excluded from the record. Instead, Complaint Counsel respectfully request the Court to assign appropriate weight to the declarations after hearing live testimony from a subset of the consumer declarants.

Dated: March 13, 2015

Respectfully submitted,



Sarah Schroeder
Yan Fang
Boris Yankilovich
Kenneth H. Abbe
Federal Trade Commission
Western Region – San Francisco
901 Market Street, Suite 570
San Francisco, CA 94103
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 Consumer Declarations 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:

Peter F. Carr, II
Eckert, Seamans, Cherin & Mellott, LLC
Two International Place, 16th Floor
Boston, MA 02110
Email: pcarr@eckertseamans.com

Counsel who have entered an appearance for Jerk, LLC:

David Duncan
David Russcol
Zalkind Duncan & Bernstein LLP
65A Atlantic Avenue
Boston, MA 02110
Email: dduncan@zalkindlaw.com;
drusscol@zalkindlaw.com

Maria Crimi Speth
Jaburg & Wilk, P.C.
3200 N. Central Avenue, Suite 2000
Phoenix, AZ 85012
Email: mcs@jaburgwilk.com

Alexandria B. Lynn
48 Dartmouth Street
Watertown, MA 02472
Email: ab.lynn@outlook.com

Dated: March 13, 2014



Kelly Ortiz
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103
Phone: 415-848-5100
kortiz@ftc.gov

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

**DECLARATION OF KELLY ORTIZ
IN SUPPORT OF COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT JOHN
FANNING’S MOTION *IN LIMINE* TO EXCLUDE CONSUMER DECLARATIONS**

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. Complaint Counsel’s First Set of Requests for Documents to Respondents Jerk, LLC and John Fanning requests copies of Jerk.com and Jerk.org, including printouts, screenshots, source code, log files, and archived versions. To date Respondents have not produced any documents responsive to these requests.

3. On June 3, 2014, Complaint Counsel produced declarations now marked as CX0001-CX00059 to Respondents. Attachment A to this declaration is a true and correct copy of the June 3, 2014 letter from Complaint Counsel to Respondents’ counsel, Peter Carr and Maria Speth.

4. On November 3, 2014, Complaint Counsel deposed a consumer declarant in this matter. Respondents' counsel did not make an appearance for this deposition.

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



Kelly Ortiz

ATTACHMENT A



United States of America
FEDERAL TRADE COMMISSION
Western Region

Sarah Schroeder
Attorney

(415) 848-5186
sschroeder@ftc.gov

Western Region-San Francisco
901 Market Street, Suite 570
San Francisco, California 94103

June 3, 2014

Peter F. Carr, II, Esq.
Eckert Seamans
Two International Place, 16th Floor
Boston, MA 02110

Maria Crimi Speth, Esq.
Jaburg & Wilk, P.C.
3200 N. Central Ave., Suite 2000
Phoenix, AZ 85012

Re: In the Matter of Jerk, LLC; FTC Docket No. 9361

Dear Peter and Maria:

Attached please find Complaint Counsel's second document production containing sworn declarations from consumers and other knowledgeable individuals. Pursuant to Commission Rule of Practice § 3.43, Complaint Counsel intends to offer these statements as evidence during this proceeding. We are providing reasonable notice of our intent to designate these declarations as exhibits so that you have fair opportunity to question any declarant. Please contact me to arrange a deposition with any consumer witness.

Please note that we have marked declarations that contain sensitive personal information *confidential*. According to Judge Chappell's April 8, 2014 Protective Order Governing Discovery Material, "Confidential material shall be disclosed only to:

- (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding;
- (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter;
- (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent;

Peter Carr, II, Esq. and Maria Speth, Esq.
June 3, 2014
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(d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and

(e) any witness or deponent who may have authored or received the information in question.”

We look forward to talking with you tomorrow about a discovery plan.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sarah Schroeder".

Sarah Schroeder