

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

JOHN FANNING,
PETITIONER,

v.

FEDERAL TRADE COMMISSION,
RESPONDENT

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

BRIEF OF THE FEDERAL TRADE COMMISSION

JONATHAN E. NUECHTERLEIN
General Counsel

JOEL MARCUS
Director of Litigation

LESLIE RICE MELMAN
*Assistant General Counsel for
Litigation*

BRADLEY GROSSMAN
Attorney

S

OMMISSION
San Francisco, CA

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-2994

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QUESTIONS PRESENTED

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

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

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

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

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

COUNTERSTATEMENT OF THE CASE

A. Deception Under The FTC Act

Section 5(a) of the FTC Act prohibits, and directs the FTC to prevent, “deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(2). Deception occurs when a person (1) makes a representation that (2) is material to consumers and (3) is likely to deceive consumers acting reasonably under the circumstances. *See, e.g., FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003); *FTC Policy Statement on Deception*, appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 175-76 (1984). In determining whether a representation is deceptive, the Commission examines its overall “net impression” and considers whether “at least a significant minority of reasonable consumers” would “likely” be deceived. *See POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015) (quotation omitted); *Telebrands Corp.*

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

B. Jerk.com’s Business Practices

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

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

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

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

Contrary to the website’s message, only a tiny fges-4(t)-2 TJ 0.004n. JA 3253-illitin4 -2.2

(often including a photo) on an unfamiliar website that invited its users to “post a report” or rate them. *E.g.*, JA 313. Surprised and dismayed to see their personal information on an unfamiliar personal rating website, consumers feared they had become an object of ridicule by someone they knew. *E.g.*, JA 194, 200, 209, 213. To make matters worse, although only a tiny percentage of profiles on Jerk.com had comments, a number of those that did included obscene, threatening, or derogatory remarks—sometimes directed at minors. *See* JA 1660 (email exchange between Fanning and Jerk staff acknowledging that “99.9% of our profiles are empty” and that the rest contain such statements as “[t]his guy is gaw [(“8)8(g,)6is rt “haTw 0.2

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

¹ *See also* JA 189-90 (“I believed I could edit my profile if I paid jerk.com the requested fee Immediately after I made the payment, I found that there were no new features available to me that would allow me to remove my profile. I kept trying, and at one point, a pop-up window appeared that said, ‘Are you having fun yet?’”); JA 160 (“The website said that if you became a member of jerk.com for about \$2 to \$5 a month, you could make changes to your profile. ... After I paid ... [t]he benefit they promised—the ability to remove or change your profile—was nowhere to be found.”); JA 155 (“After paying \$30 to Jerk.com, I monitored my email account for an email message from Jerk.com. I checked all my email folders, including the spam folder. I never received an email message from the company and, thus, never received the promised password needed to access my Jerk.com membership.”).

C. The Commission's Findings Of Deception

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

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

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

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

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

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

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

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

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

The Commission granted summary decision on Count II as well. It determined that the undisputed evidence showed that Jerk made explicit representations concerning the benefits of paid memberships but failed to honor its promises. In particular, Jerk promised that

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

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

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

The Commission's final order prohibits Fanning and Jerk from misrepresenting, in the promotion of any good or service, the source of any website content or the benefits of joining any service (Paragraph I). Add. 41. The order also prohibits Fanning and Jerk from disclosing, using, selling, or otherwise benefitting from consumers' personal information—including photos and other data scraped from Internet sites—obtained in operating Jerk.com, and requires Fanning and

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

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

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

STANDARD OF REVIEW

In general, an FTC decision to grant summary decision is reviewed under the same standard as analogous decisions of the district courts. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994); *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1360 n.6 (11th Cir. 1988). The Court considers whether a reasonable decisionmaker could conclude that there is a “genuine issue of material fact” that “may affect the outcome of the case” under governing law. *Puerto Rico Aqueduct*, 35 F.3d at 605. A “speculative or purely theoretical” factual dispute, or a dispute of immaterial fact, does not defeat a motion for summary decision “when it appears conclusively from the papers that, on the available evidence, the case only can be decided one way.”

884 F.2d at 1498; *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973)

users' views of the profiled individuals.” Add. 11. Fanning fails to demonstrate either a genuine dispute of material fact or any legal error by the FTC.

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

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

(emphasis added). It advised further that users are “solely responsible” for the

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

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

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

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

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

Fanning contends

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

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

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

A representation is material if it “involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product.” *Kraft*, 970 F.2d at 322 (quoting *FTC Deception Statement*, 103 F.T.C. at 175, 182). .

reflect the view of the people who have personal first hand knowledge of the jerk.com individual who is profiled.” JA 989; *see also* JA 279. Similarly, Fanning oversaw the preparation of a draft Wikipedia article about Jerk.com, which stated that “Jerk.com ... was the first website to popularize posting [a]bout others without their consent.” JA 2360-61. Jerk also represented to the FTC, Facebook, and state officials that Jerk.com was a user-generated website. Add. 13 (citing JA 728, 1512, 2118, 2120, 2122).

Fanning and his staff understood that the essence of Jerk’s business model was user-generated content. They realized that to generate web traffic and be financially successful, Jerk.com—like any online social network—had to appear to reflect the views and personal information of actual users. Consumers otherwise would have no interest in Jerk.com. *See* JA 381-82 (“the website would only have value to users if people manually created the Jerk.com profiles,” and “[p]eople would be more likely to use the website if they believed their peers were using it”); *see also* JA 2268-69 (“To my understanding, the organic growth of Jerk.com profiles would increase traffic to the website, which wo]TJ -0.006o49my under06or(b)8(s)d(w)

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

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

In a single paragraph (at Br. 22), Fanning raises a token challenge to the Commission’s separate determination that Jerk misrepresented the benefits of paid membership, as alleged in Count II. He argues that “the allegations concerning payments for memberships and services are inconsistent with the conclusion of an implied claim.” Br. 22. But the Commission found that Jerk made an *express* claim, not an implied one, about the benefits of paid memberships. *See* Add. 25 (“The representation was express and it clearly pertained to the central characteristic of Jerk’s offering—benefits promised in exchange for the \$30 fee.”). Fanning offers nothing to rebut the overwhelming evidence that Jerk sold \$30 memberships offering consumers the ability to “dispute” 8()]TJ 0.004 Tc -0.004 it(cTw uLi(e)

II. FANNING IS PERSONALLY RESPONSIBLE FOR JERK'S CONDUCT BECAUSE HE CONTROLLED THE BUSINESS A

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

¹⁴ *See Vinick v. Comm’r*, 110 F.3d 168, 171 (1st Cir. 1997)

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

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

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

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

The evidence shows further that it was Fanning who directed the Romanian

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

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

Fanning’s violations were both serious and deliberate. Add. 36-37. At his direction, Jerk created 85 million profiles of individual users with data harvested

2415).²⁰ The Commission properly found that the absence of prior FTC Act violations does not outweigh the seriousness and deliberateness of his violations or obviate the need for stringent injunctive relief. *See Coro, Inc. v. FTC*, 338 F.2d

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

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

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

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

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

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

IV. FANNING’S FIRST AMENDMENT CLAIMS LACK MERIT.

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

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

content on a website or the benefits of joining a service in connection with marketing the service. Add. 41, Paragraph I. The Commission thereby acted well

CONCLUSION

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

Respectfully submitted,

JONATHAN E. NUECHTERLEIN
General Counsel

JOEL MARCUS
Director of Litigation

LESLIE RICE MELMAN
Assistant General Counsel for Litigation

/s/ Bradley Grossman
BRADLEY GROSSMAN
Attorney

SARAH SCHROEDER
BORIS YANKILOVICH
Attorneys

FEDERAL TRADE COMMISSION
San Francisco, CA

October 19, 2015

FEDERAL TRADE COMMISSION
600 Pennsylvania Ave. N.W.
Washington, D.C. 20580
(202) 326-2478 (Melman)
(202) 326-2994 (Grossman)
(202) 326-2477 (fax)
lmelman@ftc.gov
bgrossman@ftc.gov

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 9,562 words, excluding the parts of the

CERTIFICATE OF SERVICE

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

Peter F. Carr, II
Pamela C. Rutkowski
Eckert Seamans Cherin & Mellott, LLC
Two International Place, 16th Floor
Boston, MA 02110-2602
pcarr@eckertseamans.com
prutkowski@eckertseamans.com

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: October 19, 2015

/s/ Bradley Grossman
Bradley Grossman
Attorney
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580
(202) 326-2994 (telephone)
(202) 326-2477 (facsimile)
bgrossman@ftc.gov