

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 OR LIMIT TESTIMONY BY DEPOSITION**

Respondent John Fanning hereby moves this Court *in limine* to prohibit Complaint Counsel from offering any testimony by deposition that does not meet the threshold standards of reliability and materiality. Although deposition transcripts in general are admissible despite constituting rank hearsay, the entire transcripts should not automatically be admitted in their entirety as substantive evidence at trial. The governing standards of 16 CFR §3.43(b) require hearsay evidence to be both reliable and material in order to be admissible. Much of the testimony in the deposition transcripts offered by Complaint Counsel as proposed trial exhibits is based on other inadmissible evidence, including other hearsay statements, information derived from various internet sources, or documents that are not independently admissible. All such testimony must be barred. Further, Complaint Counsel during questioning at deposition elicited inadmissible opinions, feelings, or impressions of witnesses. Similarly, any testimony predicated on speculation, surmise, or conjecture as opposed to personal knowledge of a witness also must

be barred. Finally, for the reasons set forth in Mr. Fanning's Motion *In Limine* to Exclude Consumer Declarations, testimony that exceeds a claim for deception under Section 5 of the Act and any defenses thereto is neither relevant nor material, and must be excluded.

Mr. Fanning objects to the whole-scale admission of deposition transcripts, and requests an order directing Complaint Counsel to designate specific portions of testimony sought to be admitted at trial so that Mr. Fanning may object to, and this Court may rule on, specific questions and answers to ensure proper admissibility under law, with Mr. Fanning having the right to counter-designate. Although the rules of evidence may be relaxed, they should not be ignored.

### **CONCLUSION**

For the foregoing reasons, Respondent John Fanning requests this Court to exclude Complaint Counsel from offering inadmissible testimony by deposition.

Respectfully submitted,

**JOHN FANNING,**

By his attorneys,

/s/ Peter F. Carr, II

Peter F. Carr, II

ECKERT, SEAMANS, CHERIN & MELLOTT, LLC

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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  
600 Pennsylvania Ave., N.W., Room H-159  
Washington, DC 20580  
Email: [secretary@ftc.gov](mailto:secretary@ftc.gov)

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

The Honorable D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Avenue, N.E., Room H-110  
Washington, DC 20580  
Email: [ojl@ftc.gov](mailto:ojl@ftc.gov)

One electronic copy to the Office of the Counsel for the Federal Trade Commission:

Sarah Schroeder  
Federal Trade Commission  
901 Market Street, Suite 670  
San Francisco, CA 94103  
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One electronic copy via email to Counsel for Jerk, LLC:

Alexandria B. Lynn  
48 Dartmouth Street  
Watertown, MA 02472  
Email: [ab.lynn@outlook.com](mailto:ab.lynn@outlook.com)

/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  
600 Pennsylvania Ave., NW  
Suite 110  
Washington, DC, 20580

Donald Clark  
600 Pennsylvania Ave., NW  
Suite 172  
Washington, DC, 20580

**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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