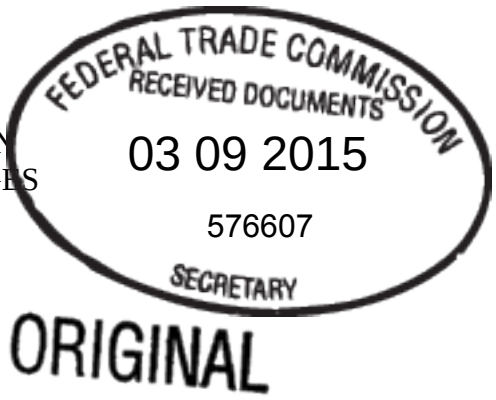
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES



ORIGINAL

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

RESPONDENT JOHN FANNING'S OBJECTION TO AND MOTION TO STRIKE COMPLAINT COUNSEL'S WITNESS LIST

Respondent John Fanning hereby objects to and moves to strike Complaint Counsel's final proposed witness list. The witness list proposed by Complaint Counsel violates the terms and spirit of this Court's Scheduling Order, places an undue burden on Mr. Fanning and this Court, and includes a variety of proposed witnesses irrelevant to this action. In further objection, Mr. Fanning states as follows:

1. Complaint Counsel has identified 56 potential witnesses to testify in its case-in-chief. Paragraph 15 of the Additional Provisions of this Court's Scheduling Order provides, "The final witness lists shall represent counsels' good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief." Complaint Counsel cannot reasonably expect to call 56 witnesses to testify at trial. Complaint Counsel should not be permitted to wield is regulatory power in a manner intended to frustrate the trial process. The trial will last for more than two weeks, contrary to the time restrictions placed on these

adjudicatory proceedings, if all of the witnesses identified are called and permitted to testify, thereby virtually running out the clock on any defense Mr. Fanning may seek to advance. Counsel for Mr. Fanning on multiple occasions, without success to date, has suggested to Complaint Counsel a dialogue aimed at identifying the actual issues to be tried in an effort to streamline the trial for the benefit of the parties, counsel, and the Court. Consequently, this Court must strike the witness list and order Complaint Counsel to refile a final witness list that accurately reflects the issues to be tried.

2. For the reasons set forth in Mr. Fanning's motion *in limine* concerning consumer declarations on file, all 21 consumer witnesses identified in the final witness list must be stricken and barred from testifying at trial. The proposed testimony of any consumers concerning the "experience with jerk.com" is wholly-irrelevant to the issue of Section 5 deception liability. Complaint Counsel's intent to draw upon the emotions of this Court is improper. This is not a chance for consumers to have their day in court, despite what Complaint Counsel may have promised to these proposed witnesses. Further, whereas the consumers presumably will testify consistent with their sworn declarations prepared in consultation with Complaint Counsel, the consumers will offer nothing but rank hearsay upon hearsay, speculation, and innuendo lacking all indicia of reliability or personal knowledge. The record will be clogged with inadmissible evidence that is probative of nothing. The trial will be bogged down with this Court having to make rulings on multiple objections on a question by question basis. There exists no legitimate purpose for the consumer witness testimony, and must be stricken in advance.

3. Witnesses identified to provide testimony about actual or potential investments and investors in Jerk, LLC must be stricken and barred at trial. These include Joseph Abrams, Joseph Yosi Amram, Larry Cox, Highland Capital, and Intellius. The solicitation of investors for

or investment in Jerk, LLC or jerk.com is irrelevant and not material to the limited issues to be tried in the claim for deception under Section 5 of the Act, namely (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). Apparently, Complaint Counsel seeks to elicit testimony concerning investing activity to demonstrate Mr. Fanning's alleged "control" over Jerk, LLC for the purposes of establishing his personal liability for the claimed Section 5 violation by Jerk, LLC. However, solicitation of investments for a social media start-up and the execution of investment instruments do not establish control over the jerk.com site. The stringent test for individual liability requires a conclusive showing that Mr. Fanning "participated directly in the practices or acts or had authority to control them." FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 573 (7th Cir. 1989). The focus of this case must be control over website content and statements made on jerk.com, and not control over Jerk, LLC as an entity. Complaint Counsel knows that jerk.com essentially was operated and controlled by Louis Lardass of Internet Domains, which owned the jerk.com domain, and foreign website developers who were reportedly supported by various interns, college students, and other independent contractors. Directly to the point, the mere fact that Mr. Fanning may have pitched investment in Jerk, LLC as part of his advisory work on behalf of NetCapital.com, LLC fails to establish that he directed or controlled the Romanian developers whom Complaint Counsel maintains were managing the content and other technical aspects of the jerk.com project. Complaint Counsel seeks this Court to draw the illogical inference that Mr. Fanning controlled Jerk, LLC and therefore Mr. Fanning must have controlled content on jerk.com. Nothing in the law permits Complaint Counsel merely to impute the content of the jerk.com site to Mr. Fanning. If Complaint Counsel is permitted to explore the

expanded theory of personal liability, each and every enforcement action by the FTC against a company necessarily will trigger individual liability, because companies can only act through individuals. Every officer or employee of any private equity or venture capital firm that invests or seeks investment in a technology start-up would suffer possible individual liability merely because the firm manages a portfolio company that becomes a subject of an FTC investigation. Complaint Counsel's argument turns otherwise exceptional, limited circumstances of individual liability into the rule governing all FTC enforcement actions. This is bad public policy, and cannot possibly be consistent with the expectations of Congress when it granted the FTC its regulatory mandate.

4. Complaint Counsel's proposed expert witnesses Mikolaj Piskorski, Paul Resnick, and Brian Rowe (who is actually a full-time FTC employee) must be stricken and barred from testifying for the reasons set forth in Mr. Fanning's motion *in limine* to strike the expert testimony and reports on file. In addition, Mr. Rowe's testimony must be stricken to the extent that he seeks to give opinions on proper or improper content on jerk.com, which implicates internet speech and clear First Amendment Rights. Mr. Rowe serves as the mouthpiece for Complaint Counsel, who is clearly offended by or uncomfortable with the content of individual profiles appearing on the jerk.com site, and the alleged practice of posting publicly available information obtained from Facebook. Such government intrusion into freedom of expression has no place in our civilized society. Complaint Counsel fails to provide any basis for the FTC's authority within its regulatory mandate to determine proper content. Complaint Counsel has no right to regulate, control, or halt the exchange of ideas and information at the core of First Amendment freedoms. See, e.g., Kleindienst v. Mandel, 408 U.S. 753, 762-753 (1972) (First Amendment includes the right to "receive information and ideas" and freedom of speech

"necessarily protects the right to receive."); Linmark Assocs., Inc. v. Louisiana, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government."). Complaint Counsel cannot stand as the arbiter of proper conversation, and cannot prevent the flow of information out of speculative fear of public harm. See Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 96 (1977) (ordinance banning "for sale" signs on residential property stricken as unlawful where Court found that the town "acted to prevent its residents from obtaining certain information" and "sought to restrict the free flow of data" out of fear that homeowners would leave town).

5. Complaint Counsel must be barred from eliciting testimony from the designated Facebook, Inc. witness concerning the allegation that Jerk, LLC and/or Mr. Fanning violated Facebook's terms of use. Complaint Counsel seeks to boot-strap the alleged violation of Facebook terms and conditions as forming the basis of a Section 5 action, as alleged in the Complaint. (Complaint, ¶¶ 10-11). Complaint Counsel also relies primarily upon the allegations contained in Facebook's cease and desist letter to Jerk, LLC as the basis for a violation. Any such claim or theory constitutes an unlawful expansion of the FTC's deception authority. The irony of Complaint Counsel's position concerning Facebook is shocking. The FTC charged Facebook with deception by misrepresenting to consumers that information posted in individual profiles was private, when Facebook actually made available to the public user names, gender, profile photos, and lists of friends. Complaint Counsel cannot halt the right to publish information that Facebook placed in the public domain, and curtail the First Amendment privilege to expose the falsity of Facebook's representations concerning privacy. As Justice Brandeis once forcefully opined:

> If there be time to expose through discussion the falsehood and falacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.
>
> Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

6. Although difficult to discern from the disclosures, Mr. Fanning anticipates based on prior filings that Complaint Counsel intends to elicit the following categories of testimony from various witnesses, which are irrelevant to a Section 5 deception claim as a matter of law:

> (i) Statements purportedly made by and between Mr. Fanning, interns, web designers, or other individuals to potential investors or other financial contacts within the technology investment community by email or otherwise, including statements contained in an alleged Executive Summary and other materials undeniably circulated for investment or internal promotional purposes, and not conveyed to or involving consumers;
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> (ii) Statements purportedly made by and between Mr. Fanning to interns, web designers, programmers, or other individuals working on the jerk.com project, and not conveyed to or involving consumers;
>
> (iii) Observations made by or the understandings, beliefs, or impressions of interns, programmers, web designers, and other consultants working on the project about the scope, development, and purpose of the site, and not conveyed to or involving consumers; and,
>
> (iv) Statements made by and between legal counsel to Jerk, LLC to Complaint Counsel, third-parties, law enforcement, or other attorneys in response to discovery demands, cease and desist demands, or other legal proceedings.

Such testimony must be barred a trial. In addition to constituting rank multi-level hearsay that is not admissible, none of the above purported evidence involves communications directed to any consumer. Consequently, Section 5 is not triggered. Permitting Complaint Counsel to establish deception liability based on alleged internal communications or communications involving non-consumers would turn the FTC's stated policy on deception on its head, and create an entirely new theory of FTC regulatory authority aimed at statements that never reach the public domain. Similarly, no such evidence is admissible to prove motive or

intent, where Complaint Counsel acknowledges that a respondent's intent is wholly-irrelevant in assessing Section 5 liability. Complaint Counsel's sole purpose of seeking to place this irrelevant and inadmissible information in the trial record is to portray Mr. Fanning in a false negative light. Complaint Counsel should not be allowed to avoid the merits by piling on layers of unduly prejudicial and immaterial information. Allegations and innuendo do not substitute for evidence and facts.

6. Mr. Fanning reserves all additional objections, and all rights to seek to bar testimony at the time of trial.

CONCLUSION

For the foregoing reasons, Respondent John Fanning requests this Court to grant his motion and to bar witness testimony at trial.

Respectfully submitted,

JOHN FANNING,

By his attorneys,

/s/ Peter F. Carr, II

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Dated: March 9, 2015

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 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
600 Pennsylvania Ave., N.W., Room H-159
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Email: secretary@ftc.gov

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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One electronic copy via email to Counsel for Jerk, LLC:

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

Dated: March 9, 2015

Notice of Electronic Service for Public Filings

I hereby certify that on March 09, 2015, I filed via hand a paper original and electronic copy of the foregoing Respondent John Fanning's Objection to and Motion to Strike Complaint Counsel's Witness List, 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 09, 2015, I filed via E-Service of the foregoing Respondent John Fanning's Objection to and Motion to Strike Complaint Counsel's Witness List, with:

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I hereby certify that on March 09, 2015, I filed via other means, as provided in 4.4(b) of the foregoing Respondent John Fanning's Objection to and Motion to Strike Complaint Counsel's Witness List, with:

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