

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



_____))
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,))
))
Respondents.))
))
_____)

PRE-TRIAL BRIEF OF RESPONDENT JERK, LLC

I. INTRODUCTION

Respondent Jerk, LLC (“Jerk”) is not liable for deceptive conduct in violation of Section 5 of the Federal Trade Commission Act. Jerk expects the evidence at trial to show that the statements relied upon by Complaint Counsel were not false or deceptive, did not mislead consumers as to the source of content on the Jerk.com website, and did not cause consumers to change their behavior in reliance on them.

Complaint Counsel relies principally on statements made on the “Terms and Conditions” page of the Jerk.com website, in which Jerk disclaims liability for content posted by users of the site. There is no evidence that Jerk has ever made a representation as to whether Jerk itself did or did not contribute content to the site, much less that all profiles were manually created by

users. Nor is there evidence from any consumer who believed someone they knew had created that consumer's profile based that assumption on representations made by Jerk. Jerk anticipates that Complaint Counsel will fall far short of proving its claims.

II. FACTUAL SUMMARY

Jerk, LLC, an internet technology start-up, launched Jerk.com in 2009. Jerk.com was a social media website, which its content derived from a variety of sources, including other Jerk users, Facebook, Intelius, various other web sources. Users of the website could create profiles about other people and rate whether the profiled person was a "jerk" or "not a jerk." Once a profile was created, other users were also able to vote people as "jerks" or "not jerks" and post comments on that page. Jerk itself was not the "author" of any content. Approximately 99 percent of Jerk.com profiles did not contain user comments or a vote of Jerk/Not a Jerk.

Often, Jerk.com users linked their personal Facebook profiles to the Jerk.com site. When they did so, profiles of their Facebook friends also populated the Jerk.com site, using information that Facebook had actively placed into the public domain. Indeed, during the relevant time period, the entire Facebook directory containing users' personal information, postings, and photographs was readily available to the public through the internet.

In 2012, Complaint Counsel commenced an investigation of Jerk, LLC, claiming violations of Section 5 of the FTC Act. The investigation was based on consumers' complaints claiming that personal information they had posted on Facebook and elsewhere on the internet, and that they believed was private, appeared on Jerk.com. Complaint Counsel identifies no evidence, however, that any consumer posted information on Jerk.com or otherwise changed their behavior in reliance on any representations made by Jerk.

III. LAW AND ARGUMENT

A. THE COMMISSION MAY NOT INFRINGE JERK'S FIRST AMENDMENT RIGHT BY PENALIZING SPEECH THAT IS TRUTHFUL OR NON-COMMERCIAL.

In exercising its authority over Jerk, the FTC may not infringe Jerk's First Amendment right to free speech.¹ In Count I, the Complaint asserts liability for purported misrepresentations by Jerk. The First Amendment protection, however, sets a high constitutional standard by which the Commission is bound. With regard to non-commercial speech, any content-based restriction must survive strict scrutiny; that is, it must be "narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). The actions of the Commission are also constrained as to commercial speech: "Commercial speech that is not false or deceptive and does not concern unlawful activities ... may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985). As relevant here, the FTC Act prohibits "deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). There is no governmental interest at stake in penalizing speech that is non-deceptive or non-commercial under this provision, and so liability for such protected speech would be foreclosed under either strict scrutiny or the *Zauderer* standard.

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

B. THE TERMS AND CONDITIONS OF THE JERK.COM WEBSITE CANNOT FORM THE BASIS OF LIABILITY UNDER THE FIRST AMENDMENT BECAUSE THEY CONSTITUTE TRUTHFUL, NON-COMMERCIAL SPEECH, NOR UNDER THE STATUTE BECAUSE THEY CONTAIN NO REPRESENTATIONS AND ARE NOT DECEPTIVE.

Complaint Counsel seeks to impose liability on Jerk for statements made in its Terms and Conditions or “About Us” page (hereinafter “Terms”). Those statements, however, did not constitute commercial speech. The Terms were, as stated therein, a legally binding contract between Jerk and its users.² It would raise serious concerns of separation of powers and federalism, in addition to freedom of speech, if the Commission were to effectively regulate the practice of law by restricting the words attorneys could use in crafting contracts. See *American Bar Ass’n v. FTC*, 430 F. 3d 457, 470-72 (D.C. Cir. 2005) (rejecting “the FTC’s apparent decision that Congress, after centuries of not doing so, has suddenly decided to regulate the practice of law”). Indeed, such action would be especially inappropriate here, where the Terms contain no factual representations at all, but only allocates the rights and liabilities between Jerk and its users. Moreover, even treating the Terms as commercial speech would be problematic because, rather than “expression[s] related solely to the economic interests of the speaker and its audience,” *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of NY*, 447 U.S. 557, 561 (1980), the Terms have independent legal significance in that they directly impact the rights of Jerk and its users.

Complaint Counsel asserts that the Terms implicitly represented to consumers that all profiles on Jerk.com were manually created by Jerk.com users. Nowhere is that stated in the Terms, nor would that would be a reasonable inference. Section 4 of the Terms,³ which

² See CX0273-001 (“This is a legal agreement (“Agreement”) between you and Jerk LLC.”).

³ Section 4 of the T&C, entitled “Online Content,” is reproduced here in full:

Complaint Counsel seems to believe contains a factual assertion about the source of information on Jerk.com, is in fact a disclaimer and an assertion of Jerk's rights under Federal law. Under the Communications Decency Act,⁴ Jerk had the right to disclaim liability for information provided by other sources, including its users, and that is exactly what Jerk did in Section 4. See 47 U.S.C. 230(c)(1). Complaint Counsel would take out of context the clause "content made available through Jerk.com [is that] of [its] respective authors and not of Jerk LLC" and interpret it unreasonably as a statement that *no* content on Jerk.com was actually authored by Jerk, LLC. This would mean that the Jerk logo, home page, and all other website content was created by some unidentified third party, which no reasonable consumer would believe. Rather, Section 4 asserts, consistent with Jerk's rights under the Communications Decency Act, that third-party content on Jerk is the responsibility of those third-parties who created it. It would defy common sense and public policy if Jerk's assertion and notification to users of its statutory rights were found to constitute a misleading trade practice.

To the extent one could interpret that Section 4 makes a factual representation, that representation could be only that third parties had the ability to create content on the Jerk.com website. This fact is not in dispute. The evidence proffered by Complaint Counsel indicates that content on Jerk.com came from a variety of sources, including Facebook, Intelius, other web sources, and Jerk users themselves. Jerk was not the "author" of any of this content. For

Opinions, advice, statements, offers, or other information or content made available through Jerk.com are those of their respective authors and not of Jerk LLC, and should not necessarily be relied upon. Such authors are solely responsible for the accuracy of such content. Jerk LLC does not guarantee the accuracy, completeness, or usefulness of any information on Jerk.com and neither adopts nor endorses nor is responsible for the accuracy or reliability of any opinion, advice or statement made. Under no circumstances will Jerk LLC be responsible for any loss or damage resulting from anyone's reliance on information or other content posted on Jerk.com. (CX0273 at 1)

⁴ See 47 U.S.C. 230(c)(1).

instance, if a Jerk user created a profile, the author of that profile would be the Jerk user. A Facebook user's name and public profile picture would be created or provided by that user. Putting to one side the wholly unreasonable interpretation of Section 4 adopted by Complaint Counsel, Section 4 is neither false nor misleading because it accurately conveys that Jerk accepts no responsibility for content not created by Jerk.

The other sections of the Terms likewise constitute contract language, and not any factual representation. Complaint Counsel identifies unremarkable disclaimers in the Terms as somehow insidious and misleading. For instance, Complaint Counsel points to Section 2 ("You agree that: You are solely responsible for the content or information you publish or display (hereinafter, 'post') on Jerk.com.") and Section 5 ("By posting information on Jerk.com, you understand and agree that the material will not be removed even at your request. You shall remain solely responsible for the content of your postings on Jerk.com.").⁵ To the extent these provisions convey any facts, they *truthfully* state that users were able publish content to Jerk.com and that Jerk disclaimed any liability for that content.

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

⁵ See CX0273-001.

C. JERK'S STATEMENTS THAT CONSTITUTED COMMERCIAL SPEECH WERE TRUE AND NOT DECEPTIVE, AND THUS PROTECTED BY THE FIRST AMENDMENT AND NOT PROHIBITED BY THE FTC ACT.

A similar analysis applies to representations contained elsewhere on Jerk.com that users had the ability to post content. Complaint Counsel cites several statements or aspects of Jerk.com, which, though constituting commercial speech, were entirely truthful and in no way deceptive. Specifically, Complaint Counsel points to 1) Profiles with comments and votes on the Jerk.com homepage;⁶ 2) the "Remove Me!" section which stated, "Jerk is where you find out if someone is a jerk, is not a jerk, or is a saint in the eyes of others";⁷ 3) the "Post a Jerk" section, which stated, "Fill out the form below to find or create a profile on jerk. Include a picture if you can and as much other information as possible";⁸ and 4) Jerk's Twitter account stated, "Find out what your 'friends' are saying about you behind your back to the rest of the world!"⁹.

The Jerk.com homepage did have profiles with comments and votes, because users *did* have the capability to post profiles, vote people as "jerks" or "not jerks," and post comments on profiles. If a person had a profile on Jerk.com and a friend had commented on that profile, that person could, indeed, see what their friends were saying about them. If, instead, nobody had voted on an individual's profile, the profile showed a default "jerk score" of zero.¹⁰

None of these representations were false or misleading in the least. The FTC Act does not cover non-deceptive speech, and even if it did, the Commission's ability to restrict it would be curtailed by the First Amendment. See *Zauderer*, 471 U.S. at 638.

⁶ See CX0048-001-002

⁷ See CX0048-032

⁸ See CX0048-031

⁹ See CX0282-001

¹⁰ See CX0302

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

Complaint Counsel is left with only one purported factual representation to consumers that any evidence suggests could be false or misleading: that “millions of people... use Jerk for important updates for business, dating, and more.”^{11,12} This was not material in the least to consumers, who knew and cared only that they had profiles on a website called Jerk.com. See CX0036, ¶ 9 (citing worry about reputational harm “if people search me and the search results show a Jerk.com entry”); CX0011, ¶ 17 (“If people search me and the search results show a Jerk.com entry, it really affects my business.”); CX0037, ¶ 7 (“[S]omeone could search my name and see this result pop up, causing harm to my personal and professional reputation.”).

Complaint Counsel makes no argument that the “millions of people... use Jerk” statement is independently material, and such an argument would be unavailing. While the Commission may “apply, within reason, a presumption of materiality,” *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992), such a presumption is unwarranted here. Rather than the type of factual representation on which consumers could be expected to rely, this statement was mere puffery that stated, in general terms, that consumers should consider Jerk. “In the FTC context, we have recognized puffery in advertising to be ‘claims [which] are either vague or highly subjective.’” *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F. 2d 242, 246 (9th Cir. 1990), quoting *Sterling Drug, Inc. v. Federal Trade Commission*, 741 F.2d 1146, 1150

¹¹ See CX0272

¹² Complaint Counsel asserts that Jerk intended to convey that Jerk.com was an organic social network created by Jerk.com users, but identifies no evidence demonstrating how this purported representation was, in fact, conveyed. The representation that Jerk.com reflected users’ views of people profiled was true to the extent that Jerk.com users submitted votes or comments about them.

(9th Cir. 1984), cert. denied, 470 U.S. 1084 (1985). Even if the vague reference to “millions of people” is considered factual, rather than hyperbole, no reasonable consumer would have relied upon it, and Complaint Counsel has not identified any person who did. Such aspirational language, standing alone, would not induce any change in behavior by consumers. In fact, Complaint Counsel’s own version of events indicates that such exaggerated rhetoric had no effect on consumers, given that the vast majority of users visited Jerk.com only once¹³ and even those users consistently spent less than a minute on the site¹⁴.

On Count I, Complaint Counsel identifies as the sole “deceptive representation” “the represent[ation], expressly or by implication, that the content on Jerk, including names, photographs, and other content was created by Jerk users and reflected those users’ views of the profiled individuals.”¹⁵ As explained above, Jerk never made this representation. Moreover, the alleged representation was not in fact material to consumers, and any presumption of materiality would be unreasonable if applied, because Complaint Counsel’s own evidence shows that Jerk’s name, not the source of the profiles, was the source of consumers’ concerns.¹⁶

A brief hypothetical illustrates this point. Suppose that substantially identical profiles to those on Jerk.com were shown instead on a website called WonderfulPeople.com. The website would pose the question, “Is [Individual Profiled] Wonderful?” and ask users to vote whether a person profiled was a Saint, a Wonderful Person, or Not a Very Wonderful Person. Most

¹³ See CX0443-001

¹⁴ See CX0443-001 (analytics reports for Jerk.com: “People have consistently spent less than a minute on the Jerk.com website. It is not engaging them sufficiently enough to interact with the site for long periods of time.”).

¹⁵ See Complaint, ¶ 15.

¹⁶ See CX0036, ¶ 9; CX0011, ¶ 17; CX0037, ¶ 7.

profiles, having no votes, would report that the person was or might be a Wonderful Person. The consumers identified by Complaint Counsel would have had no reason to care whether such pages showed up in Google results for their names. They would not be concerned about harm to their reputations or businesses. And they certainly would not care who put the profile there or how many people used WonderfulPeople on a regular basis. Only the name of the website, which is speech protected by the First Amendment, differentiates the two situations.

Complaint Counsel cites evidence that some consumers believed that people they knew had created profiles about them. If so, these consumers must have believed that someone they knew put in their name and photo, but added no other information and did not vote on whether or not they were “jerks.”¹⁷ However, not one of those consumers avers that this belief, even if mistaken, caused them to change their behavior towards Jerk. They may have been upset, as explained above, because they did not want to be associated with a site called Jerk.com. They also may have been concerned that their personal information was available on the Internet or had been available through Facebook, but the Complaint does not allege that this fact in any way violated the Federal Trade Commission Act. In short, consumers may have had concerns about what was on Jerk’s website, but that content was speech protected by the First Amendment and by the Communications Decency Act. Any harm they suffered was not traceable to any deceptive representations or unlawful conduct by Jerk. Liability based on the facts alleged by Complaint Counsel would be unwarranted by the scope of the statute and inconsistent with the Constitution and public policy.

¹⁷ See CX0036, ¶ 3 (“The profile had no other information about me or my family... no one had voted.”).

IV. CONCLUSION

For the foregoing reasons, Respondent Jerk, LLC requests that this Court find in its favor on all claims asserted by Complaint Counsel in its Complaint, to dismiss all claims, to deny the relief requested, and to grant such other and further relief as this Court deems just and proper.

JERK, LLC,

By its Attorney,

/s/ Alexandria B. Lynn

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Dated: March 13, 2015

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2015, I caused to be served true and accurate copies of *Pre-Trial Brief of Respondent Jerk* as follows:

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Notice of Electronic Service for Public Filings

I hereby certify that on March 13, 2015, I filed via hand a paper original and electronic copy of the foregoing Pre-Trial Brief of Respondent Jerk, LLC, with:

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