

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



ORIGINAL

In the matter of:)

Jerk, LLC, a limited liability company,)

Also d/b/a JERK.COM, and)

John Fanning,)

Individually and as a member of)
Jerk, LLC,)

Respondents.)

DOCKET NO. 9361

PUBLIC

**SUR-REPLY OF RESPONDENT JOHN FANNING IN OPPOSITION TO
COMPLAINT COUNSEL'S MOTION FOR SUMMARY DECISION**

Respondent John Fanning ("Fanning"), pursuant to the Commission's Rules of Practice, hereby files his sur-reply to respond to arguments raised by Complaint Counsel in its reply to Mr. Fanning's Opposition to Motion for Summary Decision. Mr. Fanning responds as follows:

1. Complaint Counsel should not win by default and avoid the merits merely because Mr. Fanning did not respond separately to each and every so-called undisputed material fact sprawled over 183 paragraphs. Justice is not served if Complaint Counsel's position prevails. Mr. Fanning did not flout the procedural rules. Commission Rule of Practice 3.24(a)(2) provides, "The opposing party shall include a separate and concise statement of those material facts as to which the opposing party contends there exists a genuine issue for trial, *as provided in §3.24(a)(3).*" (emphasis added). In addition, Rule 3.24(a)(3) states:

Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The Commission (or, when appropriate, the Administrative Law Judge)

may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of his or her pleading; the response, *by affidavits or as otherwise provided* in this rule, must set forth specific facts showing that there is a genuine issue of material fact for trial. If no such response is filed, summary decision, *if appropriate*, shall be rendered. (emphasis added).

Mr. Fanning's Affidavit and the Affidavit of Counsel filed in opposition set forth specific facts establishing a genuine issue of material fact for trial sufficient to withstand the Motion for Summary Decision. Ironically, many of the Affidavits and even the deposition testimony relied upon by Complaint Counsel contain assertions that are not admissible in evidence at trial, yet formed the basis of the so-called statement of facts. Further, Mr. Fanning pointed out conflicts and inconsistencies in the so-called facts claimed by Complaint Counsel, exposed alleged statements that mischaracterized the evidence, and established inferences that must be drawn in his favor. Mr. Fanning also cited controlling case law to support his legal arguments that Complaint Counsel was not entitled to summary decision. Even in a case where a violation occurs, the Rule does not require automatic summary decision, but rather permits summary decision if appropriate. Mr. Fanning established that summary decision is not appropriate.

Further, Complaint Counsel fails to identify any case FTC case in which summary decision was similarly granted. The two cases Complaint Counsel cites in support of a default, Cosme-Rosado v. Serrano-Rodriguez, 360 F. 3d 42, 45 (1st Cir. 2004), and Twist v. Meese, 854 F.2d 1421, 1425 (D.C. Cir. 1988), are not applicable to the instant proceeding, as they concern dissimilar cases applying the local rules of Puerto Rico and the D.C. Circuit Court, respectively, not the Commission Rules of Practice.

2. Complaint Counsel never rebuts Mr. Fanning's observation that this case is really about the substance of the content, rather than the source of the content. Rather, Complaint

Counsel continues to mischaracterize the language on the website to argue a representation about source of content. Complaint Counsel, however, ignores the paragraph titled "Online Content" that expressly states, "Opinions, advice, statements, offers, or other information or content made available through jerk.com are those of their respective authors and not of Jerk LLC and should not necessarily be relied upon," and goes on to advise that "Jerk LLC does not guarantee the accuracy, completeness, or usefulness of any information on jerk.com and neither adopts nor endorses nor is responsible for the accuracy or reliability of any opinion, advice or statement made." (CX0273-001). The website makes crystal clear that jerk.com provides a forum and platform for posting information "through jerk.com" from various sources. This is consistent with another prominent statement contained on the website: "No one's profile is ever removed, *because Jerk is based on searching free open Internet searching databases and it's not possible to remove things from the Internet.*"

3. The arguments and cases cited by Complaint Counsel about disclaimers do not establish deception. For example, in FTC v. Commerce Planet, the defendant advertised a product as "free," but disclosed in its terms of membership that the customer would have to actively unsubscribe or be charged. The court noted that "[t]he information about the continuity plan ... is buried with other densely packed information and legalese, which makes it unlikely that the average consumer will wade through the material and understand that she is signing up for a negative option plan." F.T.C. v. Commerce Planet, Inc., 878 F. Supp. 2d 1048, 1065 (C.D. Cal. 2012). Similarly, in FTC v. AMG Servs, Inc., the court noted that material in the fine print was "concealed from borrowers" so did not provide a defense. FTC v. AMG Servs., 2014 U.S. Dist. LEXIS 73285 at * 30 (D. Nev. 2014). In both cases, the disclaimer language was not sufficient to "save" statements from being deceptive. In contrast, Mr. Fanning presses that the

language cited by Complaint Commission about source of content as the basis for the deception claim in reality outlines the legal terms governing use of the site, and does not constitute a material misrepresentation. Mr. Fanning does not rely on a “disclaimer” to assert a safe-haven or defense to any alleged deceptive statement. Moreover, in this case, Complaint Counsel cites to the legalese on the website as the basis for deception liability under Section 5. Consequently, Complaint Counsel cannot maintain the required element of materiality based on statements on the website which an average consumer would most likely not read or understand, applying the reasoning in Commerce Plant.

4. Complaint Counsel’s response to Mr. Fanning’s unavoidable First Amendment arguments, both with respect to Section 5 liability and proposed enforcement provisions, are likewise unavailing. The mere fact that nothing on the site indicated that Jerk.com served as a referendum on Facebook is wholly-irrelevant to the First Amendment analysis, and does not somehow compel the repression of free speech rights. The cases cited by Complaint Counsel have no bearing. For example, in the case of Proctor & Gamble Co. v. Haugen, 222 F.3d 1262 (10th Cir. 2000), the court stated that “[w]hile economic motivation or reference to a specific brand name and products, when viewed in isolation, might not render a message commercial speech, we conclude that those factors taken together with the instant message’s promotion of Amway products at the expense of P & G products support the characterization of the subject message as commercial speech.” Proctor & Gamble Co., 222 F.3d at 1265. Here, unlike in Proctor & Gamble, Facebook is not even mentioned on the site, as Complaint Counsel concedes.

CONCLUSION

For the foregoing reasons, and reasons previously argued in opposition, Respondent John Fanning requests the Commission to deny Complaint Counsel’s motion for summary decision.

Respectfully submitted,

JOHN FANNING,

By his attorneys,

/s/ Peter F. Carr, II

Peter F. Carr, II

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2014, I caused a true and accurate copy of the document entitled *Sure-Reply of Respondent John Fanning in Opposition to Complaint Counsel's Motion for Summary Decision*, to be served electronically through the FTC's e-filing system and I caused a true and accurate copy of the foregoing to be served as follows:

One electronic copy to the Office of the Secretary:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room H-159
Washington, DC 20580
Email: secretary@ftc.gov

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

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

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

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