

No. 15-1520

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

JOHN FANNING,
PETITIONER,

v.

FEDERAL TRADE COMMISSION,
RESPONDENT

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL TRADE COMMISSION
FTC DOCKET No. 9361

BRIEF OF THE FEDERAL TRADE COMMISSION

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QUESTIONS PRESENTED

The Federal Trade Commission found that John Fanning and his company, Jerk LLC, deceived consumers on Jerk.com, a website that Fanning controlled. Jerk.com invited users to create profiles of other people and rate them as a “Jerk” or “not a Jerk.” It also sold memberships that purported to allow the subject of others’ remarks to dispute them. The undisputed facts show that Jerk and Fanning made two misrepresentations to consumers: first, that Jerk.com’s users created the website’s profiles; and second, that consumers who purchased memberships would receive valuable benefits. In fact, Jerk itself created the vast majority of Jerk.com profiles by harvesting content from Facebook, and consumers who purchased memberships received none of the promised benefits. To ensure that Jerk and Fanning would engage in no future consumer deception, and to enable the agency to monitor compliance, the FTC ordered them to cease their unlawful practices, refrain from similar practices in the future, and keep the FTC informed about future business activities. The questions presented are:

(1) Whether the FTC properly found that Jerk and Fanning violated Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), by making false and deceptive claims;

(2) Whether the FTC properly found Fanning, who controlled Jerk and participated directly in the misrepresentations, personally liable for the deception;

(3) Whether the FTC properly exercised its remedial discretion in prohibiting Fanning from making future misrepresentations and imposing other requirements that will enable the agency to monitor his compliance;

(4) Whether the FTC's order abridges Fanning's First Amendment rights.

COUNTERSTATEMENT OF THE CASE

A. Deception Under The FTC Act

Section 5(a) of the FTC Act prohibits, and directs the FTC to prevent, “deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(2). Deception occurs when a person (1) makes a representation that (2) is material to consumers and (3) is likely to deceive consumers acting reasonably under the circumstances. *See, e.g., FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003); *FTC Policy Statement on Deception*, appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 175-76 (1984). In determining whether a representation is deceptive, the Commission examines its overall “net impression” and considers whether “at least a significant minority of reasonable consumers” would “likely” be deceived. *See POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015) (quotation omitted); *Telebrands Corp.*, 140 F.T.C. 278, 290-91 (2005), *aff'd*, 457 F.3d 354 (4th Cir. 2006); *FTC Deception Statement*, 103 F.T.C. at 177 n.20.

Deceptive representations may be express or implied. *Kraft, Inc. v. FTC*, 970 F.2d 311, 318-22 (7th Cir. 1992). Implied claims “fall on a continuum,

ranging from the obvious to the barely discernable.” *Id.* at 319. For claims that are “implied, yet conspicuous,” the Commission can find deception without considering extrinsic evidence, because “common sense and administrative expertise provide the Commission with adequate tools to make its findings.” *Id.* at 320. The FTC “deals continually with cases in th[is] area” and has expertise in “determin[ing] when a practice is ‘deceptive’ within the meaning of the Act.” *Removatron Int’l Corp. v. FTC*, 884 F.2d 1489, 1496 (1st Cir. 1989) (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965)).

B. Jerk.com’s Business Practices

Jerk.com was a self-proclaimed “consumer reputation management” website operated by Jerk LLC (Jerk) from about 2009 to 2013. JA 1326, 1348. Fanning was Jerk’s founder and sole managing member. JA 1328, 2405. The website contained up to 85 million individual profiles, several million of which featured photos of minors. JA 409, 1038, 1053.

Jerk.com promoted itself as an interactive platform on which users could exchange thoughts about their friends and acquaintances. The site invited users to create web profiles of other people and to include photos and other information. JA 321. The site told users that the “[o]pinions, advice, statements ... or other information or content” it contained are the work of “their respective authors and not of Jerk LLC.” JA 368. Each Jerk.com profile sought comments or reviews

about the profiled individual and a rating of the person as a “Jerk” or “not a Jerk.” Users could nominate the profiled person for “Jerk of the Day.” *E.g.*, JA 291, 313, 1388-89.

Jerk.com also sold \$30 “memberships,” which it claimed would give users access to “additional paid premium features,” including the ability to “manage your reputation” and to “dispute” information posted in members’ profiles. JA 288, 322, 1418-19. The website claimed membership of “millions of people who already use Jerk for important updates for business, dating and more,” creating the impression that it functioned as a forum for social interaction. JA 325. *See also* JA 322 (“Less than 5% of the millions of people on Jerk are jerks. Jerk is where you find out if someone is a jerk, is not a jerk, or is a saint in the eyes of others.”).

Contrary to the website’s message, only a tiny fraction of Jerk.com profiles were created by actual Jerk.com users. The vast majority of the site’s 85 million profiles were created by Jerk itself, which “scraped” names, photos, and other content from Facebook and then transferred that information to Jerk.com. JA 382, 1202, 1205-07, 1282, 1284-85, 1990-91, 2004, 2030, 2060.

Consumers often learned about their Jerk.com profiles by happenstance, when they entered their own names into a search engine and discovered a link to Jerk.com. JA 158, 160, 162, 164, 168, 170, 189, 192, 194, 200, 202, 209, 211, 213, 215. Following the link, they saw that someone had posted their profiles

(often including a photo) on an unfamiliar website that invited its users to “post a report” or rate them. *E.g.*, JA 313. Surprised and dismayed to see their personal information on an unfamiliar personal rating website, consumers feared they had become an object of ridicule by someone they knew. *E.g.*, JA 194, 200, 209, 213. To make matters worse, although only a tiny percentage of profiles on Jerk.com had comments, a number of those that did included obscene, threatening, or derogatory remarks—sometimes directed at minors. *See* JA 1660 (email exchange between Fanning and Jerk staff acknowledging that “99.9% of our profiles are empty” and that the rest contain such statements as “[t]his guy is gay” or “that skank is ugly”); *see also* JA 1358, 1360, 1369, 1388-92 (example profiles).

Concerned about their reputations—and, in some instances, their personal safety—consumers asked Jerk to take down their profiles or remove the derogatory content. *See, e.g.*, JA 2133 (“The news of this site using my name and image has cause[d] me a great deal of stress, embarrassment and concern that it may [a]ffect my ability to obtain employment in the future.”); JA 2139 (“I have been receiving malicious posts from the man who has harmed my young daughter and is threatening me for nearly a year after I reported the abuse.”); *see also* JA 160-161, 164-65, 172-73, 189-90, 194, 211, 213, 2123-32, 2134-38.

Jerk.com’s website promised such consumers that by purchasing a \$30 “membership,” they could “manage [their] reputation and resolve disputes” and

receive “additional paid premium features.” JA 1418-19. After collecting consumers’ money, Jerk ignored those commitments, leaving those who paid (including an undercover FTC investigator, JA 287-89) without the means to correct or remove unwanted, derogatory, or threatening information from the website. *See, e.g.*, JA 213 (“After I paid the fee [for an annual membership], nothing changed. I did not receive special access to my jerk.com profile.... I ... did not receive a password for my jerk.com membership.”).¹ One parent was so desperate to remove the unwanted content that she purchased multiple memberships after Jerk did not respond to her first attempt: “someone created a profile of my fifteen-year-old daughter I was desperate to remove my daughter from the website, and I paid the \$30.00 [membership] charge three times. ... Each time, nothing changed. My daughter’s profile, photos, and negative comments about her remained on jerk.com.” JA 215-16.

¹ *See also* JA 189-90 (“I believed I could edit my profile if I paid jerk.com the requested fee 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?’”); JA 160 (“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. ... After I paid ... [t]he benefit they promised—the ability to remove or change your profile—was nowhere to be found.”); JA 155 (“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.”).

C. The Commission's Findings Of Deception

The FTC received hundreds of consumer complaints about Jerk.com. JA 1350, 2140-2266. In April 2014, it issued a two-count administrative complaint against Jerk and Fanning, charging them with having engaged in deceptive acts and practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). JA 12-23. Count I alleged that Jerk and Fanning represented that the names, photographs, and other website content were posted by Jerk.com users and reflected users' views on the profiled persons, when in fact Jerk and Fanning populated nearly all of the profiles by harvesting content from Facebook. JA 16-17. Count II alleged that Jerk and Fanning falsely represented that consumers who purchased Jerk.com memberships would receive benefits, including the ability to dispute information in their profiles, even though no such benefits were delivered. JA 17.

After months of discovery, complaint counsel moved for summary decision. JA 34-154.² Like the Federal Rules of Civil Procedure, the FTC's Rules of

² Under decades-old administrative practice, FTC procedural rules separate the Commission's adjudicatory and prosecutorial roles by walling off the Commission from "complaint counsel" (enforcement staff) once an administrative complaint has been issued. *See, e.g.*, 16 C.F.R. § 4.7. There is no merit to Fanning's oblique suggestion (Br. 11) that the FTC's rules "usurp[] the power of the Chief Administrative Law Judge" by directing resolution of summary decision motions to the Commission in the first instance. The Commission has full discretion to assign any matter to an ALJ or instead to the Commission or one or more of its members. *See* 5 U.S.C. § 556; 16 C.F.R. § 3.42(a)-(b). And even when an ALJ issues an initial decision, the Commission may "adopt, modify, or set aside" the

Practice and Procedure allow the Commission to grant summary decision when it “determines that there is no genuine issue as to any material fact regarding liability or relief.” 16 C.F.R. § 3.24(a)(2).

The Commission unanimously granted complaint counsel’s motion for summary decision and entered a cease and desist order against Jerk and Fanning. Add. 4-44. As to Count I, the Commission found that Jerk’s website made several statements impliedly representing that the names, photos, and other content on Jerk.com were “created by Jerk users and reflected those users’ views of the profiled individuals.”³ Add. 11. That representation was false in light of testimony, documents, and other evidence that showed without contradiction that the “vast majority” of Jerk.com profiles were created by “bulk loading” information from Facebook.⁴ Add. 15-17. The Commission thus concluded that there was no genuine dispute that Jerk’s representation was false and misleading. The Commission also found no genuine dispute that the representation was material, given un rebutted evidence that Jerk’s message of user-generated content drove traffic to the website and otherwise affected consumer conduct regarding the

initial decision in whole or in part and may exercise “all the powers which it could have exercised if it had made the initial decision.” 16 C.F.R. § 3.54(a).

³ The Commission also noted Jerk’s statement on Twitter: “Find out what your ‘friends’ are saying about you behind your back to the rest of the world!” Add. 9 n.4 (discussing JA 1448).

⁴ Jerk and Fanning did not contest this point. They merely disagreed that the website represented that its content was generated by users. Add. 16-17.

site. That conclusion was buttressed by evidence that Jerk and Fanning intended to convey that message. Add. 12-13, 18-19.

The Commission granted summary decision on Count II as well. It determined that the undisputed evidence showed that Jerk made explicit representations concerning the benefits of paid memberships but failed to honor its promises. In particular, Jerk promised that paying customers could dispute information posted in their profiles, but in fact they could not. Add. 20-22, 24-25.

The Commission next addressed whether Fanning was individually liable for Jerk's deceptive conduct. Fanning claimed that he was merely an "advisor" to Jerk, but the Commission found that assertion unsubstantiated and contradicted by overwhelming evidence. Add. 25-32. In fact, Fanning held himself out, and was viewed by others, as Jerk's principal decisionmaker.⁵ He solicited investors and capital,⁶ managed Jerk's finances and budget,⁷ and recruited and supervised Jerk personnel.⁸ He established Jerk's business model and directed Jerk's strategic decisions by, for example, instructing Jerk's programmers to take profile content from Facebook. Add. 29-30 (citing JA 990, 995, 1205-06, 1327, 2003, 2007,

⁵ Add. 28 (citing JA 381, 1011, 1171, 2318).

⁶ Add. 28 (citing JA 496, 1011, 1017-19, 1052-53, 1664, 1666, 1682, 2318).

⁷ Add. 27-28 (citing JA 483, 526-27, 1067, 1664, 1916-18, 1967-70).

⁸ Add. 27 (citing JA 381, 1010, 1067, 1172-74, 1644-45, 1664-65, 1651, 1984, 1999, 2059-2060, 2080, 2100, 2267, 2370).

2104, 2310). Fanning also directed Jerk’s response to consumer complaints, which is reflected in his instructions to Jerk’s registered agent to “[j]ust ignore them These are customers trying to get service from us without paying the service charge.” JA 2415; *see also* JA 218-19, 1737, 1770. In light of that evidence, Fanning’s unsupported claim to be only an advisor was insufficient to create a genuine dispute of fact regarding his personal liability. Add. 31.

The Commission then considered the question of remedy. Add. 35-39. Applying longstanding precedent, the Commission considered the seriousness and deliberateness of the violations and the ease with which the violations could be transferred to other activities. Add. 36-37. The Commission found that consumers suffered substantial harm from Jerk’s misrepresentations. Add. 36. As reflected in hundreds of complaints, Jerk’s practices frightened and embarrassed consumers and caused them to spend time and money in fruitless attempts to dispute or remove their profiles and related content. *Id.* Additionally, the Commission concluded that Jerk’s and Fanning’s violations were readily transferrable to other ventures. Indeed, they “already have demonstrated that they will use the same profiles and make the same representations on other websites they operate. When [Fanning and Jerk] lost the Jerk.com domain name they moved the content to Jerk.org and continued making the misrepresentations.” Add. 37 (citing JA 1348,

2347). Similarly, they also planned to use automatically generated profiles on Reper.com, Jerk’s “sister website.” *See id.*

The Commission’s final order prohibits Fanning and Jerk from misrepresenting, in the promotion of any good or service, the source of any website content or the benefits of joining any service (Paragraph I). Add. 41. The order also prohibits Fanning and Jerk from disclosing, using, selling, or otherwise benefitting from consumers’ personal information—including photos and other data scraped from Internet sites—obtained in operating Jerk.com, and requires Fanning and Jerk to destroy that information within 30 days of the date of the Commission’s order (Paragraph II). *Id.* Finally, Paragraphs III-VII of the order impose record-keeping, notification, and reporting requirements that will facilitate administration of the order and monitor compliance. Add. 42-43. The Commission found such measures necessary to remedy the violations and prevent their recurrence. Add. 40-44.

D. Judicial Proceedings

Fanning, but not Jerk LLC, seeks review of the Commission’s order. On May 29, 2015, Fanning asked the Court to stay the Commission’s order. After granting a temporary *ex parte* stay, the Court denied Fanning’s request on July 14, 2015, concluding that Fanning had “failed to make a showing sufficient to

demonstrate that he is likely to succeed on the merits or that he will suffer irreparable harm absent a stay.”

SUMMARY OF ARGUMENT

1. The Commission properly found that Fanning and Jerk had deceived consumers about both the source of content on the Jerk.com website and the benefits of buying a membership.

First, the unrebutted evidence showed that Jerk conveyed the implied representation that actual users created the 85 million profiles on the site, and that this misrepresentation mattered to consumers. Indeed, Fanning and Jerk *intended* to convey that message precisely because fostering the impression of user-generated content was essential to their business plan. Likewise, the testimony of actual consumers showed that they visited Jerk.com, invested time trying to remove their profiles, and paid for purported services on the belief that their profiles had been created by other people. Jerk’s and Fanning’s misrepresentations on that issue were thus both false and material. Fanning also received adequate notice that he was charged with having made both express and implied representations. Indeed, the complaint itself alleges that Jerk and Fanning made claims about the source of Jerk.com content “expressly or by implication.”

Second, the Commission also properly found that Jerk and Fanning had separately deceived consumers into paying \$30 for annual “memberships” in

exchange for *express* promises to provide “services” that Jerk never in fact provided. That distinct liability finding, which Fanning barely mentions, was also plainly correct.

2. The Commission properly found Fanning individually liable for Jerk’s deception. Fanning claims without any support to have been merely an “advisor” to Jerk. Unrebutted documentary evidence showed that, in fact, he was the company’s founder and sole managing member, controlled Jerk’s finances and personnel, created Jerk’s business model, and directed Jerk’s responses to consumer complaints.

3. The Commission’s remedial order, which requires Jerk and Fanning to maintain records and report their future business affiliations, is well-tailored and reasonably related to the proven violations. Courts routinely approve such provisions, which are necessary to enable the FTC to monitor whether proven violators are complying with the law. And such provisions are particularly appropriate here, given Fanning’s documented efforts to engage in similar conduct in other ventures. Finally, Fanning’s First Amendment challenge is meritless because the order prohibits only *misleading* commercial speech, which enjoys no constitutional protection.

STANDARD OF REVIEW

In general, an FTC decision to grant summary decision is reviewed under the same standard as analogous decisions of the district courts. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994); *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1360 n.6 (11th Cir. 1988). The Court considers whether a reasonable decisionmaker could conclude that there is a “genuine issue of material fact” that “may affect the outcome of the case” under governing law. *Puerto Rico Aqueduct*, 35 F.3d at 605. A “speculative or purely theoretical” factual dispute, or a dispute of immaterial fact, does not defeat a motion for summary decision “when it appears conclusively from the papers that, on the available evidence, the case only can be decided one way.” *Id.* at 605-06. Given its institutional expertise, “the Commission’s judgment” in interpreting a potentially deceptive statement “is to be given great weight by reviewing courts.” *Colgate-Palmolive*, 380 U.S. at 385; *see, e.g., POM Wonderful*, 777 F.3d at 499-500; *Kraft*, 970 F.2d at 316-18; *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 40 n.1 (D.C. Cir. 1985).

Congress has vested the Commission with primary responsibility for fashioning administrative remedial orders. *Colgate-Palmolive*, 380 U.S. at 392. The Commission therefore has “wide discretion” in determining the type of remedial order necessary to curb deceptive practices. *Id.*; *see also Removatron*,

884 F.2d at 1498; *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973). Courts should disturb the Commission’s choice of a remedy only if (1) it bears “no reasonable relation to the unlawful practices found”; or (2) the order’s prohibitions are not sufficiently “clear and precise” to be understood by the persons against whom they are directed. *Colgate-Palmolive*, 380 U.S. at 392, 394-95.

ARGUMENT

I. THE COMMISSION PROPERLY GRANTED SUMMARY DECISION AGAINST FANNING AND JERK.

The Commission found on summary decision that Fanning and Jerk had deceived consumers in two independent respects: both by misrepresenting that Jerk.com’s users created the site’s profiles (Count I) and by defrauding customers into purchasing “memberships” in exchange for services they would never receive (Count II). Fanning focuses on the first finding and addresses the second only in passing (*see* Br. 22). His challenge is meritless as to both.

A. Undisputed Evidence Shows That Fanning And Jerk Deceptively Represented The Source Of The Jerk.com Website’s Content.

The Commission properly concluded that undisputed evidence showed that Jerk misrepresented 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.” Add. 11. Fanning fails to demonstrate either a genuine dispute of material fact or any legal error by the FTC.

1. Fanning And Jerk Falsely Represented That Real Users Generated The Content Of Jerk.com.

The Jerk.com website contained numerous representations suggesting that actual users of the site created the profiles it displayed. The “Welcome to Jerk” page invited visitors to “join the millions of *people who already use Jerk* for important updates for business, dating and more.” JA 325 (emphasis added). Jerk told would-be subscribers that by using the site they could “[h]elp others avoid the wrong people,” and “[p]raise those who help you and move good people closer to sainthood!” *Id.* The “Post a Jerk” page provided a form to “find or create a profile on [J]erk,” encouraging users to “[i]nclude a picture if you can and as much other information as possible.” JA 321. The “Remove Me!” page described Jerk.com as a place “where you find out if someone is a jerk, is not a jerk, or is a saint *in the eyes of others.*” JA 322 (emphasis added). The “About Us” page explained that the “[o]pinions, advice, statements, offers, or other information or content” on the site were “*those of their respective authors* and not of Jerk LLC.” JA 368

(emphasis added). It advised further that users are “solely responsible” for the content of their postings on Jerk.com. *Id.*⁹

Taken together, the Commission determined, these statements “constitute an *implied* representation that the content on the website, including names, photographs, and other content, was created by Jerk users.” Add. 11. The web pages “speak[] only of user-posted profiles and user-generated content.” Add. 12. Indeed, uncontested evidence showed that Fanning and Jerk *intended* to lead consumers to believe that the website’s content was user-generated. Fanning oversaw the preparation of a Wikipedia entry describing Jerk.com as a user-generated network, represented the same information to potential investors, and made the same representation to the FTC itself. *See* Add. 12-13 (citing, *e.g.*, JA 989, 992-96, 1512, 2285, 2360-62). The finding of an implied representation is supported by evidence that “it is one the respondents intended to convey.” *Novartis Corp.*, 127 F.T.C. 580, 684 (1999), discussing *FTC Deception Statement*, 103 F.T.C. at 178.

Fanning does not dispute that the Jerk.com website contained the statements relied on by the Commission or that the overwhelming majority of the content on Jerk.com was not user-generated. Instead, he argues that the website’s statements

⁹ Fanning is flatly wrong in asserting (Br. 15) that the Commission relied “solely” on representations contained in the “About Us” and “Welcome to Jerk” pages. *See* Add. 12 (relying on “Post a Jerk” and “Remove Me!” pages as well).

do not amount to an *express* claim because its “actual language” states “nothing ... about content or views of users.” Br. 15. But the Commission found the site to make an *implied* claim, which, by its nature, does not depend on an express statement. *See Kraft*, 970 F.2d at 319-22. That conclusion is entitled to deference, *see id.* at 316-18, and is plainly correct. The statements relied on by the Commission create the unmistakable implication that users created the site’s content.

Fanning also argues that “no reasonable consumer” viewing the “About Us” page “could possibly have been misled to believe that all content” was created by actual users. Br. 16-17. But the Commission did not rely only on the “About Us” page. It also relied on the “Welcome to Jerk,” “Post a Jerk,” and “Remove Me!” pages, as well as statements made by Fanning showing his intent to convey the message that Jerk.com’s content was user-generated. Together, those materials definitively conveyed an implied representation of user generation. Even if Fanning were correct about the “About Us” page in isolation, he has shown neither a genuine dispute of fact nor a legal error in the Commission’s interpretation that the website as a whole represented that its content was generated by users.

Although he disagrees as a legal matter with the Commission’s interpretation of the website, Fanning articulates no clear basis for challenging the Commission’s factual determination that Jerk.com’s implied representation of

user-generated content was false. He claims, for the first time, that the Commission erred by failing to define “user.” Br. 16-17, 20. The argument is waived, *see Removatron*, 884 F.2d at 1493, and wrong. Fanning’s opposition to summary decision and his attached affidavit both made repeated use of the term “users” without in any way suggesting that he did not understand what the word meant. *See* JA 2427-28, 2433, 2435-36, 2440-42, 2454-55. The Commission employed the term “users” in its most natural sense: real people who accessed and used the website. *See* Add. 12. Indeed, the dictionary defines “user” as “one who uses a computer, computer program, or online service.” American Heritage Dictionary of the English Language at 1908 (5th ed. 2011). The term obviously refers to people who used the services offered by the website—and not people who operated the website and scraped data from another site.

Fanning is also wrong to argue that Jerk somehow cured its deceptive representations by including this ostensible disclaimer: “No one’s profile is ever removed because Jerk is based on searching free open searching databases and it’s not possible to remove things from the internet.” Br. 16; *see* JA 322. Disclaimers can remediate otherwise false representations only if “they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression.” *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 12 (1st Cir. 2010) (quoting *Removatron*, 884 F.2d at 1497). The supposed

“disclaimer” here does not nearly meet that standard. Whatever this “disclaimer” means, it does not suggest that Jerk.com’s profiles were merely scraped from Facebook and were not created by users of the site.

2. Fanning Was Fairly Informed Of The Charges Against Him.

Fanning contends that he lacked fair notice and was denied due process because (he says) complaint counsel premised its case on allegations that Jerk.com made express misrepresentations, whereas the Commission predicated liability only on findings of implied misrepresentations. Br. 17-21. That claim is baseless.

Despite Fanning’s contrary suggestion, Count I of the complaint itself placed him on notice of an implied-misrepresentation claim: it alleges that “Respondents 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.” JA 16 (emphasis added). Fanning is likewise wrong that complaint counsel’s motion for summary decision rested “entirely on alleged express representations” and that the “Commission *sua sponte* altered the theory espoused on summary decision to ensure the results expected.” Br. 17, 21. In fact, complaint counsel argued both express and implied misrepresentation in the alternative.¹⁰ Fanning plainly understood that complaint

¹⁰ Specifically, the motion contended that (1) Fanning and Jerk expressly represented that the site’s content was user-generated and (2) “[e]ven if this representation were not disseminated through express statements, it would still be

counsel was arguing in the alternative: He argued in his opposition that “[n]othing contained in the homepage disclaimer constitutes a ‘claim’ about the source of content, *either express or implied*, or could possibly be construed as an advertisement” JA 2433 (emphasis added). In short, Fanning was fully apprised of the nature of the allegations against him, and due process requires no more. *See, e.g., Sunshine Art Studios*, 481 F.2d at 1173.¹¹

In any event, Fanning does not demonstrate—or even contend—that he suffered prejudice from the form of notice provided by the pleadings. He does not, for example, contend that, but for the notice issues he alleges, he would have discovered exculpatory evidence or advanced legal arguments that could have established a genuine factual dispute. *See Avnet, Inc. v. FTC*, 511 F.2d 70, 76-77

presumptively material because Respondents intended to convey it to consumers visiting Jerk.com.” JA 60 (emphasis added); *see also* JA 47-48 (Jerk’s reposting of photos from Facebook created an “implication” that Jerk.com’s content was user-generated). Fanning is thus wrong in stating that complaint counsel, in moving for summary decision, “conceded” that Count I raised “solely an express representation claim.” *See* Br. 21-22.

¹¹ Fanning cites alleged FTC orders in which the Commission objected to the form of notice provided by complaint counsel. Br. 19. But Fanning’s citations denote the *respondents’ motion papers* in those cases, not the Commission’s decisions. *See id.* (citing *McWane, Inc.’s Pre-Trial Brief, McWane, Inc.*, 2012 WL 4042792, at *24 (Aug. 21, 2012); *LabMD, Inc.’s Reply in Support of Motion for Summary Decision, LabMD, Inc.*, 2014 WL 2331036, at *2 (May 12, 2014)). Far from supporting Fanning’s claim, in both instances the Commission *rejected* the notion that the form of notice was deficient. *See McWane, Inc.*, 2012 WL 4101793, at *25 (FTC Sep. 14, 2012); *LabMD, Inc.*, 2014 WL 2331027, at *8 (FTC May 19, 2014).

(7th Cir. 1975) (court was not “persuaded ... that the dispute arose so late in the proceeding that Avnet was powerless to muster evidence or argument to meet complaint counsel’s case”).

3. The Commission Correctly Found Jerk.com’s Misrepresentations To Be Material.

Fanning asserts that Jerk.com’s misrepresentations about user-generated content could not have caused a “reasonable consumer” to “act differently as a result,” Br. 16-17, and thus were not material. That argument is baseless.

A representation is material if it “involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product.” *Kraft*, 970 F.2d at 322 (quoting *FTC Deception Statement*, 103 F.T.C. at 175, 182). The Commission correctly found Jerk’s deceptions material for two independent reasons.

First, implied claims are presumptively material if there is “evidence that the seller intended to make the claim.” *Kraft*, 970 F.2d at 322; *see FTC v. Bronson Partners, LLC*, 564 F. Supp. 2d 119, 135 (D. Conn. 2008) (“the willingness of a business to promote its products reflects a belief that the consumers are interested in the advertising”) (quotation omitted). As the Commission found, undisputed facts in the record showed that Jerk and Fanning in fact intended to hold out Jerk.com as a user-generated website. Fanning wrote to an investor that Jerk.com’s 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.” JA 989; *see also* JA 279. Similarly, Fanning oversaw the preparation of a draft Wikipedia article about Jerk.com, which stated that “Jerk.com ... was the first website to popularize posting [a]bout others without their consent.” JA 2360-61. Jerk also represented to the FTC, Facebook, and state officials that Jerk.com was a user-generated website. Add. 13 (citing JA 728, 1512, 2118, 2120, 2122).

Fanning and his staff understood that the essence of Jerk’s business model was user-generated content. They realized that to generate web traffic and be financially successful, Jerk.com—like any online social network—had to appear to reflect the views and personal information of actual users. Consumers otherwise would have no interest in Jerk.com. *See* JA 381-82 (“the website would only have value to users if people manually created the Jerk.com profiles,” and “[p]eople would be more likely to use the website if they believed their peers were using it”); *see also* JA 2268-69 (“To my understanding, the organic growth of Jerk.com profiles would increase traffic to the website, which would help raise the value of Jerk LLC.”).

Fanning offers nothing to rebut the Commission’s findings that he and Jerk intended to depict Jerk.com’s content as user-generated and that he considered the appearance of user-generation integral to consumer interest in the website.

Fanning offers no evidence to suggest that he or Jerk had a contrary intention. Instead, Fanning simply asserts that the FTC's summary decision was improper because it "determined unilaterally [his] motive, state of mind, and intent." Br. 11. But "[e]ven in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *SEC v. Ficken*, 546 F.3d 45, 51-52 (1st Cir. 2008) (quotation omitted). This is precisely the case here. The only evidence Fanning submitted in opposition to summary decision was his 2½-page affidavit, which did not even address whether he or Jerk intended to represent that the site's content was user-generated. RA 2453-55. Because the record provides unrebutted evidence of Jerk's and Fanning's intention to represent that Jerk.com's content was user-generated, the representation is presumptively material.

Second, even if the presumption of materiality did not apply, materiality was established through record evidence. Direct, sworn statements from consumers who sought their profiles' removal or made payments to Jerk showed their material belief that Jerk.com's profiles were user-generated. Add 19. *See, e.g.*, JA 194 ("I thought someone I knew in the past might have posted the photograph because I had uploaded it to Facebook years ago when I was still on Facebook. ... I paid the amount required to contact the company's customer support"); JA 209

(“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.”); JA 211 (“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. ... I spent at least 30 or more hours researching how to request takedowns.”). Fanning does not rebut this evidence, and he therefore has shown no genuine dispute that his deception under Count I was material.

4. Fanning’s Remaining Claims Lack Merit.

Fanning raises other passing claims of error, all of which lack merit. He suggests that it is improper for an administrative agency to resolve an adjudication on summary judgment. Br. 11-12. But this Court has found administrative summary judgment to be “not only widely accepted, but also intrinsically valid.” *Puerto Rico Aqueduct*, 35 F.3d at 606. The Supreme Court has likewise found that due process does not “demand[] a[n administrative] hearing when it appears conclusively from the applicant’s ‘pleadings’ that the application cannot succeed.” *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 621 (1973).

Fanning also claims that the Commission may bring a deception claim only on the basis of “advertisement[s]” rather than a website’s “standard terms and conditions of use” and a “legal disclaimer.” Br. 15-16, 21. But Section 5 applies to any representation that is likely to deceive consumers acting reasonably,

whether or not it appears in advertising. *See* Add. 14-15. For example, this Court has held that Section 5 liability for deception includes non-advertising practices such as the use of a fictitious collection agency. *Sunshine Art Studios*, 481 F.2d at 1174. Other courts have likewise applied Section 5 to deceptive corporate privacy policies posted on websites, *see FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 626-31 (D.N.J. 2014), *aff'd on other grounds*, 2015 WL 4998121 (3d Cir. Aug. 24, 2015), misleading loan note disclosures, *see FTC v. AMG Servs., Inc.*, 29 F. Supp. 3d 1338, 1349-52 (D. Nev. 2014), and failures to adequately disclose the material terms of an online service, *see FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1063-1066 (C.D. Cal. 2012), *appeal pending on other grounds*, *FTC v. Gugliuzza*, No. 12-57064 (9th Cir., argued Feb. 9, 2015). In any event, the statements composing the misrepresentation here went beyond terms of use and disclaimers and actively promoted and advertised use of the Jerk.com website. *E.g.*, JA 325 (“join the millions of people who already use Jerk for important updates for business, dating and more”).¹²

¹² Fanning suggests that the FTC has authority over implied claims only if they either are intended by the seller or involve health and safety. Br. 15. That is wrong and irrelevant. Although the FTC enjoys a *presumption of materiality* with respect to, *inter alia*, health and safety claims and intended implied claims, it has full authority to pursue other unintentional implied claims *without* the benefit of that presumption. *See generally Kraft*, 970 F.2d at 322-23. Here, the record contains direct, undisputed evidence of materiality, *see* pp. 24-25, *supra*, and in any event the Commission found that Jerk and Fanning in fact intended to deceive consumers, *see* pp. 22-23, *supra*.

B. Fanning And Jerk Misrepresented The Benefits Of Paid Jerk.com Memberships.

In a single paragraph (at Br. 22), Fanning raises a token challenge to the Commission’s separate determination that Jerk misrepresented the benefits of paid membership, as alleged in Count II. He argues that “the allegations concerning payments for memberships and services are inconsistent with the conclusion of an implied claim.” Br. 22. But the Commission found that Jerk made an *express* claim, not an implied one, about the benefits of paid memberships. *See* Add. 25 (“The representation was express and it clearly pertained to the central characteristic of Jerk’s offering—benefits promised in exchange for the \$30 fee.”). Fanning offers nothing to rebut the overwhelming evidence that Jerk sold \$30 memberships offering consumers the ability to “dispute” content posted by others on Jerk.com, but failed to provide such services. *See* pp. 5-6, 9, *supra* (discussing the evidentiary record and Commission findings under Count II); Add. 20-25 (Commission opinion). He does not even address the website’s express statements promising membership benefits, including the right-to-“dispute” services (JA 1418-19), or the sworn statements of numerous consumers and an FTC undercover investigator attesting that Jerk failed to provide the promised benefits (JA 155, 160, 189-90, 213, 215-16, 287-89). In short, Fanning provides no legal or factual basis for overturning the Commission’s summary decision regarding Count II.

II. FANNING IS PERSONALLY RESPONSIBLE FOR JERK'S CONDUCT BECAUSE HE CONTROLLED THE BUSINESS AND DIRECTLY PARTICIPATED IN ITS DECEPTION.

Although he does not develop the argument, Fanning suggests in passing that his links to Jerk were somehow too tenuous to support injunctive relief against him. *See, e.g.*, Br. 4. That suggestion is meritless.

The FTC may obtain injunctive relief against an individual who either participated directly in a business entity's deceptive acts or practices *or* had the authority to control them. *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1101 (9th Cir. 2014); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005). Here, as the FTC found, undisputed evidence showed that Fanning both controlled Jerk and directly participated in its deceptive acts. He founded Jerk; oversaw its finances and personnel; established Jerk.com's web hosting; held himself out as the person in charge of Jerk; developed Jerk's business model of taking content from Facebook, presenting the content as user-generated, and charging consumers for "dispute" services; spearheaded Jerk's efforts to recruit investors; and directed Jerk's response to consumer complaints.¹³ Add. 26-31; *see* pp. 9-10, *supra* (summarizing key evidence of Fanning's participation and control).

¹³ Though Fanning asserts that the FTC found him "vicariously liable" for Jerk's misconduct (Br. 9), the FTC actually found him *individually* liable because he controlled Jerk and directly participated in its misrepresentations.

Citing his own conclusory affidavit, Fanning asserts that he was merely an “advisor to Jerk, LLC through another company.” JA 2453. He similarly claims in his brief that “[a]t no time did Fanning own, manage or control Jerk, LLC.” Br. 4. These conclusory statements, unaccompanied by any factual detail or support, raise no genuine issue of fact as to either control or direct participation.¹⁴ Delaware corporate records reveal that Fanning was Jerk LLC’s sole managing member, and further undisputed evidence shows that he hired Jerk’s registered agent and signed its taxpayer identification forms. JA 218-19, 2403-07. Fanning admitted under oath that he controlled Jerk’s bank account. JA 526. Jerk’s financial records confirm that Fanning was the sole authorized user of Jerk’s checking account (JA 1916-18), that he signed its checks (JA 1945),¹⁵ and that he controlled Jerk’s PayPal account and credit cards (JA 1967-69). Those facts alone are more than enough to establish Fanning’s corporate control and justify injunctive relief against him. *See FTC v. Publ’g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997) (evidence that company president had authority to sign documents “demonstrate[s] that she had the requisite control over the corporation”); *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1270 (S.D. Fla. 2007) (“An individual’s status as a

¹⁴ *See Vinick v. Comm’r*, 110 F.3d 168, 171 (1st Cir. 1997) (“Neither party may rely on conclusory allegations or unsubstantiated denials, but must identify specific facts derived from the pleadings, depositions ... and affidavits to demonstrate either the existence or absence of an issue of fact.”).

¹⁵ Fanning’s signature is redacted as confidential from the joint appendix.

corporate officer gives rise to a presumption of ability to control a small, closely-held corporation.”) (quotation omitted).¹⁶ The Commission was “not obliged to accept as true or deem as a disputed material fact, each and every unsupported, subjective, conclusory, or imaginative statement” made by Fanning. *Torrech-Hernandez v. Gen. Elec. Co.*, 519 F.3d 41, 47 (1st Cir. 2008).

Fanning next claims that “jerk.com was controlled or operated by overseas developers.” Br. 4; JA 2453. But Fanning himself hired, supervised, and paid these developers and thus remains responsible for Jerk’s deceptions. *See Freecom*, 401 F.3d at 1203. The use of hired programmers creates no genuine issue of fact over Fanning’s control. He emailed Jerk’s consultants that “[w]e are still using the original Romanian developers for mainten[an]ce on the production site.” JA 1010. He explained in an email to an investor that he paid Romanian developers “to fix the site from ... hacking.” JA 1067. And he discussed in an email to a contractor working on the site the need to hire someone to “review the Romanian code for jerk.com” in order to “get an opinion ... about the level of competency, or more likely incompetency of the off shore guys.”¹⁷ JA 2100.

¹⁶ *See also FTC v. RCA Credit Servs., LLC*, 727 F. Supp. 2d 1320, 1325, 1339-40 (M.D. Fla. 2010) (LLC managing member held personally liable for corporate violations of FTC Act).

¹⁷ *See also* JA 1436 (Fanning’s testimonial on Romanian programmers’ website: “Since we first contracted with them in February of 2008, they have shown incredible speed in implementation, a thorough knowledge of our products,

The evidence shows further that it was Fanning who directed the Romanian programmers to create Jerk.com profiles by taking content from Facebook. In response to a directive from Fanning to “create at least 5,000 more profiles [b]efore August” and “make sure the facebook part [w]orks,” the programmers vowed to create 20,000 new profiles by the end of the day. JA 2310-11. *See also* JA 1677 (Romanian programmer reports to Fanning that the database has 20 million profiles with 80 million to go, and that it would take “more days” to populate photos).

Fanning’s claim (Br. 4) that he did not personally “wr[i]te software code for jerk.com, and did not place any consumer content on jerk.com,” is thus beside the point. Fanning undisputedly *directed* the people who wrote the code and placed consumer content on the website. This Court, in applying the more stringent culpability standard for *monetary* redress under the FTC Act, explained that “gaps” in a defendant’s “responsibilities” are “simply irrelevant” when “he could have nipped the offending [representations] in the bud.” *Direct Mktg. Concepts*, 624 F.3d at 12-13.

superior management skills, and excellent customer service.”); JA 2347 (Fanning discusses company “highlights,” including that “[w]e have a development team in India now as well as [R]omania”); JA 2370 (Romanian programmer mentions his negotiations with Fanning: “I sent to John a very affordable offer, but he ignored [it].”).

III. THE FTC’S REMEDIAL PROVISIONS ARE SUFFICIENTLY TAILORED AND REASONABLY RELATED TO FANNING’S VIOLATIONS.

The FTC prohibited Fanning from misrepresenting in the future the source of any content on a website and the benefits of joining any service in connection with “the marketing, promoting, or offering for sale of any good or service.” Add. 41.¹⁸ To enable the Commission to monitor compliance with that directive, the FTC ordered him to maintain records, to report to the Commission on his future business affiliations, and to provide a copy of the order to personnel responsible for its implementation. Add. 42-43. Fanning’s challenge to those requirements is meritless.

A. The Remedial Provisions Are Reasonably Related To Fanning’s Violations.

The Commission’s chosen remedies were a reasonable response to Fanning’s serious, deliberate, and easily repeatable violations of the FTC Act. In crafting a remedy, the Commission considers (1) whether a violation was serious and deliberate; (2) the ease with which similar conduct can be engaged in with other products and services; and (3) the respondent’s history of prior violations. *Telebrands Corp. v. FTC*, 457 F.3d 354, 358 (4th Cir. 2006). “[N]o single factor is determinative; the more egregious the facts with respect to a particular element, the

¹⁸ To protect consumers from the possibility of continuing harm, the order also prohibits Fanning and Jerk from disclosing, using, selling, or benefitting in any way from personal information they obtained in operating Jerk.com. Add. 41. Fanning does not appeal this requirement.

less important it is that another negative factor be present.” *Removatron*, 884 F.2d at 1499 (quotation marks and brackets omitted). Moreover, the Commission is not limited to proscribing the specific unlawful conduct that it finds, but may “close all roads to the prohibited goal.” *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). It “may fashion its relief to restrain other like or related unlawful acts.” *FTC v. Mandel Bros.*, 359 U.S. 385, 392 (1959) (quotation omitted).

Fanning’s violations were both serious and deliberate. Add. 36-37. At his direction, Jerk created 85 million profiles of individual users with data harvested from Facebook, misrepresented that real Jerk.com users created those profiles, and offered nonexistent services in exchange for “membership” payments from bewildered and frightened consumers who thought they were buying the right to “dispute” the content of their profiles. *See* pp. 15-19, 22-23, 27-31, *supra*. That conduct forced consumers to expend considerable time, effort, and money in futile and sometimes repeated attempts to dispute or remove the disparaging content from their Jerk.com profiles.¹⁹ *See* pp. 4-6, 24-25, *supra*. Moreover, Fanning was responsible both for instituting Jerk’s policy of charging consumers for unfulfilled dispute services (*e.g.*, JA 990, 995, 1326-27, 2003) and for the callousness with which Jerk handled consumer complaints (*e.g.*, JA 218-19, 1737-38, 1776-77,

¹⁹ Add. 36; *see* JA 155, 160, 164, 173-90, 200-01, 210-13, 215-16, 723-25, 1350, 2118-2122, 2140-2266.

2415).²⁰ The Commission properly found that the absence of prior FTC Act violations does not outweigh the seriousness and deliberateness of his violations or obviate the need for stringent injunctive relief. *See Coro, Inc. v. FTC*, 338 F.2d 149, 154 (1st Cir. 1964) (upholding an FTC remedial order against a corporation that had no prior violations where the violations found occurred with respect to less than 1% of its business).

The Commission also noted that Fanning’s malfeasance at Jerk.com is easily transferrable to other ventures. Indeed, Fanning has a track record of operating businesses similar to Jerk. In 2010, he developed another website—Reper.com, which he intended to be a “[l]ess edgy more corporate” alternative to Jerk.com. JA 2347; *see also* JA 2366 (Jerk personnel transfers Jerk.com data to Reper.com). Moreover, when, in May 2013, Fanning lost control of the Jerk.com website, he transferred the profiles and other data to Jerk.org, where they remained for more than a year. JA 1348. Given the ease with which Fanning could establish social networks and transfer user profiles from one web domain to another, it was well within the Commission’s discretion to craft an order that covered his future products or services. *See, e.g., Colgate-Palmolive*, 380 U.S. at 394-95; *American*

²⁰ Fanning’s affidavit asserts that on unspecified occasions Jerk offered refunds and had technical problems (JA 2454), but it fails to provide any *facts* to support those bare assertions or explain how technical problems prevented Jerk from providing consumers with the promised benefits. The Commission thus properly discounted the affidavit. *See Torrech-Hernandez*, 519 F.3d at 47.

Home Prods. Corp. v. FTC, 695 F.2d 681, 706 (3d Cir. 1982); *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392, 394-95 (9th Cir. 1982).

In short, contrary to Fanning’s unsupported contentions (Br. 23), the FTC’s remedial measures are directly related to its findings of unlawful deception and Fanning’s ability to replicate his unlawful conduct elsewhere in the fluid environment of the Internet. Courts “defer to the Commission’s appraisal of the need for multi-product coverage” given the agency’s “accumulated expertise” at predicting “the likely future conduct of a proven violator.” *American Home Prods.*, 695 F.2d at 706. “Having been caught violating the [FTC] Act,” Fanning “must expect some fencing in.” *Colgate-Palmolive*, 380 U.S. at 395.

B. The Monitoring And Recordkeeping Provisions Are A Proper Exercise Of The Commission’s Remedial Discretion.

Monitoring and record-keeping requirements are routine in judicial and FTC injunctions against deceptive conduct because they allow courts and the agency to evaluate whether the bound party is complying. *See, e.g., FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1018 (N.D. Ind. 2000) (“Courts may order record-keeping and monitoring to ensure compliance with a permanent injunction.”), *rev’d in part on other grounds*, 312 F.3d 259 (7th Cir. 2002); *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1276 (S.D. Fla. 1999) (“Record-keeping and monitoring provisions in the permanent injunction are also appropriate to permit the Commission to police the defendants’ compliance with the order.”).

Fanning nevertheless asserts that the requirements here are “punitive and not related to the finding of liability based solely on the finding of an implied representation concerning source of website content.” Br. 25.

That characterization is implausible. To begin with, the Commission in fact found that Jerk and Fanning *expressly* deceived consumers into believing that Jerk would provide benefits to paid members, a point that Fanning ignores throughout his brief. *See* pp. 9, 27, *supra*. In addition, the monitoring and recordkeeping requirements are reasonable and hardly “punitive.” They “ensure that the defendants take responsibility to ensure that orders are followed by themselves and their associates, and that the FTC has the ability to monitor compliance with the orders and prevent future illegal conduct.” *FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 217 (D. Mass. 2009), *aff’d*, 624 F.3d 1 (1st Cir. 2010).

The recordkeeping requirements require Fanning to retain and provide the FTC with access to covered advertisements and promotional materials, complaints about websites or online services, and responses to these complaints. Add. 42, Paragraph III. Fanning attacks that provision as “unmanageable,” Br. 25, but he provides no concrete basis for that characterization. Moreover, these materials are necessary for the FTC to determine whether Fanning is complying with the order or continuing to deceive consumers. FTC access to them is a fundamental aspect of its ability to “close all roads to the prohibited goal.” *Ruberoide*, 343 U.S. at 473.

See, e.g., Think Achievement, 144 F. Supp. 2d at 1018, 1026-27 (“In order to ensure the enforcement of this Order, the Court finds it appropriate to require [defendants] to maintain records ... and to allow the Commission to monitor [defendants’] compliance with the Order.”) *rev’d in part on other grounds*, 312 F.3d 259 (7th Cir. 2002); *Telebrands*, 140 F.T.C. at 376 (requiring respondents to maintain, and, make available to the FTC, relevant advertisements, promotional materials, and consumer complaints); *Brake Guard Prods., Inc.*, 125 F.T.C. 138, 261-62 (1998) (same).

Fanning also objects to the order’s requirement that he provide a copy of the order to current and future employees and other relevant personnel and obtain signed acknowledgements from those persons. Add. 42, Paragraph IV. He first claims that this provision applies “even where the business does not implicate any of the conduct subject to the Complaint.” Br. 27. In fact, the requirement is expressly limited to “the subject matter of this order.” Add. 42. Fanning also implausibly accuses the FTC of imposing these remedial requirements to “harass, annoy, and embarrass” him. Br. 28. Given the behavior at issue here, the Commission had good reason to require Fanning to notify relevant employees, coworkers, and business associates of the legal duty to avoid deceptive conduct covered by the order. Notification requirements are a typical and indispensable remedy for deception. *See, e.g., FTC v. Sharp*, 782 F. Supp. 1445, 1456 (D. Nev.

1991) (ordering corporate and individual defendants to “[p]rovide a copy of this Order to any and all persons or business entities that [each] defendant employs or contracts with”); *Daniel Chapter One*, 149 F.T.C. 1574, 1581 (2010) (“Respondents shall deliver a copy of this order to ... principals, officers, directors, and managers ... employees, agents, and representatives having responsibilities with respect to the subject matter of this order”), *aff’d*, 405 F. App’x 505 (D.C. Cir. 2010); *Telebrands*, 140 F.T.C. at 376 (same).

Finally, Fanning objects to the requirement that he inform the FTC of any changes in his “current business or employment” or his “affiliation with any new business or employment.” Add. 43, Paragraph VI. He contends that the term business “affiliation” is unlawfully vague. Br. 26. Not so. The dictionary supplies an easily understood definition of “affiliate”: “to associate (oneself) as a subordinate, subsidiary, employee, or member” or “to become closely connected or associated.” *American Heritage Dictionary of English Language* at 28. The term is sufficiently “clear and precise” to be understood, especially in a business context. *Colgate-Palmolive*, 380 U.S. at 392, 394-95. FTC administrative orders routinely contain this requirement. *See, e.g., Daniel Chapter One*, 149 F.T.C. at 1581 (“Respondent ... for a period of ten (10) years ... shall notify the Commission of the discontinuance of his current business or employment, or of his

affiliation with any new business or employment.”); *Telebrands*, 140 F.T.C. at 377 (same); *Brake Guard*, 125 F.T.C. at 262 (same).

IV. FANNING’S FIRST AMENDMENT CLAIMS LACK MERIT.

Finally, Fanning contends that the FTC’s remedial provisions violate the First Amendment on the theory that they “determine what is proper content on any website” and attempt to “regulate, control, or halt the exchange and flow of ideas and information.” Br. 28-29. Fanning is mistaken. In fact, the remedial provisions do not restrict any lawful speech in which Fanning wishes to engage. He remains free to operate websites, to host public dialogue, to use information from public sources, and to engage in debate on any topic. As the Commission explained, its remedial order “places no restrictions on the content of profiles or comments that users may place on any website” Fanning operates. Add. 33.

The only speech in which Fanning may *not* engage is *misleading* commercial speech, which receives no protection under the First Amendment. “For commercial speech to come within [the First Amendment], it at least must concern lawful activity *and not be misleading.*” *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 566 (1980) (emphasis added); *see also POM Wonderful*, 777 F.3d at 499; *Rocket Learning, Inc. v. Rivera-Sanchez*, 715 F.3d 1, 14 (1st Cir. 2013); *Kraft*, 970 F.2d at 325. Here, the Commission prohibited Fanning only from *misrepresenting* to consumers the source of any

content on a website or the benefits of joining a service in connection with marketing the service. Add. 41, Paragraph I. The Commission thereby acted well within the scope of its remedial discretion in imposing a forward-looking remedy “tethered to the goal of preventing [future] deception.” *POM Wonderful*, 777 F.3d at 501.

Fanning insinuates that the FTC was nevertheless motivated by the desire to punish him for the content of speech displayed on Jerk.com. But “[a]gency opinions, like judicial opinions, speak for themselves.” *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994). Thus, as long as the Commission’s order sets forth a valid basis for its conclusions, it is entitled to “a presumption of regularity,” *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001), that precludes extra-record examination of governmental motives without a substantial showing of wrongdoing. Fanning has not even attempted to make such a showing. The FTC’s only motive was to stop Fanning and Jerk from deceiving consumers by representing that Jerk.com’s 85 million profiles were created by real users, and by selling “memberships” with nonexistent benefits, including the right to dispute derogatory or unwanted information in those profiles. The Commission’s order is sufficiently tailored to prevent Fanning and Jerk from committing similar deceptions in the future.

CONCLUSION

This Court should deny Fanning's petition for review and issue its own order mandating compliance with the FTC's Order, *see* 15 U.S.C. § 45(c).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 9,562 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced 14-point Times New Roman typeface using Microsoft Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2015, I filed and served the foregoing with the Court's appellate CM/ECF system. I certify that the following counsel of record are registered as ECF filers and that they will be served by the CM/ECF system:

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