

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

**COMMISSIONERS:**      **Edith Ramirez, Chairwoman**  
                                 **Julie Brill**  
                                 **Maureen K. Ohlhausen**  
                                 **Joshua D. Wright**  
                                 **Terrell McSweeney**

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**In the Matter of**

**Jerk, LLC, a limited liability company d/b/a JERK.OMM and Tj/TT1 1 Tf13.92 0 0 13.02 60.0001**

**PUBLIC**

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Date: September 26, 2014  
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Respectfully submitted,

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TABLE OF CONTENTS

- I. INTRODUCTION .....1.....
- II. FACTUAL BACKGROUND ..... 2
  - A. Respondents and their control over Jerk.com ..... 2
  - B. The Jerk.com website .....3.....
  - C. Respondents represented that the profiles on Jerk.com were user-generated. .... 4
  - D. Respondents meant to convey to consumers that the profiles on Jerk.com were created by users.....5.....
  - E. Consumers believed the representation that the profiles on Jerk.com were created by users and reflected their views of the persons profiled. .... 7
  - F. It was Respondents themselves who created the vast majority of the profiles on Jerk.com ..... 9.....
  - 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..... 13
  - H. Respondents have continued to use consumers’ names and photos in other ventures, even after losing control over Jerk.com in 2013. .... 15
- III. PROCEDURAL POSTURE ..... 16
- IV. SUMMARY DECISION STANDARD ..... 16
- V. RESPONDENTS’ DECEPTIVE REPRESENTATIONS VIOLATED SECTION 5 OF THE FTC ACT .....17.....
  - A. Legal Standard .....17.....
  - B. Uncontroverted evidence demonstrates that Respondents misrepresented the source of the content on Jerk.com (Count I). .... 18
  - C. Uncontroverted evidence demonstrates that Respondents misrepresented the benefits of the paid Jerk membership (Count II) ..... 21
  - D. Uncontroverted evidence demonstrates that Fanning is individually liable for the deceptive conduct alleged ..... 22

VI. RESPONDENTS' AFFIRMATIVE DEFENSES LACK MERIT ..... 27

    A. "Failure to state a claim" is not an affirmative defense ..... 27

TABLE OF AUTHORITIES

Cases

Am. Fin. Servs. Ass’n v. FTC  
767 F.2d 957 (D.C. Cir. 1985) .....31.....

Celotex Corp. v. Catrett  
477 U.S. 317 (1986).....16....

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n  
447 U.S. 557 (1980).....29....

Exposition Press, Inc. v. FTC  
295 F.2d 869 (2d Cir. 1961).....32.....

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.  
528 U.S. 167 (2000).....30....

FTC v. Affordable Media, LLC  
179 F.3d 1228 (9th Cir. 1999) .....30.....

FTC v. Amy Travel Serv., Inc.  
875 F.2d 564 (7th Cir. 1989) .....23.....

FTC v. Colgate-Palmolive Co.  
380 U.S. 374 (1965).....31....

FTC v. Commerce Planet, Inc.  
878 F. Supp. 2d 1048 (C.D. Cal. 2012) ..... 26

FTC v. Direct Mktg. Concepts, Inc.  
648 F. Supp. 2d 202 (D. Mass. 2009) ..... 37

FTC v. Medicor, LLC  
217 F. Supp. 2d 1048 (C.D. Cal. 2002) ..... 26

FTC v. Neovi, Inc.  
604 F.3d 1150 (9th Cir. 2010) .....31.....

FTC v. North America Mkt’g and Assoc., LLC  
2012 WL 5034967 (D. Ariz. Oct. 18, 2012)..... 28

FTC v. Pantron I Corp.  
33 F.3d 1088 (9th Cir. 1994) .....17.....

FTC v. Publ'g Clearing House, Inc.  
104 F.3d at 1168 (9th Cir. 1997).....23.....

FTC v. ReverseAuction.com, Inc.  
2000 US Dist LEXIS 20761 (D.D.C. 2000) ..... 36, 37

FTC v. Transnet Wireless Corp.  
506 F. Supp. 2d 1247 (S.D. Fla. 2007) ..... 23

FTC v. World Media Brokers  
415 F.3d 758 (7th Cir. 2005) .....23.....

Guziak v. FTC.  
361 F.2d 700 (8th Cir. 1966) .....31.....

In re Am. Home Prods.  
98 F.T.C. 136 (1981).....

In re Novartis Corp.  
127 F.T.C. 580 (1999).....207, 19,

In re POM Wonderful LLC  
2013 FTC LEXIS 6 (FTC Jan. 10, 2013).....17-19, 22, 35-36

In re R.M.J.,  
455 U.S. 191 (1982).....29....

In re Stouffer Foods Corp  
118 F.T.C. 746 (1994).....7.,35... 1

In re Sun Oil Co.  
84 F.T.C. 247 (1974).....32....

Jacob Seigel Co. v. FTC  
327 U.S. 608 (1946).....35....

Kraft, Inc. v. FTC

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<b>In the Matter of</b>	)	
	)	
<b>Jerk, LLC, a limited liability company,</b>	)	
<b>also d/b/a JERK.COM, and</b>	)	<b>DOCKET NO. 9361</b>
	)	
<b>John Fanning,</b>	)	
<b>individually and as a member of</b>	)	
<b>Jerk, LLC.</b>	)	
_____	)	

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.





is also Fanning's business address. (CCSMF 5, ¶17)

} (CCSMF 6, 118) Moreover, Jefk

}

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)



(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. Jerk.com did not display any contact email address, valid physical address, or phone number on the site. 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 \$25.00." Many consumers complained about their inability to contact Jerk. (d.)<sup>2</sup>

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<sup>2</sup> Some consumers sent written complaints to Jerk.com's webhost and to Jerk's registered

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. 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.**





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:



**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<sup>6</sup>, 84)

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

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



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.**

**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,” *see* 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).

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. Policy Statement on Deception, appended to *In re Cliffdale Assocs.*, 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 176. *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).



that the alleged claim was in fact conveyed to consumers. *FTC v. 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.” *Chaffle 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

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.” (d.) Additionally, internal Jerk documents show Jerk staff discussing auto-generating profiles to boost traffic to the website, at Fanning’s direction. (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

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 (CCSMF 53, 79, 159) Moreover, consumers paid money to Jerk to gain the ability to manage, and delete, profiles of them. (CCSMF 92, 158)

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 Assoc., 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

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(CX0258 ¶ 26)

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.<sup>8</sup> 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

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<sup>8</sup> 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. {

}<sup>9</sup> (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

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] reper. 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

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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. *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). *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,”<sup>10</sup> that the Complaint “fails to state a cognizable claim”<sup>11</sup> 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.”<sup>12</sup> 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,”<sup>13</sup> while Fanning maintains that he “is not responsible or liable for

<sup>10</sup> Jerk Answer at 5 (1st affirmative defense).

<sup>11</sup> Fanning Answer at 4 (1st affirmative defense).

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

<sup>13</sup> Jerk Answer at 6 (6th affirmative defense).

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

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.”<sup>16</sup>

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

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 ~~is~~ **sales**. *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.**

control over the domain for the site.<sup>18</sup>”

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”<sup>19</sup> and asserts that “the requested relief is not in the public interest.”<sup>20</sup>

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.*

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)

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. (¶ 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. (43) Jerk also failed to submit a preliminary witness list. (¶ 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.

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. 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.





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.<sup>26</sup> 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 (quoting *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

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<sup>26</sup> The proposed order mirrors the notice order attached to the Complaint.

found.” Telebrands Corp. v. FTC

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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



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