

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL

COMMISSIONERS: Edith Ramirez, Chairwoman
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright
Terrell McSweeney



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, }
 }
Respondents. }

Docket No. 9361

RESPONDENT JERK, LLC'S OPPOSITION TO COMPLAINT COUNSEL'S
MOTION FOR SUMMARY DECISION

Respondent Jerk, LLC (hereinafter "Jerk") hereby opposes Complaint Counsel's Motion for Summary Decision. Jerk's right to free speech is guaranteed by the First Amendment to the United States Constitution. The Commission's statutory authority is focused on false or misleading commercial speech, but the claims or statements for which Complaint Counsel seeks to penalize Jerk are non-commercial, true and not misleading, and/or not material to consumers. As such, this speech is constitutionally protected and beyond the Commission's authority to regulate. Even accepting all the evidence proffered by Complaint Counsel, summary decision should enter in favor of Jerk, at least on Count I, for failure to make out a violation of Section

5(a) of the Federal Trade Commission Act that could be constitutionally punished. At a minimum, Complaint Counsel's Motion for Summary Decision should be denied.¹

STATEMENT REGARDING MATERIAL FACTS

For purposes of the Motion for Summary Decision, Jerk does not dispute the facts (as distinct from analysis or legal conclusions) set forth in Complaint Counsel's Statement of Material Facts (CCSMF). As to Count I, the only allegations of purportedly false or misleading statements by Jerk are in CCSMF ¶¶ 39-50. Jerk submits that, as further described below, CCSMF ¶ 39 ("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.") is not supported by the evidence proffered by Complaint Counsel. The statements quoted or described in CCSMF ¶¶ 41 and 43-48 are neither false nor misleading. The statements quoted or described in CCSMF ¶¶ 49-50 were not made to consumers and therefore cannot form the basis of liability.

In addition, as further described below, any false or misleading statements by Jerk were not material to consumers. The allegation in CCSMF ¶ 52 ("Respondents' representation that content on Jerk.com was created by Jerk.com users and reflected those users' views of the profiled individuals was important to consumers and affected consumers' conduct regarding Jerk.com.") is not supported by the evidence proffered by Complaint Counsel. The essential linchpin for Complaint Counsel's theory of liability is the unsupported idea that consumers considered the source of the profiles on jerk.com material to their actions. Consumers were upset because the name of the website was jerk.com; it was immaterial to them whether their

¹ In addition, Jerk incorporates and adopts by reference the arguments made by Respondent John Fanning in opposition to Complaint Counsel's Motion for Summary Decision, to the extent that they are applicable to both Respondents.

information was posted by an associate or, as Complaint Counsel claims, taken from Facebook. Complaint Counsel identifies no evidence making a connection of materiality; each document it cites focuses on annoyance based on the name of the website. See CX0036, ¶ 9 (citing worry about reputational harm “if people search me and the search results show a Jerk.com entry”); CX0011, ¶ 17 (“If people search me and the search results show a jerk.com entry, it really affects my business.”); CX0037, ¶ 7 (“[S]omeone could search my name and see this result pop up, causing harm to my personal and professional reputation.”). No consumer identified by Complaint Counsel changed his or her behavior because of the purported misstatements in CCSMF ¶¶ 39-50. And the consumer harms described in CCSMF ¶¶ 158-167 are immaterial to this proceeding unless they are causally linked to violations of the Federal Trade Commission Act.

ARGUMENT

I. THE COMMISSION MAY NOT ABRIDGE JERK’S FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH BY PENALIZING SPEECH THAT IS TRUTHFUL OR NON-COMMERCIAL.

It cannot be denied that Jerk’s right to free speech is protected by the First Amendment to the United States Constitution. The Supreme Court has stated specifically: “First Amendment protection extends to corporations.” *Citizens United v. Federal Election Comm’n*, 130 S. Ct. 876, 899 (2010). Speech is not deprived of protection or considered commercial merely because a corporate entity is the speaker. “Corporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.” *Pacific Gas & Elec. Co. v. Public Util. Comm’n of Cal.*, 475 U.S. 1, 8 (1986), quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

In Count I, the Complaint asserts liability for purported misstatements by Jerk, seeking to cast pure speech as violations of the Federal Trade Commission Act. The cloak of First Amendment protection sets a high constitutional standard for the Commission to permissibly exercise its authority in addition to the requirements of its enabling statute. Any content-based restriction on non-commercial speech must survive strict scrutiny, i.e., that “it must be narrowly tailored to promote a compelling Government interest.” *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). And the actions of the Commission are also constrained as to commercial speech: “Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.” *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985). As relevant here, the FTC Act prohibits “deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(1). There is no governmental interest at stake in penalizing speech that is non-deceptive or non-commercial under this provision, and so liability for such protected speech would be foreclosed under either strict scrutiny or the *Zauderer* standard.

II. THE TERMS AND CONDITIONS OF THE JERK.COM WEBSITE CANNOT FORM THE BASIS OF LIABILITY UNDER THE FIRST AMENDMENT BECAUSE THEY CONSTITUTE TRUTHFUL, NON-COMMERCIAL SPEECH, AND UNDER THE STATUTE BECAUSE THEY CONTAIN NO REPRESENTATIONS AND ARE NOT DECEPTIVE.

Complaint Counsel seeks to impose liability on Jerk for statements made in its terms and conditions or “About Us” page (hereinafter “T&C”), cited and excerpted in CCSMF ¶ 43. The T&C were, by their own terms, a legally binding contract between Jerk and its users. See CX0273 at 1 (“This is a legal agreement (“Agreement”) between you and Jerk LLC.”). It would raise serious concerns of separation of powers and federalism, in addition to freedom of speech,

if the Commission were to effectively regulate the practice of law by restricting the words attorneys could use in crafting contracts. See *American Bar Ass'n v. FTC*, 430 F. 3d 457, 470-72 (D.C. Cir. 2005) (rejecting “the FTC’s apparent decision that Congress, after centuries of not doing so, has suddenly decided to regulate the practice of law”). Such action would be especially inappropriate in this case because the T&C contain no factual representations at all, only the allocation of rights and liabilities between Jerk and its users. Even treating the T&C as commercial speech would be problematic because, rather than being “expression related solely to the economic interests of the speaker and its audience,” *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of NY*, 447 U.S. 557, 561 (1980), the T&C have independent legal significance in that they directly impact the rights of Jerk and its users.

Section 4 of the T&C,² which Complaint Counsel seems to think contains a factual assertion about the source of information on jerk.com, in fact is a disclaimer and an assertion of Jerk’s rights under Federal law. Complaint Counsel selectively quotes only the first portion of the first sentence, leaving out the statement that third-party content on jerk.com “should not be relied upon.” Under the Communications Decency Act, Jerk had the right to disclaim liability for information provided by other sources, including its users. See 47 U.S.C. 230(c)(1). That is exactly what Jerk did in Section 4. Complaint Counsel would take out of context the clause “content made available through jerk.com [is that] of [its] respective authors and not of Jerk

² Section 4 of the T&C, entitled “Online Content,” is reproduced here in full:

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. Such authors are solely responsible for the accuracy of such content. 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. Under no circumstances will Jerk LLC be responsible for any loss or damage resulting from anyone's reliance on information or other content posted on jerk.com. (CX0273 at 1)

LLC” and interpret it unreasonably as a statement that no content on jerk.com was actually authored by Jerk, LLC. This would mean that the Jerk logo, home page, and all other website content was created by some unidentified third party, which no consumer or reasonable person would believe. Instead, Section 4 unambiguously asserts, consistent with Jerk’s rights under the Communications Decency Act, that third-party content on Jerk is the responsibility of the third-parties who provided it. It would defy common sense and public policy if Jerk’s assertion and notification of its statutory rights were found to constitute a misleading trade practice.

To the extent that there is any representation of fact in Section 4, it is true. The evidence proffered by Complaint Counsel indicates that content on jerk.com came from a variety of sources, including Facebook, Intelius, other web sources, and Jerk users themselves. See CCSMF ¶¶ 27, 30, 57-60. Jerk was not the “author” of any of this content. For instance, if a Jerk user created a profile, the author of that profile would be the Jerk user. A Facebook user’s name and public profile picture would be created or provided by that user. Putting to one side the wholly unreasonable interpretation of Section 4 adopted by Complaint Counsel, Section 4 is neither false nor misleading because it accurately conveys that Jerk accepts no responsibility for content not created by Jerk.

The rest of the T&C also constitutes contract language and not any factual representation. Complaint Counsel identifies unremarkable disclaimers in the T&C as somehow insidious and misleading. See CX0273, Section 2 (“You agree that: You are solely responsible for the content or information you publish or display (hereinafter, ‘post’) on jerk.com.”); Section 5 (“By posting information on jerk.com, you understand and agree that the material will not be removed even at your request. You shall remain solely responsible for the content of your postings on jerk.com.”). To the extent that these provisions convey any facts, they state truthfully that users could publish

content to jerk.com and that Jerk disclaimed any liability for that content. See CCSMF ¶¶ 26-28, 30. Complaint Counsel asserts that the T&C implicitly represented that all profiles on jerk.com were created by jerk.com users. Nowhere is that stated in the T&C, and that would be an unreasonable inference to draw from the T&C.³ Liability cannot be created out of thin air by inventing a representation Jerk never made and then asserting that it was false.

As truthful, non-commercial speech, the T&C cannot be constitutionally proscribed. There is no governmental interest in penalizing Jerk for publishing the T&C, nor are the broad remedies sought narrowly tailored to any such interest. Moreover, because the T&C contained no representations at all, and certainly no deceptive representations, the T&C fall outside the scope of the FTC Act.

III. JERK'S STATEMENTS ABOUT USERS' ABILITIES TO POST CONTENT WERE TRUE AND NOT DECEPTIVE, AND THUS ALSO PROTECTED BY THE FIRST AMENDMENT AND NOT COVERED BY THE FTC ACT.

A similar analysis applies to Jerk's representations that users had the ability to post content on jerk.com. Complaint Counsel cites several such statements or aspects of jerk.com, which, though constituting commercial speech, were entirely truthful and in no way deceptive: "The Jerk.com homepage featured profiles with comments and votes," CCSMF ¶ 41; "The 'Remove Me!' section on Jerk.com has stated, 'Jerk is where you find out if someone is a jerk, is not a jerk, or is a saint in the eyes of others,'" CCSMF ¶ 44; "Jerk.com's 'Post a Jerk' section stated: 'Fill out the form below to find or create a profile on jerk. Include a picture if you can and as much other information as possible,'" CCSMF ¶ 45; "Jerk.com's Twitter account has stated, 'Find out what your "friends" are saying about you behind your back to the rest of the world!'",

³ Of course, few users of any website pay any attention, let alone close attention, to the terms and conditions, which are commonly viewed as boilerplate legalese. That commonly understood fact makes it even less reasonable to draw the inferences Complaint Counsel does from the T&C.

CCSMF ¶ 46. The jerk.com homepage did have profiles with comments and votes, because users did have the capability to post profiles, vote people as “jerks” or “not jerks,” and post comments on profiles. See CCSMF ¶¶ 26-28, 30. If a person had a profile on jerk.com and a friend had commented on that profile, that person could, indeed, see what their friends were saying about them. If, instead, nobody had voted on an individual’s profile, the profile would state that the person was “not a Jerk.” See CCSMF ¶¶ 14, 29, 66. None of this is false or misleading in the least;⁴ in fact, Complaint Counsel lists as indisputably true that “Jerk.com was a website where users could vote someone a ‘Jerk’ or ‘not a Jerk,’” as well as that users could submit comments and personal information about profiled individuals. CCSMF ¶¶ 14, 26-28. The FTC Act does not cover non-deceptive speech, and even if it did, the Commission’s ability to restrict it would be curtailed by the First Amendment. See *Zauderer*, 471 U.S. at 638.

IV. ANY FALSE OR MISLEADING STATEMENTS BY JERK WERE NOT MATERIAL TO CONSUMERS.

Once the wheat is separated from the chaff, Complaint Counsel is left with only one purported factual representation to consumers that any evidence suggests could be false or misleading: that “millions of people... use Jerk for important updates for business, dating, and more.”⁵ CCSMF ¶ 42. This was not material in the least to consumers, who knew and cared

⁴ Similarly, the representations in the Wikipedia page that Jerk representatives allegedly drafted (CCSMF ¶ 48) are true, and Complaint Counsel identifies no part of them that is false or misleading.

⁵ Complaint Counsel asserts that Jerk intended to convey that “Jerk.com was an organic social network created by Jerk.com users,” CCSMF ¶¶ 47, but identifies no evidence demonstrating how this purported representation was, in fact, conveyed. The representation that jerk.com reflected users’ views of people profiled was true to the extent that jerk.com users submitted votes or comments about them; otherwise, the profile would state that the person was “not a jerk” and have no further information. See CCSMF ¶¶ 26-28, 30, 66 (“Approximately 99 percent of Jerk.com profiles did not contain user comments or a vote of Jerk/Not a Jerk.”); CX0036, ¶ 3 (“The profile had no other information about me or my family... no one had voted.”).

only that they had profiles on a website called jerk.com. See CX0036, ¶ 9 (citing worry about reputational harm “if people search me and the search results show a Jerk.com entry”); CX0011, ¶ 17 (“If people search me and the search results show a jerk.com entry, it really affects my business.”); CX0037, ¶ 7 (“[S]omeone could search my name and see this result pop up, causing harm to my personal and professional reputation.”).

Complaint Counsel makes no argument that the “millions of people... use Jerk” statement is independently material, and such an argument would be unavailing. While the Commission may “apply, within reason, a presumption of materiality,” such a presumption is unwarranted here. *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992). Rather than the type of factual representation on which consumers could be expected to rely, this statement was mere puffery that stated, in general terms, that consumers should consider Jerk. “In the FTC context, we have recognized puffery in advertising to be ‘claims [which] are either vague or highly subjective.’” *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F. 2d 242, 246 (9th Cir. 1990), quoting *Sterling Drug, Inc. v. Federal Trade Commission*, 741 F.2d 1146, 1150 (9th Cir. 1984), cert. denied, 470 U.S. 1084 (1985). The brief Twitter post merely illustrates possible uses for Jerk’s service. It does not give any specific information about how any set of people use Jerk’s service, or for how long. Even if the vague reference to “millions of people” is considered factual, rather than hyperbole, no reasonable consumer would have relied upon it, and Complaint Counsel has identified nobody who did. Such aspirational language, standing alone, would not induce any change in behavior by consumers, and none of the consumers who submitted affidavits claim to have been influenced in any decision by this statement. In fact, Complaint Counsel’s own version of events indicates that such exaggerated rhetoric had no effect on consumers, because Jerk had “few users,” CCSMF ¶ 17, “[f]ew users frequented or

interacted with Jerk.com,” CCSMF ¶ 61, “[t]he vast majority of users visited Jerk.com only once,” CCSMF ¶ 63, and “[u]sers consistently spent less than a minute on Jerk.com,” CCSMF ¶ 64.

On Count I, Complaint Counsel identifies the sole representation underpinning its theory of liability as “the representation that the content on Jerk.com, including the names, photographs, and other content displayed in the millions of the profile pages on the site, was created by Jerk.com users and reflected those users’ views of the profiled individuals.” Motion for Summary Decision at 18. This is also the only representation pleaded in the Complaint as warranting relief on Count I. Complaint, ¶¶ 15-16. As explained above, Jerk never made this representation. Complaint Counsel’s distortions of truthful and non-misleading speech do not suffice to create liability, and doing so would be inconsistent with the First Amendment.

Complaint Counsel argues that this purported representation could be presumed material because it was made explicitly or was made implicitly but intentionally. *See Kraft, Inc.*, 970 F.2d at 322. No explicit representation is contained in the evidence, so that theory fails. Even if the Commission somehow discerns an implicit representation, the presumption of materiality does not apply because there is no evidence Jerk intended to make it to consumers. Complaint Counsel identifies evidence suggesting that investors or others acting on Jerk’s behalf made a related representation to investors and other non-consumers through channels totally separate from the statements on jerk.com or Twitters that were directed at consumers. *See* CCSMF ¶¶ 49-50. A claim not made to consumers could not possibly be material to those consumers, and falls outside the Commission’s regulatory jurisdiction. *Cf. Kraft, Inc., supra* at 322-23. It is additionally outside the allegations in the Complaint, and therefore not a permissible basis for relief. *See* Complaint, ¶ 8 (“Respondents have disseminated or have caused to be disseminated

statements to consumers...” (emphasis supplied)), ¶ 15 (alleging that purported misrepresentation was made “[t]hrough the means described in Paragraph 8”).

This alleged representation was not in fact material to consumers, and any presumption of materiality would be unreasonable if applied, because Complaint Counsel’s own evidence shows that Jerk’s name, not the source of the profiles, was the source of consumers’ concerns. See CX0036, ¶ 9; CX0011, ¶ 17; CX0037, ¶ 7. A brief hypothetical illustrates this point. Suppose that substantially identical profiles to those on jerk.com were shown instead on a website called WonderfulPeople.com. The website would pose the question, “Is [Individual Profiled] Wonderful?” and ask users to vote whether a person profiled was a Saint, a Wonderful Person, or Not a Very Wonderful Person. Most profiles, having no votes, would report that the person was or might be a Wonderful Person. The consumers identified by Complaint Counsel would have had no reason to care whether such pages showed up in Google results for their names. They would not be concerned about harm to their reputations or businesses. And they certainly would not care who put the profile there or how many people used WonderfulPeople on a regular basis. Only the name of the website, which is speech protected by the First Amendment, differentiates the two situations.

Complaint Counsel cites evidence that some consumers believed that people they knew had created profiles about them. If so, these consumers must have believed that someone they knew put in their name and photo, but added no other information and did not vote on whether or not they were “jerks.” See CX0036, ¶ 3 (“The profile had no other information about me or my family... no one had voted.”). In no case does any consumer aver that this belief, even if mistaken, caused them to change their behavior towards Jerk. They may have been upset, as explained above, because they did not want to be associated with a site called jerk.com. They

also may have been concerned that their personal information was available on the Internet or had been available through Facebook, but the Complaint does not allege that this fact in any way violated the Federal Trade Commission Act. In short, consumers may have had concerns about what was on Jerk's website, but that content was speech protected by the First Amendment and by the Communications Decency Act. Any harm they suffered was not traceable to any deceptive representations or unlawful conduct by Jerk. Liability based on the facts alleged by Complaint Counsel would be unwarranted by the scope of the statute and inconsistent with the Constitution and public policy.

WHEREFORE, Jerk respectfully requests that this Honorable Commission deny Complaint Counsel's Motion for Summary Decision and instead enter summary decision in Jerk's favor on Count I.

Respectfully submitted,

JERK, LLC,
By its attorneys,



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Dated: January 5, 2015

CERTIFICATE OF SERVICE

I, David A. Russcol, hereby certify that I have, on January 5, 2015, caused a copy of the foregoing document to be served by email on Complaint Counsel and counsel for Respondent John Fanning, and that I have filed true and correct copies of thereof electronically with the Secretary of the Commission and the Office of the Chief Administrative Law Judge. In addition, I have this day caused an original and twelve copies to be delivered by Federal Express to Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, N.W., Room H-172, Washington, D.C., 20580.



David A. Russcol