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.	**PUBLIC**

OPINION OF THE COMMISSION

By Commissioner Terrell McSweeny, for the Commission.

In this case we address allegations of deception by Respondents Jerk, LLC ("Jerk") and rrde cccdei(1c)- wn tdes5(r)i(1c)t4(c)-that invited users to create profiles of individuals and rate those profiled as a "jerk" or "not a jerk." Hundreds of consumers filed complaints about Jerk.com with the Commission and other law enforcement agencies.

In 2014, the Commission issued a two-count administrative complaint alleging that Respondents had engaged in deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act. In Count I, Complaint Counsel allege that Respondents falsely represented that content on Jerk.com was generated by users, when in fact it was almost entirely "scraped" from Facebook. In Count II, Complaint Counsel allege that Respondents falsely represented that users would receive additional benefits, including the ability to dispute information posted to the site by purchasing a membership, when in fact consumers received nothing in return. Before us is Complaint Counsel's Motion for Summary Decision.[1] Complaint

[1] We use the following abbreviations for purposes of this opinion:
Comp.: Complaint
CCMSD: Complaint Counsel's Motion for Summary Decision
CCSMF: Complaint Counsel's Statement of Material Facts Not in Dispute
JOppB: Respondent Jerk LLC's Opposition to Complaint Counsel's Motion for Summary Decision

Counsel contend that Respondents made false or misleading and material representations. Complaint Counsel also argue that Mr. Fanning is individually liable because he participated in the deceptive conduct and controlled the acts and practices at issue. Both Respondents oppose the Motion.

For the reasons explained below, we grant Complaint Counsel's motion. We conclude that there is no genuine issue of material fact concerning Jerk's liability for the alleged misrepresentations, and we grant summary decision on both counts against Jerk. We also conclude that there are no genuine issues of material fact as to Mr. Fanning's personal involvement in, and control over, Jerk's unlawful conduct, and we grant summary decision on both counts against Mr. Fanning. We issue an order that, *inter alia*, prohibits Respondents – in connection with the marketing, promoting, or offering for sale of any good or service – from misrepresenting the source of any content on a website, including any personal information, or the benefits of joining any service.

I. THE COMPLAINT AND PROCEDURAL CHRONOLOGY

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information it contained. Comp. ¶ 12. However, in many instances, consumers allegedly received nothing in return. *Id.*

The Complaint further alleges that Respondents made it difficult for consumers to register complaints. Comp. ¶ 13. Respondents charged consum j r(g)10(i)-2(ge)4(o e266)3 0 01 0 Tw 3-.002

that precludes summary judgment." *Clark v. Coats & Clark, Inc*., 929 F.2d 604, 608 (11th Cir. 1991).

The "party opposing the motion may not rest upon the mere allegations or denials of his or her pleading" and must instead "set forth specific facts showing that there is a genuine issue of material fact for trial." 16 C.F.R. §3.24 (a)(3); *Celotex*, 477 U.S. at 323; *see, e.g., FTC v. Stefanchik*,

A. Count I: Misrepresentation about the Source of Jerk.com's Content

1. The Representation

The first question we address is whether Complaint Counsel have presented sufficient evidence that Jerk made the representation the Complaint alleges: namely, whether Jerk represented "expressly or by implication, that content on Jerk, including names, photographs,

posted on Twitter,[4]

Respondents challenge Complaint Counsel's interpretation. With respect to the first statement, from Section 4 of the "About Us" page, Jerk says that it is not a factual assertion about the source of information on Jerk.com, but rather a disclaimer, which Jerk was entitled to make under the Communications Decency Act. JOppB 5-6. Further, Jerk contends that if the statement contains any representation of fact, that representation is true because "[t]he evidence proffered by Complaint CJOpp0ltemeDer]ridame5-heTw -22.35 -1.15 Td [(m)6bty(i)-6(d)Lferd tthat ridues Tw
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> Subscribers on Jerk . . . receive free benefits including:
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> . . .
>
> 4. Enter comments and reviews for people you interact with.
>
> 5. Help others avoid the wrong people.
>
> 6. Praise those who help you and move good people closer to sainthood!

CX0048-035. All of these statements in our view convey the essential message that Jerk.com is based on content generated by its users.

That message is further underscored by the "Post a Jerk" feature which invited consumers to post profiles of other individuals to the site. It 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." CCSMF ¶ 45, *citing* CX0048-031.

Au consumer clicking on the "About Us" tab would see still other statements that reinforced the

Our interpretation is bolstered by the substantial extrinsic evidence presented by Complaint Counsel that Respondents *intended* to convey the message that the content on the Jerk.com site was user-generated, and that consumers actually *believed* that their profiles were posted by other users. Evidence shows that Jerk staff prepared a Wikipedia entry at Mr. Fanning's direction describing Jerk.com as a user-generated network.[7] The evidence shows that Jerk represented to investors that Jerk.com was a user-generated website.[8] There is also evidence that Jerk's counsel represented to the FTC, state officials and Facebook that content on Jerk.com was user-generated.[9] All this evidence manifests Jerk's intention to produce the impression that the Jerk.com profiles were user-generated. While these representations were not conveyed directly to *consumers*, as Jerk correctly notes, they are nevertheless relevant to the message Jerk intended to convey to consumers. Evidence of that intent is relevant to our consideration of whether the statements on Jerk's website actually conveyed the representation alleged. *See, e.g.*, *Telebrands Corp.*, 140 F.T.C. 278, 304 (2005) (concluding that "evidence that respondents intended to convey the challenged claims" provided further support for the conclusion that advertisements made the alleged claims); *Novartis Corp.*, 127 F.T.C. at 683 ("evidence of intent to make a claim may support a finding that the claims were indeed made").

Our interpretation is also supported by extrinsic evidence showing that consumers believed someone they knew had created their Jerk.com profiles. *See* CCSMF ¶ 51. One consumer in her sworn declaration stated, "Initially, I was worried that someone had created the Jerk.com profile against me. I was mortified and embarrassed that my name and the photo of me with my children were on this website." CX0036-001 ¶ 3. Another stated:

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[7] *See* CCSMF ¶ 48, *citing, e.g.*, CX0670 (e-mail from Fanning: "I figured this is a good time to finish the Wikipedia page for jerk.com . . . . The first Anti Social Network."); CX0636-001 ("Jerk.com is an online social networking and reputation management service which attempts to determine whether its users are good (denoted as Saints) or bad people (denoted as Jerks) based on the opinions of those around them. Each user has his own profile which consists of a picture, brief biographical information, personality quiz, and reviews from other Jerk users.") (Wikipedia links omitted); CX0642-002.

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> When I visited jerk.com, I saw a profile with my full name and a photograph of me as a child. I immediately thought that someone who didn't like me put me on there. The website bragged about success stories of posting and rating 'jerks,' and these stories were like ads encouraging people to post and rate more people. I was alarmed. I thought that someone was messing with me.

CX0037-001 ¶ 3. This extrinsic evidence, though not required for us to determine that Respondents have made the alleged representations,[10] lends support to our interpretation. Neither Respondent has given any reason to doubt the evidence's reliability.[11]

We considered Respondents' various legal arguments about the representation, but are unpersuaded. First, we reject Mr. Fanning's assertion that Complaint Counsel's failure to point to "specific, affirmative statements that were made to advertise or promote Jerk.com" was a "fatal defect . . . requi[ring] denial of [summary decision]." FOppB 8. There is no need to identify a single, express deceptive statement; it is well established that deception may be found based on the net impression conveyed. *POM Wonderful*, 2015 WL 394093, at *8; *Kraft*, 970 F.2d at 318-20. Nor is it necessary that the deceptive representation arise in advertising or similar promotional material. Although many oa41.15 TD [o.15 TD [o7numma.01 tsyy oa

Jerk.com was user-

2. Falsity of the Representation

Having determined that Jerk made the representation alleged in the Complaint, we

Jerk's counsel previously represented to the Federal Trade Commission that the content on Jerk.com was user-generated and not taken from Facebook (*see* CCSMF ¶ 50, CX0291-001, CX0528-001, CX0529-001; CX0107-003-04), but Respondents no longer dispute that Facebook was the source of the vast majority of profiles. Jerk states that it does not dispute the facts set forth in Complaint Counsel's Statement of Material Facts. JOppB 2. Rather, it argues that the statements cited by Complaint Counsel, taken individually, are literally true, and hence cannot create a net impression that is false or misleading.

> information from Facebook in violation of Facebook's policies, including by (1) failing to obtain users' explicit consent to collect certain Facebook data, including photographs; (2) maintaining information obtained through Facebook even after respondents' Facebook access was disabled; (3) failing to provide an easily accessible mechanism for consumers to request deletion of their Facebook data; and (4) failing to delete data obtained from Facebook upon a consumer's request.

Complaint Counsel propose factual findings regarding this issue,[18] and urge us to conclude that Respondents' conduct violated the Facebook rules and policies as set out in the Complaint. CCMSD 36. However, Mr. Fanning maintains that the information was obtained in ways that do not violate Facebook policies. In any event, he argues, whether Jerk violated Facebook rules is not relevant to this case. FOppB 10-12.

We conclude that factual disputes remain regarding whether Respondents violated Facebook's rules by "scraping" profile content from Facebook for use on Jerk.com. However, it is not necessary for us to decide whether Respondents violated Facebook's rules in order to determine that Jerk's statements were deceptive, and therefore the possibility of a Facebook rule violation is not an issue we need to resolve in this case. Accordingly, we grant summary decision on Count I only with respect to the alleged deceptive representation regarding the source of content on Jerk.com. We find it unnecessary to determine whether Respondents also violated Facebook rules.

3. Materiality

Finally, we consider whether Complaint Counsel have established that the representation was material and, if so, whether there are issues of disputed fact as to the representation's materiality. A false or misleading representation will violate Section 5 only if it is also "material," that is, if it "is likely to affect a consumer's conduct with respect to the product or service." *POM Wonderful LLC*, 2013 WL 268926, at *52 (FTC Jan. 16, 2013) (citing *Deception Statement*, 103 F.T.C. at 182), *aff'd*, 2015 WL 394093 (D.C. Cir. Jan. 30, 2015); *accord*, *FTC v. Cyberspace.com LLC*, 453 F.3d at 1201 ("A misleading impression created by a solicitation is material if it 'involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.'") (citing *Cliffdale Assocs., Inc.*, 103 F.T.C. 110,165 (1984)).

We presume that "express claims, claims significantly involving health or safety, and claims pertaining to the central characteristic of the product [or service]" are material. *POM Wonderful LLC*, 2013 WL 268926, at *52 (citing *Novartis Corp.*, 127 F.T.C. 580, 686 (1999) (citing *Deception Statement*, 103 F.T.C. at 182)), *aff'd*, 2015 WL 394093 (D.C. Cir. Jan. 30, 2015). The presumption also applies to intended implied claims

Neither Respondent disputes any of these facts. Jerk does not even mention Count II in its Opposition. Mr. Fanning's Declaration does not contain any information relevant to this issue. Mr. Fanning does not deny that the statements at issue appeared on the Jerk.com website. Nor does he dispute that Jerk offered to make dispute resolution contingent on consumers paying a $30 membership fee, or that consumers believed that they could dispute, alter, or delete their profiles by paying the fee. Rather, he argues that "Complaint Counsel com[m]ingles and interchanges references to enhanced membership benefits, subscriptions, and the ability to dispute or remove posted information from profiles," and "conflates" a representation from "various sources." FOppB 13. According to Mr. Fanning, Complaint Counsel has not identified a "specific claim," and, consequently, "no deception exists." *Id.*

We disagree. To be sure, Complaint Counsel's Opposition and Statement of Material Facts do include references not only to the $30 membership fee, but also to another $25 customer service fee that Jerk charged to enable consumers to contact the website. *See, e.g.*, CCMSD 8 & n.2; CCSMF ¶ 79. However, Count II challenges only Jerk's representation as to the $30 membership fee, and it is the evidence relating to that fee upon which we base our conclusions.

Complaint Counsel have identified specific statements on the Jerk.com website that represent that paying $30 for a membership subscription unlocks additional benefits, including the ability to dispute information in profiles. A consumer accessing the Jerk.com website would have seen the following:

> Subscribers on Jerk. . . receive free benefits including:
>
> 1. Fast notifications of postings about you!
>
> 2. Updates on people you know and are tracking
>
> 3. Search for people you know, and read about people you are interested in.
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> 4. .(<0eo)2]TJ-(e156-(e210a)6llo)3(s)-1(on J)-9.4<7 0 Ts-5(ons)-7fi42J 8k. 7 e1k419(n)

Ortiz Dec); CX0048-032 (Kauffman Dec. attachment A-32).[19] We conclude that these statements represent exactly what the Complaint alleges in Count II – that consumers who

The assertion that Complaint Counsel fail to establish "a clear pattern or practice of deception" is an argument characterizing Complaint Counsel's showing, not evidence rebutting it. Moreover, it is not Complaint Counsel's burden to prove the negative – to "conclusively" prove that "memberships did not exist, or that there were *no* actual subscriptions, or that the *only* way to remove a post was by paying money." FOppB 13 (emphasis added). Once Complaint Counsel have presented evidence that Jerk made the representation, and that that representation was false or misleading and material, the burden shifts to Respondents to establish that there exists a genuine issue of material fact that makes summary decision with respect to Count II inappropriate.

The only evidence either Respondent offers – Mr. Fanning's affidavit – is not sufficient to create a disputed issue of material fact. Mr. Fanning does not dispute the consumers' sworn declarations that they never received any benefit in return for their subscription fees. He does not dispute that the FTC investigator had the same experience as those consumers. He states only that "[*a*]*s far as [he is] aware*," Jerk "took action including to remove content from Jerk.com *whenever it was obligated to do so*" and "would refund money to users who claimed they had paid but had not received membership services via a web form." FAff ¶ 4 (emphasis added). Similarly, Mr. Fanning's statement that "Jerk LLC experienced a number of problems in operating the site, including the site being hacked and being 'snaked' by the FTC which d[illegible] services," FAff ¶ 4, did not dithose97t -1.4(A)2(f) -1.15 Td [(ope)4(2(t)-2(e)4(be)4(i)-,e)4(d t)2(

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In sum, we conclude that Complaint Counsel present sufficient evidence to establish that Jerk's representation as to membership benefits was false and material, and that Respondents failed to identify a genuine dispute of material fact. Accordingly, we grant Complaint Counsel's motion for summary decision on Count II.

V. MR. FANNING'S INDIVIDUAL LIABILITY

An individual may be liable for the deceptive acts or practices committed by a corporate entity if the individual either participated directly in or had the authority to control the acts or practices at issue. *E.g.*, *FTC v. IAB Mktg. Assocs.*, 746 F.3d 1228, 1233 (11th Cir. 2014); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1204 (10th Cir. 2005); *FTC v. Amy Travel Services, Inc*., 875 F.2d 564, 573 (7th Cir. 1989). "If the FTC proves direct participation in or authority to control the wrongful act, then the individual may be permanently enjoined from engaging in acts that violate the FTC Act." *Commerce Planet*, 878 F. Supp. 2d at 1079 (citing *FTC v. Garvey*, 383 F.3d 891, 900 (9th Cir. 2004)).

"Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer." *Amy Travel Services*, 875 F.2d at 573; *see also FTC v. Publ'g Clearing House, Inc*., 104 F.3d 1168, 1170-71 (9th Cir. 1997) (individual's "authority to sign documents on behalf of the corporation [helped to] demonstrate that she had the requisite control over the corporation"); *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).

"[D]irect participation can be demonstrated through evidence that the defendant developed or created, reviewed, altered and disseminated the deceptive . . . materials." *FTC v. Ross*, 897 F. Supp. 2d 369, 383 (D. Md. 2012), *aff'd*, 743 F.3d 886 (4th Cir. 2014). "Active supervision of employees as well as the review of sales and marketing reports related to the deceptive scheme is also demuperper tdenceed thrfso3 [(FT)-5(r)3(fs)-5(o)-4er3nat [(FTc(6)-4er)-(3oe)4-6(r)-1a4
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direct participation in the unlawful conduct. If Complaint Counsel put forward sufficient evidence to establish *either*

Moreover, there is also undisputed evidence that Jerk staff and outside parties regarded Mr. Fanning as the person in charge of Jerk.com. CCSMF ¶ 139; *see, e.g.*, CX0181-104:7 (Fanning "seemed to be running – calling the shots"); CX0057 ¶ 3 ("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."); CX0109:51: 18-20 (Depo: "Q: Is there anything – anyone else besides Fanning that you associate with jerk.com? A: No."); CX0438-26:5-12 (Depo: "Q: And who would you say led the Jerk.com website? Who was in charge? A: At that time, it certainly seemed to me that it was John Fanning. Q:

my email did not describe the means by which Jerk.com profiles were generated, but he confirmed that jerk.com profiles came from Facebook."

could not do it in your lifetime."); CX0360-001 (e-mail from Romanian programmer to Fanning discussing exporting Jerk.com profiles to an iPhone app: "As we underlined in a previous email, the populating of current profiles it's a work in progress operation. There are 80 million profiles to add to the database . . . . Will take more days to populate face recognition database with all pictures."). In short, the evidence shows that Mr. Fanning not only had the authority to control Jerk's conduct but also that he was at the center of the unlawful conduct alleged in Count I.

Likewise, the evidence shows that Mr. Fanning participated directly in the unlawful conduct alleged in Count II. Mr. Fanning advocated collecting subscriptions and charging consumers for dispute resolution and other premium services, and further defended his idea to one of his business partners who objected to Jerk's "blackmail-feeling revenue model." CCSMF ¶ 90; *see* CX0117-004; CX0438-29:3-10; CX0112-002; CX0080.

Complaint Counsel thus present sufficient evidence to establish that Mr. Fanning had the authority to control Jerk's unlawful conduct and that he participated directly in that conduct. To controvert all this evidence, drawn from a wide variety of depositions, sworn declarations, and documents,[33] Mr. Fanning submits only his own affidavit. We must consider whether that affidavit creates

at 1055-56 (holding "consultant" individually liable on summary judgment for company's deceptive policies and practices when he was active in the company's operations, had authority to formulate and implement company policies and practices, and had knowledge of the company's deceptive acts and practices); *FTC v. J.K. Publications, Inc.*, 99 F. Supp. 2d 1176, 1181-82 (C.D. Cal. 2000) (holding "consultant" liable because he had "ownership in and/or control over" the company).

Mr. Fanning's reliance on *FTC v. Ross* for the proposition that summary decision is inappropriate as a matter of law

First Amendment because "it is clear that in this case the FTC made a factual finding, based on its investigation of Bristol's ads, that consumers viewing the ads would believe them to be making claims" and that the "ads were deceptive"); *POM Wonderful*, 2013 WL 268926, at *54-55; *Daniel Chapter One*, 2009 WL 5160000 at *20, n.2.

Respondents' arguments regarding other, allegedly truthful, representations are off point. It does not matter that Section 4 of the "About Us" page "accurately conveys that Jerk accepts no responsibility for content not created by Jerk," JOppB 6: the Complaint does not challenge this representation, but rather a different representation that the webpage also conveys. Nor does the Complaint challenge the representation that "users had the ability to post content on jerk.com." *See id*. at 7.

Similarly, while Mr. Fanninlar]TJ (24.056)2(lar-1(s(F)-9(r056)t Tc 0 Tw [(i)-2(on-2(t)-2(hepoe)4(-

¶ 5. In any case, Mr. Fanning asserts, "[t]here is nothing to buttress" because Facebook "make[s] information readily accessible to the public through the internet." FOppB 20. More broadly, Mr. Fanning contends that "Congress has supplanted, and even preempted, the FTC's regulatory authority in the data privacy and security space . . . ." *Id*. Jerk adds the argument that the Commission's challenge to Jerk.com's "Terms and Conditions" improperly "regulate[s] the practice of law by restricting the words attorneys could use in crafting contracts." JOppB 4-5.

These arguments are also without merit. Congress granted the FTC broad authority to protect consumers against unfair and deceptive practices. This authority has not been curtailed as Mr. Fanning contends. *See, e.g.*, *In re LabMD, Inc.*, 2014 WL 253518, at *9 (F.T.C. Jan. 16, 2014) (holding that the Commission's unfairness authority applies in the data security context). In any event, as discussed above in Section IV.A.2, our liability findings are not predicated on a

frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in [the] future." *Colgate-Palmolive*, 380 U.S. at 395.

The Complaint in this matter attached a notice of the form of order that might issue if the facts were found to be as alleged. Complaint Counsel urge us to issue an order that mirrors that Proposed Order, arguing that the provisions are clear, reasonably related to the unlawful practices, and implement appropriate fencing-in relief. CCMSD 35 & n.26. Mr. Fanning argues that the Proposed Order is overly broad, would restrain Mr. Fanning's entry into any internet or social media venture in the future, and imposes a prior restraint on free speech in violation of the First Amendment.

Having found liability for Jerk and for Mr. Fanning individually, the Order we issue applies to both Respondents. Several provisions in the Order parallel provisions in the Proposed Order, although, as explained below, we have modified or deleted some of the provisions that were originally proposed.

Part I of the Order prohibits Respondents from making the kinds of misrepresentations alleged in the Complaint. In particular, Respondents are prohibited from misrepresenting (A) the source of any content on a website, including personal information, which is defined to include, *inter alia*, photographs, videos, or audio files that contain an individual's image or voice; and (B) the benefits of joining any service.

Under the Order, these prohibitions are not limited to the now-abandoned Jerk.com website, but also apply to "the marketing, promoting or offering for sale of any good or service" by Respondents and their representatives. Although the prohibitions on misrepresentations apply broadly, these cease and desist requirements are reasonably related to the unlawful practices. When determining whether an order is reasonably related to the unlawful practices, the Commission considers "(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. 746, 811 (1994); *see also Telebrands Corp.*, 457 F.3d 354, 358 (4th Cir. 2006); *Kraft, Inc. v. FTC*, 970 F.2d 311, 326 (7th Cir. 1992). "The reasonable relationship analysis operates on a sliding scale – any one factor's importance varies depending on the extent to which the others are found. . . . All three factors need not be present for a reasonable relationship to exist." *Telebrands Corp.*, 457 F.3d at 358-59.

We first consider the seriousness and deliberateness of the violation. Respondents do not

being concerned about their safety and that of their family members. CCSMF ¶ 163-64. Many paid money to Respondents in an effort to have their profiles removed, and spent considerable time trying to get their profiles or those of loved ones deleted from the site.[39]

Moreover, as previously discussed, Respondents intended Jerk.com visitors to obtain the impression that profile content was user-generated. *See supra* Sections IV.A.1 and IV.A.3. Respondents also made the false claim about benefits from a Jerk.com membership – which amounted to the sole reason for purchasing a $30 standard membership – while choosing not to provide any benefits in return for the membership fee. *See supra*, Section IV.B.[40] Respondents' misrepresentations were knowing, and their violations were both serious and deliberate. *See Telebrands Corp.*, 457 F.3d at 359.

Next, we consider the ease with which Respondents' claims may be transferred to other products. A violation is considered transferable when other products could be sold utilizing similar techniques. *See Colgate-Palmolive*, 380 U.S. at 394-95; *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392, 394-95 (9th Cir. 1982); *POM Wonderful*, 2013 WL 268926, at *64. Here, we need not speculate because Respondents already have demonstrated that they will use the same profiles and make the same representations on other websites they operate. When Respondents lost the Jerk.com domain name they moved the content to Jerk.org and continued making the misrepresentations. *See* CX0258 ¶ 17. Similarly, Respondents used automatically generated profiles on the reper.com website when they began the next iteration of their business in 2010. *See, e.g.*, CX0663 (e-mail explaining that there were nearly 90 million profiles on company's second brand, www.reper.com).[41]

Accordingly, we conclude that prohibiting Respondents from making the misrepresentations described in Part I of the Order in the marketing, promotion, or sale of any good or service bears a reasonable relationship to the violation of the FTC Act found in this case. As courts have recognized, the Commission's authority includes power to issue orders "encompassing all products or all products in a broad category, based on violations involving only a single product or group of products." *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 223 (2d Cir. 1976); *see also Colgate-Palmolive*, 380 U.S. at 394-95.

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[39] *See, e.g.*, CCSMF ¶¶ 158-59; CX0001-001 ¶¶ 2-3; CX0005-001 ¶ 5; CX0026-001-02 ¶ 6; CX0038-001 ¶ 4; CX0040-001-02 ¶ 6; CX0007-001 ¶ 5; CX0031-001-02 ¶ 5; CX0011-004 ¶ 17; CX0036-002 ¶ 9; CX0037-001-02 ¶ 7.

[40] Mr. Fanning's broad statement that "Jerk LLC experienced a number of problems in operating the site, including the site being hacked and being 'snaked' by the FTC which disrupted the services," FAff ¶ 4, does not link any "problems in operating the site" to the failure to provide benefits. Respondents provided no evidence that the failure to offer benefits was inadvertent.

[41] Although there is no history of violations in this case, that factor is less important in our analysis considering the strength of the other factors, particularly the ease of transferability to other products. Courts look to the circumstances as a whole "and not to the presence or absence of any single factor." *Sears, Roebuck & Co.*, 676 F.2d at 392; *see also Telebrands Corp.* 457 F.3d at 362 (finding evidence of first two factors sufficient to establish there was a reasonable relationship between the remedy and violation).

We are unpersuaded by Respondents' remaining objections. Mr. Fanning argues that the Order "effectively prohibits or regulates [him] from engaging in any business that involves social media or the internet" and would restrain for twenty years his "involvement with respect to each and every actual or potential business venture involving the internet, public information, or personal data without exception or any degree of specificity" and thereby has no reasonable relation to the violation found in this case. FOppB 24-26. We disagree. Mr. Fanning is free to engage in any business so long as he abstains from making the misrepresentations described in Part I of the Order or from using the consumer and customer data obtained in connection with operating Jerk.

Mr. Fanning also asserts that the Order "lacks specificity." Although he fails to identify the particular provisions that he finds insufficiently clear, Mr. Fanning claims that an order is inappropriate because this case "is not a situation where an order restricting or deterring certain future claims about a product or service is even possible where there is no specific advertisement or mode of presenting a claim." FOppB 24. We disagree. Many Commission cases are based on implied claims rather than express claims, and cease and desist orders in those cases, like the Order in this case, sufficiently identify the prohibited conduct. *See, e.g.*, *POM Wonderful*, 2013 WL 268926. Here, Part I of the Order identifies the specific prohibited misrepresentations, and Part II of the Order clearly identifies the types of information obtained from the operation of Jerk that Respondents are prohibited from using in the future. Thus, the Order's prohibitions are sufficiently "clear and precise in order that they may be understood by those against whom they are directed." *FTC v. Cement Institute*, 333 U.S. 683, 726 (1948).

Mr. Fanning argues that the Order abrogates his First Amendment rights as a prior restraint of free speech. It is well-established that the First Amendment does not protect misleading commercial speech. *See Central Hudson*, 447 U.S. at 566. It is also clear that a FTC Order prohibiting the same conduct and claims that the Commission found to be misleading does not abrogate the First Amendment rights of respondents. *See, e.g.*, *POM Wonderful*, 2015 WL 394093, at *20; *Kraft*, 970 F.2d at 325-26. If the Commission's assessment of liability established that the past claims were deceptive, then, as a forward-looking remedy, limiting the same claims "is tightly tethered to the goal of preventing deception," and "is not more extensive than necessary to serve the [substantial government] interest in preventing misleading commercial speech." *POM Wonderful*, 2015 WL 394093, at *20. Thus, Part I of the Order prohibiting the specific misrepresentations found to be misleading does not violate Respondents' First Amendment rights.

Mr. Fanning also argues that the Order imposes a prior restraint on free speech to the extent that it restricts the use and dissemination of information gathered from public sources. According to Mr. Fanning, "taken literally, the injunction sought against Fanning would bar him from commenting on or utilizing any information that exists or potentially exists in the public domain . . . ." FOppB 25. We disagree. The Order only prevents Respondents from using or benefitting from personal consumer or customer information that was previously obtained by Respondents from operating Jerk and that has been found to have contributed to the misleading representations in this case. The provision prevents Respondents from repeating their prior conduct and acts to "'close all roads to the prohibited goal,'" so that Respondents cannot simply bypass the Order. *Litton*, 676 F.2d at 370 (quoting *Ruberoid*, 343 U.S. at 473). Accordingly,