UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

COMPLAINT COUNSEL'S REPLY TO RESPONDENT JOHN FANNING'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR SUMMARY DECISION

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I. INTRODUCTION

Complaint Counsel have met their burden of proving that the Commission should grant summary decision against Respondents Jerk, LLC ("Jerk") and John Fanning ("Fanning"). There is no genuine dispute about the material facts and evidence presented by Complaint Counsel. In response to Complaint Counsel's Motion for Summary Decision ("CCMSD")—supported by a developed record of material facts and evidence—Respondents have controverted no material facts and have presented no independent evidence. Jerk failed to submit an opposition altogether. Fanning has not countered Complaint Counsel's record with any evidence besides a self-serving affidavit. Instead, Fanning attacks the legal viability of the Complaint. That too is unavailing because Fanning misstates and misapplies the governing law.

Commission Rule of Practice ("Rule") 3.24(a)(2) requires the party opposing summary decision to "include a separate and concise statement of those material facts as to which the opposing party contends there exists a genuine issue for trial, as provided in §3.24(a)(3)." Rule 3.24(a)(3) requires the opposing party to respond by "set[ting] forth *specific facts* showing that there is a genuine issue of material fact for trial" (emphasis added), and cautions that where the respondent fails to do so, "summary decision, if appropriate, shall be rendered."

The party opposing summary judgment cannot rest on generalized refutations, but must set forth "concrete particulars" showing the need for a trial. *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978). It is not sufficient merely to assert a conclusion without supporting it with facts. *Id.*; *see also* Rule 3.24(a)(3) ("a party opposing the motion may not rest upon the mere allegations or denials of his or her pleading"); *Kroger*, 1981 FTC LEXIS 16, at *195 (the opponent may not "forestall summary judgment by asserting immaterial facts or setting forth merely speculative arguments."). Otherwise, if unsubstantiated assertions were sufficient to compel a trial, "the policy favoring efficient resolution of disputes, which is the cornerstone of the summary judgment procedure, would be completely undermined." *Research Automation,* 585 F.2d at 33.

By failing to provide a statement identifying material facts they contend raise a genuine issue for trial, Respondents have failed to satisfy their burden in opposing summary decision. Jerk does not oppose Complaint Counsel's Motion and therefore does not contest Complaint Counsel's Statement of Material Facts ("CCSMF").[1] Although Fanning filed an opposition brief

[1] Under Rule 3.22(d), Jerk, by failing to respond to Complaint Counsel's motion, is deemed to have consented to summary decision against it. Although federal court practice appears to differ, *see* Fed. R. Civ. P. 56(e) advisory committee notes (2010 Amendment) ("summary judgment cannot be granted by default even if there is a complete failure to respond to the motion"), Federal Rule 56 nonetheless "authorizes the court to consider a fact as

("Opp."), he too failed to provide the required separate statement articulating the material facts he disputes. This failure alone provides sufficient basis to deem Complaint Counsel's facts admitted and to grant summary decision against both Respondents. *See Coseme-Rosado v. Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) ("'failure to present a statement of disputed facts, embroidered with specific citations to the record, justifies the court's deeming the facts presented in the movant's statement of undisputed facts admitted'") (citation omitted); *Twist v. Meese*, 854 F.2d 1421, 1425 (D.C. Cir. 1988) ("We are satisfied that in the absence of the statement required to be furnished by [the defendant], the district court did not abuse its discretion in accepting as 'admitted' the facts identified by the government in the government's statement of material facts.").

B. Fanning's Opposition Does Not Genuine

Indeed, the only piece of evidence lacking satisfactory indicia of reliability is the sole piece of evidence submitted by Fanning—a self-serving affidavit, which courts typically treat as devoid of evidentiary value on summary judgment. *See, e.g.*, *Valley Forge Ins. Co. v. Health Care Mgmt. Ptnrs, Ltd.*, 616 F.3d 1086, 1095 (10th Cir. 2010) ("'conclusory and self-serving' affidavit is insufficient to create a factual dispute"); *Hansen v. United States*, 7 F.3d 137, 138 n.2 (9th Cir. 1993) ("When the nonmoving party relies only on its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact."); *FTC v. MacGregor*, 360 F. App'x 891, 893 (9th Cir. 2009) (finding respondents' affidavits, proffered without evidentiary support, "conclusory and thus fail[ing] to create a genuine issue of material fact").

Because Respondents have not controverted Complaint Counsel's facts and evidence with specific facts or evidence of their own, they have failed to meet their burden in creating a genuine dispute of material fact.

III. FANNING'S ATTACK ON THE DECEPTION COUNTS AS LEGALLY INSUFFICIENT IS UNAVAILING.

Instead of challenging Complaint Counsel's material facts and supporting evidence, Fanning argues that Complaint Counsel have failed to state a valid legal claim for deception. This attack fails because it rests on inapposite or misstated authority applied to unsupported factual contentions.

A. Section 5 Covers The Deceptive Representations Alleged In The Complaint.

Fanning appears to argue that Section 5 does not apply to the deceptive representations made by Respondents on Jerk.com because these are not "affirmative statements . . . made to advertise or promote Jerk.com." (Opp. 8) Focusing this argument at the deceptive representation alleged in Count I—that the profiles posted on Jerk.com were created by users,

not Jerk, and reflected the users' views of the profiled individuals—Fanning contends that the express statements on Jerk.com articulating this representation do not constitute a "claim" or an "advertisement intended to lure users to the Jerk.com site." (Opp. 9) Instead, according to Fanning, these statements merely comprise "part of a legal disclaimer," and therefore are not actionable under Section 5. (*Id.*)[3]

This argument finds no support in law. Fanning does not, and cannot, support the unprecedented proposition that Section 5 covers only those statements that conform to some unspecified notion of advertisement or promotion that excludes statements a company makes on its own website about its services. In fact, Section 5 applies broadly to "deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). Courts have routinely applied Section 5's deception prong to representations like the ones alleged in Counts I and II—*i.e.*, statements made by defendants on their own websites about their services. *See, e.g., FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1064-65 (C.D. Cal. 2012) (finding deception based on defendants' messages on their website about features and cost of their service); *FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 626-31 (D.N.J. 2014) (rejecting dismissal of a deception count based on defendant website's statements about its privacy policy). And courts have not exempted deceptive statements made in disclaimers from Section 5 liability. *See, e.g., FTC v. AMG Servs., Inc*., 2014 U.S. Dist. LEXIS 73285, at *26-27 (D. Nev. May 28, 2014)

[3] In arguing that the allegations "far exceed[] the legal bounds of a 'claim' properly regulated by the FTC," Fanning inexplicably describes, in painstaking detail, the test for adequate substantiation, and then argues that Count I fails it. (Opp. 8-9) This straw man cannot stand. Falsity and lack of substantiation are distinct concepts, each of which can independently sustain a deception claim under Section 5. *See FTC v. Nat'l Urological Group*, 645 F. Supp. 2d 1167, 1190 (N.D. Ga. 2008); *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 298 n.6 (D. Mass. 2008). Here, the Complaint pleads deception through falsity, not lack of adequate substantiation for the false statements. (Complaint ¶¶ 16, 18)

(predicating finding of Section 5 deception on statements made in a Truth In Lending Act disclosure box and fine print in a payday loan document).

In any case, Fanning provides no facts or evidence supporting his argument that the deceptive representation alleged in Count I is predicated entirely on disclaimer language. In fact, Complaint Counsel's evidence shows the opposite: Respondents made numerous statements articulating this representation on at least four different Jerk.com webpages, including the "Welcome" and "About Us" pages, which describe what Jerk.com is and where its content comes from, as well as on Jerk.com's Twitter account. (CCSMF 40-46) Fanning provides no facts or law on why Section 5 does not cover statements clearly conveyed to consumers.

B. No Further Extrinsic Evidence Is Necessary To Interpret The Meaning Of Statements Expressly and Clearly Conveyed.

Fanning argues that Count I fails as a matter of law because Complaint Counsel "mis-states and falsely depicts the statements on the website." (Opp. 8) This argument is misguided. The representation alleged in Count I is express, and express claims "directly state the representation at issue." *In re Thompson Med. Co., Inc.*, 1984 FTC LEXIS 6, *311 (Nov. 23, 1984); *see also POM Wonderful,* 2013 FTC LEXIS 6, at *21 ("The primary evidence of the representations that an advertisement conveys to reasonable consumers is the advertisement itself.").

Here, the Commission has sufficient uncontroverted facts and evidence to determine whether Respondents conveyed the representation alleged in Count I, because the statements supporting that representation are express and clear on their face. Respondents have expressly stated on Jerk.com that "information or content made available through jerk.com are *those of their respective authors and not of Jerk LLC*" and "Jerk is where you find out if someone is a jerk, not a jerk, or a saint *in the eyes of others*." (CX0273, CX0275 (emphasis added))

Respondents have reinforced these express representations with additional statements clearly conveying that other users, not Jerk itself, were responsible for posting the content, including the individual profiles, on Jerk.com. (*See* CCSMF 40-46)

Fanning does not contest the fact that these statements appeared on Jerk.com. On the contrary, he acknowledges it. (*See* Opp. 9 (conceding that "Complaint Counsel relies solely on and quotes the statements previously featured on the Jerk.com homepage and in the 'About Us'

Jerk has not presented any opposition whatsoever, and Fanning has not provided any evidence to rebut the presumption of materiality.[4]

Fanning argues that Complaint Counsel have not demonstrated materiality in Count I

court's finding of individual liability).

B. Fanning Disputes Complaint Counsel's Evidence Establishing Individual Liability With Naked Contentions, Not Facts Or Evidence.

Fanning presents only naked challenges to Complaint Counsel's material facts and evidence establishing his individual liability, relying exclusively on his own affidavit. This cannot overcome Complaint Counsel's evidence on summary decision. *See MacGregor*, 360 F. App'x at 893 (defendants' conclusory affidavits, unsupported by evidence, failed to raise a genuine dispute about their individual liability).

For example, Fanning argues that his involvement in Jerk does not make him liable for the misrepresentations made on Jerk.com. (Opp. 23) But the uncontroverted evidence shows that Jerk's primary, if not exclusive, business was operating Jerk.com (CCSMF 3, 11-16), and that Fanning was actively involved with the site. (CCSMF 120-157) Moreover, Fanning acknowledges that Jerk was a small and fluid Internet company without a rigid corporate hierarchy. (Opp. 21) Thus, Fanning's role in Jerk cannot be compartmentalized to exclude any involvement with Jerk.com. *See Nat'l Urological Group*, 645 F. Supp. 2d at 1207 ("If a defendant was a corporate officer of a small, closely-held corporation, that individual's status gives rise to a presumption of ability to control the corporation.").

Additionally, Fanning argues that he took no individual action with respect to Jerk's conduct. (Opp. 21) Complaint Counsel, however, have provided uncontroverted evidence showing that Fanning has taken many actions for and on behalf of both Jerk and Jerk.com, including directing the company's strategy (CCSMF 137); controlling its finances (CCSMF 122-128); hiring staff to work on Jerk.com (CCSMF 138); incorporating Jerk and distributing shares in the company (CCSMF 98-105, 108-110); and soliciting investors to fund Jerk.com (CCSMF 129, 131-133). Fanning has not disputed any of this evidence; nor has he provided new evidence

to support his argument.

Moreover, although Fanning contends that he did not write any software code to operate Jerk.com (Opp. 22), Complaint Counsel have presented uncontroverted evidence showing Fanning's integral involvement in operating the site, including leasing the domain name jerk.com (CCSMF 15, 115); hiring and directing the staff who developed and maintained the software for Jerk.com (CCSMF 138, 143); hiring and directing a data hosting company to host Jerk.com's servers (CCSMF 142); participating in the creation of content on Jerk.com, including deciding on the prominent website language "Are you a Jerk?" (CCSMF 144-147); deciding on Jerk.com's design (CCSMF 148-150); and controlling the bank accounts that paid the site's expenses and received consumers' payments to Jerk.com (CCSMF 122-127). Fanning has not controverted any of this evidence either.

V. FANNING'S FIRST AMENDMENT ARGUMENT IS MISGUIDED.

Fanning argues that the First Amendment immunizes Respondents' deceptive representations from Section 5 liability because Jerk.com hosted public dialogue and provided a public referendum on Facebook. (Opp. 15-18) This argument fails. The Complaint does not challenge the truthfulness of *consumers'* speech posted on Jerk.com. It challenges *Respondents'* representations to consumers about what Jerk.com is and what it offers. As explained in Complaint Counsel's Opening Brief, *that* speech is commercial, and is not protected by the First Amendment because it is false. (CCMSD 29)

The notion that the First Amendment bars the Complaint because Jerk.com was purportedly a referendum on Facebook is equally meritless. First, no facts support this bare contention. If exposing Facebook was indeed what Jerk.com was doing, it is curious (and telling) that Fanning cannot point to a single statement on Jerk.com expressing this mission to

consumers. Moreover, even if Respondents did intend for Jerk.com to be a vehicle for exposing Facebook, the act of criticizing a competitor's product in the marketplace is commercial speech. *See Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1276 (10th Cir. 2000) (message that competitor was affiliated with Satan was false commercial speech). Respondents cannot "immunize false or misleading product information from government regulation simply by including references to public issues." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983).

VI. FANNING'S ARGUMENT THAT THE COMPLAINT IS AN UNLAWFUL EXPANSION OF FTC AUTHORITY IS UNSUPPORTED BY LAW OR FACT.

Fanning argues that Count I is an unlawful expansion of FTC authority because it is predicated on Facebook's policies. (Opp. 11, 18-20) As explained in n.2, *supra*, Fanning misconstrues the actual deception alleged in Count I, which falls well within the Commission's broad discretion in interpreting and enforcing Section 5. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) (emphasizing the Commission's "influential role in interpreting § 5 and in applying it to the facts of particular cases").

Fanning also argues that the FTC is not authorlyes.

VII.

from disclosing, using, or benefitting from customer information and requiring its destruction).[7]

VIII. CONCLUSION

For the reasons stated herein, the Commission should grant Complaint Counsel's Motion for Summary Decision.

Dated: November 12, 2014

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[7] Should the Commission call for it, Complaint Counsel would welcome the opportunity for supplemental briefing or oral argument to address the standalone issue of the proposed relief.