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

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 MOTION *IN LIMINE*
TO EXCLUDE COMPLAINT COUNSEL'S EXPERT WITNESSES

Respondent John Fanning hereby moves this Court *in limine* to exclude all three of Complaint Counsel's expert witnesses from testifying at trial, and to strike the expert witness reports as trial exhibits.[1] The so-called opinions of the experts offered by Complaint Counsel far exceed the proper scope of both proper expert testimony under the governing rules, and admissible evidence pursuant to 16 CFR §3.43(b). In further support of barring the experts, Mr. Fanning states as follows:

1. Complaint Counsel has designated three (3) experts to testify at trial in this matter: Mikolaj Piskorski, Paul Resnick, and Brian Rowe. In summary, according to the reports submitted, Complaint Counsel offers the experts to provide the following analysis and opinions:

a. Mr. Piskorski opines that "a great majority of jerk.com users believed that the profiles were created and populated by other users."

[1] Mr. Fanning requests oral argument on his motion, and reserves the right to supplement his arguments in support of exclusion of the experts.

b. Mr. Resnick concludes that “the rate of manual profile generation by visitors to the site could not have produced the volume of profiles that the site appears to have.”

c. Mr. Rowe estimates the total number of profiles appearing on the jerk.com site in November 2012.

None of these opinions or conclusions is admissible for a number of reasons.

2. When considering the admissibility of expert testimony, the trial court must act as "gatekeeper" and decide whether evidence will assist the trier of fact in understanding the evidence in order to determine a fact in issue. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 588 (1993). Under the well-established test, a party seeking to admit expert testimony must lay a proper foundation either by showing that the expert’s underlying theory is generally accepted within the relevant scientific community, or by showing that the theory is reliable or valid through other objective means. An expert's opinion should be excluded if the proponent of the testimony fails to show that it is reliable or otherwise based upon an acceptable method of proof. The trial judge has a significant function as gatekeeper to ensure not only that an expert is qualified, but also that his or her opinions will be useful in understanding the evidence. Where the "factual basis, data, principles, methods or. .. application" of methods underlying an expert's proposed testimony "are called sufficiently into question…the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of [the relevant] discipline." Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 149 (1999) (internal quotations and citations omitted). The objective of the court’s gatekeeper requirement "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Id. at 152. The issue "is not only

how objectively reliable the evidence is, but also the legitimacy of the process by which it is generated." United States v. Hines, 55 F.Supp.2d 62, 65 (D. Mass. 1999). The purpose of this requirement is to ensure that the expert has not developed his opinions solely for the purpose of testifying, and that the expert analysis is based upon principles recognized and accepted by practitioners in the expert's particular field.

3. Complaint Counsel only brings claims for deception under Section 5 of the Act. The essential elements of 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). Whether a statement is a "claim" constituting a "representation" is a question of fact. See FTC v. QT, Inc., 448 F.Supp.2d 908, 957-958 (N.D.Ill. 2006), citing National Bakers Services, Inc. v. FTC, 329 F.2d 365, 367 (7th Cir.1964) (meaning of an advertisement, the claims or net impressions communicated to reasonable consumers, is fundamentally a question of fact); Kraft, 970 F.2d at 317 ("[T]he determination of whether an ad has a tendency to deceive is an impressionistic one more closely akin to a finding of fact than a conclusion of law."). To the extent that Complaint Counsel seeks to admit the opinions to support the deception claim, the experts improperly invade the province of the fact finder, this tribunal, to determine facts to which the law will then be applied. On this basis alone, the opinions should be stricken.

4. Moreover, the heart of Complaint Counsel's deception claim is that Respondents represented that content on Jerk, including names, photographs, and other content, was created by Jerk.com users and reflected those users' views of the profiled individuals. This is a conclusion or characterization, not a fact. Complaint Counsel relies solely on statements

contained on the Jerk homepage in the "About Us" and "Welcome to Jerk" tabs to support its position that Respondents made a "claim" to trigger deception liability. Complaint Counsel does not correctly cite the language, and no such representation appears on the cite. Rather, Complaint Counsel cites to the terms of use and limitation of liability associated with use of the site, which contain no such representations as alleged. (CX0273). Complaint Counsel also ignores statements on the Jerk homepage such as the paragraph titled "Online Content" that expressly states, "Opinions, advice, statements, offers, or other information or content made available through jerk.com are those of their respective authors and not of Jerk LLC and should not necessarily be relied upon," and goes on to advise that "Jerk LLC does not guarantee the accuracy, completeness, or usefulness of any information on jerk.com and neither adopts nor endorses nor is responsible for the accuracy or reliability of any opinion, advice or statement made." (CX0273-001). The website makes crystal clear that jerk.com provides a forum and platform for posting information "through jerk.com" from various sources. This is consistent with another prominent statement contained on the website: *"No one's profile is ever removed, because Jerk is based on searching free open Internet searching databases and it's not possible to remove things from the Internet."* Nonetheless, once again, the fact finder, not an expert, must determine whether the statement constitutes a claim for liability under the Act. The language on the site is the language on the site. This Court must decide whether the language meets the standards of deception liability under the regulations as interpreted and narrowed by reviewing courts. No expert is required, or permitted.

5. Complaint Counsel's presentation of expert testimony far exceeds the legal bounds of a "claim" properly regulated by the FTC. Complaint Counsel and the experts attempt to re-write the scope of FTC regulatory authority. This alone requires preclusion. The Court in

FTC v. Direct Marketing Concepts, Inc., 569 F.Supp.2d 285, 298-299 (D.Mass. 2008) outlined the rubric that is supposed to govern, as follows:

> Generally, claims can be divided into two categories-establishment claims and non-establishment claims. Establishment claims are those that contain "statements regarding the amount of support the advertiser has for the product claim." Policy Statement on Advertising Substantiation. They are in effect statements "that scientific tests establish that a product works." Removatron, 884 F.2d at 1492 n. 3. Common examples include statements such as "tests prove," "doctors recommend," or "studies show." Policy Statement on Advertising Substantiation; see also Thompson Med. Co. v. Fed. Trade Comm'n, 791 F.2d 189, 194 (D.C.Cir. 1986); Spalding Sports Worldwide, Inc. v. Wilson Sporting Goods Co., 198 F.Supp.2d 59, 67 (D.Mass. 2002); Gillette Co. v. Norelco Consumer Prods. Co., 946 F.Supp. 115, 121 (D.Mass. 1996) ("An establishment claim is one that says, in substance, that 'tests or studies prove' a certain fact."). In the case of establishment claims, the advertiser must be able to demonstrate that it has at least the advertised level of substantiation.
>
> In contrast, for non-establishment claims, what constitutes sufficient substantiation may depend on multiple factors, such as the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable. Removatron, 884 F.2d at 1492 n. 3; QT, 448 F.Supp.2d at 959 (citing Policy Statement Regarding Advertising Substantiation). For health-related efficacy and safety claims, the FTC has commonly insisted on "competent and reliable scientific evidence." See, e.g., Removatron, 884 F.2d at 1498 (reviewing Commission Order that required claims to be supported by "competent and reliable scientific evidence"); Sterling Drug, Inc. v. Fed. Trade Comm'n, 741 F.2d 1146, 1156-57 (9th Cir. 1984) (same).

As a matter of law, Complaint Counsel has no legal basis to provide expert testimony intended to expand deception jurisdiction. See Kraft, Inc. v. FTC, 970 F.2d 311, 322 (7th Cir. 1992) (FTC authority is limited to (1) express claims; (2) implied claims where there is evidence that the seller intended to make the claim; and (3) claims that significantly involve health, safety, or other areas with which reasonable consumers would be concerned).

6. Mr. Piskorski provides his opinion on what some unknown person may have believed or understood. "An opinion based solely on speculation is without probative value."

Goffredo v.Mercedes-Benz Truck Co. Inc., 402 Mass. 97, 103 (1988). Apart from constituting rank speculation, Mr. Piskorski cannot scientifically conclude, pegged to an established standard or tested theory, that a hypothetical person or people could have been or was likely to be deceived by language contained on the jerk.com home page. The opinion effectively ignores the differences existing in all human beings. The concept is so ludicrous that it requires scant attention. The reasonable person test is an objective standard to be decided by a fact finder based upon life experiences, common knowledge, and common sense. There exists no basis for an expert opinion regarding an individual person's state of mind.

7. Mr. Resnick's conclusions about site content generation is likewise inadmissible for the same reasons. They are pure guesswork. Further, whether profiles were created manually by visitors or through some other means is neither material nor relevant to whether the statements contained on the jerk.com homepage trigger deception liability.

8. Mr. Rowe's convoluted statistical analysis is based on speculation, and not a tested methodology mandated by Daubert and its progeny. A statistical analysis is not needed, when the number of profiles merely could be counted to determine the number of posts, similar to tracking hits or visits to a website. Purported opinions about the statistical likelihood of the total number of profiles on the jerk.com site at some point in time in November 2012 also do not bear on the issues to be determined by the fact finder in this Section 5 case. The number of profiles, whether actual or approximate as assumed by Mr. Rowe, is irrelevant. Indeed, under the Act, it makes no difference whether there was one deceptive statement that was published once or a thousand times, so long as there is an intent to publish and actual publication of the statement to the public. The heart of a "representation" giving rise to Section 5 liability is a "claim" communicated to the consuming public. See Cliffdale Assocs., 103 F.T.C. at 176. See

also POM Wonderful, at *20 (actionable representation is one that conveys a particular interpretation to a reasonable consumer); In re Novartis Corp., 127 F.T.C at 689 (liability premised on respondent's knowledge that the deceptive claim was being communicated to the public). Just as Complaint Counsel argues that intent to deceive is not relevant, the number of profiles is not relevant to the claim.

9. Although the expert reports may be admitted as hearsay, they are nonetheless barred by 16 CFR §3.43(b), which further requires hearsay evidence to be relevant, material, and bear satisfactory indicia of reliability so that its use is fair. For the reasons stated above, the reports do not pass muster and must be excluded.

CONCLUSION

For the foregoing reasons, Respondent John Fanning requests this Court to exclude Complaint Counsel's expert witnesses and expert reports.

Respectfully submitted,

JOHN FANNING,

By his attorneys,

/s/ 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:

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One electronic copy to the Office of the Administrative Law Judge:

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

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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, 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

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