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I. INTRODUCTION

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

## II. FACTUAL BACKGROUND

### A. Respondents and their control over Jerk.com.

Fanning formed Jerk as a Delaware limited liability company in January 2009.

Throughout the period relevant to this action, Fanning has held himself out as a founder and member of Jerk. He is listed as Jerk's "managing member" on incorporation documents. He is also a founder, officer, and manager of NetCapom, LLC ("NetCapital"), a company that controls the majority of Jerk shares.

Jerk has operated out of Fanning's business and home addresses. The company has used as its principal address 165 Nantasket Ave, Hull, MA 02045, which is also Fanning's business address. It has also used Fanning's P.O. Box in Hingham, MA as its mailing address. Moreover, Jerk has used Fanning's home address as a business address, and Jerk staff worked

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<sup>3</sup> Answer of Respondent Jerk (filed May 19, 2014) ("Jerk's Answer") ¶ 1; Answer of Respondent John Fanning (filed May 19, 2014) ("Fanning's Answer") ¶ 1; CX0041-002 ¶ 4; CX0133-002; CX0139-001; CX0181-052:11-18 (Amram Dep. Tr.); CX0210-001; CX0368-007; CX0737-003, 005.

<sup>4</sup> CX0041-002 ¶ 4; CX0411-001.

<sup>5</sup> CX0737-003.

<sup>6</sup> CX0046-018, 022; CX0057-001 ¶ 3; CX0073-002; CX0181-070:13-24, 073:6-11 (Amram Dep. Tr.); CX0187-001-002; CX0283-001; CX0370-002; CX0466-001; CX0629-001 ¶ 5.

<sup>7</sup> Fanning's Answer ¶ 2; Jerk's Answer ¶ 2; Respondent John Fanning's Responses to Complaint Counsel's First Requests for Admissions #4 (filed May 29, 2014); CX0056-002; CX0092-003-005:18-19 (Fanning Dep. Tr.); CX0239-001; CX0412; CX0417-002, 005; CX0427-002.

<sup>8</sup> Fanning's Answer ¶ 2; Jerk's Answer ¶ 2; CX0125-001; CX0239-001; CX0417-002, 005; CX0427-002.

<sup>9</sup> Respondent John Fanning's Responses to Complaint Counsel's First Requests for Admissions #4 (filed May 29, 2014); CX0056-002; CX0113-CX0416, CX0418-CX0419; CX0421-002; CX0427-002; CX0507-001.

out of Fanning's house<sup>16</sup>.

From at least 2009 through 2013, Jerk operated the website Jerk.com. Jerk has done business as Jerk.com, Jerk.org, and Jerk.be (collectively, "Jerk.com"), as well as Reper.com, another business that Fanning had in connection with Jerk. Jerk leased the Jerk.com

a home page, a “Post a Jerk” page, a “Remove” page, a “Contact Us” page, an “About Us” page, a “sign in” page, a “Become a Subscriber” page as well as pages profiling individuals to which the Complaint refers as “Jerk profiles.”

Jerk profiles comprised the vast majority of the webpages on Jerk.com. As of 2010, Jerk.com contained as many as 85 million Jerk profile pages, each corresponding to a unique individual.<sup>20</sup> Approximately 29 million profiles contained a photo of the profiled subject. Jerk.com profiled people of all ages, including children.<sup>21</sup> An estimated 4.74 million profiles contained photos of children who appeared to be under age 17.<sup>22</sup> The Jerk.com profile pages displayed the profiled person’s name, picture (or a blank square avatar in lieu of a picture), buttons to vote the profiled person “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.<sup>23</sup> Profiled subjects were identified as a “jerk” or “not a jerk” in red or green lettering above their name.<sup>24</sup> Some Jerk.com profiles had comments about the profiled person. For example, a few profiles included comments, such as: “Omg I hate this kid so much a loser,” “Address: gay boulevard,” and “just can go fucking slaughter self . . . Nobody in their right mind would love you . . . not

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<sup>19</sup> Fanning’s Answer ¶ 4; Jerk’s Answer ¶¶ 10, 11 (C. Kaufman Decl.); CX0048-001, -002, 031, -032, -035, -078, -079; CX0259 (K. Ortiz Decl.); CX0259; CX0272; CX0276; CX0301-001.

<sup>20</sup> CX0063 ¶ 8 (Expert Report of Brian Rowe); CX0151-012; CX0153-002; CX0317; CX0307-001, -003; CX0352-001; CX0360; CX0663.

<sup>21</sup> CX0063-002 ¶ 9 (B. Rowe Expert Rep.).

<sup>22</sup> CX0004-001 ¶ 6; CX0027-001 ¶¶ 2-3; CX0032-001-002 ¶¶ 2, 4, 8; CX0036-001 ¶ 3; CX0040-001 ¶ 2; CX0259.

<sup>23</sup> CX0063-002 ¶ 10 (B. Rowe Expert Rep.).

<sup>24</sup> Fanning’s Answer ¶ 6; Jerk’s Answer ¶ 6.

<sup>25</sup> CX0259; CX0302 ¶ 8.

even your parents love [you].<sup>26</sup>

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.<sup>27</sup> 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."<sup>28</sup> Jerk.com supported that claim by stating that "millions of people . . . already use Jerk for important updates for business, dating, and more" 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."<sup>29</sup> 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 . . ."<sup>31</sup>

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." Jerk.com's homepage also featured profiles with

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<sup>26</sup> Fanning's Answer ¶ 6; Jerk's Answer ¶ 6.

<sup>27</sup> Fanning's Answer ¶ 4; Jerk's Answer ¶ 4; CX0047 (C. Kauffman Decl.); CX0048-001, -002, -031, -032, -035, -078, -079; CX0258 ¶ 16 (C. Ortiz Decl.); CX0259; CX0272; CX0273; CX0274; CX0275; CX0282-001; CX0301-001.

<sup>28</sup> CX0048-078-79; CX0273.

<sup>29</sup> CX0048-035; CX0272.

<sup>30</sup> CX0048-032; CX0275.

<sup>31</sup> CX0048-078-79; CX0273.

<sup>32</sup> Fanning's Answer ¶ 4; Jerk's Answer ¶ 4; CX0048-031; CX0274.

comments and votes, reinforcing consumers' belief that the profiles on the website were user-generated.<sup>33</sup> Jerk.com's Twitter page supported user-generated-content message, stating, "Find out what your 'friends' are saying about you behind your back to the rest of the world!"

Through these statements, Respondents clearly presented that the profiles on Jerk.com were user-generated.

D. Respondents intended 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 and Jerk.com users created Jerk profiles which reflected those users' views about people profiled on the site.<sup>35</sup>

Jerk's commercial success depended upon making this representation convincingly. Respondents recognized that to see Jerk's value for a potential acquisition or merger, Jerk.com needed to boost its web traffic. 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. The problem for Respondents was that people were not frequenting Jerk.com nor creating many profiles, and

only if it was perceived that the profiles were created by people actually visiting and using the site. As a Jerk insider expert, "I believed the website could 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."

generals, and Facebook that Jerk.com's users, Jerk, created the profiles on the site.

E. Consumers believed the representation that the profiles on Jerk.com were created by users and reflected their views of the persons profiled.

The evidence demonstrates that consumers involved Respondents' representation that the Jerk profiles and their content were created by the site's users and reflected the users' views of the persons profiled.<sup>45</sup> With millions of profiles created on Jerk.com, the site began to "regularly show up among the top 1-3 search results on search engines like Google when someone searched a person's name who is in [Jerk.com's] database."<sup>46</sup> Consequently, many consumers began to discover Jerk.com profiles of themselves or family members after doing routine Internet searches.<sup>47</sup> Visiting those profile pages left consumers with the impression that the profiles were created by someone who knew the profiled person. As one consumer testified:

When I visited jerk.com, I saw a profile with my full name and 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 and thought someone was messing with me.<sup>48</sup>

The display of personal photographs on the profile pages reinforced Respondents' user-generated representation and caused consumers to perceive that someone who knew the

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<sup>44</sup> CX0107-003, -004; CX0291-001; CX0528-001; CX0529-001; CX0531-001.

<sup>45</sup> CX0027-001 ¶¶ 3, 4; CX0028-001 ¶ 5; CX0036-001 ¶ 3; CX0037-001 ¶ 3; CX0539; CX0541-003; CX0542; CX0554; CX0565; CX0570; CX0576; CX0577; CX0586; CX0591; CX0604; CX0610; CX0613

<sup>46</sup> CX0153-002.

<sup>47</sup> CX0004-001 ¶ 2; CX0005-001 ¶ 2; CX0006-001 ¶ 2; CX0007-001 ¶ 2; CX0010-001 ¶ 2; CX0011-001 ¶ 2; CX0026-001 ¶ 2; CX0027-001 ¶ 2; CX0028-002 ¶ 2; CX0031-002 ¶ 1; CX0032-001 ¶ 3; CX0035-001; CX0036-001 ¶ 3; CX0037-001 ¶ 2; CX0038-001 ¶ 2; CX0040-001 ¶ 2; CX0153-002; CX0231; CX0397; CX0443-001; CX0637-003.

<sup>48</sup> CX0037-001.

profiled person created the profile. Bolstering this perception was the fact, asserted in many consumers' complaints, that the photographs also on their Jerk profiles were originally posted on their Facebook profile pages not designated for public viewing. In fact, many photos on Jerk.com profiles were publicly available on Google images. The resulting implication was that only Jerk.com users with access to the profiled person's Facebook photographs – i.e. one of the person's Facebook friends – could have used those photographs to create the Jerk.com profile.

The display of personal photographs on Jerk 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 what they thought to be private photographs of themselves and their family members placed on Jerk.com, especially because some of these photos portrayed intimate family moments, including bathing and nursing children. In fact, many Jerk.com profiles featured photographs of children, displayed without their parents' knowledge or consent. Consumers also feared the Jerk.com profiles would endanger their their family members' safety. Some consumers also suffered

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<sup>49</sup> CX0027-001 ¶¶ 3, 4; CX0028-001 ¶ 5; CX0036-001 ¶ 3; CX0037-001 ¶ 3; CX0539; CX0541-003; CX0542; CX0554; CX0565; CX0570; CX0576; CX0577; CX0586; CX0591; CX0604; CX0610; CX0613.

<sup>50</sup> CX0036-001 ¶ 4; CX0011-001-003 ¶¶ 3, 4; CX0026-001 ¶ 3; CX0028-001 ¶ 5; CX0037-001 ¶ 4; CX0031-001 ¶ 4; CX0550; CX0551; CX0552; CX0557; CX0570; CX0574; CX0582; CX0599; CX0603; CX0605; CX0606; CX0610; CX0619; CX0620; CX0623; CX0625.

<sup>51</sup> CX0258 ¶ 27 (K. Ortiz Decl.).

<sup>52</sup> See, e.g., CX0028 ¶ 5.

<sup>53</sup> CX0259-024-030; CX0032-001 ¶ 4; CX0036-001 ¶¶ 3-4.

<sup>54</sup> CX0032-001 ¶ 4; CX0036-001 ¶¶ 3-4; CX0048-023, -024, -026; CX0259-001 to -056.

<sup>55</sup> CX0532-001; CX0535-001; CX0538; CX0540; CX0592-001; CX0595-001; CX0596-001;



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.<sup>65</sup>

Expert testimony further shows that Jerk's representations about the source of Jerk profiles misled consumers. Online social media expert Professor Michal Jan Piskorski examined the design and content of Jerk.com and concluded that the majority of site users would believe that the content on the site was created by other users.<sup>67</sup> As he explains in his report, some users who saw personal information on the profiles, such as a personal photograph of themselves or someone else they knew, likely believed that someone who knew them or was

reflected their views of the profiled individuals, Respondents themselves created the vast majority of the profiles displayed on the site.

As explained in Section II.D, creating the appearance that profiles on Jerk.com were input by users, and therefore reflected users' views of those profiled, was important to Jerk's commercial success. But since relatively few people actually used Jerk.com, it was unlikely that Jerk.com would quickly become popular and valuable if Respondents relied strictly on organic profile growth. Facing this predicament, Respondents decided to create Jerk profiles themselves. Specifically, through Software Assist, the Romanian-run company Fanning hired to develop code for Jerk.com, Respondents gathered personal data about people from Facebook and used that data to create profiles of those people on Jerk.com.

The company employed two automated methods to gather data from Facebook. First, Jerk traversed Facebook's Developer Platform to harvest Facebook users' names and pictures.

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<sup>70</sup> *Id.* at 012 ¶ 59.

<sup>71</sup> CX0057 ¶ 8; CX0093-004-005 ¶¶ 26-31; CX0277; CX0640-001.

<sup>72</sup> CX0057 ¶¶ 5, 8; CX0135-001; CX0167-001; CX0181-103:11-22, 134:20-24, 137:22-138:2, 214:9-25, 216:20-217:13 (Amram Dep. Tr.); CX0279-001; CX0302 ¶ 6; CX0307-002; CX0428; CX0438-017:7-14, 024:16-24, 030:3-20, 056:6-12, 086:3 (Patenaude Dep. Tr.); CX0491-001; CX0629-002, -003-4 ¶¶ 7, 11; CX0640-001; CX0641-002, -003; CX0663; CX0711-003; CX0724-001.

<sup>73</sup> Respondents also added content from other sources to populate Jerk.com profiles (CX0305-

Jerk then bulk-loaded those names and pictures into its own database, from which it created profiles for those people on Jerk.com.<sup>75</sup> Second, Jerk created a feature called “Find People I Know,” through which it invited unsuspecting consumers to sign into Jerk.com using their Facebook login credentials.<sup>76</sup> Once those customers did so, Jerk gained access to their Facebook friends list and, without the friend’s knowledge, automatically generated Jerk.com profiles for them.<sup>77</sup>

Jerk’s own documents show that Respondents created the vast majority of Jerk.com profiles using information obtained from Facebook.<sup>78</sup> Jerk’s business plan stated that “Jerk.com grew to over 85 million profiles in just a few months,” an assertion repeated in Jerk’s presentations to investors.<sup>79</sup> Given that Jerk did not have a strong user base, the sheer number of Jerk profiles and the small amount of time spent on the website indicates that they were auto-generated.<sup>80</sup> Internal emails confirm that Respondents auto-generated Jerk.com profiles using Facebook data. In a March 2010 email to 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 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.”

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jerk4.com] was less than 60 users.”)

<sup>75</sup> CX0057 ¶¶ 5, 8; CX0181-134:20-24, 137:22-23; 138:14-9-25, 216:20-217:13; CX0307-002; CX0438-030:3-20, 056:6-12.

<sup>76</sup> CX0438-017:7-14 (Patenaude Dep. TC); CX0629-003 ¶ 10; CX0640-001; CX0641-002, -003; CX0724-001.

<sup>77</sup> *Id.*

<sup>78</sup> CX0151-012; CX0317; CX0637-003.

<sup>79</sup> CX0057 ¶¶ 5, 8; CX0063-002 ¶ 11 (B. Rowe Exp. Rep.); CX0093-005 ¶ 13 (Expert Report of Paul Resnick); CX0181-134:20-24, 137:22-23; 138:14-9-25, 216:20-217:13; CX0307-002, -003; CX0438-030:3-20, 056:6-12; CX0441-001; CX0443-001, -002, -003, -004.

<sup>80</sup> CX0724-001.

Another email from July 2009 illustrates the ~~scall~~ rapid pace of Respondents' auto-generation of profiles:

Fanning to Romanian developer: "Fix 'People I know' This is important





G. Respondents represented that \$30 memberships to Jerk.com would give consumers additional benefits in managing profiles, but they provided none.

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’ Jerk profiles.

Jerk.com stated that consumers can “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].”<sup>100-3c -ofiles, butJerk.cooverted evid</sup>

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.<sup>104</sup>

The evidence demonstrates that Respondents intended to represent to consumers that buying a Jerk.com membership would give them the benefits, including the ability to modify, and delete, their profiles.<sup>105</sup> Fanning articulated his vision for this revenue source to investors.<sup>106</sup> To his Jerk teammates, Fanning analogized this revenue source to the model that he believed was being used by a popular business review website in which a business profiled on the website purportedly could pay a fee to have negative reviews removed from or obscured on their profile pages.<sup>107</sup> Respondents proceeded to implement this revenue model despite concerns from Fanning's NetCapital partner about the fees being "blackmail-feeling."<sup>108</sup>

Believing Respondents' representation that purchasing a Jerk membership would enable them to alter their Jerk.com profiles, consumers bought the \$30 memberships.<sup>109</sup> As one consumer testified, "I was desperate to remove my daughter from the website, and I paid the \$30.00 charge three times."<sup>110</sup> Jerk's payment processor deposited funds from consumers into Jerk's bank account, which was opened and managed by Fanning.<sup>111</sup>

The evidence shows that Respondents failed to provide the promised benefits of a

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<sup>104</sup> CX0047 ¶¶ 10-11 (C. Kauffman Decl.).

<sup>105</sup> CX0046-0049; CX0080; CX0112-002; CX01004; CX0207-002; CX0438-029:3-10.

<sup>106</sup> CX0117-004. *Id.*

<sup>107</sup> CX0438-029:3-10. *Id.*

<sup>108</sup> CX0080. *Id.*

<sup>109</sup> Jerk's Answer ¶ 12; CX0001 ¶ 2; CX0005 ¶ 5; CX0026 ¶ 5; CX0038 ¶ 4; CX0040 ¶ 6.

<sup>110</sup> CX0040 ¶ 6.

<sup>111</sup> CX0092-79:14-80:21, 108:12-13; CX0410; CX0418-CX0419; CX0421-001-002; CX0423-



intended to “leverage the[] same techniques”Jerk.com without Jerk.com’s “edginess.”<sup>120</sup>

Jerk.com and Reper.com were highly integrated, and, as of July 2010, both sites were using the same back-end database.<sup>121</sup> They were also connected to another reputation website called “things I promised to do” or Tiptd.com.<sup>122</sup>

Respondents continued to operate and display profiles of people on Jerk.com until May 2013, at which time Internet Domains apparently locked Fanning out of the Jerk.com domain and altered the content on the site.<sup>123</sup> After this lockout, Jerk.com profiles appeared on another domain—Jerk.org.<sup>124</sup>

Currently, the Jerk.com and Jerk.org sites do not contain individual profiles.<sup>125</sup> However, Reper.com has continued to operate as recently as March 2014,<sup>126</sup> since Jerk has refused prior demands to delete the data it obtained from Facebook,<sup>127</sup> Respondents continue to control content contained in millions of profiles that have been displayed on Jerk.com.

### III. 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

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<sup>120</sup> CX0231-001.

<sup>121</sup> CX0345; CX0702.

<sup>122</sup> CX0281, CX0634-001.

<sup>123</sup> CX0527-001, -003.

<sup>124</sup> CX0258 ¶ 17 (K. Ortiz. Decl.).

<sup>125</sup> CX0258 ¶ 18 (K. Ortiz Decl.).

<sup>126</sup> CX0665.

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., Inc.*, 103 F.T.C. 110 (1984)

(“Deception Statement”) *In re POM Wonderful LLC*

are material.” Deception Statement, 103 F.T.C. at 182.

B. Respondents misrepresented the source of the content on Jerk.com (Count I).

The record evidence establishes three elements of the deception alleged in Count I of the Complaint.

1. Dissemination

First, the evidence demonstrates that Respondents disseminated the representation that the content on Jerk.com, including the names, biographies, and other content displayed in the millions of Jerk profile pages, 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 “[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<sup>128</sup>; users can “post a jerk” on the website<sup>129</sup>; users are “solely responsible for the content of [their] postings on jerk.com<sup>130</sup>,” 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.”<sup>131</sup> Additionally, Jerk.com’s Twitter described Jerk.com as the site where you can “[f]ind out what your ‘friends’ are saying about you behind your back to the rest of the world!”<sup>132</sup> Furthermore, as described in Section II.D, Respondents intended to make this representation. Thus, based upon a facial analysis of Jerk.com and Jerk.com’s Twitter page, as well as

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<sup>128</sup> *Id.*

<sup>129</sup> Fanning’s Answer ¶ 4; Jerk’s Answer ¶ 4; CX0048-031; CX0274.

<sup>130</sup> CX0048-078-79; CX0273.

<sup>131</sup> CX0048-032; CX0275.

<sup>132</sup> CX0282-001.

documentary evidence and consumer testimony. Respondents disseminated the representation

The extrinsic evidence also shows that Jerk's efforts succeeded in convincing consumers that Jerk.com profiles were created by Jerk.com users.

himself concedes that the content on Jerk.com was indeed derived from Facebook.<sup>144</sup> Additionally, internal Jerk documents show Jeff discussing auto-generating profiles to boost traffic to the website, at Fanning's direction.<sup>145</sup> The sheer number of profiles on Jerk.com compared to the minimal amount of user activity on the site further demonstrates that profiles were auto-generated.<sup>146</sup> 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.

### 3. Materiality

Third, evidence demonstrates that Respondent's representation that the content on Jerk.com was created by Jerk.com users and reflected their views of the profiled individuals was material. "A 'material' misrepresentation is one that involves information important to consumers and that is therefore likely to affect the consumer's choice of, or conduct regarding, a product." *Novartis Corp.*

pertained to a central characteristic of Jerk.com.

Even if this representation were not disseminated through press statements and not central, 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. The evidence is clear that Respondents intend to communicate 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 is important to consumers and affected their conduct regarding Jerk.com. *See id.* at 685. The evidence demonstrates that consumers believed this representation from the website, described in Section II.E above. 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

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CX0360-001; CX0441-001, -002; CX0443-001, -002, -004; CX0640-001; CX0663.

<sup>147</sup> CX0046-047; CX0112-001; CX0117-002-003; CX0636-001; CX0642-002; CX0670.

<sup>148</sup> CX0027-001 ¶¶ 3, 4; CX0028-001 ¶ 5; CX0036-001 ¶ 3; CX0037-001 ¶ 3; CX0539; CX0541-003; CX0542; CX0554; CX0565; CX0570; CX0576; CX0577; CX0586; CX0591; CX0604; CX0610; CX0613.

created those profiles<sup>149</sup>. Consequently, numerous consumers exerted considerable time and effort to attempt to contact Jerk—through its registered agent, domain host, and attorney—to request deletion of profiles and photos of them from Jerk.com, as well as to complain to Facebook and law enforcement.<sup>150</sup> Moreover, consumers paid money to Jerk to gain the ability to manage, and delete, profiles of theirs.

Because Complaint Counsel have demonstrated that the representation alleged in Count I was express and intentional, and therefore presumptively material, the burden shifts to Respondents to rebut that presumption by “coming forward with sufficient evidence to support a finding that the claim issue is not material.” *In re Novartis Corp.*, 1999 FTC LEXIS 63, \*27 (F.T.C. 1999). Jerk cannot do so. In its Oppositions to Complaint Counsel’s Motion for Summary Decision, Jerk appears to attack the materiality of the claim in Count I by challenging just one of its statements set forth in Count I—the “Welcome” page enticement: “Want to join the millions of people who already use Jerk for important updates for business, dating, and more?”<sup>152</sup> Ignoring all the other statements pleaded in Count I

Jerk.com users. Jerk also contends that reference to “millions” should be ignored as mere puffery.<sup>153</sup>

In addition to being completely speculative, Jerk’s argument misses the point. Complaint Counsel highlighted the “millions of people” statement, in conjunction with the other pleaded (and uncontroverted) statements that Jerk disseminated, to demonstrate that Jerk conveyed the message that Jerk.com was a website where consumers could see what people were saying about them and their friends, colleagues, and romantic interests. This message added to the net impression created by Jerk that Jerk.com’s profiles were user-generated. *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) (advertisements may be deceptive by virtue of their net impression). Consumers very much cared about representation, as established through uncontroverted evidence demonstrating unaffected consumers’ conduct regarding Jerk.com.<sup>154</sup>

- C. Respondents misrepresented the benefits of the paid Jerk.com membership (Count II).

The record establishes all the elements for the deception alleged in Count II of the

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<sup>153</sup> *Id.* at 9. Jerk’s claim that this representation constitutes puffery misses the mark, except to highlight Jerk’s concession that millions of people did not actually use Jerk.com. The statement is not puffery, since “[p]uffing refers generally to an expression of opinion not made as a representation of fact.” *FTC v. US Sales Corp.*, 785 F. Supp. 737, 746 (N.D. Ill. 1992) (internal citation and quotation marks omitted, whereas specific and measurable claims that may be literally true or false are not puffery, and may be the subject of deceptive advertising claims.” *FTC v. Direct Mkt’ing Concepts, Inc.*, 624 F.3d 1, 11-12 (1st Cir. 2010 (internal citation and quotation marks omitted). Whether Jerk.com did, in fact, have millions of users at the time Jerk made this statement is susceptible to a measurable determination.

<sup>154</sup> CX0001 ¶¶ 2-3; CX0004-001 ¶ 5; CX0005-001 ¶ 5; CX0006-001 ¶ 5-6; CX0007-001 ¶ 4; CX0011 ¶¶ 3, 17; CX0026-001-002 ¶ 6; CX0027-001 ¶ 6-7; CX0028-001-002 ¶¶ 3, 6, 8; CX0031-001-002 ¶ 5; CX0036 ¶¶ 3, 9; CX0037 ¶¶ 3, 7; CX0038-001 ¶ 4; CX0040-001 ¶ 6; CX0450-17:2-19:18 (Consumer Dep. Tr.); CX0532-001; CX0535-001; CX0536-001; CX0538; CX0540-001; CX0541; CX0544-001; CX0545-001; CX0592-001; CX0595-001; CX0596-001;

Complaint. First, as described in Section II.G above, the evidence demonstrates that Respondents expressly disseminated on Jerk.com the representation that subscribing to Jerk.com by buying a \$30 standard membership would give consumers additional benefits, including the ability to dispute information posted on Jerk profiles of themselves. Specifically, Respondents stated that consumers would get access to “additional premium features” and that they “must be a subscriber in order to create a dispute.”<sup>155</sup> Moreover, the evidence demonstrates that Respondents intended to convey this representation to consumers who visited Jerk.com.<sup>156</sup> Fanning listed subscription services—charging users “for access to dispute resolution for other premium and for fee services”—as a potential revenue stream for Jerk in executive summaries sent to potential investors.<sup>157</sup> The record also includes evidence that consumers actually took away this claim from the website. For example, one consumer stated, “I read a statement on Jerk.com that indicated I could remove information from my profile by joining Jerk.com.”<sup>158</sup> A facial analysis of Jerk.com and consumer comments on the website [co.275 -2. 0 TD -.0003 Tc .0003 That subs02 Tw (3er

even receive the password that was purportedly necessary to activate the Jerk membership.<sup>160</sup> As one consumer declared, “[t]he membership was a complete waste.”<sup>161</sup> An undercover purchase by an FTC investigator confirmed that Jerk did not send passwords necessary to activate the paid Jerk.com membership.<sup>162</sup>

Finally, Respondents’ membership-benefits presentation was material. It was presumptively material because it was an expres



the authorized person to pay all of Jerk's taxes.<sup>169</sup> Fanning also held himself out as a "member" of Jerk on a bank account application<sup>170</sup> and signed Jerk's W-9 taxpayer identification form.<sup>171</sup>

Second, Fanning controlled Jerk's shares and signed agreements on behalf of the company. Through one of his other companies, NetCapital,<sup>172</sup> Fanning controlled the majority of Jerk's shares.<sup>173</sup> He also participated in board meetings for Jerk, distributed shares to investors, and set aside stock for employees.<sup>174</sup> Fanning also signed numerous contracts, including an agreement to lease the domain name Jerk.com,<sup>175</sup> employment and contractor agreements, and service agreements with Jerk's data hosting company.<sup>176</sup>

Third, Fanning handled Jerk's finances. As mentioned above, in January 2009 Fanning opened Jerk's bank account, on which he is the sole signatory.<sup>177</sup> In his deposition, Fanning admitted that he "opened a checking account on behalf of Jerk at Bank of America" and stated that he was responsible for the account and had control over how the funds were disbursed.<sup>178</sup> Fanning also established accounts for Jerk with two payment processors.<sup>179</sup> One

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<sup>169</sup> CX0737-005.

<sup>170</sup> CX0411-001.

<sup>171</sup> CX0507.

<sup>172</sup> Fanning founded, managed, and has served as an officer of NetCapital, a business that owns the majority of shares in Jerk and made the initial investment in Jerk. CX0046-018, 022; CX0057 ¶ 3; CX0073-20; CX0181-70:13-24; 73:6-11; CX0187-001-002; CX0283-001; CX0375-002; CX0629 ¶ 5. Jerk and NetCapital shared employees and commingled funds. CX0236-001; CX0239-001; CX00411-004; CX00415; CX0466-001.

<sup>173</sup> CX0181-70:13-24, 73:6-11; CX0187-001-002.

<sup>174</sup> CX0115-001; CX0119-001; CX0466-008.

<sup>175</sup> CX0401-002-004 ¶ 6; CX0464 ¶ 1; CX0466; CX0526-002; CX0735.

<sup>176</sup> CX0092-79:14-80:21, 108:12-13 (Fanning Dep.); CX0411-001-002, -003; CX0417-001.

<sup>177</sup> CX0092-79:14-80:21 (Fanning Dep. Tr.).

<sup>178</sup> CX0421-001-002; CX0423-CX0424; CX0427-001-003.

payment processor collected funds from consumers who purchased Jerk.com memberships or paid Jerk.com's customer service fee and deposited those funds in the Bank of America account opened and controlled by Fanning. Fanning also handled finances and budgeting for Jerk, met with potential investors to solicit funding for Jerk, and attempted to sell the company for millions of dollars by meeting and pitching to potential advisors. He has admitted that he spoke with numerous investors, including venture capital companies, about investing in Jerk.

Fourth, Fanning managed Jerk's day-to-day operations. He has admitted that he was "actively involved" with Jerk.com.<sup>182</sup> Fanning directed strategy and set objectives for Jerk. For example, in responding to a Jerk.com design question about "whole company objectives," Fanning explained:

Yes, I am talking about jerk [and] Leper. As far as whole company objectives, what I meant was, 1. Build team. 2. Raise capital. 3. Drive Traffic 4. Build Brand.<sup>183</sup>

Fanning took steps to meet these goals. He hired contractors and interns to work on Jerk.com,

time, he was involved in all decisions about the website of which I was aware.<sup>185</sup> Jerk and Fanning shared several addresses and Jerk registered agent and domain host sent consumer complaints about Jerk.com directly to John Fanning.<sup>186</sup> Jerk staff even worked out of Fanning's house.<sup>187</sup> Fanning was also active in marketing Jerk.com and strategized on how to "create some buzz" for the website.<sup>188</sup> According to a major investor in Jerk, Fanning "seemed to be running – calling the shots."<sup>189</sup>

Finally, Fanning participated in the creation of content on Jerk.com. He hired a data service company to host Jerk.com's servers.<sup>190</sup> He hired and collaborated with programmers in Romania and India to write code for and publish Jerk.com.<sup>191</sup> He reviewed Jerk.com content.<sup>192</sup> By Fanning's own admission, part of his role at the company was providing "[a]dvice to ensure that the software that was being written and developed and built offshore was complying with the U.S. regulation."<sup>193</sup> In 2009, he participated in the development of the first version of

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CX0629-001 ¶ 2; CX0734; CX0735.

<sup>185</sup> CX0057 ¶ 3.

<sup>186</sup> Fanning's Answer ¶ 2; Response to John Fanning's Responses to Complaint Counsel's First Requests for Admission #4; CX0041-002-006; CX0056-002; CX0092-5:18-19 (Fanning Dep. Tr.); CX0125-001; CX0239-001; CX0400-004 ¶ 11; CX0412; CX0417-002, 005; CX0427-002.

<sup>187</sup> CX0629-002 ¶ 6, CX0361.

<sup>188</sup> CX0668.

<sup>189</sup> CX0181-103:4-16 (Amram Dep. Tr.).

<sup>190</sup> CX0081-001, 003; CX0401-002-004 ¶¶ 6, 8, 10, 11, 12, 13, 14, 15.a-e; CX0402-001-023; CX0403-002; CX0468-001.

<sup>191</sup> CX0135-001; CX0167-001; CX0181-103:11-22 (Amram Dep. Tr.); CX0279-001; CX0302 ¶ 6; CX0428; CX0438-024:16-24 (Patenaude Dep.); CX0491-001; CX0629-002 ¶ 7; CX0663; CX0711-003.

<sup>192</sup> CX0666; CX0669; CX0130.

<sup>193</sup> CX0092-196:3-6 (Fanning Dep. Tr.).

Jerk.com.<sup>194</sup> 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.<sup>195</sup> He decided what would be published on the website and had authority to remove profiles from the website.<sup>196</sup> Additionally, 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.<sup>197</sup> He then defended this strategy to other Jerk team members and even encouraged expanding it to create millions of additional profiles.<sup>198</sup>

During his deposition, Fanning testified that he was merely an "advisor" to Jerk, hired to advise the company by some other entity of which he now claims he cannot remember.<sup>199</sup> Even if this self-serving testimony could be reconciled with the overwhelming weight of all the evidence to the contrary, as courts have noted, 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. *See FTC v. Medicor, LLC*, 217 F. Supp. 2d 1048,







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 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>210</sup>

Fanning echoes this assertion, citing that the Complaint and Noce Order “unlawfully impinge upon and violate the rights and privileges Respondent established and protected under the United States Constitution, including the First Amendment right to free speech.”<sup>211</sup>

The First Amendment does not protect Respondent’s false representations to consumers. To qualify for First Amendment protection, commercial speech must at least “concern lawful activity and not be misleading.”

by selling \$30 memberships, and by charging consumers a \$25 customer service fee.<sup>214</sup> Jerk staff also discussed how the 85 million profiles would drive consumer traffic to Jerk.com, which would make the website more valuable to investors and potential acquirers.<sup>215</sup> Commercial speech such as the representations at issue do not qualify for First Amendment protection if it is false. *See 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, Respondent-generated and membership-benefits representations were false and thus protected by the First Amendment.

Fanning has also argued that the First Amendment bars the Complaint because Jerk.com was purportedly a referendum on Facebook.<sup>216</sup> This argument 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 Respondent did intend for Jerk.com to be a vehicle to critique Facebook, the act of criticizing a competitor 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.” *Bölger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983).

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<sup>214</sup> Fanning’s Answer ¶ 5; Jerk’s Answer ¶ 5.

<sup>215</sup> CX0317-001.

<sup>216</sup> Memorandum of Respondent John Fanning in Opposition to Complaint Counsel’s Motion for Summary Judgment (Nov. 4, 2014) at 17.

C. The claims asserted and relief sought in the Complaint are not moot.

Fanning further challenges the Complaint and a notice order as “moot” because, according to him, “the site at issue is no

Regardless of whether Respondents are currently operating Jerk.com, there is substantial risk that Respondents will engage in the alleged misconduct in the future, either on Jerk.com or on other Internet domains. As the record demonstrates, Respondents have used several different URLs for displaying content to consumers online.<sup>220</sup> In addition, as recently as March 2014, Fanning was working on Jerk.com's "sister site" Reper.com, which relies on the same source content as Jerk.<sup>221</sup> Respondents thus can easily re-post content previously displayed on Jerk.com to Reper.com or to another domain such as a "Jerk7.com" or "Jerk.8.com."

Finally, Respondents' conduct did not cease in 2013 at the earliest—well after the Commission issued a civil investigative demand in July 2012. This fact further undercuts Respondents' mootness defense, because "where continuance occurred 'only after the Commission's hand was on the Respondents' shoulder,'" a "claim of abandonment is rarely sustainable as a defense."<sup>222</sup> *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 ~~only~~ accuses the Commission of "exceed[ing] and/or abus[ing] its statutory and regulatory authority,"<sup>222</sup> and asserts that "the requested relief is not in the public interest."<sup>223</sup>

These defenses lack merit. The Commission has broad authority to act against deceptive

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<sup>220</sup> CX0032-001 ¶ 3; CX0258 ¶ 17 (K. Ortiz Decl.); CX0259.

<sup>221</sup> CX0150-002; CX0181-217:18-218:2, 219:18-22, 220:16 (Amram Dep. Tr.); CX0231-001; CX0345-001; CX0438-76:2-11 (Patenaude Dep. Tr.); CX0663; CX0664-001; CX0665; CX0702-001.

<sup>222</sup> Jerk's Answer at 4 (2d affirmative defense); Fanning's Answer at 4 (2d affirmative defense).

practices under Section 5 (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); *U. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 966 (D.C. Cir. 1985). Likewise, “the Commission has broad discretion in determining whether a proceeding brought by it is in the public interest.” *Guziak v. FTC.*, 361 F.2d 700, 704 (8th Cir. 1966). Prosecuting and preventing deceptive representations to consumers has sufficient public interest backing. *See Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873 (2d Cir. 1961). In this vein, the Commission is “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 spent money trying to remove their profiles from Jerk.com, including by paying Respondents for worthless memberships. Consumers suffered professionally from being profiled on Jerk.com when the site represented that the profiles were user-generated. Numerous consumers also feared for their safety because they were profiled on Jerk.com. Jerk’s deception has posed, and continues to pose, a serious threat to consumers. The proposed order is in the public’s interest.

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<sup>223</sup> Jerk Answer at 5 (5th affirmative defense).

<sup>224</sup> CX0001-001 ¶ 2-3; CX0005-001 ¶ 5; CX0004 ¶ 17; CX0026-001-002 ¶ 6; CX0031-001-002 ¶ 5; CX0036-002 ¶ 9; CX0037-001-002 ¶ 4; CX0038-001 ¶ 4; CX0040-001 ¶ 6; CX0007-001 ¶ 5; CX0422-CX0425; CX0428.

<sup>225</sup> CX0540-001; CX0541; CX0544-001; CX0450-20:11:4 (Consumer Dep. Tr.).

<sup>226</sup> CX0532-001; CX0535-001; CX0538; CX0545-001; CX0592-001; CX0595-001; CX0596-

## VI. COMPLAINT COUNSEL'S PROPOSED ORDER PROVIDES APPROPRIATE RELIEF

The Commission's proposed order is appropriate.<sup>227</sup> The Commission has wide discretion in its choice of a remedy 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 has 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 found.” *Telebrands Corp. v. FTC*, 457 F.3d 354, 358 (4th Cir. 2006). Furthermore, the Commission may issue an order that contains fencing-in provisions, which are “provisions that are broader than the conduct that is declared unlawful.” *POM Wonderful LLC*, 2013 FTC LEXIS at \*156-57. The Commission need not restrict the order to a “narrow lane” of Respondents’ past actions.

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001; CX0598-001; CX0627.

<sup>227</sup> The proposed order mirrors the net order attached to the Complaint.



information obtained in connection with Respondents' operation of Jerk.<sup>231</sup> This would include photos and other data improperly obtained or used in violation of other websites' policies. The proposed order requires Respondents to dispose of such information within 30 days of its entry.<sup>232</sup> Parts V through IX contain reporting and compliance provisions common to many Commission orders.<sup>233</sup>

The proposed order is reasonably related to the lawful practices at issue in light of the seriousness and deliberateness of the violations. Furthermore, the challenged representations are the types of claims that Respondents easily could transfer to other products or services. In fact, Respondents have experimented with similar reputation websites, including Reper.com and Tiptd.com.<sup>234</sup>

Furthermore, the proposed order appropriately applies to Faino because he participated in and had authority to control the deceptive acts and practices alleged in the Complaint.

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security, or integrity of Personal Information collected from or about consumers”).

<sup>231</sup> The Commission has included similar provisions in other orders. See, e.g., *FTC v. ReverseAuction.com, Inc.*, 2000 US Dist. LEXIS 20761, at \*90 (consent order requiring respondents to delete or refrain from using or disclosing data from eBay customers); *In re Chitika, Inc.*, 2011 FTC LEXIS 114, at \*8 (June 7, 2011) (prohibiting respondent from using, disclosing, selling, renting, leasing, or transferring information that can be associated with users).

<sup>232</sup> Recent Commission orders have similarly mandated deletion of online user information. See, e.g., *In re Chitika*, 2011 FTC LEXIS 114 at \*8-9; *In re Compete, Inc.*; 2013 FTC LEXIS 15, at \*16-17 (Feb. 20, 2013).

<sup>233</sup> See, e.g., *In re POM Wonderful LLC*, 2013 FTC LEXIS 5 (Jan. 10, 2013) (order containing standard reporting and compliance provisions); *In re Daniel Chapter One*, 149 F.T.C. 1574 (2010) (same). Such provisions help ensure respondents comply with the order. See *FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 212 (D. Mass. 2009) (“A permanent injunction serves twin goals: avoiding repeat violations of and monitoring compliance with the law and

Fanning's continued possession and use of the millions of Jerk.com profiles in other business ventures illustrates the need for extending the proposed order's provisions to him.

Although Fanning has objected to the breadth and constitutionality of the proposed order, these objections are baseless.<sup>235</sup> First, contrary to Fanning's hyperbolic contention, the Proposed Order does not restrain him from participating in "each and every potential business venture involving the internet, public information, or personal data."<sup>236</sup> Under the Proposed Order, Fanning will remain free to engage in any business venture so long as he abstains from making specified misrepresentations (Part III) or using consumer data obtained in connection with operating Jerk (Part IV).

Second, contrary to Fanning's contention, nothing in the proposed order impinges on constitutionally protected speech. Parts I–III prohibit "misrepresentations" in the "marketing, promotion, or offering for sale" *i.e.*, false commercial speech. Such a prohibition is constitutionally sound. See *In re R.M.J.*, 455 U.S. 191, 200 (1982) ("False, deceptive, or misleading advertising remains subject to restraint.") Part IV also poses no constitutional problem because it directly advances the government's substantial interest in preventing future deception, as well as in protecting the privacy of consumer's information. See *Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 602 (2003) ("[T]he First Amendment does not shield fraud."); *Trans Union Corp. v. FTC*, 245 F.3d 809, 818 (D.C. Cir. 2001) (rejecting First Amendment challenge to statutory restrictions on disclosing consumer financial

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<sup>235</sup> Respondent John Fanning's Opposition to Complaint Counsel's Motion for Summary Decision (Nov. 4, 2014), p. 24-26.

<sup>236</sup> Respondent John Fanning's Opposition to Complaint Counsel's Motion for Summary Decision (Nov. 4, 2014), p. 24.

information). By preventing Respondents from using consumer information that they previously used to deceive, Part IV is sufficiently narrowly tailored to prevent future, similar deception, and to safeguard consumer information from harmful exposure. *FTC v. John Beck Amazing Profits LLC*, 888 F. Supp. 2d 1006, 1015-16 (C.D. Cal. 2012) (enjoining defendants from disclosing, using, or benefitting from consumer information and requiring its destruction).

## VII. CONCLUSION

The evidence on the record and the testimony presented at the evidentiary hearing will show that Respondents violated Section 5 of the FTC Act by (1) misrepresenting that Jerk profiles were created by Jerk users and reflected users' views of the profiled individuals and (2) misrepresenting that consumers who subscribe to Jerk.com would receive additional benefits in managing their Jerk.com profiles. Evidence and testimony will also establish that John Fanning is individually liable for these violations. Accordingly, Complaint Counsel respectfully requests that this Court enter an appropriate order.

Dated: March 6, 2015

Respectfully submitted,

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Notice of Electronic Service for Public Filings

**I hereby certify that on March 06, 2015, I filed via hand a paper original and electronic copy of the foregoing COMPLAINT COUNSEL'S PRE-TRIAL BRIEF, with:**

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