

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

**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.**

**DOCKET NO. 9361**

**PUBLIC**

**OPINION OF THE COMMISSION**

By Commissioner Terrell McSweeney, for the Commission.

In this case we address allegations of deception by Respondents Jerk, LLC (“Jerk”) and John Fanning (“Fanning” or “Mr. Fanning”) in their operation of the Jerk.com website. Jerk.com was a social media website that invited users to create profiles of other individuals and rate those profiled as a “jerk” or “not a jerk.” Hundreds of consumers filed complaints about Jerk.com with the Commission and other law enforcement agencies.

In 2014, the Commission issued a two-count administrative complaint alleging that Respondents had engaged in deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act. In Count I, Complaint Counsel allege that Respondents falsely represented that content on Jerk.com was generated by users, when in fact it was almost entirely “scraped” from Facebook. In Count II, Complaint Counsel allege that Respondents falsely represented that users would receive additional benefits, including the ability to dispute information posted to the site by purchasing a membership, when in fact consumers received nothing in return. Before us is Complaint Counsel’s Motion for Summary Decision.<sup>1</sup> Complaint

---

<sup>1</sup> We use the following abbreviations for purposes of this opinion:

Comp.: Complaint

CCMSD: Complaint Counsel’s Motion for Summary Decision

CCSMF: Complaint Counsel’s Statement of Material Facts Not in Dispute

JOppB: Respondent Jerk LLC’s Opposition to Complaint Counsel’s Motion for Summary Decision

Counsel contend that Respondents made false or misleading and material representations. Complaint Counsel also argue that Mr. Fanning is individually liable because he participated in the deceptive conduct and controlled the acts and practices at issue. Both Respondents oppose the Motion.

For the reasons explained below, we grant Complaint Counsel’s motion. We conclude that there is no genuine issue of material fact concerning Jerk’s liability for the alleged misrepresentations, and we grant summary decision on both counts against Jerk. We also conclude that there are no genuine issues of material fact as to Mr. Fanning’s personal involvement in, and control over, Jerk’s unlawful conduct, and we grant summary decision on both counts against Mr. Fanning. We issue an order that, *inter alia*, prohibits Respondents – in connection with the marketing, promoting, or offering for sale of any good or service – from misrepresenting the source of any content on a website, including any personal information, or the benefits of joining any service.

## I. THE COMPLAINT AND PROCEDURAL CHRONOLOGY

On April 2, 2014, the Commission issued an administrative complaint against Jerk, a Delaware limited liability company doing business as Jerk.com, and John Fanning, who, the Complaint alleges, “formulated, directed, controlled, or had authority to control the acts and practices of Jerk, LLC.” Comp. ¶¶ 1-2. The Complaint alleges that Respondents operated a social networking site from 2009 until 2013 that invited users to create individual profiles using the site’s “Post a Jerk” feature. Comp. ¶ 4. The site earned revenue by selling memberships for \$30, charging consumers a \$25 customer service fee to contact the website, and placing third-party advertisements on Jerk.com. Comp. ¶ 5.

According to the Complaint, Respondents disseminated statements to consumers representing that profiles on the website reflected the views of Jerk users. This led consumers to believe that a Jerk.com user had created their profiles, when in fact it was the Respondents themselves who created the profiles by “scraping” information from Facebook. Comp. ¶¶ 8-10. The Complaint alleges that Jerk’s website contained between 73.4 and 81.6 million unique profiles, including several million profiles with pictures of children. Comp. ¶¶ 4, 7.

The Complaint also alleges that Respondents told consumers if they purchased a \$30 subscription to Jerk.com they would obtain “additional paid premium features,” including the ability to dispute information posted on Jerk.com. Numerous consumers believed that a membership would allow them to alter or delete their Jerk profile and to dispute any false

---

FOppB:	Respondent John Fanning’s Opposition to Complaint Counsel’s Motion for Summary Decision
FAff:	Respondent Fanning’s Affidavit
CCRJ:	Complaint Counsel’s Reply to Respondent Jerk, LLC’s Opposition
CCRF:	Complaint Counsel’s Reply to Respondent Fanning’s Opposition
FS:	Respondent Fanning’s Surreply
CX:	Complaint Counsel’s Exhibit

information it contained. Comp. ¶ 12. However, in many instances, consumers allegedly received nothing in return. *Id.*

The Complaint further alleges that Respondents made it difficult for consumers to register complaints. Comp. ¶ 13. Respondents charged consumers \$25 just to e-mail the Jerk customer service department, and ignored requests funneled through Jerk’s registered agent and web host asking that consumer photos and other profile information be removed. *Id.*

There are two counts in the Complaint. Count I alleges that Respondents falsely represented to consumers that content on the Jerk.com website was user-generated, when in fact it was almost entirely scraped from Facebook. Count II alleges that Respondents falsely represented that by purchasing a membership users would receive additional benefits, including the ability to dispute information posted to the site, but in fact received nothing in return. Accordingly, the Complaint alleges that “Respondents’ practices . . . constitute deceptive acts or practices in . . . violation of Section 5(a) of the Federal Trade Commission Act.” Comp. ¶ 19.

On May 19, 2014, Respondents filed their answers, disputing liability. Following discovery, Complaint Counsel moved for summary decision on September 29, 2014, contending that there remained no genuine dispute about any material fact. Both Respondents filed opposition briefs responding to Complaint Counsel’s motion, and Complaint Counsel filed reply briefs. Mr. Fanning also filed a Surreply.<sup>2</sup>

## II. STANDARD FOR SUMMARY DECISION

We review Complaint Counsel’s motion for summary decision pursuant to Rule 3.24 of our Rules of Practice, the provisions of which “are virtually identical to the provisions of Federal Rule of Civil Procedure 56, governing summary judgment in the federal courts.” *Polygram Holding, Inc.*, 2002 WL 31433923, at \*1 (FTC Feb. 26, 2002).

A party moving for summary decision must show that “there is no genuine dispute as to any material fact,” and that it is “entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party “bears the initial responsibility of . . . identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotations omitted); 16 C.F.R. 3.24 (a)(1) (requiring moving party to provide “a separate and concise statement of the material facts as to which [it] contends there is no genuine issue for trial”). “Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact

---

<sup>2</sup> Respondents do not dispute that the Commission has jurisdiction over the conduct challenged in the Complaint. Section 5 of the Federal Trade Commission Act grants the Commission authority to prevent “unfair or deceptive acts or practices in or affecting commerce” by “persons, partnerships, or corporations.” 15 U.S.C. § 45(a)(1)-(2). Jerk, a limited liability company, Jerk Ans. ¶ 1, is a partnership or corporation over which, and Mr. Fanning is a person over whom, the FTC has jurisdiction. In addition, Respondents admit “[t]he acts and practices of respondents . . . have been in or affecting commerce, as ‘commerce’ is defined in Section 4 of the Federal Trade Commission Act.” Jerk Ans. ¶ 3; Fanning Ans. ¶ 3.

that precludes summary judgment.” *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

The “party opposing the motion may not rest upon the mere allegations or denials of his or her pleading” and must instead “set forth specific facts showing that there is a genuine issue of material fact for trial.” 16 C.F.R. §3.24 (a)(3); *Celotex*, 477 U.S. at 323; *see, e.g., FTC v. Stefanichik*, 559 F.3d 924, 929 (9th Cir. 2009) (“A non-movant’s bald assertions or a mere scintilla of evidence in his favor are both insufficient to withstand summary judgment.”); *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978) (explaining that a party opposing summary judgment cannot rest on generalized assertions, but must set forth “concrete particulars” showing the need for trial). Otherwise, “the policy favoring efficient resolution of disputes, which is the cornerstone of the summary judgment procedure, would be completely undermined.” *Research Automation*, 585 F.2d at 33.

In accord with this policy, Commission Rules require a party opposing summary decision to identify “those material facts as to which the opposing party contends there exists a genuine issue for trial.” 16 C.F.R. §3.24 (a)(2). The response must set forth “specific facts showing that there is a genuine issue of material fact for trial.” 16 C.F.R. §3.24 (a)(3). “If no such response is filed, summary decision, if appropriate, shall be rendered.” *Id.* Further, under our Rules, any “[a]ffidavits shall set forth such facts as would be admissible in evidence and . . . show affirmatively that the affiant is competent to testify to the matters stated therein.” *Id.* Conclusory, speculative and self-serving affidavits are insufficient to create a factual dispute. *See, e.g., Valley Forge Ins. Co. v. Health Care Mgmt. Ptnrs, Ltd*, 616 F.3d 1086, 1095 n.2 (10th Cir. 2010) (“conclusory and self-serving affidavit is insufficient to create a factual dispute”) (internal quotation omitted); *FTC v. MacGregor*, 360 F. App’x 891, 893 (9th Cir. 2009) (finding respondents’ affidavits, proffered without evidentiary support, “conclusory and thus fail[ing] to create a genuine issue of material fact”); *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993) (“When the nonmoving party relies only on its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact.”); *FTC v. Medicor LLC*, 217 F. Supp. 2d 1048, 1053 (C.D. Cal. 2002) (“Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment.”).

When the “evidence [favoring the non-moving party] is merely colorable, or is not significantly probative, summary judgment may be granted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted). However, at the summary judgment stage, we are not to make credibility determinations or weigh conflicting evidence, and must view the inferences “drawn from the underlying facts . . . in the light most favorable to the party opposing the motion.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

### **III. LEGAL STANDARD FOR DECEPTION**

Section 5 of the FTC Act makes unlawful “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. §45. This case involves only alleged deception; there are no allegations of unfair acts or practices.

“An act or practice is deceptive if (1) there is a representation, omission, or practice, (2) that is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material.” *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1063 (C.D. Calif. 2012) (citing *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994)), *appeal docketed*, No. 14-56528 (9th Cir. Sept. 17, 2014); *accord FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1266 (S. D. Fla. 2007) (citing, e.g., *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003)); *FTC Policy Statement on Deception*, appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984). Thus, “[t]he FTC may establish corporate liability under section 5 with evidence that a corporation made material representations or omissions likely to mislead a reasonable consumer.” *FTC v. World Media Brokers*, 415 F.3d 758, 763 (7th Cir. 2005).

In determining whether a representation is false or misleading, we consider the overall “net impression” of the representation or act. *See, e.g., POM Wonderful LLC v. FTC*, 2015 WL 394093, at \*8, \*18 (D.C. Cir. Jan. 30, 2015); *Commerce Planet, Inc.*, 878 F. Supp. 2d at 1063 (A court should “consider the overall, common sense ‘net impression’ of the representation or act as a whole to determine whether it is misleading”) (citing *FTC v. Gill*, 265 F.3d 944, 956 (9th Cir. 2001) and *Stefanchik*, 559 F.3d at 928). A representation is considered material if it “involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product.” *E.g., FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 960 (N.D. Ill. 2006) (citing *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992)), *aff’d*, 512 F.3d 858 (7th Cir. 2008); *Commerce Planet*, 878 F. Supp. 2d at 1063 (citing *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006)). Complaint Counsel “need not present proof of subjective reliance by each victim.” *Transnet Wireless*, 506 F. Supp. 2d at 1266.

“To hold an individual liable for a corporation’s deceptive practices, [Complaint Counsel] must first prove an underlying corporate violation of section 5 of the FTC Act.” *FTC v. World Media Brokers*, 415 F.3d 758, 763 (7th Cir. 2005). “Upon establishing corporate liability, the FTC is obligated to demonstrate that the individual defendants either participated directly in the deceptive acts or practices or had authority to control them” in order to hold the individual personally liable for the unlawful conduct. *Id.* at 764.

#### **IV. JERK’S LIABILITY**

In analyzing Jerk’s liability for deception, we focus on three questions: (1) did Jerk make the representations alleged in the Complaint; (2) if so, were the representations false or misleading; and (3) even if false or misleading, were they material? We conclude that Complaint Counsel have established an affirmative answer to all three questions. We find Respondents failed to raise any genuine issue of disputed material fact and therefore summary decision is appropriate.

## A. Count I: Misrepresentation about the Source of Jerk.com’s Content

### 1. The Representation

The first question we address is whether Complaint Counsel have presented sufficient evidence that Jerk made the representation the Complaint alleges: namely, whether Jerk represented “expressly or by implication, that content on Jerk, including names, photographs, and other content, was created by Jerk users and reflected those users’ views of the profiled individuals.” Comp. ¶ 15. Complaint Counsel contend that “Respondents expressly conveyed this claim through statements made on Jerk.com and Twitter . . . .” CCMSD 18. They emphasize, in particular, the following statement that appears in Section 4 of the “About Us” portion of the website entitled “Online Content”: “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. . . .” CCMSD 4; CCSMF ¶ 43. They also identify additional statements on the Jerk.com website that allegedly send the same message, CCMSD 18; CCSMF ¶¶ 42-46, and they identify extrinsic evidence that allegedly shows that Respondents intended to convey that message to consumers and that consumers so interpreted it, CCMSD 5-9; CCSMF ¶¶ 47-51. Respondents dispute Complaint Counsel’s interpretation of the statements on the Jerk.com website. Thus, the key question we must resolve is whether the statements on the Jerk.com website would convey to consumers that the content on the website, including the profiles, was generated by the website’s users.

Our framework for analyzing this issue is well-established. We deem the statements to convey the representation alleged if consumers, acting reasonably under the circumstances, would so interpret them. *See Deception Statement*, 103 F.T.C. at 176. The primary evidence we consider in making that determination is the statements themselves, and what we seek to determine is the “net impression” they convey. *See, e.g., id.* at 176, 178; *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 958 (N.D. Ill. 2006), *aff’d*, 512 F.3d 858 (7th Cir. 2008). Where the statements convey a representation that is “reasonably clear,” extrinsic evidence of how consumers actually interpreted the statements is not required. *See, e.g., Kraft, Inc.*, 970 F.2d at 319. Further, although evidence of intent to make a particular representation is not required to establish liability under Section 5 (*see, e.g., Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 363 n.5 (D.C. Cir. 1977)), evidence that the respondent intended to make the alleged representation can help demonstrate that the alleged representation was in fact conveyed to consumers. *See, e.g., Novartis Corp.*, 127 F.T.C. at 683. And, as Respondent Fanning correctly acknowledges (FOppB 9), our authority extends to implied as well as express claims. *See, e.g., Kraft, Inc.* 970 F.2d at 322.

In accordance with this framework, our analysis initially focuses on the statements themselves. Complaint Counsel highlight the following statements that appeared on the Jerk.com website,<sup>3</sup> and urge us to find that these statements, in conjunction with a statement Jerk

---

<sup>3</sup> *See* CCSMF ¶ 40, *citing, e.g.,* CX0047; CX0048; CX0258 ¶ 16; CX0259; CX0272; CX0273; CX0274; CX0275.

posted on Twitter,<sup>4</sup> convey the message to consumers that the content of Jerk.com was user-generated:

- “Opinions, advice, statements, offers, or other information or content made available through jerk.com are those of their respective authors and not that of Jerk LLC. . .” which was set out in Section 4, entitled “Online Content,” on the “About Us” webpage. *See* CCSMF ¶ 43.<sup>5</sup>
- “You shall remain solely responsible for the content of your postings on jerk.com,” which was set out in Section 5 entitled “Removal of Information,” on the “About Us” webpage. *See id.*
- “You agree that: You are solely responsible for the content or information you publish or display (hereinafter, ‘post’) on jerk.com” which was set out in Section 2 of the “About Us” portion of the website. *See id.*
- “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,” which appeared on the “Post a Jerk” section of the website. *See* CCSMF ¶ 45.
- “Want to join the millions of people who already use Jerk for important updates for business, dating and more,” which appeared on the “Welcome” page of the website. *See* CCSMF ¶ 42.
- “Jerk is where you find out if someone is a jerk, is not a jerk, or is a saint in the eyes of others,” which appeared on the “Remove Me” page of the website. *See* CCSMF ¶ 44.

*See* CCMSD 4-5.

---

<sup>4</sup> Jerk made the following statement on Twitter: “Find out what your ‘friends’ are saying about you behind your back to the rest of the world!” CCSMF ¶ 46.

<sup>5</sup> Section 4 states, in full:

#### 4. Online Content

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.

Respondents challenge Complaint Counsel’s interpretation. With respect to the first statement, from Section 4 of the “About Us” page, Jerk says that it is not a factual assertion about the source of information on Jerk.com, but rather a disclaimer, which Jerk was entitled to make under the Communications Decency Act. JOppB 5-6. Further, Jerk contends that if the statement contains any representation of fact, that representation is true because “[t]he 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” and “Section 4 . . . accurately conveys that Jerk accepts no responsibility for content not created by Jerk.” JOppB 6. Likewise, Jerk argues that Sections 2 and 5 of the “About Us” page constitute contract “terms and conditions,” not factual representations, and, to the extent they convey any facts, the statements are truthful. *Id.*

Jerk argues that the statements in the “Post a Jerk” and “Remove Me” sections were true. It contends that the “Welcome” page statement – “[M]illions of people already use Jerk for important updates for business, dating and more” – is mere puffery and was not material because consumers would not have relied on it. JOppB 7-9.

Mr. Fanning, who addressed only the first statement, similarly argues that it was a legal disclaimer. He maintains that this statement could not embody a cognizable claim under Section 5 of the FTC Act because it was not “an advertisement intended to lure users to the Jerk.com site.” FOppB 9. Additionally, he contends that claims interpretation is a question of fact. *Id.* at 8.

Having considered the parties’ respective arguments and examined the statements at issue, we conclude that neither the language in Section 4 nor that language in combination with the other statements Complaint Counsel identify constitutes an *express* representation that the content on Jerk.com was created by Jerk users and reflected their views of the profiled individuals.

On the other hand, our facial analysis of the Section 4 statement, in conjunction with the various other statements on the website, does lead us to conclude that Jerk’s statements constitute an *implied* representation that the content on the website, including names, photographs, and other content, was created by Jerk users and reflected those users’ views of the profiled individuals. Thus, a consumer clicking on the “Welcome to Jerk” tab would see:

Welcome to Jerk. Looking for the latest scoop on a world filled with Jerks?  
Want to join millions of people who already use Jerk for important updates for  
business, dating, and more? Don’t worry we have room for one more!

The reference to “millions of people who already use Jerk” introduces the website as a vibrant source of user participation and social interaction. The Welcome page then goes on to say:



Subscribers on Jerk . . . receive free benefits including:

. . .

4. Enter comments and reviews for people you interact with.
5. Help others avoid the wrong people.
6. Praise those who help you and move good people closer to sainthood!

CX0048-035. All of these statements in our view convey the essential message that Jerk.com is based on content generated by its users.

That message is further underscored by the “Post a Jerk” feature which invited consumers to post profiles of other individuals to the site. It 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, *citing* CX0048-031.

A consumer clicking on the “About Us” tab would see still other statements that also give the impression that the content was generated by website’s users. Section 4’s language, stating that “[o]pinions, advice, statements . . . or other information or content made available” on the website is from “their respective authors and not that of Jerk LLC,” is particularly telling. CX0048-78. Section 2, entitled “Online Conduct,” and Section 5, entitled “Removal of Information,” refer only to information posted by users. *Id.* A consumer who went further and clicked on the “Remove Me” tab would find a similar message – that users generate Jerk’s content. As it 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.” CX0048-032.

The impression conveyed by these statements is that the content on Jerk.com was created and posted by users and reflected their views. Both the basic “Welcome” and “About Us” screens – central to the website’s self-description – speak in terms of user-posted content, and the latter states that “content” posted on the website is “not” that “of Jerk LLC.” Other key screens yield the same impression. The “Post-a-Jerk” screen – describing the website’s central function – again focuses on user-generated postings. The removal screens also reference only user-generated material and suggest that the postings reflect the views of other users. Each of these screens speaks only of user-posted profiles and user-generated content. Respondents have not identified countervailing statements indicating that Jerk posted the profiles and content.<sup>6</sup>

---

<sup>6</sup> The two statements Mr. Fanning highlights, *see* FS 3, do not change the net impression. The statement 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,” further suggests that Jerk.com’s content is user-generated and not placed on the site by Jerk. And the statement that “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,” suggests nothing regarding *who* posted the Internet-sourced content to Jerk.com. The net impression remains that the content on Jerk.com, including the profiles, was user-generated.

Our interpretation is bolstered by the substantial extrinsic evidence presented by Complaint Counsel that Respondents *intended* to convey the message that the content on the Jerk.com site was user-generated, and that consumers actually *believed* that their profiles were posted by other users. Evidence shows that Jerk staff prepared a Wikipedia entry at Mr. Fanning’s direction describing Jerk.com as a user-generated network.<sup>7</sup> The evidence shows that Jerk represented to investors that Jerk.com was a user-generated website.<sup>8</sup> There is also evidence that Jerk’s counsel represented to the FTC, state officials and Facebook that content on Jerk.com was user-generated.<sup>9</sup> All this evidence manifests Jerk’s intention to produce the impression that the Jerk.com profiles were user-generated. While these representations were not conveyed directly to *consumers*, as Jerk correctly notes, they are nevertheless relevant to the message Jerk intended to convey to consumers. Evidence of that intent is relevant to our consideration of whether the statements on Jerk’s website actually conveyed the representation alleged. *See, e.g., Telebrands Corp.*, 140 F.T.C. 278, 304 (2005) (concluding that “evidence that respondents intended to convey the challenged claims” provided further support for the conclusion that advertisements made the alleged claims); *Novartis Corp.*, 127 F.T.C. at 683 (“evidence of intent to make a claim may support a finding that the claims were indeed made”).

Our interpretation is also supported by extrinsic evidence showing that consumers believed someone they knew had created their Jerk.com profiles. *See* CCSMF ¶ 51. One consumer in her sworn declaration stated, “Initially, I was worried that someone had created the Jerk.com profile against me. I was mortified and embarrassed that my name and the photo of me with my children were on this website.” CX0036-001 ¶ 3. Another stated:

---

<sup>7</sup> *See* CCSMF ¶ 48, *citing, e.g.,* CX0670 (e-mail from Fanning: “I figured this is a good time to finish the Wikipedia page for jerk.com . . . . The first Anti Social Network.”); CX0636-001 (“Jerk.com is an online social networking and reputation management service which attempts to determine whether its users are good (denoted as Saints) or bad people (denoted as Jerks) based on the opinions of those around them. Each user has his own profile which consists of a picture, brief biographical information, personality quiz, and reviews from other Jerk users.”) (Wikipedia links omitted); CX0642-002.

<sup>8</sup> *See* CCSMF ¶ 49, *citing, e.g.,* CX0112-001 (e-mail from Fanning to investor: “jerk.com will provide a framework for uploading and posting ratings, reviews, feedback, photos, and data on an individual basis. Like Wikipedia this content will be grown organically from the users themselves and reflect the view of the people who have personal, first-hand knowledge of the jerk.com individual who is profiled.”); CX0117-002-003 (e-mail from Fanning to investor: “Jerk.Com – Company Summary . . . [Jerk.com] offers a framework for posting praise and disputes, computing ratings, and gathering feedback and comments; the system provides for users to include photos and personal information.”); CX0046-047 (presentation on NetCapital’s website: “Jerk com provides consumer reputation management . . . Designed to offer Wikipedia-like information on doing business and for social interactions on the web, the content is growing organically from the users themselves and reflect the view of the people who have personal first hand knowledge of the profiled individual.”).

<sup>9</sup> CCSMF ¶ 50, *citing, e.g.,* CX0291-001 (representing to the Commission in its Petition to Quash, “Profiles are submitted to Jerk.com by users by choosing the ‘post a jerk’ option.”); CX0528-001; CX0529-001; CX0531-001 (letters to the offices of the attorneys general of Missouri, Connecticut and New York: “Jerk, LLC operates the forum, but the content is provided by users.”) CX-0107-003 (letter from Jerk’s counsel to Facebook: “You claim jerk.com uses automated means to collect Facebook user data. Again, jerk.com users – not Jerk LLC – post content to jerk.com.”).

When I visited jerk.com, I saw a profile with my full name and a photograph of me as a child. I immediately thought that someone who didn't like me put me on there. The website bragged about success stories of posting and rating 'jerks,' and these stories were like ads encouraging people to post and rate more people. I was alarmed. I thought that someone was messing with me.

CX0037-001 ¶ 3. This extrinsic evidence, though not required for us to determine that Respondents have made the alleged representations,<sup>10</sup> lends support to our interpretation. Neither Respondent has given any reason to doubt the evidence's reliability.<sup>11</sup>

We considered Respondents' various legal arguments about the representation, but are unpersuaded. First, we reject Mr. Fanning's assertion that Complaint Counsel's failure to point to "specific, affirmative statements that were made to advertise or promote Jerk.com" was a "fatal defect . . . requi[ring] denial of [summary decision]." FOppB 8. There is no need to identify a single, express deceptive statement; it is well established that deception may be found based on the net impression conveyed. *POM Wonderful*, 2015 WL 394093, at \*8; *Kraft*, 970 F.2d at 318-20. Nor is it necessary that the deceptive representation arise in advertising or similar promotional material. Although many of the cases we decide involve advertising or other types of promotional claims, Section 5 applies broadly to "deceptive acts or practices in or affecting commerce." Thus, the Commission's authority is not confined to claims that can be identified as advertising or other promotional claims. See *FTC v. AMG Servs., Inc.*, 29 F. Supp. 3d 1338, 1349-52 (D. Nev. 2014) (summary judgment granted to FTC where loan note disclosure was likely to mislead consumer borrowers acting reasonably under the circumstances); *FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 626-31 (D.N.J. 2014) (rejecting dismissal of deception count based on defendant website's statements about its privacy policy); cf. *Feil v. FTC*, 285 F.2d 879, 896 (9th Cir. 1960) (referring to the FTC's "extensive" power "to prevent the use of [deceptive] acts").<sup>12</sup> In any case, the representation that content on

---

<sup>10</sup>See, e.g., *Kraft*, 970 F.2d at 319 ("the Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement"); see also *Kroger*, 98 F.T.C. 639, 728 (1981) ("It is settled that the Commission has sufficient expertise to determine an advertisement's meanings – express and implied – without necessarily resorting to evidence of consumer perceptions.") (citing *National Dynamics Corp.*, 82 F.T.C. 488, 548 (1972)), *aff'd*, 492 F.2d 1333 (2d Cir. 1974).

<sup>11</sup> Complaint Counsel attach further extrinsic evidence – the Expert Report of Milolaj Jan Piskorski – as an Exhibit to their Reply to Jerk's Opposition. It addresses issues relevant to what reasonable consumers would have understood regarding the source of content on Jerk.com. This exhibit was submitted after Mr. Fanning's briefing had closed and shortly after Jerk's second counsel had withdrawn. To avoid any possible prejudice to Respondents we have reached our determinations without relying on the expert's report.

Complaint Counsel also attach their Second Request for Admissions to Respondent Jerk, LLC, to which Jerk responded only after an extended deadline. Complaint Counsel argue that pursuant to Commission Rules, 16 C.F.R. § 3.32(c), the matters in the Requests for Admission are now "conclusively established" as to Jerk. However, given the nature of Jerk's defense and our rulings, based on other evidence regarding Respondents' liability, Jerk's failure to timely respond to the Second Request for Admissions does not affect this Opinion.

<sup>12</sup> Mr. Fanning also criticizes Complaint Counsel for failing to follow "the rubric that is supposed to govern" the analysis here. FOppB 8. As is evident from the very language cited by Mr. Fanning, however, the rubric that he

Jerk.com was user-generated drove traffic to the Jerk.com website, as explained in the discussion of materiality below. *See infra* Section IV.A.3. It pertained to a central characteristic of the website, important to consumers, *see id.*, and its display was indeed promotional.

Second, we also reject Respondents' attempt to dismiss certain of their statements as mere legal disclaimers or other legalese unlikely to be read by consumers. A material representation that is likely to deceive a consumer acting reasonably violates Section 5, regardless of whether it is found in the terms and conditions or elsewhere. *See AMG Servs.*, 29 F. Supp. 3d at 1349-52 (loan note disclosure found deceptive); *Wyndham Worldwide*, 10 F. Supp. 3d at 626-31 (rejecting dismissal of deception count based on defendant website's statements about its privacy policy). Moreover, our conclusion is based on far more than just the statements that Jerk labels contractual "terms and conditions."

Finally, we reject Mr. Fanning's argument that claims interpretation is a matter of fact rather than of law and that we therefore cannot interpret the meaning of the statements in considering a motion for summary decision. *See* FOppB 7. The issue is not whether claims interpretation is more akin to a question of fact rather than law, but whether there is a *genuine factual dispute in this case* as to whether Respondents made the statements at issue and whether those statements convey the message to consumers that Complaint Counsel allege. *See FTC v. Gill*, 71 F. Supp. 2d 1030, 1035 (C.D. Cal. 1999) ("Where the operative facts are substantially undisputed, and the heart of the controversy is the legal effect of such facts, such a dispute effectively becomes a question of law that can, quite properly, be decided on summary judgment."), *aff'd*, 265 F.3d 944 (9th Cir. 2001); *AMG Services*, 29 F. Supp. 3d at 1349-50 (noting that "numerous Ninth Circuit cases . . . have found the net impression of a representation to be suitable for summary judgment determination."). To be sure, on a motion for summary decision, we must draw all *factual* inferences against the movant, and may rule in the movant's favor only if we are persuaded that no genuine issue of material *fact* exists. However, "the critical issue is not whether the alleged claims are [express or] implicit, but simply whether they are so clearly conveyed . . . that no genuine issue as to their existence can be raised." *In re Kroger*, 98 F.T.C. 639, 729 (1981). "Where such certainty exists, the movant may be said to have fully discharged its burden of proof under Rule 3.24." *Id.*

Here, neither Respondent has raised any genuine issue of disputed fact as to whether Jerk made the representation alleged in the Complaint. Thus, we find that Jerk conveyed the implied representation that "content on [Jerk.com], including names, photographs, and other content, was created by [the website's] users and reflected those users' views of the profiled individuals."

---

identifies applies to analyzing the adequacy of substantiation for advertising claims in proceedings brought under Sections 5 and 12 of the FTC Act; it has no relevance in this case. As to Mr. Fanning's suggestion that Complaint Counsel must establish "inducement," FOppB 10, while a lack of evidence of inducement may be relevant to a false advertising claim brought under Section 12 of the FTC Act, such evidence is not required in an action brought under Section 5, which is the case here.

## 2. Falsity of the Representation

Having determined that Jerk made the representation alleged in the Complaint, we consider whether Complaint Counsel establish that it was false or misleading, and whether Respondents raise any genuine issues of disputed material fact. We ask whether the representation is likely to mislead; Complaint Counsel need not prove actual deception. *Deception Statement*, at 103 F.T.C. at 176 (citing *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976)); *accord Commerce Planet*, 878 F. Supp. 2d at 1073 (“To establish a section 5 violation, proof of actual deception is unnecessary; it only requires a showing that misrepresentations ‘possess a tendency to deceive.’”) (citing *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979)).

Complaint Counsel assert that uncontroverted evidence demonstrates that Respondents’ representation about the source of the Jerk.com content, including the profiles, was false, because the vast majority of the content on Jerk.com, including the profiles, was created, not by Jerk.com users, but rather by Jerk itself or those under Jerk’s control, largely from profile and other information taken from Facebook. Indeed, Complaint Counsel cite extensive deposition testimony, documents, and other evidence establishing that: (1) the vast majority of Jerk.com profiles were created by automated means, which included bulk loading information from Facebook;<sup>13</sup> (2) Jerk obtained this information by registering as a Facebook developer;<sup>14</sup> and (3) Jerk did nothing when consumers and Facebook itself complained to the company about using photos and other data from Facebook.<sup>15</sup>

---

<sup>13</sup> CCSMF ¶ 57, *citing, e.g.*, CX0057 ¶ 8; CX0438-30:3-20; CX0181-138:22-139:2. Some Jerk.com profiles were created when consumers entered their Facebook login credentials on Jerk.com to search for people they knew on Jerk.com; doing that caused a program to automatically generate Jerk.com profiles based upon the consumers’ contact information and Facebook friends lists. CCSMF ¶ 58, *citing, e.g.*, CX0629-003 ¶ 10; CX0438-17:7-14. Respondents also added comments from other sources to populate Jerk.com profiles. CCSMF ¶ 60, *citing, e.g.*, CX0305-001. Through these means, Jerk.com grew to displaying more than 85 million profiles in just a few months, CCSMF ¶ 59, *citing, e.g.*, CX0317; CX0153-002, although approximately 99 percent of Jerk.com profiles did not contain user comments or a vote of Jerk/Not a Jerk, CCSMF ¶ 66, *citing* CX0063-002 ¶ 11; CX0307-003.

<sup>14</sup> CCSMF ¶ 73, *citing, e.g.*, CX0094-004 ¶¶ 15, 16. By having its agent register as a Facebook Developer, Jerk gained access to Facebook’s application programming interface (API), which allowed it to retrieve Facebook user[s’] publicly available and non-public data. CCSMF ¶ 74, *citing, e.g.*, CX0094-002-003 (Facebook Declaration).

<sup>15</sup> Jerk failed to delete photos it obtained from Facebook upon user requests to delete the data. CCSMF ¶ 80, *citing, e.g.*, CX0528-001; CX0006-001 ¶ 6; CX0011-001-003 ¶¶ 5-15; CX0027-001-002 ¶¶ 7-8; CX0037-001 ¶ 5; CX0043-001-002 ¶¶ 3, 5-6 (Jerk ignored a request from a sheriff’s deputy to remove a Jerk.com profile that was endangering a 13-year old girl); CX0534 (Jerk refused to remove a profile of a child who was a victim of abuse). Users complained to Facebook about Jerk.com posting their data from Facebook. CCSMF ¶ 77, *citing, e.g.*, CX0105-001 ¶ 3. Facebook investigated its user[s’] complaints about Jerk.com and sent Jerk a cease and desist letter in March 2012. CCSMF ¶ 82, *citing, e.g.*, CX0106-001; CX0107. Jerk maintained information obtained through Facebook after Jerk’s Facebook access was disabled. CCSMF ¶ 81, *citing* CX0094-005 ¶ 19; CX107-005; CCSMF 32.

Jerk's counsel previously represented to the Federal Trade Commission that the content on Jerk.com was user-generated and not taken from Facebook (*see* CCSMF ¶ 50, CX0291-001, CX0528-001, CX0529-001; CX0107-003-04), but Respondents no longer dispute that Facebook was the source of the vast majority of profiles. Jerk states that it does not dispute the facts set forth in Complaint Counsel's Statement of Material Facts. JOppB 2. Rather, it argues that the statements cited by Complaint Counsel, taken individually, are literally true, and hence cannot create a net impression that is false or misleading. *Id.* at 2, 4, 6-8.

Likewise, Mr. Fanning does not dispute that profile information from Facebook was loaded onto the Jerk.com site. *See* FOppB 11, Fanning Aff. ¶ 5. Nor does he dispute any of the specific factual assertions in Complaint Counsel's Statement of Material Facts on this issue. The only rebuttal he offers is in ¶ 5 of his Affidavit, which disputes Complaint Counsel's contention that the information was taken *in violation of Facebook rules and policies*.

In view of Respondents' failure to dispute or controvert any of Complaint Counsel's factual assertions,<sup>16</sup> there is no genuine dispute as to the source of the vast majority of Jerk.com content. Most of it was taken from Facebook, and Jerk occasionally augmented the profiles with information drawn from other sources. Notwithstanding Jerk's claim that individual statements cited by Complaint Counsel are truthful,<sup>17</sup> Respondents' representation – that the content on Jerk.com was generated by Jerk.com users and reflected those users' views – is false, and summary decision as to that issue is appropriate.

We have, however, concluded that there remains a genuine issue of disputed fact about whether Jerk's "scraping" the profile information from Facebook and its use of that information violated Facebook rules and policies. Paragraph 16 of the Complaint alleges in pertinent part that Respondents took:

---

<sup>16</sup> Mr. Fanning's disavowal of "hacking" is not a denial that Jerk generated profiles by scraping them from Facebook. Mr. Fanning's affidavit argues that the profiles could be derived from portions of Facebook available to the public. If so, the affidavit suggests, "hacking" was unnecessary. Mr. Fanning's statement that "any user of Jerk.com . . . *could have* accessed the directory and posted the information on Jerk.com," FAff ¶ 5 (emphasis added), is not a denial that the vast majority of the content on Jerk.com was generated by Jerk itself, rather than by the website's users.

<sup>17</sup> Jerk argues that statements cited by Complaint Counsel, taken individually, are literally true. For example, Jerk observes that Jerk.com's invitation to "[f]ill out the form below to find or create a profile on jerk" and to "[i]nclude a picture if you can and as much other information as possible" was truthful: "users did have the capability to post profiles, vote people as 'jerks' or 'not jerks,' and post comments on profiles." JOppB 7-8. That may be true, but it is not dispositive. The implied representation that we find false – that content on Jerk was created by Jerk users and reflected those users' views of the profiled individuals – is distinct from the express statements that contribute to the net impression left by Jerk.com. *See, e.g., FTC v. National Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1189 (N.D. Ga. 2008) ("When assessing the meaning and representations conveyed by an advertisement, the court must look to the advertisement's overall, net impression rather than the literal truth or falsity of the words in the advertisement."); *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982) ("The impression created by the advertising, not its literal truth or falsity, is the desideratum."); *AMG Services, Inc.*, 29 F. Supp. 3d at 1349 ("[T]he Court considers the overall, common sense net impression of the representation or act as a whole to determine whether it is misleading, and a Section 5 violation may still be found even if the fine print and legalese were technically accurate and complete.") (internal quotation omitted).

information from Facebook in violation of Facebook’s policies, including by (1) failing to obtain users’ explicit consent to collect certain Facebook data, including photographs; (2) maintaining information obtained through Facebook even after respondents’ Facebook access was disabled; (3) failing to provide an easily accessible mechanism for consumers to request deletion of their Facebook data; and (4) failing to delete data obtained from Facebook upon a consumer’s request.

Complaint Counsel propose factual findings regarding this issue,<sup>18</sup> and urge us to conclude that Respondents’ conduct violated the Facebook rules and policies as set out in the Complaint. CCMSD 36. However, Mr. Fanning maintains that the information was obtained in ways that do not violate Facebook policies. In any event, he argues, whether Jerk violated Facebook rules is not relevant to this case. FOppB 10-12.

We conclude that factual disputes remain regarding whether Respondents violated Facebook’s rules by “scraping” profile content from Facebook for use on Jerk.com. However, it is not necessary for us to decide whether Respondents violated Facebook’s rules in order to determine that Jerk’s statements were deceptive, and therefore the possibility of a Facebook rule violation is not an issue we need to resolve in this case. Accordingly, we grant summary decision on Count I only with respect to the alleged deceptive representation regarding the source of content on Jerk.com. We find it unnecessary to determine whether Respondents also violated Facebook rules.

### 3. Materiality

Finally, we consider whether Complaint Counsel have established that the representation was material and, if so, whether there are issues of disputed fact as to the representation’s materiality. A false or misleading representation will violate Section 5 only if it is also “material,” that is, if it “is likely to affect a consumer’s conduct with respect to the product or service.” *POM Wonderful LLC*, 2013 WL 268926, at \*52 (FTC Jan. 16, 2013) (citing *Deception Statement*, 103 F.T.C. at 182), *aff’d*, 2015 WL 394093 (D.C. Cir. Jan. 30, 2015); *accord*, *FTC v. Cyberspace.com LLC*, 453 F.3d at 1201 (“A misleading impression created by a solicitation is material if it ‘involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.’”) (citing *Cliffdale Assocs., Inc.*, 103 F.T.C. 110,165 (1984)).

We presume that “express claims, claims significantly involving health or safety, and claims pertaining to the central characteristic of the product [or service]” are material. *POM Wonderful LLC*, 2013 WL 268926, at \*52 (citing *Novartis Corp.*, 127 F.T.C. 580, 686 (1999) (citing *Deception Statement*, 103 F.T.C. at 182)), *aff’d*, 2015 WL 394093 (D.C. Cir. Jan. 30, 2015). The presumption also applies to intended implied claims. *POM Wonderful*, 2013 WL

---

<sup>18</sup> See CCSMF ¶¶ 69, 76, 77 (“Jerk failed to obtain users’ explicit consent to collect certain Facebook data, including photos, in violation of Facebook’s policies”), ¶¶ 78-79, 80, 81 (“in violation of Facebook policy”).

268926, at \*52; *Novartis*, 127 F.T.C. at 687; *Deception Statement*, 103 F.T.C. at 182. A respondent may rebut the presumption of materiality by providing evidence that the claim is not material – *i.e.*, “evidence that tends to disprove the predicate fact from which the presumption springs (*e.g.*, that the claim did *not* involve a health issue) or evidence directly contradicting the initial presumption of materiality. This is not a high hurdle.” *Novartis*, 127 F.T.C. at 686.

We conclude that it is appropriate to presume that Respondents’ representation about the source of content posted on Jerk.com is material. The representation here is not express, but Complaint Counsel identify evidence showing that persons involved in the creation and operation of the Jerk.com site (i) intended to represent to consumers that content was created by Jerk users and reflected those users’ views of profiled individuals; and (ii) considered user-generated content to be a key feature of what Jerk.com offered to consumers. CCSMF ¶¶ 48-50, 54; *see, e.g.*, CX0112-001 (e-mail from Mr. Fanning to investor, stating, “Like Wikipedia this content will be grown organically from the users themselves . . . .”); CX0057-001-02 (“I believed that the website would only have value to users if people manually created the Jerk.com profiles. People would be more likely to use the website if they believed their peers were using it.”); CX0629-002-03 ¶ 9 (“To my understanding, the organic growth of Jerk.com profiles would increase traffic to the website . . . .”).

Even if the presumption of materiality were not applicable, we would still conclude that Complaint Counsel make a sufficient showing that the representation was, in fact, material to consumers – that it was important to them and affected their conduct.

As Jerk.Com’s creators believed, the understanding that the website’s content was user-generated drove traffic to the website; it also prompted some consumers to complain and seek their profiles’ removal. See CCSMF ¶¶ 158-59. Consumers testified that they were “mortified,” “embarrassed,” and “alarmed” when they saw profiles of themselves or their loved ones because they thought that some person who knew them created those profiles. CX0037-001 ¶ 3 (“I immediately thought that someone who didn’t like me put me on there. . . . I was alarmed. I thought that someone was messing with me.”); CX0036 ¶¶ 3, 5 (“Initially, I was worried that someone had created the Jerk.com profile against me. I was mortified and embarrassed . . . . I immediately tried everything I could think of to remove my name and photo. I went through the Jerk.com website and tried several different ways to contact them . . . .”); CX0536-001 (“I know that there are people out there . . . . that . . . tried to humiliate my husband through your website. . . I keep on crying on why there are people who never stop torturing me. My family and my husband’s family are very affected. They want to know who is the person responsible for this post.”). Another consumer testified about the impact of Jerk.com content on the consumer’s business reputation – a concern that would most likely arise from believing that the content was user-generated – and as a result decided to pay for a Jerk.com membership. CX0038 ¶ 4 (“Although I did not want to support jerk.com and the website’s extortionate practices, I was concerned about my business reputation so I paid jerk.com \$30 for an annual membership.”). This evidence demonstrates that Respondents’ representations about the source of content on Jerk.com were important to consumers’ decisions about whether to purchase Jerk.com memberships or otherwise engage with the site.



Respondents' counter-arguments are unpersuasive. Mr. Fanning addresses only the Section 4 "legal disclaimer" and contends that no reasonable consumer would have bothered to read such legalese; Jerk echoes that argument with respect to all the statements set out in the "About Us" section of the website, which it characterizes as mere legal terms and conditions. FOppB 10; FS 4; JOppB 7, n. 3. Respondents disregard the appearance of the relevant statements on such key website locations as the "Welcome," "About Us," and "Post a Jerk" pages. Jerk argued that the statement that "millions of people . . . use Jerk for important updates for business, dating, and more" was mere "puffery," upon which no reasonable consumer would have relied. JOppB 8-10. However, this statement was only one contributor to the net impression conveyed by the website regarding user-generation of content. More fundamentally, Respondents ignore the evidence that user-generation was vital to driving consumer traffic to the website and disregard the effects on consumer conduct represented by their investment of time and money in trying to get their postings removed.

\*\*\*\*\*

In sum, we conclude that Complaint Counsel have established that Jerk made the representation alleged in Count I of the Complaint, the false or misleading nature of that representation, and its materiality. There are no genuine issues of disputed material fact with respect to these issues. Accordingly, we grant Complaint Counsel's motion for summary decision on Count I.

## **B. Count II: Misrepresentation of the Benefits of Jerk Membership**

Count II of the Complaint alleges that "[R]espondents represented, expressly or by implication, that consumers who subscribe to Jerk by paying for a standard membership would receive additional benefits, including the ability to dispute information posted on Jerk," but that, "in numerous instances, consumers who subscribed to Jerk by paying for a standard membership received nothing in return for their payment." Comp. ¶¶ 17-18. To determine whether summary decision on Count II is appropriate, we again consider whether Complaint Counsel established the alleged representation was made, was false or misleading and was material to consumers. We conclude that Complaint Counsel met this burden and that Respondents raised no genuine issue of material fact. Accordingly, we grant summary decision on Count II.

### **1. The Representation**

Complaint Counsel assert that Respondents represented that consumers who paid a \$30 standard membership fee would receive additional benefits, including the ability to dispute information posted on the website. CCMSD 13-14; 21. They point to website text stating that consumers would gain access to "additional paid premium features" by paying the membership fee and users "must be a subscriber in order to create a dispute." CCMSD 13; CCSMF ¶¶ 84-88. Additionally, Complaint Counsel point to evidence that Respondents intended to convey this representation (CCMSD 21; CCSMF ¶ 90) and further that it is the message consumers "took away" from the website. CCMSD 21; CCSMF ¶ 91.

Neither Respondent disputes any of these facts. Jerk does not even mention Count II in its Opposition. Mr. Fanning’s Declaration does not contain any information relevant to this issue. Mr. Fanning does not deny that the statements at issue appeared on the Jerk.com website. Nor does he dispute that Jerk offered to make dispute resolution contingent on consumers paying a \$30 membership fee, or that consumers believed that they could dispute, alter, or delete their profiles by paying the fee. Rather, he argues that “Complaint Counsel com[m]ingles and interchanges references to enhanced membership benefits, subscriptions, and the ability to dispute or remove posted information from profiles,” and “conflates” a representation from “various sources.” FOppB 13. According to Mr. Fanning, Complaint Counsel has not identified a “specific claim,” and, consequently, “no deception exists.” *Id.*

We disagree. To be sure, Complaint Counsel’s Opposition and Statement of Material Facts do include references not only to the \$30 membership fee, but also to another \$25 customer service fee that Jerk charged to enable consumers to contact the website. *See, e.g.*, CCMSD 8 & n.2; CCSMF ¶ 79. However, Count II challenges only Jerk’s representation as to the \$30 membership fee, and it is the evidence relating to that fee upon which we base our conclusions.

Complaint Counsel have identified specific statements on the Jerk.com website that represent that paying \$30 for a membership subscription unlocks additional benefits, including the ability to dispute information in profiles. A consumer accessing the Jerk.com website would have seen the following:

Subscribers on Jerk. . . receive free benefits including:

1. Fast notifications of postings about you!
2. Updates on people you know and are tracking
3. Search for people you know, and read about people you are interested in.
4. Enter comments and reviews for people you interact with.
5. Help others avoid the wrong people.
6. Praise those who help you and move good people closer to sainthood!

CX0047-002-03, ¶ 9 (Kauffman Dec.). Directly below this, the page had a button titled “Subscribe,” which, if clicked, directed a consumer to an online “Billing Information” form. *Id.* ¶10. The top stated: “Become a Subscriber. . . You must be a subscriber member in order to create a dispute!” *Id.* The bottom contained a field for the consumer to choose between a “Gold Membership,” which was “(under development),” or a “standard membership for \$30/year.” *Id.*

Another statement, on the “Remove Me!” and “Remove” pages of the website, conveyed the same basic message. It stated, in pertinent part, “You can however use Jerk to manage your reputation and resolve disputes with people who you are in conflict with. There are also paid premium features that are available <http://www.jerk.com/signin.php>.” CX0275 (attachment to

Ortiz Dec); CX0048-032 (Kauffman Dec. attachment A-32).<sup>19</sup> We conclude that these statements represent exactly what the Complaint alleges in Count II – that consumers who subscribed to Jerk.com by paying the \$30 standard membership fee would receive additional benefits, including the ability to dispute information posted on Jerk.com.

Our conclusion is bolstered by uncontroverted evidence that Jerk intended to convey to consumers that they could receive additional features, including dispute resolution, by purchasing a Jerk.com membership. *See* CCSMF ¶ 90; CX0117-004 (e-mail from Fanning: “Other potential revenue streams include advertising, as well as subscription services. For example, users may be charged for access to dispute resolution or other premium and for fee services.”); CX0438-29:3-7 (Depo. “A: With monetizing, I know John would occasionally bring up the Yelp business model, which was that businesses could subscribe to Yelp and pay fees, for instance, to have negative reviews removed from their Yelp pages, or at least buried deeper down.”); CX0112-002 (e-mail from Fanning: “Once a dispute is created with respect to an item it will not be published until both parties agree on the content of the posting so long as you continue to maintain your active access to the dispute resolution membership service.”). *See also* CX0080 (chat between Fanning and business partner with business partner observing: “the only negative of the jerk.com business plan is the blackmail-feeling revenue model.”).

Equally important, Complaint Counsel offer uncontroverted evidence that consumers believed purchasing a subscription enabled them to alter or remove their profiles. *See* CCSMF ¶ 91; CX0038 ¶ 4 (“I read a statement on jerk.com that indicated I could remove information from my profile by joining jerk.com.”); CX0005 ¶ 5 (“The website said that if you became a member of jerk.com for about \$2 to \$5 a month, you could make changes to your profile”); CX0026 ¶ 5 (“I explored the website, searching for a way to remove my profile. At several points, the website asked me to submit my credit card information in order to make a change to my profile . . . I believed I could edit my profile if I paid jerk.com the requested fee, so I set up a PayPal account in order to make the payment.”); CX0040 ¶ 6 (“I was desperate to remove my daughter from the website, and I paid the \$30 charge three times”).

In sum, we conclude that Complaint Counsel establish that Jerk.com represented that consumers who subscribed to Jerk.com would receive additional benefits, including the ability to dispute information posted on the website, and that there is no genuine dispute as to any material fact regarding this issue.

---

<sup>19</sup> Mr. Fanning’s Surreply highlights a statement under the “Remove Me” tab that “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,” FS 3 (emphasis in original), but cites it only in connection with Count I. In a previous filing to the Commission, Jerk explained that this statement was meant “to educate consumers that removal from Jerk.com is not removal of the content from the source on the Internet” and further indicated that the statement had been removed from the Jerk.com website. *See* CX0291, at 002-03 (Jerk LLC Petition to Quash CID, March 15, 2013). In any event, the sentence does not controvert the representation at issue – that consumers would receive additional premium features, including the right to dispute information on the website, in return for payment of a \$30 membership fee.

## 2. Falsity of the Representation

Complaint Counsel assert that “uncontroverted documentary and testimonial evidence establishes that consumers who subscribed to Jerk.com by paying for a standard membership did not receive the promised additional benefits.” CCMSD 22. In fact, Complaint Counsel provided evidence that consumers did not receive any benefits in exchange for purchasing a Jerk.com membership,<sup>20</sup> and did not even receive the password that was purportedly necessary to activate their account.<sup>21</sup>

Far from disputing any of Complaint Counsel’s Statements or the underlying evidence Complaint Counsel cites, Respondent Jerk does not even mention Count II in its Opposition. The only evidence Mr. Fanning offers in rebuttal is one paragraph in his declaration, which states:

Jerk, LLC established an agent, a lawyer in Phoenix, Arizona, to accept service of complaints about Jerk.com while Jerk, LLC held a paid option to purchase the domain name. As far as I am aware, Jerk, LLC took action including to remove content from Jerk.com whenever it was obligated to do so. As far as I am aware, Jerk, LLC would refund money to users who claimed they had paid but had not received membership services via a web form. Jerk, LLC experienced a number of problems in operating the site, including the site being hacked and being “snaked” by the FTC which disrupted the services. The FTC also made demands on Jerk, LLC to take corrective action. I understand that Jerk, LLC complied with the FTC’s demands, although the company denied any liability.

FAff ¶ 4. His brief argues that “the evidence does not conclusively establish that memberships did not exist, or that there were no actual subscriptions, or that the only way to remove a post was by paying money,” and asserts, without citation to evidence, that “there was a legitimate process for rectifying complaints and removing profiles” and that “Complaint Counsel has not established a clear pattern or practice of deception.” FOppB 13.

---

<sup>20</sup> CCSMF ¶ 94, *citing, e.g.*, CX0005 ¶ 6 (“After I paid, there were no new features available to me to remove my profile. The benefit they promised – the ability to remove or change your profile – was nowhere to be found.”); CX0026 ¶ 6 (“Immediately after I made the payment, I found that there were no new features available to me that would allow me to remove my profile. I kept trying, and at one point, a pop-up window appeared that said, “Are you having fun yet?” At that moment, I knew the website was a scam.”); CX0038 ¶ 4 (“After I paid the fee, nothing changed. . . . The membership was a complete waste.”). In addition, an FTC investigator purchased a \$30 Jerk.com membership and did not receive any additional benefits. CCSMF ¶ 96, *citing* CX0047 ¶¶ 6-16, CX0050-52.

<sup>21</sup> CCSMF ¶ 95, *citing* CX0001 ¶ 3 (“After paying \$30 to Jerk.com, I monitored my email account for an email message from Jerk.com. I checked all my email folders, including [the] spam folder. I never received an email message from the company and, thus, never received the promised password needed to access my Jerk.com membership.”); CX0038 ¶ 4 (“I checked my email folders, including my spam folders, but did not receive a password for my jerk.com membership.”).

The assertion that Complaint Counsel fail to establish “a clear pattern or practice of deception” is an argument characterizing Complaint Counsel’s showing, not evidence rebutting it. Moreover, it is not Complaint Counsel’s burden to prove the negative – to “conclusively” prove that “memberships did not exist, or that there were *no* actual subscriptions, or that the *only* way to remove a post was by paying money.” FOppB 13 (emphasis added). Once Complaint Counsel have presented evidence that Jerk made the representation, and that that representation was false or misleading and material, the burden shifts to Respondents to establish that there exists a genuine issue of material fact that makes summary decision with respect to Count II inappropriate.

The only evidence either Respondent offers – Mr. Fanning’s affidavit – is not sufficient to create a disputed issue of material fact. Mr. Fanning does not dispute the consumers’ sworn declarations that they never received any benefit in return for their subscription fees. He does not dispute that the FTC investigator had the same experience as those consumers. He states only that “[a]s far as [he is] aware,” Jerk “took action including to remove content from Jerk.com *whenever it was obligated to do so*” and “would refund money to users who claimed they had paid but had not received membership services via a web form.” FAff ¶ 4 (emphasis added). Similarly, Mr. Fanning’s statement that “Jerk LLC experienced a number of problems in operating the site, including the site being hacked and being ‘snaked’ by the FTC which disrupted the services,” FAff ¶ 4, did not directly address the issue or create a disputed factual issue.

Moreover, Mr. Fanning’s statements are not relevant to the critical issue: whether the representation Jerk made as to membership benefits was false or misleading. For example, whether Jerk had a process in place to deal with consumer complaints, as Mr. Fanning’s affidavit asserts, is not at issue. Similarly, his statement that “[a]s far as [he is] aware,” Jerk made refunds to some consumers who purchased memberships, is likewise not material with respect to either the falsity of the claim or its materiality.<sup>22</sup> To be sure, Complaint Counsel present evidence that may call into question the accuracy of a number of the statements contained in Paragraph 4 of Mr. Fanning’s affidavit.<sup>23</sup> However, even if completely accurate, Mr. Fanning’s statements do not involve *material* issues of disputed fact as to this Count.

---

<sup>22</sup> See *FTC v. Publishers Bus. Servs.*, 821 F. Supp. 2d 1205, 1222, n.12 (D. Nev. 2010), *rev’d in part on other grounds*, 540 Fed. Appx 555 (9th Cir. 2013) (“Whether [respondent] received any monetary benefit from the misrepresentation is not necessary to establish a Section 5 violation.”); *Cyberspace.com LLC*, 453 F.3d at 1201-02 (“the fact that the companies provided consumers a toll free number to call for refunds does not affect our conclusion that [their] solicitation violated [the FTC Act]”).

<sup>23</sup> For example, Complaint Counsel have presented abundant evidence that Jerk made it difficult for consumers to request deletion of their information and ignored complaints and requests by consumers that Jerk remove their profiles and other information from the Jerk.com website. See CCSMF ¶ 79 *citing, e.g.*, CX0004-001 ¶ 5 (“I could not find any other way to contact jerk.com to remove my profile. I did research on the website and found hundreds of complaints by other customers who had paid money and were unable to remove their profiles.”); CX0006-01 ¶¶ 5-6 (“I also wanted to contact the website through the customer support page on the website, but they requested \$25.00 to contact them. I refused to pay to contact customer support. Instead, I did some research on jerk.com on the Internet and found an e-mail address that was supposed to be their customer service e-mail account (support@jerk.com). I e-mailed this address over five times . . . I never received any response.”); CX0007-001 ¶ 4 (“I tried to remove my profile by clicking on a page that said I could remove my name from the website if I paid jerk.com \$25.00. I did not want to pay this money, so instead I wrote jerk.com a letter. I sent the letter via certified mail to

We conclude that Complaint Counsel provide sufficient evidence that the representation at issue was false – that although Jerk promised subscribers additional benefits, including the right to dispute information contained on Jerk.com, it provided nothing in return for the membership fees. That evidence consists not only of sworn declarations by consumers who paid the \$30 fee and received no benefits, but also a sworn declaration of an undercover FTC investigator explaining that he likewise paid the \$30 fee and received nothing in return. *See* CCSMF ¶¶ 94-96. Nothing submitted by Respondents creates a genuine dispute of material fact as to this issue.

### 3. Materiality

Finally, we consider the materiality of the representation at issue in Count II. The representation was express and it clearly pertained to the central characteristic of Jerk’s offering – benefits promised in exchange for the \$30 fee. For both these reasons, the representation is presumptively material, and neither Respondent has argued otherwise.

Moreover, Complaint Counsel present uncontroverted evidence that consumers acted on the representation by purchasing Jerk.com memberships expecting to receive additional benefits, including the right to dispute information on the website. *See, e.g.*, CX0026 ¶ 5 (“I believed I could edit my profile if I paid jerk.com the requested fee, so I set up a PayPal account in order to make the payment.”); CX0038 ¶ 4 (“Although I did not want to support jerk.com and the website’s extortionate practices, I was concerned about my business reputation so I paid jerk.com \$30 for an annual membership.”). This evidence establishes that the representation was likely to affect consumers’ choice or conduct regarding the offered service and therefore that it was material.

\*\*\*\*\*

---

DMCA Complaints, Jerk, LLC . . . which was the address I found on their website. . . . The letter was returned to me ‘undeliverable’ because the address was ‘unknown’ and no forwarding address was available.”); CX0028-001 ¶ 6 (“Jerk.com also required you to pay to have your profile removed. I paid the amount required to contact the company’s customer support, but never received an email response.”); CX0027-001 ¶¶ 6-7 (“I never got a chance to complain to anyone at jerk.com because there was no way to contact the company. . . . In February 2012, I filed a complaint with the Better Business Bureau in Delaware on behalf of my brother. The BBB told us that they contacted the company about our complaint, but no one from jerk.com ever got back in touch with them. No one from Jerk ever contacted me.”); CX0738-01 (Feb. 2012 e-mail from Fanning to Jerk’s registered agent: “Just ignore them.... These are customers trying to get service from us without paying the service charge.”).

Likewise, although Mr. Fanning’s Affidavit states that Jerk would refund the cost of the membership fees to consumers who complained, Jerk, in responding to Complaint Counsel’s interrogatories, stated that “The Company has no formal refund policy,” and “knows of no requests for refunds.” *See* CX0286-006 (Jerk LLC’s Responses to Civil Investigative Demand).

In sum, we conclude that Complaint Counsel present sufficient evidence to establish that Jerk's representation as to membership benefits was false and material, and that Respondents failed to identify a genuine dispute of material fact. Accordingly, we grant Complaint Counsel's motion for summary decision on Count II.

## V. MR. FANNING'S INDIVIDUAL LIABILITY

An individual may be liable for the deceptive acts or practices committed by a corporate entity if the individual either participated directly in or had the authority to control the acts or practices at issue. *E.g.*, *FTC v. IAB Mktg. Assocs.*, 746 F.3d 1228, 1233 (11th Cir. 2014); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1204 (10th Cir. 2005); *FTC v. Amy Travel Services, Inc.*, 875 F.2d 564, 573 (7th Cir. 1989). "If the FTC proves direct participation in or authority to control the wrongful act, then the individual may be permanently enjoined from engaging in acts that violate the FTC Act." *Commerce Planet*, 878 F. Supp. 2d at 1079 (citing *FTC v. Garvey*, 383 F.3d 891, 900 (9th Cir. 2004)).

"Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer." *Amy Travel Services*, 875 F.2d at 573; *see also FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170-71 (9th Cir. 1997) (individual's "authority to sign documents on behalf of the corporation [helped to] demonstrate that she had the requisite control over the corporation"); *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1271 (S.D. Fla 2007) (individual held liable where he was a signatory on corporate bank accounts, held himself out as an officer or manager of the company, and had the power to hire and fire employees).

"[D]irect participation can be demonstrated through evidence that the defendant developed or created, reviewed, altered and disseminated the deceptive . . . materials." *FTC v. Ross*, 897 F. Supp. 2d 369, 383 (D. Md. 2012), *aff'd*, 743 F.3d 886 (4th Cir. 2014). "Active supervision of employees as well as the review of sales and marketing reports related to the deceptive scheme is also demonstrative of direct participation." *Ross*, 897 F. Supp. 2d at 383.

Complaint Counsel assert that Mr. Fanning both had the authority to control, and participated in, the allegedly deceptive conduct. CCMSD 22-27. Complaint Counsel offer evidence that Mr. Fanning founded Jerk; controlled Jerk's shares; signed numerous agreements and documents on behalf of Jerk; handled Jerk's finances and budgeting and met and communicated with potential investors; and managed Jerk's day-to-day operations by directing Jerk's strategy, setting Jerk's business objectives, and hiring contractors and staff. CCSMF ¶¶ 97-116, 122-40. According to Complaint Counsel, Mr. Fanning and Jerk staff worked out of Mr. Fanning's house and shared several addresses. CCMSD 25; CCSMF ¶¶ 117-21.

Complaint Counsel also point to evidence that allegedly shows that Mr. Fanning participated in creating and directing Jerk's content by hiring its software developers; participating in the website design; and deciding publishing standards and whether consumer complaints could remove profiles. CCMSD 25-26; CCSMF ¶¶ 141-50, 157. Notably, the evidence allegedly shows that Mr. Fanning advocated auto-generating profiles from Facebook to

boost traffic and enhance Jerk’s attractiveness as a potential acquisition candidate. CCMUSD 26; CCSMF ¶¶ 18, 58, 151-56.

Mr. Fanning does not dispute any of the factual statements or any of the evidence Complaint Counsel cite. Mr. Fanning argues he was merely an “advisor” to Jerk as an agent of NetCapital, and asserts that “exposing [him] to personal liability for actions taken on behalf [of NetCapital] with respect to Jerk, LLC unlawfully ignores the corporate structure.” FOppB 21. The only evidence Mr. Fanning offers is his affidavit, in which he states, in pertinent part:

2. I formerly served as an advisor to Jerk, LLC through another company called NetCapital.com, LLC, and not in my individual capacity. NetCapital.com LLC is a private equity/venture capital firm, with a number of partners, that invests in and provides advisory services to a wide-range of technology start-ups including those in its portfolio of companies. My authority was limited, and at all times I acted on behalf of NetCapital.com, LLC with respect to Jerk, LLC. I never acted in my individual capacity.

3. Jerk, LLC, as an internet technology start-up, was not a large company with levels of management and regular employees. Jerk.com essentially was operated and controlled by Louis Lardass [sic]<sup>24</sup> of Internet Domains, which owned the Jerk.com domain, and foreign software developers who were reportedly supported by various interns, college students, and other independent contractors working for their own benefit. I was not responsible for spearheading and operating Jerk, LLC or Jerk.com. Through and on behalf of NetCapital.com LLC, I was part of a group involved in efforts to launch, finance, and expand the Jerk brand through the Jerk.com website. I did not write any software code for Jerk, LLC to operate Jerk.com, and did not place any consumer content on Jerk.com. I was not a software developer or web developer for Jerk, LLC. I had no authority over or advisory agreement with the primary developers of the Jerk, LLC software.

Based solely on his affidavit, Mr. Fanning contends that “[a] live issue exists about the scope of [his] agency and control, which must be decided by the finder of fact on a full record after weighing credibility” and that “[s]ummary decision is not appropriate as a matter of law on the issue of [his] personal liability.” FOppB 23 (citing *FTC v. Ross*, 2012 WL 2126533, at \*4 (D. Md. 2012)).

We disagree. The applicable legal standard is not based on any piercing-the-corporate veil principles as Mr. Fanning argues. FOppB 21-22. Instead, individual liability for purposes of Section 5 hinges on an individual’s authority to control the acts or practices at issue *or* his

---

<sup>24</sup> The correct spelling of the name is “Lardas,” not “Lardass.” See CX0526-002.



direct participation in the unlawful conduct. If Complaint Counsel put forward sufficient evidence to establish *either* that Mr. Fanning had the authority to control Jerk’s unlawful conduct *or* that he participated directly in that conduct, Mr. Fanning should be held personally liable. *E.g., FTC v. QT, Inc.*, 512 F.3d 858, 864 (7th Cir. 2008) (“Either participation or control suffices.”).

Complaint Counsel present sufficient and uncontroverted evidence establishing both prongs of the test. Complaint Counsel establish that Mr. Fanning was the founder of Jerk and its sole managing member.<sup>25</sup> Evidence shows that Mr. Fanning hired a registered agent to incorporate Jerk in early 2009, certified that Jerk was paying applicable state taxes, and signed Jerk’s IRS taxpayer ID form as the person authorized to do so.<sup>26</sup> The evidence shows that Mr. Fanning negotiated and signed employment agreements with those working on Jerk.com, as well as agreements with Internet Domains to lease the Jerk.com domain.<sup>27</sup> Mr. Fanning established the web hosting for Jerk, and signed the service orders with the data hosting company.<sup>28</sup> Mr. Fanning recruited people and hired outside companies, including a web design firm and Software Assist, the Romanian software firm referenced in Mr. Fanning’s affidavit, to work on Jerk.com.<sup>29</sup> Mr. Fanning opened bank and other payment accounts in Jerk’s name, disbursed funds from those accounts on behalf of Jerk, and, in general, handled the finances and budgeting for Jerk.<sup>30</sup> Mr. Fanning took the lead in soliciting investors for capital to fund Jerk.com and established business strategies and objectives for Jerk.com.<sup>31</sup> And, importantly, the evidence also shows that Mr. Fanning controlled how consumer complaints were to be handled and decided whether to remove profiles from the Jerk.com website in response to consumer complaints.<sup>32</sup>

---

<sup>25</sup> See CCSMF ¶ 97, *citing* CX0210-001; CX0133-002; CX0139-001; CX0368-007; CX0181-53:11-18; CCSMF ¶ 100, *citing* CX0737-003.

<sup>26</sup> CCSMF ¶ 98, *citing* CX0041-002 ¶ 4; CCSMF ¶ 99, *citing* CX0737-005; CCSMF ¶ 102, *citing* CX0507.

<sup>27</sup> CCSMF ¶ 114, *citing* CX0464 ¶ 1; CX0466; CX0735; CCSMF ¶ 115, *citing* CX056-002.

<sup>28</sup> CCSMF ¶ 141, *citing* CX0081-001, 003; CCSMF ¶ 142, *citing, e.g.,* CX0401-002-04 ¶¶ 6, 8.

<sup>29</sup> CCSMF ¶ 138, *citing, e.g.,* CX0464-001 ¶¶ 1-2; CX0181-106:7-10; CX0438-85:25-86:2; CX0438-10:5-11; CX0057 ¶ 3; CX0304-003; CX0629-001 ¶ 2; CX0308; CX0466; CX0735; CX0302 ¶¶ 3-4; CCSMF 143, *citing* CX0629-002 ¶ 7; CX0279-001; CX0135-001; CX0428; CX0181-104:11-22; CX0438-024:16-24; CX0711-003; CX0663; CX0491-001; CX0167-001; CX0302 ¶ 6.

<sup>30</sup> CCSMF ¶ 122, *citing* CX-0411-001-02; CCSMF ¶ 123, *citing* CX0411-003; CCSMF ¶ 124, *citing* CX0417-001; CX0092-108:12-13; CCSMF ¶ 125, *citing* CX0427-001-03; CCSMF ¶ 126, *citing* CX0421-001-02; CCSMF ¶ 128, *citing, e.g.,* CX0308-001; CX0167-001; CX0076.

<sup>31</sup> CCSMF ¶ 129, *citing, e.g.,* CX0308-001; CX0367-001; CX0141-001; CCSMF ¶ 131, *citing, e.g.,* CX0082-001; CCSMF ¶ 133, *citing* CX0139-001; CX0153-001; CCSMF ¶ 136, *citing* CX0643-001; CCSMF ¶ 137, *citing* CX0309-001; CX0181-108:4-7; CX0629-001 ¶ 8; CX0151-002.

<sup>32</sup> CCSMF ¶¶ 120, 157; *see, e.g.,* CX0041-002-03 ¶ 6 (“HBS [Jerk’s registered agent] mailed the complaint letters to John Fanning. . . . I also personally called Mr. Fanning on several occasions to express concern about the number of complaints HBS was receiving about jerk.com.”); CX0401-004 ¶ 11 (“Immedion received various [consumer] complaints about the website, www.jerk.com, during the time frame when Immedion was providing services to Jerk, LLC. When these complaints came in to Immedion, Immedion forwarded the complaints to John Fanning . . . . To the best of my knowledge, Mr. Fanning was responsible to respond to these complaints on behalf of the website, [www.jerk.com](http://www.jerk.com)”); CX0403-007 (e-mail from Fanning: “The photo has been removed.”).

Moreover, there is also undisputed evidence that Jerk staff and outside parties regarded Mr. Fanning as the person in charge of Jerk.com. CCSMF ¶ 139; *see, e.g.*, CX0181-104:7 (Fanning “seemed to be running – calling the shots”); CX0057 ¶ 3 (“Jerk.com was John Fanning’s pet project and at that point in time, he was involved in all decisions about the website of which I was aware.”); CX0109:51: 18-20 (Depo: “Q: Is there anything – anyone else besides Fanning that you associate with jerk.com? A: No.”); CX0438-26:5-12 (Depo: “Q: And who would you say led the Jerk.com website? Who was in charge? A: At that time, it certainly seemed to me that it was John Fanning. Q: And do you know who had final decision-making authority over the website? A: When I worked on it, I believe it was John Fanning.”). Indeed, Mr. Fanning himself identified Jerk as “a new venture of mine.” CX0139-001 (e-mail from Fanning to potential investor, “I wanted to update you on some of the progress we’ve made so far on Jerk.com – a new venture of mine”); *see also* CX0643-001 (e-mail from Fanning: “I want to introduce [y]ou to an exciting new venture I am involved in. . . . We have the founder of napster (me), the founder of MySpace, and Individual Inc. . . . all actively involved.”).

This evidence of Mr. Fanning’s control would be sufficient, in and of itself, to support the conclusion that Mr. Fanning is individually liable for Jerk’s unlawful conduct. Yet Complaint Counsel also present evidence of Mr. Fanning’s direct participation in Jerk’s deceptive conduct. Indeed, Mr. Fanning advocated in favor of using Facebook to create profiles on Jerk.com. *See* CCSMF ¶ 151. One of Jerk’s staff members testified in his deposition as follows:

Q: When talking about scraping from Facebook, was there anyone at Jerk.com who was particularly in favor of this idea?

A: I know John was certainly in favor of the idea during the stages where we were making investor pitches. Because it was beneficial to show what kind of capacity the website could handle, to show that it was possible to have that many profiles on the site.

Q. Is there anybody else that advocated for that mechanism?

A: No one that I can think of, that I spoke to, no.

CX0438-033:11-22.

The evidence shows that Mr. Fanning deflected suspicions raised by Jerk staff and investors about whether the profiles on Jerk.com were in fact all created by Jerk.com users. Another staff member who worked on Jerk.com under Mr. Fanning stated:

Around August 2009, I noticed that thousands of new profiles per day were being added to Jerk.com – a much higher pace than before . . . . [T]his profile growth struck me as odd and it occurred to me that perhaps Jerk was using other means to generate profiles. I emailed [one of the Romanian developers] to inquire about the growth and ask him about its true source . . . . [The developer’s] response to

my email did not describe the means by which Jerk.com profiles were generated, but he confirmed that jerk.com profiles came from Facebook.”

CX0629-003-04 ¶ 11. The staff member further stated that he “expressed [his] concerns to Mr. Fanning,” but that “neither [Mr. Fanning] nor his developers were giving [him] answers that made [him] feel confident.” *Id.* ¶¶ 12-13.

Similarly, one of the Jerk investors testified at his deposition as follows:

Q. Do you recall what was said during that conversation?

A: Well, I had raised the question, did the company have the ability or the right to create these profiles by traversing Facebook information?

Q: How did you know that the company was creating profiles by traversing Facebook for information?

A: John and I talked about it and it had a rapid growth in the number of profiles that were on the site and John explained that it had something to do with getting information off of Facebook.

Q. Can you remember any more details about what John said about that issue?

A. Just that he believed that it was legal.

Q. But was John the one who informed you that Jerk was getting profiles by traversing Facebook for that information?

A. Yes.

CX0181-138:17-139:9.

Finally, there is also undisputed evidence that Mr. Fanning instructed the Romanian programmers to create the Jerk.com profiles using information from Facebook. *See* CCSMF ¶¶ 18, 155; *see, e.g.*, CX0640-001 (August 2009 e-mail exchange between Fanning and Romanian programmers: “Fix ‘People I Know’. This is important because we need to create at least 5,000 more profiles [b]efore August (3 days and counting). Specifically, make sure the facebook part [w]orks.” Response from Romanian programmer: “we have created 7000 profiles so far – at the end of the day we [w]ill have 20,000 new profiles”). Other evidence likewise shows that Mr. Fanning was a driving force behind Jerk’s unlawful conduct. *See, e.g.*, CX0492-003 (e-mail from Fanning: “How about this. We try to boost our profiles up by another say 250M, we try to boost our traffic up as high as we can get it . . . . We could do that within 90 days easy and just sell jerk.com to them before you graduate. You would make millions.”); CX0153-002 (e-mail from Fanning: “In the first 6 months of Jerk.com’s launch: Awesome viral user acquisition – Our data base has grown to over 85 million profiles”); CX0307-001-02 (e-mail from Fanning: “I think you don’t understand how truly large 85 million is. If you tried to count to 85 million you

could not do it in your lifetime.”); CX0360-001 (e-mail from Romanian programmer to Fanning discussing exporting Jerk.com profiles to an iPhone app: “As we underlined in a previous email, the populating of current profiles it’s a work in progress operation. There are 80 million profiles to add to the database . . . . Will take more days to populate face recognition database with all pictures.”). In short, the evidence shows that Mr. Fanning not only had the authority to control Jerk’s conduct but also that he was at the center of the unlawful conduct alleged in Count I.

Likewise, the evidence shows that Mr. Fanning participated directly in the unlawful conduct alleged in Count II. Mr. Fanning advocated collecting subscriptions and charging consumers for dispute resolution and other premium services, and further defended his idea to one of his business partners who objected to Jerk’s “blackmail-feeling revenue model.” CCSMF ¶ 90; *see* CX0117-004; CX0438-29:3-10; CX0112-002; CX0080.

Complaint Counsel thus present sufficient evidence to establish that Mr. Fanning had the authority to control Jerk’s unlawful conduct and that he participated directly in that conduct. To controvert all this evidence, drawn from a wide variety of depositions, sworn declarations, and documents,<sup>33</sup> Mr. Fanning submits only his own affidavit. We must consider whether that affidavit creates a genuine issue of disputed fact.

We conclude that it does not. It is well-established that conclusory, self-serving affidavits are not sufficient to create a factual dispute for purposes of summary judgment. *See, e.g., Valley Forge*, 616 F.3d at 1095 n.2; *MacGregor*, 360 F. App’x at 893; *Hansen*, 7 F.3d at 138; *Medicor*, 217 F. Supp. 2d at 1053; *see also supra* Section II. Here, Mr. Fanning has not pointed to *any* evidence to support his bare assertions. Mr. Fanning’s assertion that he lacked authority over the primary developers of Jerk’s software is a conclusory statement contradicted by evidence that he hired the software developers, instructed them to create Jerk.com profiles, and directed their work. CCSMF ¶¶ 143, 155; *see, e.g.,* CX0181-104:11-22 (Depo. of Jerk investor: “Q: What made you think that he [Fanning] was running – or calling the shots? A: Just the tenor of our conversations and, you know, various things we would discuss and then he would say that happened or he had a development team in Romania that he was directing. . . .”).

The remaining assertions in Mr. Fanning’s affidavit are not material. He asserts that he personally did not write the software code for Jerk.com or post the Facebook profile information on Jerk.com. Complaint Counsel do not need to establish that Mr. Fanning personally performed every aspect of Jerk’s operations to establish authority to control the unlawful conduct of the company. *See FTC v. Medicor LLC*, 217 F. Supp. 2d 1048, 1057 (C.D. Cal. 2002) (defendant’s evidence that other people had control over certain aspects of business insufficient to defeat summary judgment on defendant’s individual liability).

We are also unpersuaded by Mr. Fanning’s legal arguments. Although Mr. Fanning argues that he was a mere “advisor” to Jerk, that characterization, even if true, would not mean that he cannot be held individually liable for Jerk’s conduct. *See, e.g., Medicor*, 217 F. Supp. 2d

---

<sup>33</sup> Although Mr. Fanning stated that he had no responsive documents in response to Complaint Counsel’s CID, Complaint Counsel received over 13,800 pages of documents from other sources. CCMSD 33 n.22.

at 1055-56 (holding “consultant” individually liable on summary judgment for company’s deceptive policies and practices when he was active in the company’s operations, had authority to formulate and implement company policies and practices, and had knowledge of the company’s deceptive acts and practices); *FTC v. J.K. Publications, Inc.*, 99 F. Supp. 2d 1176, 1181-82 (C.D. Cal. 2000) (holding “consultant” liable because he had “ownership in and/or control over” the company).

Mr. Fanning’s reliance on *FTC v. Ross* for the proposition that summary decision is inappropriate as a matter of law for determining individual liability is misplaced. *Ross* involved a deceptive, internet-based scheme to market computer security software. The district court initially granted default judgment as to the corporation and all but one of the individual defendants, but denied summary judgment with respect to the remaining individual defendant (Ross), who argued that she was a mere employee and not a “control person” of the company. *Ross*, 2012 WL 2126533.<sup>34</sup> The court however, stated no rule of law precluding findings of individual liability on summary judgment. Rather, the court based its ruling on the specific evidence at hand and the conflicting inferences that could be drawn from that evidence. *Id.* at \*5-7. Other courts have not hesitated to grant summary judgment regarding individual liability when the evidence has supported such a determination. *See Publ’g Clearing House*, 104 F.3d 1168; *Nat’l Urological Group*, 645 F. Supp. 2d 1167; *Medicor*, 217 F. Supp. 2d 1048.

Complaint Counsel present sufficient uncontroverted evidence establishing Mr. Fanning’s authority as to Jerk and his actual exertion of control, as well as his direct participation in the unlawful conduct alleged in the Complaint. In response, Mr. Fanning chose not to address Complaint Counsel’s Statement of Material Facts or the evidence cited in that Statement, and submitted only a legal argument and a self-serving affidavit without other evidentiary support. We conclude that summary decision is appropriate as to Mr. Fanning’s individual liability for the deceptive acts and practices of Jerk.

## **VI. RESPONDENTS’ AFFIRMATIVE DEFENSES**

### **A. First Amendment**

Respondents maintain that the representations at issue constitute speech protected by the First Amendment and cannot be challenged by the Commission. Jerk claims the representations at issue under Count I constitute truthful, non-commercial speech that may be restricted only to serve a substantial governmental interest and only through means that advance that interest. JOppB 4-8. Jerk argues that the language cited from Jerk.com’s “About Us” page was a contract between Jerk and its users and represented a disclaimer of liability and an assertion of Jerk’s rights under Federal law. *Id.* at 4-6. Consequently, Jerk argues, the language was not related

---

<sup>34</sup> After a bench trial, the court determined that the Commission had shown both that Ross had the authority to control the company’s deceptive acts and that she had participated directly in those acts and concluded that she was individually liable. *FTC v. Ross*, 897 F. Supp. 2d 369 (D. Md. 2012), *aff’d*, 743 F.3d 886 (4th Cir. 2014). Ross was not only enjoined from engaging in future deceptive marketing, she was also held jointly and severally liable with her co-defendants for more than \$163 million in consumer redress.

“solely to the economic interests of the speaker and its audience,” but had “independent legal significance.” *Id.* at 5 (internal quotation omitted). According to Jerk, the disclaimers were truthful. *Id.* at 6-8. Mr. Fanning argues that Complaint Counsel improperly seek to control the content in Jerk.com profiles. FOPP 15-17. Furthermore, he contends that Jerk’s activities “expose[d] the falsity of Facebook’s representations that all information posted was private,” and provided a constitutionally protected “public referendum on Facebook.” *Id.* at 17-18. We discuss each argument in turn.

It is well-established that misleading commercial speech lies outside First Amendment protection and may be regulated or prohibited. *See, e.g., Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) (misleading commercial speech is “not protected by the First Amendment”); *Kraft, Inc. v. FTC*, 970 F.2d 311, 325 (7th Cir. 1992); *POM Wonderful* 2013 WL 268926, at \*54-55, *aff’d*, 2015 WL 394093, at \*18; *Daniel Chapter One*, 2009 WL 5160000, at \*20, n.2 (FTC Dec. 24, 2009), *aff’d*, 405 F. App’x 505 (D.C. Cir. 2010); *see also Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (to qualify for First Amendment protection, commercial speech must “concern lawful activity and not be misleading”).

Here, the specific misrepresentations – that the “content on Jerk, including names, photographs, and other content, was created by Jerk users and reflected those users’ views of the profiled individuals” and that “consumers who subscribe to Jerk by paying for a standard membership would receive additional benefits, including the ability to dispute information posted on Jerk” – are commercial speech designed to increase demand for a product. *See, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983); *Central Hudson*, 447 U.S. at 561 (“commercial speech [is] . . . expression related solely to the economic interests of the speaker and its audience”). Jerk’s representation that content was user-generated was intended to increase interest in Jerk.com among consumers and potential investors. *See supra* Sections IV.A.1 and IV.A.3; CX0629-002-03; CX0317-001; CX0302-002. Similarly, the representation that additional benefits were available for a \$30 membership proposed a commercial transaction and was designed to encourage the sale of those memberships. *See, e.g., CX0117-004* (e-mail from Mr. Fanning stating “Other potential revenue streams include advertising as well as subscription services. For example, users may be charged for access to dispute resolution or other premium and for fee services.”). The fact that some of the statements may carry legal significance does not alter our analysis. The Complaint challenges specific net impressions relating to Jerk’s economic interests. Consequently, the representations challenged in the Complaint are commercial speech.<sup>35</sup>

Moreover, we have determined, based on the uncontroverted evidence presented by Complaint Counsel discussed above, that Jerk’s representations were false and material. False commercial speech like that at issue here is not protected by the First Amendment and may be prohibited. *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 562 (2d Cir. 1984) (finding no violation of

---

<sup>35</sup> Mr. Fanning suggests that the absence of any mention of Facebook on Jerk.com demonstrates that the statements on the website are not commercial speech because they do not reference a competitor. *See* FS 4. The representations challenged in the Complaint, however, are commercial speech because they encourage commercial transactions involving Jerk.com, not because they characterize Jerk.com as a competitor to Facebook.

First Amendment because “it is clear that in this case the FTC made a factual finding, based on its investigation of Bristol’s ads, that consumers viewing the ads would believe them to be making claims” and that the “ads were deceptive”); *POM Wonderful*, 2013 WL 268926, at \*54-55; *Daniel Chapter One*, 2009 WL 5160000 at \*20, n.2.

Respondents’ arguments regarding other, allegedly truthful, representations are off point. It does not matter that Section 4 of the “About Us” page “accurately conveys that Jerk accepts no responsibility for content not created by Jerk,” JOppB 6: the Complaint does not challenge this representation, but rather a different representation that the webpage also conveys. Nor does the Complaint challenge the representation that “users had the ability to post content on jerk.com.” *See id.* at 7.

Similarly, while Mr. Fanning is correct that portions of the Complaint and Complaint Counsel’s Statement of Material Facts describe in detail the content of many Jerk.com profiles, the Complaint does not challenge the nature of the content or comments found in Jerk.com profiles. Apart from the challenge to misrepresentations as to the *source* of the website’s content, there are no allegations that the profiles’ content violates the FTC Act. *See Comp.* ¶¶ 15-19. Moreover, the relief at issue contradicts Mr. Fanning’s contention that this case is really a disguised effort to control content. The Order places no restrictions on the content of profiles or comments that users may place on any website operated by Respondents. It includes no content restrictions on Respondents other than prohibitions on specified misrepresentations. We thus find no support in either the Complaint’s counts or the relief granted for the contention that this proceeding is an attempt to control content.

We also find no support for Mr. Fanning’s contention that Jerk “provided a public referendum on Facebook” that triggers First Amendment protection. FOppB 17-18. Mr. Fanning points to no evidence that Jerk was attempting publicly to examine Facebook’s privacy statements and thereby encourage marketplace discussion. *See id.* at 17. Indeed, Jerk’s conduct was precisely the opposite of Mr. Fanning’s current claim: the essence of Count I is that Respondents represented that users created the profiles on Jerk.com, not that Jerk scraped content from Facebook. *See supra* Section IV.A.1. Respondent offers no evidence that Mr. Fanning or Jerk considered public discussion regarding Facebook’s privacy policy a reason for any action or representation by Jerk. Even if there were factual support, Respondents “should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.” *Bolger*, 463 U.S. at 68 (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 540 (1981) (Brennan, J., concurring)).

Consequently, Respondents’ deceptive conduct is not constitutionally sheltered from Section 5 liability.

## **B. Regulatory Authority**

Mr. Fanning argues that this case expands and exceeds the Commission’s deception authority by seeking to buttress Facebook’s privacy policies. FOppB 18-20. He claims that Respondents made no representations to Facebook, *id.* at 19, and, “[s]o far as [he is] aware,” never “violated any valid contract or agreement with Facebook with respect to Jerk.com.” FAff

¶ 5. In any case, Mr. Fanning asserts, “[t]here is nothing to buttress” because Facebook “make[s] information readily accessible to the public through the internet.” FOppB 20. More broadly, Mr. Fanning contends that “Congress has supplanted, and even preempted, the FTC’s regulatory authority in the data privacy and security space . . . .” *Id.* Jerk adds the argument that the Commission’s challenge to Jerk.com’s “Terms and Conditions” improperly “regulate[s] the practice of law by restricting the words attorneys could use in crafting contracts.” JOppB 4-5.

These arguments are also without merit. Congress granted the FTC broad authority to protect consumers against unfair and deceptive practices. This authority has not been curtailed as Mr. Fanning contends. *See, e.g., In re LabMD, Inc.*, 2014 WL 253518, at \*9 (F.T.C. Jan. 16, 2014) (holding that the Commission’s unfairness authority applies in the data security context). In any event, as discussed above in Section IV.A.2, our liability findings are not predicated on any alleged representations to Facebook or violation of Facebook’s policies. Complaint Counsel have shown false representations made directly to consumers about the source of Jerk.com profiles and the benefits of purchasing standard memberships.<sup>36</sup>

Jerk’s contention that the FTC is seeking improperly to regulate the practice of law is also unavailing. As already noted, the representation at issue in Count I concerns the source of Jerk.com’s content, not its disclaimer of liability. Beyond this, Jerk cites no authority for the principle that a business’s statements to consumers constitute the practice of law merely because they relate to the business’s views of its legal rights. To the contrary, courts have been willing to find liability for deception under the FTC Act based on the misleading net impression generated by statements in a Truth in Lending Act disclosure box and the “fine print” of a Loan Note and Disclosure document. *See AMG Servs.*, 29 F. Supp. 3d at 1350-51.<sup>37</sup>

## VII. REMEDY

The FTC Act authorizes the Commission to issue an order that requires Respondents to cease and desist the deceptive acts or practices. 15 U.S.C. § 45(b); *FTC v. Nat’l Lead Co.*, 352 U.S. 419, 428 (1957). Such an order must be sufficiently clear so that it is comprehensible to the violator and must be reasonably related to the violations that were found. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). Yet, “[t]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past.” *Id.* at 395 (quoting *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952)). The Commission is permitted “to

---

<sup>36</sup> The facts, consequently, preclude any argument that the Commission exceeded its authority by challenging deception of a business rather than false representations made directly to consumers. In any case, the argument would be flawed: although it may be unusual for the Commission to find misrepresentations to a business to be deceptive under Section 5, the Commission has done so when the circumstances justified an enforcement action. *See, e.g., FTC v. ReverseAuction.com, Inc.*, 2000 US Dist. LEXIS 20761 (D.D.C. 2000) (Commission unanimously applied a deception theory based on a company’s breach of agreements with eBay in a complaint that also alleged consumer deception).

<sup>37</sup> Jerk relies on *American Bar Ass’n v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), a case that addresses the applicability to attorneys, engaged in the practice of their profession, of privacy rules that govern the activities of “financial institutions” under the Gramm-Leach-Bliley Act. That case is inapposite to our challenge to Jerk’s deceptive conduct under the FTC Act.



frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in [the] future.” *Colgate-Palmolive*, 380 U.S. at 395.

The Complaint in this matter attached a notice of the form of order that might issue if the facts were found to be as alleged. Complaint Counsel urge us to issue an order that mirrors that Proposed Order, arguing that the provisions are clear, reasonably related to the unlawful practices, and implement appropriate fencing-in relief. CCMSD 35 & n.26. Mr. Fanning argues that the Proposed Order is overly broad, would restrain Mr. Fanning’s entry into any internet or social media venture in the future, and imposes a prior restraint on free speech in violation of the First Amendment.

Having found liability for Jerk and for Mr. Fanning individually, the Order we issue applies to both Respondents. Several provisions in the Order parallel provisions in the Proposed Order, although, as explained below, we have modified or deleted some of the provisions that were originally proposed.

Part I of the Order prohibits Respondents from making the kinds of misrepresentations alleged in the Complaint. In particular, Respondents are prohibited from misrepresenting (A) the source of any content on a website, including personal information, which is defined to include, *inter alia*, photographs, videos, or audio files that contain an individual’s image or voice; and (B) the benefits of joining any service.

Under the Order, these prohibitions are not limited to the now-abandoned Jerk.com website, but also apply to “the marketing, promoting or offering for sale of any good or service” by Respondents and their representatives. Although the prohibitions on misrepresentations apply broadly, these cease and desist requirements are reasonably related to the unlawful practices. When determining whether an order is reasonably related to the unlawful practices, the Commission considers “(1) the seriousness and deliberateness of the violation; (2) the ease with which the violative claim may be transferred to other products; and (3) whether the respondent has a history of prior violations.” *Stouffer Foods Corp.*, 118 F.T.C. 746, 811 (1994); *see also Telebrands Corp.*, 457 F.3d 354, 358 (4th Cir. 2006); *Kraft, Inc. v. FTC*, 970 F.2d 311, 326 (7th Cir. 1992). “The reasonable relationship analysis operates on a sliding scale – any one factor’s importance varies depending on the extent to which the others are found. . . . All three factors need not be present for a reasonable relationship to exist.” *Telebrands Corp.*, 457 F.3d at 358-59.

We first consider the seriousness and deliberateness of the violation. Respondents do not contest the fact that as many as 85 million Jerk.com profiles were created by scraping content from Facebook and other internet sites. The false claim that profile content was user-generated led to substantial harm to consumers. Hundreds of consumers filed complaints with the Commission, state law enforcement agencies, and Facebook about Jerk.com.<sup>38</sup> Some reported

---

<sup>38</sup> *See, e.g.*, CX0258-007 (Ortiz Dec. ¶ 26 (FTC investigator identifying 313 complaints against Jerk filed on the FTC’s Consumer Sentinel Network)); CX0550-626 (sample of consumer complaints submitted through the Consumer Sentinel Network); CX0012-25; CX0528-001; CX0529-001; CX0531-001 (complaints to offices of Minnesota, Missouri, Connecticut and New York); CX0105-001 ¶ 3 (Facebook Dec. ¶ 3).

being concerned about their safety and that of their family members. CCSMF ¶ 163-64. Many paid money to Respondents in an effort to have their profiles removed, and spent considerable time trying to get their profiles or those of loved ones deleted from the site.<sup>39</sup>

Moreover, as previously discussed, Respondents intended Jerk.com visitors to obtain the impression that profile content was user-generated. *See supra* Sections IV.A.1 and IV.A.3. Respondents also made the false claim about benefits from a Jerk.com membership – which amounted to the sole reason for purchasing a \$30 standard membership – while choosing not to provide any benefits in return for the membership fee. *See supra*, Section IV.B.<sup>40</sup> Respondents’ misrepresentations were knowing, and their violations were both serious and deliberate. *See Telebrands Corp.*, 457 F.3d at 359.

Next, we consider the ease with which Respondents’ claims may be transferred to other products. A violation is considered transferable when other products could be sold utilizing similar techniques. *See Colgate-Palmolive*, 380 U.S. at 394-95; *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392, 394-95 (9th Cir. 1982); *POM Wonderful*, 2013 WL 268926, at \*64. Here, we need not speculate because Respondents already have demonstrated that they will use the same profiles and make the same representations on other websites they operate. When Respondents lost the Jerk.com domain name they moved the content to Jerk.org and continued making the misrepresentations. *See CX0258* ¶ 17. Similarly, Respondents used automatically generated profiles on the reper.com website when they began the next iteration of their business in 2010. *See, e.g.*, CX0663 (e-mail explaining that there were nearly 90 million profiles on company’s second brand, www.reper.com).<sup>41</sup>

Accordingly, we conclude that prohibiting Respondents from making the misrepresentations described in Part I of the Order in the marketing, promotion, or sale of any good or service bears a reasonable relationship to the violation of the FTC Act found in this case. As courts have recognized, the Commission’s authority includes power to issue orders “encompassing all products or all products in a broad category, based on violations involving only a single product or group of products.” *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 223 (2d Cir. 1976); *see also Colgate-Palmolive*, 380 U.S. at 394-95.

---

<sup>39</sup> *See, e.g.*, CCSMF ¶¶ 158-59; CX0001-001 ¶¶ 2-3; CX0005-001 ¶ 5; CX0026-001-02 ¶ 6; CX0038-001 ¶ 4; CX0040-001-02 ¶ 6; CX0007-001 ¶ 5; CX0031-001-02 ¶ 5; CX0011-004 ¶ 17; CX0036-002 ¶ 9; CX0037-001-02 ¶ 7.

<sup>40</sup> Mr. Fanning’s broad statement that “Jerk LLC experienced a number of problems in operating the site, including the site being hacked and being ‘snaked’ by the FTC which disrupted the services,” FAff ¶ 4, does not link any “problems in operating the site” to the failure to provide benefits. Respondents provided no evidence that the failure to offer benefits was inadvertent.

<sup>41</sup> Although there is no history of violations in this case, that factor is less important in our analysis considering the strength of the other factors, particularly the ease of transferability to other products. Courts look to the circumstances as a whole “and not to the presence or absence of any single factor.” *Sears, Roebuck & Co.*, 676 F.2d at 392; *see also Telebrands Corp.* 457 F.3d at 362 (finding evidence of first two factors sufficient to establish there was a reasonable relationship between the remedy and violation).

Part II of the Order prohibits Respondents from disclosing, using, selling, or benefitting from customer information or consumers' personal information obtained in connection with Respondents' operation of Jerk. Order II.A, II.B. Consumers' personal information is defined to include photos and other data scraped from internet sites. Order, Definition 3. The Order also requires Respondents to dispose of consumers' personal and customer information within 30 days after entry of the Order. Order II.C. The customer information and consumers' personal information obtained in connection with the operation of Jerk are raw material that could be used by Respondents to transfer their claims to other products. Applying the same three-part analysis as for Part I of the Order, we conclude that these provisions bear a reasonable relationship to the violation and, therefore, are appropriate fencing-in relief. "Fencing-in provisions serve to 'close all roads to the prohibited goal, so that (the FTC's) order may not be by-passed with impunity.'" *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 370 (9th Cir. 1982) (quoting *Ruberoid*, 343 U.S. at 473).

Parts III-VII of the Order impose certain record-keeping, notification, and reporting requirements, and properly serve to facilitate administration of the Order. Part VIII provides that the Order will terminate in twenty years.

Complaint Counsel seek two additional provisions in the Proposed Order. First, Complaint Counsel argue for a provision that would prohibit Respondents from misrepresenting compliance with any company's user agreement, privacy policy, or contract provisions pertaining to the collection, use, or disclosure of consumers' personal information. Complaint Counsel characterize this provision as fencing-in relief and claim that it "is important because Respondents' use of the Facebook platform to build Jerk.com's profiles violated Facebook's terms for Developers." CCMSD 36. We do not include this provision in the Order. As discussed above, there are unresolved factual disputes regarding whether Respondents violated Facebook rules, but we do not regard that as an issue requiring resolution in order to determine liability for the deceptive conduct alleged in the Complaint. *See supra* Section IV.A.2. Complaint Counsel have not shown a sufficient relationship between the misrepresentations to consumers regarding the source of Jerk.com's content and the benefits of standard membership, on the one hand, and misrepresentations regarding Respondents' compliance with other companies' user agreements, privacy policies, or contract provisions to justify adding the requested provision as fencing-in relief.

Complaint Counsel also seek a provision, which they characterize as fencing-in relief, that would prohibit Respondents from misrepresenting their privacy practices. Mr. Fanning argues that this provision is unrelated to any alleged unlawful conduct, particularly when there is "no mention or reference to" Respondents' privacy protections in the Complaint. FOppB 24. We agree with Mr. Fanning. The Complaint alleges misrepresentations regarding the source of content on Respondents' website and the benefits of paid membership. The Complaint does not allege misrepresentations regarding the privacy practices of Respondents. We see no clear linkage between the Complaint's deception allegations and Respondents' privacy practices. Consequently, we conclude that the provision at issue does not bear a reasonable relationship to the violations of the FTC Act found in this case, and we do not include the provision in the Order.

We are unpersuaded by Respondents' remaining objections. Mr. Fanning argues that the Order "effectively prohibits or regulates [him] from engaging in any business that involves social media or the internet" and would restrain for twenty years his "involvement with respect to each and every actual or potential business venture involving the internet, public information, or personal data without exception or any degree of specificity" and thereby has no reasonable relation to the violation found in this case. FOppB 24-26. We disagree. Mr. Fanning is free to engage in any business so long as he abstains from making the misrepresentations described in Part I of the Order or from using the consumer and customer data obtained in connection with operating Jerk.

Mr. Fanning also asserts that the Order "lacks specificity." Although he fails to identify the particular provisions that he finds insufficiently clear, Mr. Fanning claims that an order is inappropriate because this case "is not a situation where an order restricting or deterring certain future claims about a product or service is even possible where there is no specific advertisement or mode of presenting a claim." FOppB 24. We disagree. Many Commission cases are based on implied claims rather than express claims, and cease and desist orders in those cases, like the Order in this case, sufficiently identify the prohibited conduct. *See, e.g., POM Wonderful*, 2013 WL 268926. Here, Part I of the Order identifies the specific prohibited misrepresentations, and Part II of the Order clearly identifies the types of information obtained from the operation of Jerk that Respondents are prohibited from using in the future. Thus, the Order's prohibitions are sufficiently "clear and precise in order that they may be understood by those against whom they are directed." *FTC v. Cement Institute*, 333 U.S. 683, 726 (1948).

Mr. Fanning argues that the Order abrogates his First Amendment rights as a prior restraint of free speech. It is well-established that the First Amendment does not protect misleading commercial speech. *See Central Hudson*, 447 U.S. at 566. It is also clear that a FTC Order prohibiting the same conduct and claims that the Commission found to be misleading does not abrogate the First Amendment rights of respondents. *See, e.g., POM Wonderful*, 2015 WL 394093, at \*20; *Kraft*, 970 F.2d at 325-26. If the Commission's assessment of liability established that the past claims were deceptive, then, as a forward-looking remedy, limiting the same claims "is tightly tethered to the goal of preventing deception," and "is not more extensive than necessary to serve the [substantial government] interest in preventing misleading commercial speech." *POM Wonderful*, 2015 WL 394093, at \*20. Thus, Part I of the Order prohibiting the specific misrepresentations found to be misleading does not violate Respondents' First Amendment rights.

Mr. Fanning also argues that the Order imposes a prior restraint on free speech to the extent that it restricts the use and dissemination of information gathered from public sources. According to Mr. Fanning, "taken literally, the injunction sought against Fanning would bar him from commenting on or utilizing any information that exists or potentially exists in the public domain . . . ." FOppB 25. We disagree. The Order only prevents Respondents from using or benefitting from personal consumer or customer information that was previously obtained by Respondents from operating Jerk and that has been found to have contributed to the misleading representations in this case. The provision prevents Respondents from repeating their prior conduct and acts to "close all roads to the prohibited goal," so that Respondents cannot simply bypass the Order. *Litton*, 676 F.2d at 370 (quoting *Ruberoid*, 343 U.S. at 473). Accordingly,

Part II of the Order advances the government's substantial interest in preventing deception and is not broader than necessary.

Finally, Mr. Fanning argues that "relief should not be adjudicated in summary fashion on this record" and that "the spirit of due process, with actual notice and an opportunity to be heard" should preclude the imposition of relief. FOppB at 26. As we previously explained, the Complaint in this case attached a notice of the form of order that would be issued if facts in the case established liability. Thus, Respondents received actual notice of the likely relief. Moreover, Mr. Fanning's Opposition to the Motion for Summary Decision belies his argument. Mr. Fanning challenged specific provisions in the Proposed Order and offered broad over-arching First Amendment objections to the Proposed Order. Respondents have been provided due process regarding relief and have been heard. We see no reason for further argument on the remedy and therefore issue the accompanying Order at this time.

For the foregoing reasons, the Commission concludes that Jerk, LLC and John Fanning violated the FTC Act, 15 U.S.C § 45, in connection with the website Jerk.com. Consequently, we issue a Final Order to remedy Respondents' violations and prevent their recurrence.

Date of Decision: March 13, 2015