

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) DOCKET NO. 9361
)
John Fanning,)
individually and as a member of)
Jerk, LLC.)
)
_____)

**COMPLAINT COUNSEL’S
MOTION FOR SUMMARY DECISION**

Pursuant to Section 3.24 of the Commission’s Rules of Practice, Complaint Counsel move for summary decision in this matter. Based on the pleadings and evidence in the case, as described in Complaint Counsel’s *Statement of Material Facts as to Which There Is No Genuine Issue For Trial* (“CCSMF”), summary decision is appropriate as to violations of Sections 5(a) of the Federal Trade Commission Act as alleged in the Complaint. The arguments supporting Complaint Counsel’s motion are set forth in the accompanying *Memorandum in Support of Complaint Counsel’s Motion for Summary Decision*.

PUBLIC

Dated: September 26, 2014

Respectfully submitted,



Sarah Schroeder

Yan Fang

Boris Yankilovich

Kenneth Abbe

Federal Trade Commission
Western Region – San Francisco
901 Market Street, Suite 570
San Francisco, CA 94103
Telephone: 415-848-5100
Fax: 415-848-5184
Email: sschroeder@ftc.gov

COMPLAINT COUNSEL

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MEMORANDUM IN SUPPORT OF
COMPLAINT COUNSEL’S MOTION FOR SUMMARY DECISION

I. INTRODUCTION

The uncontroverted evidence demonstrates that Respondents Jerk, LLC (“Jerk”) and John Fanning (“Fanning”) (collectively, “Respondents”) violated Section 5(a) of the Federal Trade Commission Act (“FTC Act”) by making false representations to consumers. Specifically, Respondents falsely represented that the content on their website, Jerk.com, was created by Jerk.com users and reflected those users’ views of the individuals profiled on the site (Count I). For example, the website claimed that “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.” But, in fact, Respondents themselves created the vast majority of the profiles on the site. Moreover, Respondents falsely represented that by purchasing a subscription to Jerk.com users would obtain additional paid premium features, including the ability to dispute information posted on Jerk.com (Count II). Consumers who purchased a membership, however, received nothing in return.

The uncontroverted evidence demonstrates that Respondents made these representations, that these representations were false, and that they were material. Moreover, the record demonstrates that Fanning had authority to control and participated in the unlawful conduct alleged in the Complaint. As described below, the website Jerk.com was in many ways Fanning's "pet project" and, as the founder and manager of Jerk, he was actively involved in the creation of the website and its content.

It is plainly evident at this juncture that no genuine dispute about any material fact exists. Since its counsel withdrew from this litigation two months ago, Jerk has effectively abandoned the case. Fanning remains involved in the litigation, but cannot point to any document or witness to dispute the Complaint's allegations, or any evidence that would call these allegations into question. Consequently, holding an administrative hearing would simply waste judicial time and resources.

II. FACTUAL BACKGROUND

A. Respondents and their control over Jerk.com.

Fanning formed Jerk as a Delaware limited liability company in January 2009. (CCSMF 1-2, 97-100) Throughout the period relevant to this action, Fanning has held himself out as a founder and member of Jerk. (CCSMF 98, 101) He is also a founder, officer, and manager of NetCapital.com, LLC ("NetCapital"), { }¹ (CCSMF 106-111)

Jerk has operated out of Fanning's business and home addresses. (CCSMF 117-119) The company has used as its principal address 165 Nantasket Avenue, Hull, MA 02045, which

¹ Pursuant to Commission Rule of Practice 3.45(e), confidential material is designated in bold with brackets.

is also Fanning's business address. (CCSMF 5, 117) {
} (CCSMF 6, 118) Moreover, Jerk {
}, and Jerk staff worked out of Fanning's house. (CCSMF
7, 119, 121)

From at least 2009 through 2012, Jerk operated the website Jerk.com. (CCSMF 3, 16)
Jerk has done business as Jerk.com, Jerk.org, and Jerk.be (collectively, "Jerk.com"), as well as
Reper.com, another business that Fanning launched as part of Jerk. (CCSMF 4, 20) Jerk leased
the Jerk.com domain from Internet Domains, a company that leases domain names to businesses.
(CCSMF 15) In May 2013, after Fanning had a payment dispute with Internet Domains, Jerk
profiles appeared on another domain, Jerk.org. (CCSMF 21-22)

Respondents' acts and practices have been in or affecting commerce as defined in Section
4 of the FTC Act. (CCSMF 10-13) Jerk earned revenue by selling \$30 memberships over the
Internet, charging consumers a \$25 customer service fee, and placing third-party advertisements
on Jerk.com. (*Id.*)

B. The Jerk.com website.

Respondents launched Jerk.com on the Internet in early 2009. (CCSMF 16) Jerk.com
was a social media website that invited people ("users") to create profiles about others and rate
the profiled person a "Jerk" or "not a Jerk." (CCSMF 14) As of 2012, the website contained
various webpages, including a home page, a "Post a Jerk" page, a "Remove Me" page, a
"Contact Us" page, an "About Us" page, a "sign in" page, a "Become a Subscriber" page, and
pages profiling individuals, which the Complaint refers to as "Jerk profiles." (CCSMF 40-45,
85-87)

The individual profiles comprised the vast majority of the webpages on Jerk.com. As of 2010, Jerk.com contained as many as 85 million of these profile pages, each corresponding to a unique profile. (CCSMF 32) Approximately 29 million profiles contained a photo of the profiled subject. (CCSMF 33) Jerk.com profiled people of all ages, including children. (CCSMF 31) An estimated 4.74 million profiles contained photos of children who appeared to be under age 10. (CCSMF 34) The Jerk.com profile pages displayed the profiled person's name, picture (or a blank square or avatar in lieu of a picture), buttons to vote the profiled person a "jerk" or "not a jerk," a tally of the vote results, and a space to enter comments and add other information about the profiled person. (CCSMF 25-28) Profiled subjects were identified as a jerk or not a jerk in red or green lettering above their name. (CCSMF 29) Some Jerk.com profiles appear to have been created by actual users or had comments added by users. For example, a few profiles included comments, such as: "Omg I hate this kid he\'s such a loser," "Address: gay boulevard," and "just can go fucking slaughter herself . . . Nobody in their right mind would love you . . . not even your parents love [you]." (CCSMF 30)

C. Respondents represented that the profiles on Jerk.com were user-generated.

Jerk.com represented to consumers that the content displayed on the website, including the profiles, was generated by the website's users and reflected the users' own views of the profiled subjects. (CCSMF 39-46)

Jerk.com expressly stated that "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." (CCSMF 43) Jerk.com supported that claim by boasting that "millions of people . . . already use Jerk for important updates for business, dating, and more" (CCSMF 42) and that "Jerk is where you find out if someone is a jerk, is not a jerk, or is a saint in the eyes of others."

(CCSMF 44) Jerk.com’s terms and conditions further reinforced the representation that the content on Jerk.com was user-generated by telling users that “You are solely responsible for the content or information you publish or display (hereinafter, ‘post’) on jerk.com,” and “You shall remain solely responsible for the content of your postings on jerk.com” (CCSMF 43)

Moreover, the website prominently featured a “Post A Jerk” function that encouraged users to “[f]ill out the form below to create a profile on jerk” and “[i]nclude a picture if you can and as much other information as possible.” (CCSMF 45) Jerk.com’s homepage also featured profiles with comments and votes, reinforcing consumers’ belief that the profiles on the website were user-generated. (CCSMF 41) Jerk.com’s Twitter page supported its user-generated-content message, stating, “Find out what your ‘friends’ are saying about you behind your back to the rest of the world!” (CCSMF 46)

Through these statements, Respondents clearly represented that the profiles on Jerk.com were user-generated. Respondents do not, and cannot, genuinely challenge Complaint Counsel’s evidence that the foregoing statements were disseminated on Jerk.com and Twitter.

D. Respondents meant to convey to consumers that the profiles on Jerk.com were created by users.

The record includes uncontroverted evidence that Respondents intended to convey that Jerk.com was an organic social network with its content created by Jerk.com users themselves and that the site reflected those users’ views about people profiled on the site. (CCSMF 47)

Jerk’s commercial success depended upon making this representation convincingly. Respondents recognized that to raise Jerk’s value for a potential acquisition or merger, Jerk.com needed to boost its web traffic. (CCSMF 54-55, 154-155) Few people, however, were visiting the site. In June 2009, four months after its launch, Jerk.com had few actual users and less than 7,000 profiles. (CCSMF 17) The problem for Respondents was that people were neither

frequenting Jerk.com nor creating many profiles, and consequently the site was not growing in traffic and marketability. (CCSMF 61)

Creating the appearance that Jerk.com had many profiles would resolve that problem, but only if it was understood that the profiles were being created by people actually visiting the site. As a Jerk insider explained, “I believed the website would only have value to users if people manually created Jerk.com profiles. People would be more likely to use the website if they believed their peers were using it.” (CCSMF 54-CX0057) More profiles would also drive traffic to the website by people who were searching for their names or the names of others on Internet search engines. (CCSMF 37-38) And more profiles stood to boost direct revenue from consumers paying membership fees to Jerk to gain the ability to manage or delete the profiles, as explained below.

Thus, it was important for Respondents to convey the representation that the content on Jerk.com, including the profiles, was generated by actual users, not manufactured by Jerk itself. Respondents did so through the statements on Jerk.com described above, which they crafted with the intent to make this representation. Jerk team members brainstormed website language that would convey to consumers that Jerk.com is a site where “someone i[s] going to tell you the answer” to the question, “Are you a jerk?” (CCSMF 47-CX0357) They also worked on drafting a Wikipedia entry for Jerk.com that described the website as a user-generated social network. (CCSMF 48) Additionally, Respondents made this representation to investors, stating that the content on Jerk.com “is growing organically from the users themselves and reflect the view of the people who have personal first hand knowledge of the profiled individual.” (CCSMF 49-CX0046) Jerk also told the FTC, state attorney generals, Facebook, that Jerk.com’s users, not Jerk, created the profiles on the site. (CCSMF 50)

E. Consumers believed the representation that the profiles on Jerk.com were created by users and reflected their views of the persons profiled.

The uncontroverted evidence demonstrates that consumers believed Respondents' representation that the content on Jerk.com was created by the site's users and reflected the users' views of the persons profiled. (CCSMF 51)

With millions of profiles created on Jerk.com, the site began to "regularly show up among the top 1-3 search results on search engines like Google when someone searche[d] a person's name who is in [Jerk.com's] database." (CCSMF 38-CX0153) Consequently, many consumers began to discover Jerk.com profiles of themselves or family members after doing routine Internet searches. (CCSMF 37, 38) Visiting those profile pages left consumers with the impression that the profiles were created by someone who knew the profiled person. As one consumer testified:

When I visited jerk.com, I saw a profile with my full name and 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 someone was messing with me.

(CCSMF 51-CX0037)

The display of personal photographs on the Jerk.com profile pages reinforced Respondents' user-generated representation and caused consumers to perceive that someone who knew the profiled person created the profile. (CCSMF 51) Bolstering this perception was the fact, asserted in many consumers' complaints, that the photographs displayed on their Jerk.com profiles were originally posted on Facebook and not designated for public viewing. (CCSMF 68, 69) In fact, many photos on Jerk.com profiles were not publicly available on Google images.

(CCSMF 70) The resulting implication was that only Jerk.com users with access to the profiled person's Facebook photographs could have used those photographs to create the Jerk.com profile.

The display of personal photographs on Jerk.com profiles prompted many consumers, acting under the perception that some other user was responsible for their posting, to complain and seek their profiles' removal. Consumers reported being "mortified" and "furious" to find private photographs of them and their family members on Jerk.com, especially because some of these photos portrayed intimate family moments, including bathing and nursing children.

(CCSMF 35-36) In fact, many Jerk.com profiles featured photographs of children, which were displayed without their parents' knowledge or consent. (CCSMF 36) Consumers also feared the Jerk.com profiles would endanger their or their family members' safety. (CCSMF 163-165) Some consumers also suffered professionally from having profiles of them displayed on Jerk.com. (CCSMF 162)

Consumers attempted to complain to Jerk.com's administrators directly. (CCSMF 79) Respondents, however, frustrated their efforts by failing to give consumers any contact information for Jerk.com's administrators. (*Id.*) Jerk.com did not display any contact email address, valid physical address, or phone number on the site. (*Id.*) The site did have a "Contact Us" page, but to use it, consumers had to either buy a Jerk.com membership (described below) or pay a "service charge of \$25." (*Id.*) Many consumers complained about their inability to contact Jerk. (*Id.*)²

² Some consumers sent written complaints to Jerk.com's webhost and to Jerk's registered business agent, both of which forwarded the complaints to Fanning. (CCSMF 119) However, Fanning instructed Jerk's registered agent to "[j]ust ignore them . . . These are customers trying to get service from us without paying the service charge." (CX0738) In one instance, a

Numerous consumers also complained to Facebook about their names, private photos, and other content that they had posted on Facebook appearing on Jerk.com without authorization. (CCSMF 77) Facebook investigated these complaints, including by visiting Jerk.com, and sent Jerk a cease and desist letter in March of 2012. (CCSMF 82) That letter expressed Facebook's concern about Jerk's use of automated means to collect Facebook user data in violation of Facebook's terms, and it requested that Jerk cease automated data collection from Facebook and destroy all Facebook user data that Jerk collected. (*Id.*) Jerk refused to alter its practices in response to Facebook's request. (CCSMF 81)

F. It was Respondents themselves who created the vast majority of the profiles on Jerk.com.

The uncontroverted evidence demonstrates that, contrary to their representation that the content on Jerk.com was created by users and reflected their views of the profiled individuals, Respondents themselves created the vast majority of the profiles displayed on the site.

As explained in Section II.D, creating the appearance that the profiles on Jerk.com were input by users, and therefore reflected users' views of those profiled, was important to Jerk's commercial success. But since relatively few people actually used Jerk.com (CCSMF 17), it was unlikely that Jerk.com would quickly become popular and valuable if Respondents relied strictly on organic profile creation. Facing this predicament, Respondents' solution was to create the profiles themselves. Specifically, through Software Assist, the Romanian-run company Fanning hired to develop code for Jerk.com, Respondents gathered personal data about people from

consumer found contact information for one of Fanning's partners in NetCapital and called him to complain about the consumer's thirteen year-old son being profiled on Jerk. (CCSMF 157) The partner, in turn, complained to John Fanning. (*Id.*)

Facebook and used that data to create profiles of those people on Jerk.com. (CCSMF 18, 56, 143)

The company employed two automated methods to gather data from Facebook.³ First, Jerk traversed Facebook's Developer Platform to harvest Facebook users' names and pictures.⁴ (CCSMF 57) Jerk then bulk-loaded those names and pictures into its own database, from which it created profiles for those people on Jerk.com. (*Id.*) Second, Jerk created a feature called "Find People I Know," through which it invited unsuspecting consumers to sign into Jerk.com using their Facebook login credentials. (CCSMF 58) Once customers did so, Jerk gained access to their Facebook friends list and, without the user's knowledge, automatically generated Jerk.com profiles for those Facebook friends. (*Id.*)

Jerk's internal documents establish that Respondents created the vast majority of Jerk.com profiles using information obtained from Facebook. Jerk's business plan stated that "Jerk.com grew to over 85 million profiles in just a few months," an assertion repeated in Jerk's presentation to investors. (CCSMF 59-CX0317) Given that Jerk did not have a strong user base, the sheer number of Jerk profiles indicates that they were auto-generated. (CCSMF 57, 61) Internal emails also confirm that Respondents auto-generated Jerk.com profiles using Facebook

³ Respondents also added content from other sources to populate Jerk.com profiles, (CCSMF 60) further helping the website appear to be user-generated.

⁴ An employee of Software Assist, Jerk's hired development company, registered as a developer with Facebook in 2008 and proceeded to register multiple applications on the Facebook Platform, including Jerk.com and Jerk.be. (CCSMF 73) Those applications gave Software Assist and Jerk access to Facebook's application programming interfaces ("APIs") and other services, which allowed them to retrieve, in an automated fashion, information from Facebook users. (CCSMF 74) Very few Facebook users, however, used or connected with Jerk's Facebook applications. (CX0094-005) ("the number of users who accessed or connected to [jerk.com, jerk2.com, jerk3.com and jerk4.com] was less than 60 users.")

data. In a March 2010 email copying John Fanning, Jerk's programmers stated: "When you ask the user to login into their Facebook account to find friends, auto sync Facebook and auto create track me links between all the Facebook friends. Auto generate profiles for Facebook friends who are not in the system already. Use the API's provided by Facebook to accomplish this."

(CCSMF 58-CX0724) Another email from July 2009 illustrates the scale and pace of

Respondents' auto-generation of profiles:

Fanning to Romanian developer: "Fix 'People I know' This is important because we need to create at least 5,000 more profiles before August (3 days and counting). Specifically, make sure the facebook part works."

Response from Romanian developer:

– we have created 7000 profiles so far
– at the end of the day we will have 20,000 new profiles."

(CCSMF 18-CX0640)

Testimony from Jerk insiders also establishes that Respondents created the vast majority of the profiles displayed on Jerk.com. A Jerk team member testified that "when website visitors signed into Jerk.com through Facebook, Jerk.com gained access to the visitors' Facebook friends lists and generated profiles on Jerk.com for all of them." (CCSMF 58-CX0629) Another Jerk team member testified that "[m]ost of the profiles were bulk loaded from Facebook." (CCSMF 57-CX0057) An investor in Jerk testified that John Fanning admitted to him that the force behind Jerk.com's explosive growth in profiles was obtaining the information from Facebook.

(CCSMF 57-CX0181)

These admissions comport with statistical analysis showing that less than one percent of all profiles on Jerk.com had any votes for whether the profiled person was a "Jerk" or a "not a Jerk," which indicates that nearly all the profiles on Jerk.com were not created manually by

actual users.⁵ (CCSMF 66) Therefore, based on uncontroverted evidence, including an analysis of the website itself, there is no genuine issue that the vast majority of the profiles on Jerk.com were not created by users and therefore did not reflect users' views of the profiled persons.

Furthermore, uncontroverted evidence demonstrates that Fanning dismissed concerns raised about the true source of the profiles and the mismatch between the large numbers of Jerk.com profiles and the small number of actual users. For example, some members of the Jerk team and potential investors raised suspicions to Fanning and the Romanian programmers about whether the profiles were really created organically, as Jerk claimed. (CCSMF 152) Similarly, a Jerk team member raised concerns "that Jerk, by using Facebook users' profiles to build its own profiles, was storing Facebook information for longer than Facebook's Developers Terms of Use permitted." (CCSMF 153-CX0629-004) And when Jerk team members voiced concerns to Fanning about the usefulness of a website that displayed many profiles but had few actual users, Fanning retorted that Jerk.com having millions of profiles was valuable in itself because that drove traffic to the site. (CCSMF 154) Indeed, in September 2010, Fanning suggested that Jerk create even more profiles to drive up traffic to Jerk.com and increase the company's acquisition value:

{

}

(CCSMF 155-CX0492)

⁵ Brian Rowe, an economist at the FTC's Bureau of Economics, provided statistical analysis relating to the Jerk.com website. (CX0063)

G. Respondents represented that \$30 memberships to Jerk.com would give consumers additional benefits in managing profiles, but they provided no additional benefits to consumers who paid.

Uncontroverted evidence demonstrates that Respondents, in addition to creating most of the profiles on Jerk.com, also marketed and sold \$30 subscriptions—called “memberships”—by representing to consumers that these subscriptions would give them additional benefits, including managing the paying members’ profiles. (CCSMF 11, 84)⁶

Jerk.com stated that consumers can “use Jerk to manage your reputation and resolve disputes with people who you are in conflict with. There are also additional paid premium features that are available [hyperlink to Jerk’s Sign-in page].” (CCSMF 86-CX0048-032, CX0275-001) That Sign-in page directed consumers to a Subscription page, which laid out the benefits of subscribing. A large, red “Subscribe” button appeared directly below this list.

Clicking on that button took consumers to a payment form, which stated at the top:

“Become a Subscriber

.....

You must be a subscriber in order to create a dispute!”

(CCSMF 87-CX0276-001) The page included a billing form where consumers could enter billing information. (CCSMF 88-CX0276-001) The form included a choice between a “Gold Membership,” which was “(under development),” or a “standard membership for \$30/year.”

(CCSMF 88) After a consumer entered the required payment information, Jerk.com displayed a message that the consumer’s account was upgraded to a membership and invited the consumer to log into Jerk.com. (CCSMF 89-CX0047 ¶¶10-11) Based on uncontroverted evidence, including a capture of the Jerk.com website, there is no genuine issue that Respondents represented the

⁶ That Respondents may not have sold many memberships does not negate the illegality of their conduct.

foregoing on Jerk.com.

Furthermore, uncontroverted evidence demonstrates that Respondents intended to represent to consumers that buying a Jerk.com membership would give them added benefits, including the ability to modify, and delete, their profiles. (CCSMF 90) Fanning articulated his vision for this revenue source to investors. (*Id.*-CX0117) To his Jerk teammates, Fanning analogized this revenue source to the model that he believed was being used by a popular business review website, under which a business profiled on the website purportedly could pay a fee to have negative reviews removed from or obscured on their profile pages. (*Id.*-CX0438) Respondents proceeded with this revenue model despite concerns from Fanning's business partner about the fees being "blackmail-feeling." (*Id.*-CX0080)

Believing Respondents' representation that purchasing a Jerk membership would enable them to alter their Jerk.com profiles, consumers bought the \$30 memberships. (CCSMF 91, 93) As one consumer testified, "I was desperate to remove my daughter from the website, and I paid the \$30.00 charge three times." (CCSMF 93) {

}

Uncontroverted evidence shows that Respondents failed to provide the promised benefits of a Jerk.com membership to the consumers who bought a membership. (CCSMF 92) After purchasing a membership on Jerk.com, the site would display a message stating that Jerk.com would send the consumer a password to activate all the features. (CCSMF 89) Consumers, however, never received any password. (CCSMF 95-96) In fact, Respondents did not provide consumers with any benefits whatsoever in exchange for purchasing memberships. (CCSMF 94) As one consumer declared, "[t]he membership was a complete waste." (*Id.*-CX0038) An

undercover FTC investigation confirmed that Respondents charged the investigator for a membership but never provided a password, let alone any benefits. (CCSMF 96)

H. Respondents have continued to use consumers' names and photos in other ventures, even after losing control over Jerk.com in 2013.

Despite pitching Jerk.com to several venture capital firms and at least one potential competitor, Fanning failed to sell Jerk. (CCSMF 129-135) By 2010, Fanning decided to pivot the business to Reper.com, another reputation website that he ran. (CCSMF 20) Reper.com was Jerk.com's "sister site" intended to "leverage the[] same techniques" as Jerk.com without Jerk.com's "edginess." (*Id.*; CCSMF 181) Jerk and Reper were highly integrated, and as of July 2010, both Jerk.com and Reper.com were using the same back-end database. (CCSMF181-CX0702, CX0345) Fanning developed yet another reputation website called "things I promised to do" (CCSMF 182) and {

} (CCSMF 183)

Respondents continued to operate and display profiles of people on Jerk.com until May 2013, at which time Internet Domains apparently locked Fanning out of the Jerk.com domain and altered the content on the site. (CCSMF 21) After this lockout, Jerk.com profiles appeared on another domain—Jerk.org. (CCSMF 22)

Currently, the Jerk.com and Jerk.org websites do not contain individual profiles. (CCSMF 24) However, Reper.com has continued to operate as recently as March 2014 (CCSMF 23), and since Jerk has refused prior demands to delete the user data it obtained from Facebook against its terms (CCSMF 81; 82-CX0107), Respondents continue to control content contained in millions of profiles that have been displayed on Jerk.com.

III. PROCEDURAL POSTURE

The Commission issued its Complaint on April 7, 2014. On May 19, 2014, Respondents filed answers to the Complaint. Chief Administrative Law Judge Chappell held a scheduling conference on May 28, 2014, and immediately issued a Scheduling Order. Fact discovery opened on May 28 and will conclude on November 17, 2014. Expert discovery closes on December 31. The evidentiary hearing is scheduled to begin on January 27, 2015.

IV. SUMMARY DECISION STANDARD

The Commission has the authority to grant summary decision in this matter. Rule 3.24 states that summary decision is proper when there is no genuine issue for trial. 16 C.F.R. § 3.24(a)(1). The provisions of Rule 3.24 are “virtually identical to the provisions of Fed. R. Civ. P. 56, governing summary judgment in the federal courts,” *In re LabMD, Inc.*, 2014 FTC LEXIS 126, *6-7 (2014) (citations omitted), under which 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 “party seeking summary judgment always bears the initial responsibility of . . . identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). But once the moving party meets this initial responsibility, the burden shifts to the nonmoving party to establish “specific facts showing that there is a genuine issue for trial.” *In re N.C. State Bd. of Dental Examiners*, 151 F.T.C. 607, 611 (2011) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). The nonmoving party “may not rest upon the

mere allegations or denials of his or her pleading,” but “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).

V. RESPONDENTS’ DECEPTIVE REPRESENTATIONS VIOLATED SECTION 5 OF THE FTC ACT

A. Legal Standard.

Section 5 of the FTC Act declares unlawful “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(1). When evaluating whether a representation is deceptive, the Commission conducts a three-pronged inquiry: (1) whether the respondent disseminated the representations alleged; (2) whether those representations were false or misleading; and (3) whether those representations are material to prospective consumers. *FTC Policy Statement on Deception, appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984) (“Deception Statement”); *In re POM Wonderful LLC*, 2013 FTC LEXIS 6, *17-19 (FTC Jan. 10, 2013); *In re Stouffer Foods Corp.*, 118 F.T.C. 746, 798 (1994); *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994).

With regard to the first prong, a representation conveys “a claim if consumers, acting reasonably under the circumstances, would interpret the advertisement to contain that message.” *POM Wonderful LLC*, 2013 FTC LEXIS at *20 (citations omitted); *see also* Deception Statement, 103 F.T.C. at 176. If a representation conveys a particular interpretation to “at least a significant minority of reasonable consumers,” that interpretation is reasonable. *POM Wonderful*, 2013 FTC LEXIS at *20 (citations omitted); *see* Deception Statement, 103 F.T.C. at 177 n.20. This is true even if the respondent did not intend to communicate a particular claim. *See In re Novartis Corp.*, 127 F.T.C. 580, 689 (1999) (lack of intent arguments “ring hollow” in the face of respondent’s knowledge that the deceptive claim was being communicated). Moreover, “a showing that an advertiser intended to make particular claims can help demonstrate

that the alleged claim was in fact conveyed to consumers.” *POM Wonderful LLC*, 2013 FTC LEXIS at *51. Under the second prong, whether representations were false or misleading, actual deception need not be found; the representation need only be “likely to mislead.” *Cliffdale Associates*, 103 F.T.C. at 105. For the third prong, materiality, “the Commission presumes that express claims are material.” *Deception Statement*, 103 F.T.C. at 182.

B. Uncontroverted evidence demonstrates that Respondents misrepresented the source of the content on Jerk.com (Count I).

Undisputed evidence establishes all three elements of the deception alleged in Count I of the Complaint.

First, uncontroverted evidence demonstrates that Respondents disseminated the representation that the content on Jerk.com, including the names, photographs, and other content displayed in the millions of the profile pages on the site, was created by Jerk.com users and reflected those users’ views of the profiled individuals. Respondents expressly conveyed this claim through statements made on Jerk.com and Twitter, as described in Section II.C. These include explicit statements that users can “post a jerk” on the website; that users are “solely responsible for the content of [their] postings on jerk.com;” that “[o]pinions, 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 that “Jerk is where you find out if someone is a jerk, is not a jerk, or is a saint in the eyes of others.” (CCSMF 43-46) Additionally, the Twitter page for Jerk.com explicitly stated that Jerk.com is where to “[f]ind out what your ‘friends’ are saying about you behind your back to the rest of the world!” (CCSMF 46) Furthermore, as described in Section II.D, Respondents intended to make this representation. Thus, based upon a facial analysis of Jerk.com and Jerk.com’s Twitter page, as well as documentary evidence and

consumer testimony, there is no genuine issue for trial that Respondents disseminated the representation alleged in Count I.

Second, uncontroverted evidence demonstrates that this representation was false. As described in Section II.F, the uncontroverted documentary and testimonial evidence establishes that Respondents took content, including names and photographs, from Facebook, and used that content to create profiles on Jerk.com. (CCSMF 57) Jerk insiders admitted that the company created profiles by “traversing Facebook” and that “[m]ost of the profiles were bulk loaded from Facebook.” (*Id.*) Additionally, internal Jerk documents show Jerk staff discussing auto-generating profiles to boost traffic to the website, at Fanning’s direction. (*Id.*) The sheer number of profiles on Jerk.com compared to the minimal user interaction with the site further demonstrates that profiles were auto-generated. (CCSMF 17, 19, 61) In light of this evidence, it is beyond dispute that the vast majority of profiles on Jerk.com were not created by the site’s users and did not reflect those users’ views of the profiled individuals, in direct contradiction to Respondents’ representation.

Third, uncontroverted evidence demonstrates that Respondents’ representation that the content on Jerk.com was created by Jerk.com users and reflected their views of the profiled individuals was material. “A ‘material’ misrepresentation is one that involves information important to consumers and that is therefore likely to affect the consumer’s choice of, or conduct regarding, a product.” *Novartis Corp.*, 127 F.T.C. at 685. Representations involving “express claims” and claims “pertaining to the central characteristic of the product” are presumptively material. *See POM Wonderful LLC*, 2013 FTC LEXIS at *121; *Novartis Corp.*, 127 F.T.C. at 686; *In re Am. Home Prods.*, 98 F.T.C. 136, 368 (1981). As explained in Sections II.C and II.D, Respondents’ representation that the content on Jerk.com was created by the site’s users and

reflected those users' views of the profiled individuals is presumptively material because it was express and pertained to a central characteristic of the product.

Even if this representation were not disseminated through express statements, it would still be presumptively material because Respondents intended to convey it to consumers visiting Jerk.com. *See Novartis Corp.*, 127 F.T.C. at 684-86; *Deception Statement*, 103 F.T.C. at 182 (“Similarly, when evidence exists that a seller intended to make an implied claim, the Commission will infer materiality.”). As explained in Section II.D, Jerk.com’s commercial success depended on consumers believing it was a user-generated website. Driven by this motivation, Respondents strove to convey this message to consumers. In addition to making this representation through express statements on Jerk.com, they drafted company summaries and a Wikipedia entry describing Jerk.com as a user-generated social network with its content grown from the users themselves. (CCSMF 47-49.) The evidence is clear that Respondents were aware that they were communicating this representation to consumers. Therefore, the representation is presumptively material. *See Novartis Corp.*, 127 F.T.C. at 688-89.

Finally, even if this representation were not presumptively material, it would be material nonetheless because it is beyond dispute that it was important to consumers and affected their conduct regarding Jerk.com. *See id.* at 685. The evidence demonstrates that consumers actually believed this representation from the website, as described in Section II.E above. (CCSMF 51) Numerous consumers testified that they were “devastated,” “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. (CCSMF 160) Consequently, numerous consumers exerted considerable time and effort to contact Jerk—through its registered agent, domain host, and attorney—to request deletion of profiles or photos of them from Jerk.com, as

well as to complain to Facebook and law enforcement.⁷ (CCSMF 53, 79, 159) Moreover, consumers paid money to Jerk to gain the ability to manage, and delete, profiles of them. (CCSMF 92, 158)

C. Uncontroverted evidence demonstrates that Respondents misrepresented the benefits of the paid Jerk membership (Count II).

Undisputed evidence shows that Complaint Counsel have established all three elements for the deception alleged in Count II of the Complaint.

First, as described in Section II.G above, uncontroverted evidence demonstrates that Respondents expressly disseminated on Jerk.com the representation that subscribing to Jerk.com by buying a \$30 standard membership would give consumers additional benefits, including the ability to dispute information posted on the site. Specifically, Respondents stated that consumers would get access to “additional paid premium features” and that they “must be a subscriber in order to create a dispute.” (CCSMF 84-88) Moreover, uncontroverted evidence demonstrates that Respondents intended to convey this representation to consumers who visited Jerk.com. (CCSMF 90) Fanning listed subscription services—charging users “for access to dispute resolution for other premium and for fee services”—as a potential revenue stream for Jerk in executive summaries sent to potential investors. (*Id.*-CX0117) The record also includes evidence that consumers actually took away this claim from the website. For example, one consumer stated, “I read a statement on Jerk.com that indicated I could remove information from my profile by joining Jerk.com.” (CCSMF 91) A facial analysis of Jerk.com and consumer testimony thus shows that there is no genuine issue for trial that Respondents conveyed the member-benefits representation to consumers.

⁷ The FTC’s Consumer Sentinel Network has received over 300 complaints about Jerk.com.

Second, there is no genuine issue that this representation was false. 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. (CCSMF 92) In fact, consumers did not even receive the password that was purportedly necessary to activate the Jerk membership. (CCSMF 95) As one consumer declared, “[t]he membership was a complete waste.” (CCSMF 94-CX0038) An undercover purchase by an FTC investigator confirmed that Jerk did not send passwords necessary to activate paid Jerk memberships. (CCSMF 96)

Finally, Respondents’ membership-benefits representation was material. It was presumptively material because it was an express claim and the claim pertained to the central characteristic of the Jerk.com membership—its purpose. *Deception Statement*, 103 F.T.C. at 182 (Commission will presume materiality where the claim “concerns the purpose, safety, efficacy, or cost of the product or service”). Even if the representation were not presumptively material, testimony establishes that consumers acted on the representation (CCSMF 91-92), which demonstrates materiality. *See Cliffdale Assocs.*, 103 F.T.C. at 118.

D. Uncontroverted evidence demonstrates that Fanning is individually liable for the deceptive conduct alleged.

Uncontroverted evidence shows that Fanning is liable for the conduct alleged in the Complaint. Under the FTC Act, an individual is liable for a business entity’s deceptive acts or practices if the individual either participated directly in or had the authority to control the acts or practices at issue. *POM Wonderful*, 2013 FTC LEXIS at *163-64. In holding that individuals had the requisite control and/or participation to be liable, the Commission and federal courts

have accepted evidence that they: (1) were officers or held themselves out as officers of the company; (2) signed contracts on behalf of the company; (3) were signatories on company bank accounts; (4) managed the day-to-day affairs of the company; (5) hired employees; and (6) had employees report to them.⁸ The FTC is not required to show that an individual defendant intended to defraud consumers in order to establish personal liability. *FTC v. Publ’g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997).

Here, uncontroverted evidence establishes that Fanning both had authority to control the acts and practices at issue and participated in the deceptive conduct. First, he was founder and managing member of Jerk. (CCSMF 97, 100) {

} and an investor in Jerk told other

potential investors that “[t]he company is started by John Fanning.” (CCSMF 97) In January 2009, Fanning hired a registered agent to incorporate Jerk. (CCSMF 98) Certificate of formation records list Fanning as the only “Managing Member” of Jerk. (CCSMF 100) In his role as member, Fanning signed State of Delaware incorporation documents stating that he was the authorized person to pay all of Jerk’s taxes. (CCSMF 99) Fanning {

⁸ *POM Wonderful*, 2013 FTC LEXIS at *163-64 (control found when individual acted as an officer of the company; signed checks and contracts on behalf of the company; managed the day-to-day affairs of the company; had the authority to determine which advertisements should run; had numerous employees reporting to him directly; and had the authority to hire and fire employees); *FTC v. World Media Brokers*, 415 F.3d 758, 765 (7th Cir. 2005) (control found when individual held herself out as an “authorized officer” of several of the corporate defendants); *FTC v. Publ’g Clearing House, Inc.*, 104 F.3d at 1168, 1170-71 (9th Cir. 1997) (individual’s “authority to sign documents on behalf of the corporation demonstrate that she had the requisite control over the corporation”); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989) (“Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy”); *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).

} (CCSMF 102)

Second, Fanning controlled Jerk's shares and signed agreements on behalf of the company. {

}⁹ (CCSMF 106-113) He also participated in board meetings for Jerk, distributed shares to investors, and set aside stock for employees. (CCSMF 103-105) As further evidence of his authority to control Jerk, Fanning signed numerous contracts and documents on behalf of Jerk, including employment and contractor agreements, an agreement to lease the domain name Jerk.com, and service agreements with Jerk's data hosting company. (CCSMF 114-116)

Third, Fanning handled Jerk's finances. As mentioned above, in January 2009 Fanning { } (CCSMF 122-124) In his deposition, Fanning admitted that he {

} Fanning also handled finances and budgeting for Jerk, met with potential investors and acquirers to solicit funding for

⁹ Fanning founded, managed, and has served as an officer of NetCapital,

{ (CCSMF 106-110)
} (CCSMF 111-113)

or an acquisition of Jerk, and attempted to sell the company for millions of dollars. (CCSMF 128-135)

Fourth, Fanning managed Jerk's day-to-day operations. He has admitted that he was "actively involved" with Jerk.com. (CCSMF 136) Fanning directed strategy and set objectives for Jerk, such as:

Yes, I am talking about jerk [and] reeper. As far as whole company objectives, what I meant was, 1. Build out team. 2. Raise capital. 3. Drive Traffic 4. Build Brand.

(CCSMF 137-CX 309) Fanning took steps to meet these goals. He hired contractors and interns to work on Jerk.com, and managed assignments and payments to staff. (CCSMF 138) One staff member testified that he "reported directly to John Fanning" and that "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." (CX0057 ¶ 3) Jerk and Fanning shared several addresses and Jerk's registered agent and data host sent consumer complaints about Jerk.com directly to John Fanning. (CCSMF 5, 117-120) Jerk staff even worked out of Fanning's house. (CCSMF 121 CX0361, photo of Fanning and Jerk staff). Fanning also recruited investors and attempted to find capital for Jerk.com. (CCSMF 129-133) He has admitted that {

} Fanning was also active in marketing Jerk.com and strategized on how to "create some buzz" for the website. (CCSMF 140-CX0668) According to a major investor in Jerk, Fanning "seemed to be running – calling the shots." (CCSMF 139)

Finally, Fanning participated in the creation of and content on Jerk.com. He hired a data service company to host Jerk.com's servers. (CCSMF 141-142) He hired and collaborated with

developers in Romania and India to design and publish Jerk.com. (CCSMF 143) {

} (CX0092 196:3-6) In 2009, he participated in the development of the first version of Jerk.com, which was to represent his “vision.” (CCSMF 144) He circulated mock-ups of the Jerk.com website for the Jerk team’s feedback, suggested headings for the website, edited the Introduction section, and directed a redesign of the website. (CCSMF 144-149) He decided what would be published on the website and had authority to remove profiles from the website. (CCSMF 150, 157) Most notably, Fanning was instrumental in the decision to create Jerk.com profiles from Facebook users’ information to drive traffic to Jerk.com. He instructed his Romanian programmers to auto-generate Jerk.com profiles, which they did. (CCSMF 18, 58 151) He then defended this strategy to other Jerk team members and even encouraged expanding it to create millions of additional profiles. (CCSMF 152-154; CX0317)

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} (CCSMF 178) Even if this self-serving testimony were true, as courts have noted, an individual defendant’s title is not necessarily “determinative of, or even relevant to, whether he had the required control” to be held individually liable under the FTC Act. *See FTC v. Medicor, LLC*, 217 F. Supp. 2d 1048, 1056 (C.D. Cal. 2002) (rejecting the argument that the individual defendant should not be held liable because he was “merely a consultant” to the corporate defendant where he was involved in company staffing decisions and had authority to formulate and implement company policies and procedures); *see also FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1080-81 (C.D. Cal. 2012) (holding that individual defendant

“participated in and had authority to control the website marketing of [the company] as a consultant”).

An overwhelming body of evidence, including Fanning’s admissions, conclusively establishes that Fanning both had authority to control the acts and practices at issue and participated in the deceptive conduct. Accordingly, there is no genuine issue of fact for a trial regarding Fanning’s liability.

VI. RESPONDENTS’ AFFIRMATIVE DEFENSES LACK MERIT

In their respective Answers, Jerk has pleaded six affirmative defenses and Fanning has pleaded eight. All these defenses boil down to four categories: (1) that Complaint Counsel has failed to plead a viable case-in-chief; (2) that this proceeding conflicts with the First Amendment; (3) that this proceeding is moot; and (4) that this proceeding exceeds the Commission’s authority and that the requested relief is against the public interest. None of these propounded defenses has any merit.

A. “Failure to state a claim” is not an affirmative defense.

Respondents assert that the Complaint “fails to state a claim upon which relief may be granted,”¹⁰ that the Complaint “fails to state a cognizable claim,”¹¹ and that “[a]ny injury or harm to any individual consumer or to the public . . . was caused by the acts or omissions of a third-party over which Respondent had no authority or control.”¹² Jerk also alleges that “[n]o representation alleged to be deceptive is a material representation, omission or practice likely to affect a consumer’s conduct,”¹³ while Fanning maintains that he “is not responsible or liable for

¹⁰ Jerk Answer at 5 (1st affirmative defense).

¹¹ Fanning Answer at 4 (1st affirmative defense).

¹² Jerk Answer at 5 (3rd affirmative defense); Fanning Answer at 4 (4th affirmative defense).

¹³ Jerk Answer at 6 (6th affirmative defense).

the acts or omissions of any third-party,”¹⁴ did not “cause any harm to any consumer,” and did not “make any misrepresentation of material fact . . . upon which any individual consumer relied.”¹⁵

All these assertions amount to a failure-to-state-a-claim defense, which is not a cognizable affirmative defense. *FTC v. North America Mkt’g and Assoc., LLC*, 2012 WL 5034967, *2 (D. Ariz. Oct. 18, 2012). Moreover, these assertions lack merit. As discussed above, Respondents represented to consumers that (1) content on Jerk.com was created by Jerk users and reflected those users’ views of the profiled individuals, and (2) consumers who subscribed by paying for a membership would receive additional benefits. The record also demonstrates that both these claims were material and false. Thus, Complaint Counsel have stated valid claims under Section 5 of the FTC Act, and have now presented overwhelming, incontrovertible evidence to support those claims. The record also establishes that Fanning participated in and had authority to control the deceptive conduct at issue. Respondents “failure to state a claim” challenges therefore are groundless.

B. The First Amendment does not shield Respondents’ false representations from liability under the FTC Act.

Jerk next asserts that the “regulations upon which the Federal Trade Commission relies cannot be applied in a manner as to restrict or prohibit free speech under the First Amendment.”¹⁶ Fanning echoes this assertion, alleging that the Complaint and notice order “unlawfully impinge upon and violate the rights and privileges of Respondent established by and

¹⁴ Fanning Answer at 4 (5th affirmative defense).

¹⁵ Fanning Answer at 4 (6th affirmative defense).

¹⁶ Jerk Answer at 6 (4th affirmative defense).

protected under the United States Constitution, including . . . [the] right to free speech.”¹⁷

The First Amendment does not protect Respondents’ false representations to consumers. To qualify for constitutional protection, commercial speech must at least “concern lawful activity and not be misleading.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980); *see also In re R.M.J.*, 455 U.S. 191, 200 (1982). Here, the undisputed record demonstrates that the representations that form the predicate of the Complaint’s deception counts were commercial speech. The very purpose of Jerk.com was commercial—to generate revenue. (CCSMF 168-176) That commercial purpose undergirds the representations at issue. (CCSMF 10) Respondents admit, for example, that Jerk earned revenue by placing third-party advertisements on Jerk.com, by selling \$30 memberships, and by charging consumers a \$25 customer service fee. (CCSMF 10-13) They also admit that the purpose of creating the 85 million profiles was to drive consumer traffic to Jerk.com, which would make the website more valuable to investors and potential acquirers. (CCSMF 55) Commercial speech such as the representations at issue does not qualify for First Amendment protection if it is false. *See Central Hudson*, 447 U.S. at 563 (“there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity”). And, as explained above, Respondents’ user-generated and membership-benefits representations were false. Accordingly, Respondents’ First Amendment affirmative defenses are unavailing.

C. The claims asserted and relief sought are not moot.

Fanning further challenges the Complaint and notice order as “moot” because, according to him, “the site at issue is no longer in operation” and he “does not currently have any right to or

¹⁷ Fanning Answer at 5 (7th affirmative defense).

control over the domain for the site.”¹⁸

If Respondents are not operating Jerk.com at the moment, that does not mean these proceedings are moot. Voluntary cessation of allegedly illegal conduct does not render a case moot. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953); *see also In re McWane, Inc.*, 2014 FTC LEXIS 28, at *113 (Jan. 30, 2014) (“[T]he Commission may issue a cease and desist order even when a respondent no longer engages in the illegal conduct if there is sufficient danger of recurrence.”) (citations omitted); *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1237-38 (9th Cir. 1999). Otherwise, “the defendant is . . . free to return to his old ways.” *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs, Inc.*, 528 U.S. 167, 189 (2000) (citation omitted).

Here, Respondents appear to have stopped operating Jerk.com in 2013 because they had a dispute with Internet Domains, the company from which Respondents leased the Jerk.com domain; Internet Domains then allegedly posted its own content on the site. (CCSMF 15, 21) That, however, does not prevent Respondents from resuming the alleged conduct in the future. In fact, Jerk sued Internet Domains for breaching their domain lease agreement for Jerk.com, and recently won the case on default judgment. The very fact that Jerk decided to sue Internet Domains over Jerk.com indicates its intent to continue operating the site.

Regardless of whether Respondents are currently operating Jerk.com, there is substantial risk that the violations at issue will recur in the future, either on Jerk.com or on other Internet domains. As the record demonstrates, Respondents have used several different URLs for displaying content to consumers online. (CCSMF 4) In addition, as recently as March 2014, Fanning was working on Jerk.com’s “sister site,” Reper.com. (CCSMF 23, 181) Respondents thus can easily repost the content previously displayed on Jerk.com to Reper.com or to any other

¹⁸Fanning Answer at 5 (3rd affirmative defense).

domain, such as “Jerk7.com” or “Jerk.8.com.” In fact, {

} (CCSMF 183)

Finally, Respondents’ conduct did not cease until 2013 at the earliest—well after the Commission issued a civil investigative demand to Jerk in July 2012. This fact further undercuts Respondents’ mootness defense, because where “discontinuance occurred ‘only after the Commission’s hand was on the Respondents’ shoulder,’” a “claim of abandonment is rarely sustainable as a defense.” *In re Int’l Assoc. of Conf. Interpreters*, 123 F.T.C. 465, 596 (1997) (quoting *In re Zale Corp.*, 78 F.T.C. 1195, 1240 (1971)).

D. The Commission is authorized to protect consumers from Respondents’ deceptive conduct.

Respondents’ final affirmative defense category accuses the Commission of “exceed[ing] and/or abus[ing] its statutory and regulatory authority,”¹⁹ and asserts that “the requested relief is not in the public interest.”²⁰

These defenses lack merit. The Commission has broad authority to act against deceptive practices under Section 5(a) of the FTC Act. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384-85 (1965); *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1152 (9th Cir. 2010); *Am. Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 966 (D.C. Cir. 1985). Likewise, “the Commission has broad discretion in determining whether a proceeding brought by it is in the public interest.” *Guziak v. FTC.*, 361 F.2d 700, 704 (8th Cir. 1966). Prosecuting and preventing deceptive representations to consumers has sufficient public interest backing. *See Exposition Press, Inc. v. FTC*, 295 F.2d

¹⁹ Jerk Answer at 5 (2d affirmative defense); Fanning Answer at 4 (2d affirmative defense).

²⁰ Jerk Answer at 6 (5th affirmative defense).

869, 873 (2d Cir. 1961). In this vein, the Commission “not only is empowered but also bound to enter an order of sufficient breadth to ensure that a Respondent will not engage in future violations of the law.” *In re Sun Oil Co.*, 84 F.T.C. 247, 274-75 (1974).

As demonstrated above, Respondents disseminated false, material representations to consumers in commerce. Consumers lost money by paying Respondents for worthless memberships and nonexistent customer service and they spent considerable time trying to remove their profiles. (CCSMF 158-159) Consumers suffered professionally from being profiled on Jerk.com when the site represented that the profiles were user-generated. (CCSMF 162) Numerous consumers also feared for their safety because they were profiled on Jerk.com. (CCSMF 163-165) All this illustrates that an order is in the public’s interest.

VII. SUMMARY DECISION IS APPROPRIATE AT THIS JUNCTURE

This action is ripe for summary decision. Given the track record in this matter, having the case proceed through another three months of discovery and an administrative hearing is far more likely to result in more obstructionist conduct than the development of additional evidence giving rise to any dispute of material fact.

The likelihood that Respondents will unearth any evidence through the remainder of discovery or the evidentiary hearing sufficient to counter or dispute the record evidence already developed by Complaint Counsel is miniscule. The FTC investigated Respondents for nearly two years before filing this action. (CX0285 ¶ 28) The length of the investigation was the result of Respondents’ failure to cooperate with the FTC. For example, both Fanning and Jerk failed to appear at their noticed investigational hearings, the latter even after the Commission denied Jerk’s petition to quash and ordered Jerk to appear. (CX0292, CX0293, CX0294)

Since the scheduling conference in May, Respondents have engaged in hardly any

discovery, which suggests that they do not believe additional evidence outside their possession will counter or change the core facts of this case. They have not noticed a single deposition. (CX0258 ¶ 46) In fact, neither Respondent sent counsel to attend two of the three third-party depositions taken to date. (*Id.* ¶ 47) In addition to not appearing for its noticed deposition, even after being ordered to do so, Jerk never responded to Complaint Counsel's Interrogatories. (*Id.* ¶ 43) Jerk also failed to submit a preliminary witness list. (*Id.* ¶ 49) On July 30, Jerk's counsel Maria Crimi Speth filed a notice that she no longer represents Jerk, LLC, and no other counsel has made an appearance for Jerk.²¹

Similarly, Fanning has made it clear that he does not intend to develop any evidence beyond what Complaint Counsel has yielded through their discovery efforts.²² Although Fanning, unlike Jerk, responded to Complaint Counsel's discovery requests and appeared at his deposition once compelled, his responses indicate his inability or unwillingness to provide evidence in his defense. Fanning produced no documents in response to Complaint Counsel's Requests for Production. (CX0297) His responses to Complaint Counsel's Requests for Admissions deny even the most unassailable facts supported by uncontroverted evidence.²³ For example, Fanning denied that Jerk.com has displayed millions of unique profiles about persons (Fanning RFA Response ¶ 17), even though this fact is obvious on the face of the website.

²¹ *Notice Regarding Representation*, http://www.ftc.gov/system/files/documents/cases/140730_jerknotice.pdf.

²² Since the start of discovery in late May, Complaint Counsel have received more than 13,800 pages of documents from sixteen third parties, as well as five sworn declarations, and have deposed four witnesses. (CX0258 ¶ 45)

²³ *Respondent John Fanning's Responses to Complaint Counsel's First Requests for Admissions* ("Fanning RFA Response"), <http://www.ftc.gov/system/files/documents/cases/570245.pdf>.

Fanning's responses to Complaint Counsel's Interrogatories offered mostly threadbare "unknown to me" answers. (CX0301) Moreover, during his deposition, Fanning could not recall answers to scores of questions on material issues. (*See generally* CX0092) That is not surprising in light of Fanning's testimony that {

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(CX0092 35:3-10, 113:20-114:2, 251:19-22)

Instead of giving Respondents a chance to develop new evidence, continuing this action will give them an opportunity to further obstruct and obfuscate. At the same time as refusing to provide the FTC with meaningful discovery responses and documents, Respondents have declined to streamline discovery on even uncontroversial topics. For example, Jerk refused to authenticate videos of approximately 400 Jerk.com profiles in the interest of judicial economy, without waiving any other evidentiary objections to the videos. Respondents also refused to authenticate screenshots of Jerk.com.²⁴ Instead of engaging in productive discovery calculated to yield the truth, Respondents have contemplated resorting to evidentiary chicanery just to undermine the FTC.²⁵

Through diligent discovery work Complaint Counsel have built a record of overwhelming uncontroverted evidence to support the Complaint's counts. Respondents, on the other hand, have attacked the Complaint on its face as contravening First Amendment speech

²⁴ *Respondent John Fanning's Responses to Requests for Admissions for Authentication and Admissibility of Exhibits*, <http://www.ftc.gov/system/files/documents/cases/570246.pdf>.

²⁵ In an email sent shortly after the scheduling conference, Fanning wrote: "This is an interesting idea. The idea is that you make a video, and the video itself become [sic] evidence in a case. If the other side wants to depose the people in the video, then let them. We could try this approach with the FTC just to fuck with them." (CX0072)

protections, exceeding the Commission's authority, and misguidedly predicating the alleged deception on Facebook's business practices. (Respondents' Answers; CX0295- 030:4-31:21, 40:5-25; CX0092- 325:21-327:2) If Respondents intend, as they appear, to mount their defense based on these threshold issues instead of rebutting the Commission's evidence with evidence of their own, they can do so now, abating months of additional discovery and an evidentiary hearing.

VIII. COMPLAINT COUNSEL'S PROPOSED ORDER PROVIDES APPROPRIATE RELIEF

The Commission's proposed order is appropriate.²⁶ The Commission has wide discretion in its choice of a remedy in addressing unlawful practices. *See, e.g., Jacob Seigel Co. v. FTC*, 327 U.S. 608, 611 (1946). Additionally, the proposed order should apply to Fanning because he participated in and had authority to control the deceptive practices and thus is individually liable for violating the FTC Act.

A cease and desist order is appropriate if the Commission determines that the order is sufficiently clear and reasonably related to the unlawful practices at issue. *POM Wonderful LLC*, 2013 FTC LEXIS at *153 (citing *Colgate-Palmolive Co.*, 380 U.S. at 392, 394-95). When determining whether an order is reasonably related to the unlawful practices, the Commission considers three factors: "(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. at 811; *see also POM Wonderful LLC*, 2013 FTC LEXIS at *153. "The reasonable relationship analysis operates on a sliding scale—any one factor's importance varies depending on the extent to which the others are

²⁶ The proposed order mirrors the notice order attached to the Complaint.

found.” *Telebrands Corp. v. FTC*, 457 F.3d 354, 358 (4th Cir. 2006). Furthermore, the Commission may issue an order that contains fencing-in provisions, which are “provisions that are broader than the conduct that is declared unlawful.” *POM Wonderful LLC*, 2013 FTC LEXIS at *156-57. The Commission need not restrict the order to a “narrow lane” of Respondents’ past actions. *Id.*

Here, the proposed order’s provisions are appropriate because they are clear and reasonably related to the unlawful practices at issue, and they implement appropriate injunctive provisions and fencing-in relief. Part I addresses the misrepresentations alleged in the Complaint, prohibiting Respondents from misrepresenting (A) the source of any personal information; (B) the benefits of joining any service; and (C) any other fact material to consumers. Part II contains fencing-in relief prohibiting Respondents from misrepresenting that they agree to comply with “any company’s user agreement, privacy policy, or contract provision, pertaining to the collection, use, or disclosure of consumers’ personal information.”²⁷ This provision is important because Respondents’ use of the Facebook platform to build Jerk.com’s profiles violated Facebook’s terms for Developers.²⁸ Part III contains additional fencing-in

²⁷ The Commission has imposed similar provisions in other orders. *See, e.g., FTC v. ReverseAuction.com, Inc.*, 2000 US Dist. LEXIS 20761 (D.D.C. 2000) (consent order in matter where respondents violated eBay’s user agreement and privacy policy by harvesting eBay users’ email address for unauthorized purposes, including sending deceptive spam).

²⁸ Respondents violated Facebook’s policies by (1) failing to obtain users’ explicit consent to collect and use certain Facebook user data, including photos (CCSMF 77); (2) keeping Facebook user data for longer than permitted (CCSMF 78); (3) failing to provide an easily accessible mechanism for consumers to request deletion of their Facebook data from Jerk.com (CCSMF 79); (4) failing to delete photos obtained from Facebook despite users’ requests (CCSMF 80); and (5) maintaining information obtained through Facebook after Jerk’s Facebook access was disabled (CCSMF 81).

relief, prohibiting Respondents from misrepresenting their privacy practices.²⁹ Part IV prohibits Respondents from disclosing, using, selling, or benefitting from consumers' personal information obtained in connection with Respondents' operation of Jerk.³⁰ This would include photos and other data improperly obtained or used in violation of Facebook's policies. The proposed order requires Respondents to dispose of such information within 30 days of its entry.³¹ Parts V through IX contain reporting and compliance provisions common to many Commission orders.³²

The proposed order is reasonably related to the unlawful practices at issue in light of the seriousness and deliberateness of the violations. Respondents made false claims about the source of content on Jerk.com and the benefits of a Jerk membership, misleading and harming consumers. Furthermore, the challenged representations are the types of claims that Respondents easily could transfer to other products or services. In fact, Respondents have experimented with

²⁹ The Commission has imposed similar provisions in other orders. *See, e.g., In re Foru™ Int'l Corp.*, 2014 FTC LEXIS 119, *14 (May 8, 2014) (consent order prohibiting company from misrepresenting "the extent to which it maintains and protects the privacy, confidentiality, security, or integrity of Personal Information collected from or about consumers").

³⁰ The Commission has included similar provisions in other orders. *See, e.g., FTC v. ReverseAuction.com, Inc.*, 2000 US Dist. LEXIS 20761 *9-10 (consent order requiring respondents to delete or refrain from using or disclosing data from eBay customers); *In re Chitika, Inc.*, 2011 FTC LEXIS 114, *8 (June 7, 2011) (prohibiting respondent from using, disclosing, selling, renting, leasing, or transferring information that can be associated with users).

³¹ Recent Commission orders have similarly mandated deletion of online user information. *See, e.g., In re Chitika*, 2011 FTC LEXIS 114 at *8-9; *In re Compete, Inc.*; 2013 FTC LEXIS 15, *16-17 (Feb. 20, 2013).

³² *See, e.g., In re POM Wonderful LLC*, 2013 FTC LEXIS 5 (Jan. 10, 2013) (order containing standard reporting and compliance provisions); *In re Daniel Chapter One*, 149 F.T.C. 1574 (2010) (same). Such provisions help ensure that respondents comply with the order. *See FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 212 (D. Mass. 2009) ("A permanent injunction serves twin goals: avoiding repeat violations of and monitoring compliance with the law and

similar reputation websites, including Reper.com and Tiptd.com. (CCSMF 180-182)

Finally, the proposed order appropriately applies to Fanning because he participated in and had authority to control the deceptive acts and practices alleged in the Complaint. Fanning's continued possession and use of the millions of Jerk.com profiles in other business ventures illustrates the need for extending the proposed order's provisions to him.

IX. CONCLUSION

Based on the foregoing, Complaint Counsel respectfully request that the Commission grant this motion for summary decision and issue a final order that adopts the contents of the proposed order.

Dated: September 26, 2014

Respectfully submitted,



Sarah Schroeder
YanFang
Boris Yankilovich
Kenneth Abbe

Federal Trade Commission
Western Region – San Francisco
901 Market Street, Suite 570
San Francisco, CA 94103

COMPLAINT COUNSEL

with the terms of injunction itself.") (citation omitted).