

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES



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) PUBLIC
 Jerk, LLC.)
)

COMPLAINT COUNSEL'S
PRE-TRIAL BRIEF

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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 the content on their website, Jerk.com, was created by Jerk.com users and reflected those users’ views of the individuals profiled on the site (Count I). For example, the website claimed that “Opinions, advice, statements, offers, or other information or content made available through jerk.com are those of their respective authors and not of Jerk LLC.”¹ But, in fact, Respondents themselves created the vast majority of the profiles on the site. Moreover, Respondents falsely represented that consumers would obtain additional paid premium features by purchasing a subscription to Jerk.com, including the ability to dispute information posted on Jerk.com (Count II). Consumers who purchased a membership, however, received nothing in return.

The evidence demonstrates that Respondents made these representations, that these representations were false, and that they were material. Moreover, the record demonstrates that Fanning had authority to control and participated in the unlawful conduct alleged in the Complaint. As described below, the website Jerk.com was in many ways Fanning’s “pet project” and, as the founder and manager of Jerk, he was actively involved in making the false representations.²

¹ CX0048-078-79; CX0273-001.

² CX0057 ¶ 3.

II. FACTUAL BACKGROUND

A. Respondents and their control over Jerk.com.

Fanning formed Jerk as a Delaware limited liability company in January 2009.³

Throughout the period relevant to this action, Fanning has held himself out as a founder and member of Jerk.⁴ He is listed as Jerk's "managing member" on incorporation documents.⁵ He is also a founder, officer, and manager of NetCapital.com, LLC ("NetCapital"), a company that controls the majority of Jerk shares.⁶

Jerk has operated out of Fanning's business and home addresses.⁷ The company has used as its principal address 165 Nantasket Avenue, Hull, MA 02045, which is also Fanning's business address.⁸ It has also used Fanning's P.O. Box in Hingham, MA as its mailing address.⁹ Moreover, Jerk has used Fanning's home address as a business address, and Jerk staff worked

³ 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.

⁴ CX0041-002 ¶ 4; CX0411-001.

⁵ CX0737-003.

⁶ CX0046-018, 022; CX0057-001 ¶ 3; CX0073-020; CX0181-070:13-24, 073:6-11 (Amram Dep. Tr.); CX0187-001-002; CX0283-001; CX0375-002; CX0466-001; CX0629-001 ¶ 5.

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

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

⁹ Respondent John Fanning's Responses to Complaint Counsel's First Requests for Admissions #4 (filed May 29, 2014); CX0056-002; CX0413-CX0416, CX0418-CX0419; CX0421-002; CX0427-002; CX0507-001.

out of Fanning's house.¹⁰

From at least 2009 through 2013, Jerk operated the website Jerk.com.¹¹ Jerk has done business as Jerk.com, Jerk.org, and Jerk.be (collectively, "Jerk.com"), as well as Reper.com, another business that Fanning launched in connection with Jerk.¹² Jerk leased the Jerk.com domain from Internet Domains, a company that leases domain names to businesses.¹³ In May 2013, after Fanning had a payment dispute with Internet Domains, Jerk profiles appeared on another domain, Jerk.org.¹⁴

Respondents' acts and practices have been in or affecting commerce as defined in Section 4 of the FTC Act.¹⁵ Jerk earned revenue by selling to consumers \$30 memberships over the Internet, charging consumers \$25 customer service fees to contact Jerk.com, and placing third-party advertisements on Jerk.com.¹⁶

B. The Jerk.com website.

Respondents launched Jerk.com on the Internet in early 2009.¹⁷ Jerk.com was a social media website that invited people ("users") to create profiles about others and rate the profiled person a "Jerk" or "not a Jerk."¹⁸ As of 2012, the website contained various webpages, including

¹⁰ CX0092-003-5:18-19 (Fanning Dep. Tr.); CX0361; CX0412-001; CX0629-002 ¶ 6.

¹¹ CX0079-002; CX0286-001 # 1 (Jerk's CID Response); CX0291-001; CX0629 ¶ 5; CX0664-001.

¹² CX0032 ¶ 3; CX0229-001; CX0258 ¶ 17 (K. Ortiz Decl.); CX0259; CX0309-001; CX0394; CX0432; CX0663; CX0731-002; CX0732.

¹³ CX0526-002; CX0527-002.

¹⁴ CX0258 ¶ 17 (K. Ortiz Decl.); CX0527-001, -003.

¹⁵ Fanning's Answer ¶¶ 3, 5; Jerk's Answer ¶¶ 3, 5.

¹⁶ *Id.*

¹⁷ CX0079-002; CX0664-001.

¹⁸ CX0048-004; CX0231-001; CX0629 ¶ 3; CX0637-003.

a home page, a “Post a Jerk” page, a “Remove Me” 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.”¹⁹

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.²⁰ Approximately 29 million profiles contained a photo of the profiled subject.²¹ Jerk.com profiled people of all ages, including children.²² An estimated 4.74 million profiles contained photos of children who appeared to be under age 10.²³ The Jerk.com profile pages displayed the profiled person’s name, picture (or a blank square or avatar in lieu of a picture), buttons to vote the profiled person a “jerk” or “not a jerk,” a tally of the vote results, and a space to enter comments and add other information about the profiled person.²⁴ Profiled subjects were identified as a “jerk” or “not a jerk” in red or green lettering above their name.²⁵ Some Jerk.com profiles had comments about the profiled person. For example, a few profiles included comments, such as: “Omg I hate this kid he\’s such a loser,” “Address: gay boulevard,” and “just can go fucking slaughter herself . . . Nobody in their right mind would love you . . . not

¹⁹ Fanning’s Answer ¶ 4; Jerk’s Answer ¶ 4; CX0047 ¶¶ 10, 11 (C. Kauffman Decl.); CX0048-001, -002, 031, -032, -035, -078, -079; CX0258 ¶ 16 (K. Ortiz Decl.); CX0259; CX0272; CX0276; CX0301-001.

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

²¹ CX0063-002 ¶ 9 (B. Rowe Expert Rep.).

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

²³ CX0063-002 ¶ 10 (B. Rowe Expert Rep.).

²⁴ Fanning’s Answer ¶ 6; Jerk’s Answer ¶ 6.

²⁵ CX0259; CX0302 ¶ 8.

even your parents love [you].”²⁶

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.²⁷ 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.”²⁸ Jerk.com supported that claim by boasting that “millions of people . . . already use Jerk for important updates for business, dating, and more”²⁹ 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.”³⁰ 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”³¹

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.”³² Jerk.com’s homepage also featured profiles with

²⁶ Fanning’s Answer ¶ 6; Jerk’s Answer ¶ 6.

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

²⁸ CX0048-078-79; CX0273.

²⁹ CX0048-035; CX0272.

³⁰ CX0048-032; CX0275.

³¹ CX0048-078-79; CX0273.

³² 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.³³ Jerk.com's Twitter page supported its user-generated-content message, stating, "Find out what your 'friends' are saying about you behind your back to the rest of the world!"³⁴

Through these statements, Respondents clearly represented 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 that Jerk.com users created Jerk profiles which reflected those users' views about people profiled on the site.³⁵

Jerk's commercial success depended upon making this representation convincingly. Respondents recognized that to raise Jerk's value for a potential acquisition or merger, Jerk.com needed to boost its web traffic.³⁶ 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.³⁷ The problem for Respondents was that people were neither frequenting Jerk.com nor creating many profiles, and consequently the site was not growing in traffic and marketability.³⁸

Creating the appearance that Jerk.com had many profiles would resolve that problem, but

³³ CX0048-001-002.

³⁴ CX0282-001.

³⁵ CX0202; CX0306-002; CX0357.

³⁶ CX0057-002 ¶ 5; CX0302-002 ¶ 7; CX0317-001; CX0344-001; CX0492-003; CX0629-002-003 ¶ 9; CX0640-001.

³⁷ CX0057 ¶ 8; CX0640-001.

³⁸ CX0063-002 ¶ 11 (B. Rowe Expert Rep.); CX0307-003; CX0441-001, -002; CX0443-001, -002, -003, -004.

only if it was perceived that the profiles were being created by people actually visiting and using the site. As a Jerk insider explained, “I believed the website would only have value to users if people manually created Jerk.com profiles. People would be more likely to use the website if they believed their peers were using it.”³⁹ More profiles would also drive traffic to the website by people searching for their names or the names of others on Internet search engines.⁴⁰ And more profiles stood to boost direct revenue from consumers paying membership fees to Jerk to gain the ability to manage or delete the profiles, as explained below.

Thus, it was important for Respondents to convey the representation that the Jerk profiles were created by actual users, not manufactured by Jerk itself. Respondents did so through the statements on Jerk.com described above. Jerk team members brainstormed website language that would convey to consumers that Jerk.com is a site where “someone i[s] going to tell you the answer” to the question, “Are you a jerk?”⁴¹ They also worked on drafting a Wikipedia entry for Jerk.com that described the website as a user-generated social network.⁴² Additionally, Respondents made this representation to investors, stating that the content on Jerk.com “is growing organically from the users themselves and reflect the view of the people who have personal first hand knowledge of the profiled individual.”⁴³ Jerk also told the FTC, state attorney

³⁹ CX0057 ¶ 5.

⁴⁰ CX0004-001 ¶ 2; CX0005-001 ¶ 2; CX0006-001 ¶ 2; CX0007-001 ¶¶ 2, 3; CX0010-001 ¶ 2; CX0011-001 ¶ 2; CX0026-001 ¶ 2; CX0027-001 ¶ 2; CX0028-001 ¶¶ 2-3; CX0031-002 ¶ 1; CX0032-001 ¶¶ 2-3; CX0036-001 ¶¶ 2-3; CX0037-001 ¶ 2; CX0038-001 ¶ 2; CX0035-001; CX0040-001 ¶ 2; CX0153-002; CX0231; CX0397; CX0443-001; CX0450-15:21-16:16 (Consumer Dep. Tr.); CX0637-003.

⁴¹ CX0357.

⁴² CX0629-001 ¶ 4; CX0636-001; CX0642-002; CX0670.

⁴³ CX0046-047.

generals, and Facebook that Jerk.com's users, not Jerk, created the profiles on the site.⁴⁴

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 believed 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.⁴⁵ 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 search[ed] a person's name who is in [Jerk.com's] database."⁴⁶ Consequently, many consumers began to discover Jerk.com profiles of themselves or family members after doing routine Internet searches.⁴⁷ 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. I thought someone was messing with me.⁴⁸

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

⁴⁴ CX0107-003, -004; CX0291-001; CX0528-001; CX0529-001; CX0531-001.

⁴⁵ 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.

⁴⁶ CX0153-002.

⁴⁷ 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.

⁴⁸ CX0037-001.

profiled person created the profile.⁴⁹ Bolstering this perception was the fact, asserted in many consumers' complaints, that the photographs displayed on their Jerk profiles were originally posted on their Facebook profile pages and not designated for public viewing.⁵⁰ In fact, many photos on Jerk.com profiles were not publicly available on Google images.⁵¹ 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.⁵²

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 them and their family members placed on Jerk.com, especially because some of these photos portrayed intimate family moments, including bathing and nursing children.⁵³ In fact, many Jerk.com profiles featured photographs of children, displayed without their parents' knowledge or consent.⁵⁴ Consumers also feared the Jerk.com profiles would endanger their or their family members' safety.⁵⁵ Some consumers also suffered

⁴⁹ 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.

⁵⁰ CX0036-001 ¶ 4; CX0011-001-003 ¶¶ 3, 15; CX0026-001 ¶ 3; CX0028-001 ¶ 5; CX0037-001 ¶ 4; CX0031-001 ¶ 4; CX0550; CX0551; CX0552; CX0557; CX0570; CX0574; CX0582; CX0599; CX0603; CX0605; CX0606; CX0617; CX0619; CX0620; CX0623; CX0625.

⁵¹ CX0258 ¶ 27 (K. Ortiz Decl.).

⁵² *See, e.g.*, CX0028 ¶ 5.

⁵³ CX0259-024-030; CX0032-001 ¶ 4; CX0036-001 ¶¶ 3-4.

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

⁵⁵ CX0532-001; CX0535-001; CX0538; CX0545-001; CX0592-001; CX0595-001; CX0596-001;

professionally from having profiles of them displayed on Jerk.com.⁵⁶

Consumers attempted to complain about their profiles to Jerk.com's administrators directly.⁵⁷ Respondents, however, frustrated their efforts by failing to give consumers any contact information for any site administrators.⁵⁸ The Jerk.com site did not display any contact email address, valid physical address, or phone number.⁵⁹ The site did have a "Contact Us" page, but to use it, consumers had to either buy a Jerk.com membership (described below) or pay a "service charge of \$25."⁶⁰ Many consumers complained about their inability to contact Jerk.⁶¹

Numerous consumers also complained to Facebook about their names, private photos, and other content that they had posted on Facebook appearing on Jerk.com without their authorization.⁶² Facebook investigated these complaints, including by visiting Jerk.com, and sent Jerk a cease and desist letter in March of 2012.⁶³ That letter expressed Facebook's concern about Jerk's use of automated means to collect Facebook user data in violation of Facebook's terms,

CX0598-001; CX0627.

⁵⁶ CX0450-10:23-11:4 (Consumer Dep. Tr.); CX0540-001; CX0541; CX0544-001.

⁵⁷ CX0006-001 ¶¶ 5-6; CX0007-001 ¶ 4.

⁵⁸ CX0004-001 ¶ 5; CX0006-001 ¶¶ 5-6; CX0027-001 ¶¶ 6-7; CX0048-077.

⁵⁹ *Id.*

⁶⁰ CX0048-077; CX0028-001 ¶ 6. (*Id.*)

⁶¹ CX0004-001 ¶ 5; CX0006-001 ¶¶ 5-6; CX0007-001 ¶ 4; CX0028-001 ¶ 6; CX0027-001 ¶¶ 6-7. *Id.* Some consumers sent written complaints to Jerk.com's webhost and to Jerk's registered business agent, both of which forwarded the complaints to Fanning. CX0041-002-003 ¶ 6; CX0401-004 ¶ 11. However, Fanning instructed Jerk's registered agent to "[j]ust ignore them . . . These are customers trying to get service from us without paying the service charge." (CX0738) In one instance, a consumer found contact information for one of Fanning's partners in NetCapital and called him to complain about the consumer's thirteen year-old son being profiled on Jerk. CX0074; CX0075. The partner, in turn, complained to John Fanning. *Id.*

⁶² CX0105-001 ¶ 3.

⁶³ CX0105-001 ¶ 3; CX0106-001.

and it requested that Jerk cease automated data collection from Facebook and destroy all Facebook user data that Jerk collected.⁶⁴ Jerk refused to alter its practices.⁶⁵

Expert testimony further shows that Jerk’s representations about the source of Jerk profiles misled consumers. Online social media expert Professor Mikołaj Jan Piskorski examined the design and content of Jerk.com⁶⁶ and concluded that the majority of site users would believe that the content on the site was created by other users.⁶⁷ As he explains in his report, some users who saw personal information in the profiles, such as a personal photograph of themselves or someone else they knew, likely believed that someone who knew them or was familiar with the person in the profile created that profile.⁶⁸ Similarly, the “Post a Jerk” and “Remove [Me]” functionalities would remind users of analogous features on user-generated websites such as Facebook or Twitter, leading those users to think that other users created the content on Jerk.com.⁶⁹ Because, as Professor Piskorski explains, “Internet users fundamentally care about their online reputations, particularly when they believe real human beings contributed content about them,” consumers’ mistaken belief that Jerk.com was user-generated hurt their welfare.⁷⁰

F. It was Respondents themselves who created the vast majority of the profiles on Jerk.com.

Contrary to Respondents’ representation that Jerk profiles were created by users and

⁶⁴ *Id.*

⁶⁵ CX107-005.

⁶⁶ CX0108-004-012 (Piskorski Expert Report).

⁶⁷ *Id.* at 012 ¶ 59.

⁶⁸ *Id.* at 006 ¶ 24.

⁶⁹ *Id.* at 007-008 ¶¶ 32-35.

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 the 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,⁷¹ 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.⁷²

The company employed two automated methods to gather data from Facebook.⁷³ First, Jerk traversed Facebook's Developer Platform to harvest Facebook users' names and pictures.⁷⁴

⁷⁰ *Id.* at 012 ¶ 59.

⁷¹ CX0057 ¶ 8; CX0093-004-005 ¶¶ 26-31; CX0277; CX0CX0640-001.

⁷² 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, 086:3-12 (Patenaude Dep. Tr.); CX0491-001; CX0629-002, -003-4 ¶¶ 7, 11; CX0640-001; CX0641-002, -003; CX0663; CX0711-003; CX0724-001.

⁷³ Respondents also added content from other sources to populate Jerk.com profiles (CX0305-001; CX0352-001), further helping the website appear to be user-generated.

⁷⁴ CX0057 ¶¶ 5, 8; CX0181-134:20-24, 137:22-138:2, 214:9-25, 216:20-217:13; CX0307-002; CX0438-030:3-20, 056:6-12. An employee of Software Assist, Jerk's hired development company, registered as a developer with Facebook in 2008 and proceeded to register multiple applications on the Facebook Platform, including Jerk.com and Jerk.be. CX0094-004 ¶¶ 15-16; CX0104; CX0428. Those applications gave Software Assist and Jerk access to Facebook's application programming interfaces ("APIs") and other services, which allowed them to retrieve, in an automated fashion, information from Facebook users. CX0094-002-003 ¶ 8. Very few Facebook users, however, used or connected with Jerk's Facebook applications. CX0094-005 ¶¶ 17-18 ("the number of users who accessed or connected to [jerk.com, jerk2.com, jerk3.com and

Jerk then bulk-loaded those names and pictures into its own database, from which it created profiles for those people on Jerk.com.⁷⁵ 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.⁷⁶ 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.⁷⁷

Jerk’s own documents show that Respondents created the vast majority of Jerk.com profiles using information obtained from Facebook. 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.⁷⁸ Given that Jerk did not have a strong user base, the sheer number of Jerk profiles and the small amount of time they spent on the website indicates that they were auto-generated.⁷⁹ Internal emails confirm that Respondents auto-generated Jerk.com profiles using Facebook data. In a March 2010 email copying John Fanning, Jerk’s programmers stated:

“When you ask the user to login into their Facebook account to find friends, auto sync Facebook and auto create track me links between all the Facebook friends. Auto generate profiles for Facebook friends who are not in the system already. Use the API’s provided by Facebook to accomplish this.”⁸⁰

jerk4.com] was less than 60 users.”)

⁷⁵ CX0057 ¶¶ 5, 8; CX0181-134:20-24, 137:22-138:2, 214:9-25, 216:20-217:13; CX0307-002; CX0438-030:3-20, 056:6-12.

⁷⁶ CX0438-017:7-14 (Patenaude Dep. Tr.); CX0629-003 ¶ 10; CX0640-001; CX0641-002, -003; CX0724-001.

⁷⁷ *Id.*

⁷⁸ CX0151-012; CX0317; CX0637-003.

⁷⁹ CX0057 ¶¶ 5, 8; CX0063-002 ¶ 11 (B. Rowe Expert Rep.); CX0093-005 ¶32 (Expert Report of Paul Resnick); CX0181-134:20-24, 137:22-138:2, 214:9-25, 216:20-217:13; CX0307-002, -003; CX0438-030:3-20, 056:6-12; CX0441-001; CX0443-001, -002, -003, -004.

⁸⁰ CX0724-001.

Another email from July 2009 illustrates the scale and pace of Respondents' auto-generation of profiles:

Fanning to Romanian developer: "Fix 'People I know' This is important because we need to create at least 5,000 more profiles before August (3 days and counting). Specifically, make sure the facebook part works."

Response from Romanian developer:

"– we have created 7000 profiles so far
– at the end of the day we will have 20,000 new profiles."⁸¹

Testimony from Jerk insiders also establishes that Respondents created the vast majority of the profiles displayed on Jerk.com. A Jerk team member testified that "when website visitors signed into Jerk.com through Facebook, Jerk.com gained access to the visitors' Facebook friends lists and generated profiles on Jerk.com for all of them."⁸² Another Jerk team member testified that "[m]ost of the profiles were bulk loaded from Facebook."⁸³ An investor in Jerk testified that John Fanning admitted to him that the force behind Jerk.com's explosive growth in profiles was obtaining the information from Facebook.⁸⁴ Far from contesting this fact, Fanning concedes it, acknowledging that content presented on Jerk.com as user-generated was indeed derived from Facebook.⁸⁵

These admissions comport with statistical analysis showing that less than one percent of all profiles on Jerk.com had any votes for whether the profiled person was a "Jerk" or a "not a

⁸¹ CX0640-001.

⁸² CX0629-003 ¶ 10.

⁸³ CX0057 ¶ 8.

⁸⁴ CX0181-137:22-138:2 (Amram Dep. Tr.).

⁸⁵ Respondent John Fanning's Opposition to Complaint Counsel's Motion for Summary Decision (Nov. 4, 2014), pp. 11-12, 17; Affidavit of John Fanning [in opposition to Complaint Counsel's Motion for Summary Decision] (Nov. 4, 2014), ¶ 5.

Jerk.”⁸⁶ According to Professor Paul Resnick, an expert on human computer interaction and social computing, the low percentage of votes signals that the majority of Jerk.com profiles were not created manually by actual users.⁸⁷ As Professor Resnick explains, the name of the site, the language used to describe the action of creating a profile (i.e., “Post a Jerk”), and the prominence of the “Jerk” and “not a Jerk” voting buttons throughout the website “convey a clear message to users that the purpose of profiles is to collect and publicly present judgments that individual people are jerks, or that they are not jerks.”⁸⁸ If most of the Jerk.com profiles had been created by real users, “many more should have had votes.”⁸⁹ Professor Resnick also examined whether the user traffic on the Jerk.com website was sufficient to have generated the number of profiles on the site.⁹⁰ Based on an analytics report for the Jerk.com site, Professor Resnick determined that the estimated number of visitors to Jerk.com between January 1, 2009, and November 29, 2012, was 5,431,568.⁹¹ Visitors spent an average of 1 minute and 7 seconds on Jerk.com.⁹² Assuming, conservatively, that users could create one profile in this amount of time, the total number of profiles that all users could have created is likewise 5,431,568.⁹³ As there are in excess of 85 million profiles on the Jerk.com website, Professor Resnick concludes that the number of visitors to Jerk.com could not have manually produced the number of profiles on the

⁸⁶ CX0063-002 ¶ 11 (B. Rowe Expert Rep.). Brian Rowe, an economist at the FTC’s Bureau of Economics, provided statistical analysis relating to the Jerk.com website.

⁸⁷ CX0093-003-004 ¶¶ 20-22 (Expert Report of Paul Resnick).

⁸⁸ *Id.* at -003 ¶ 20.

⁸⁹ *Id.* at -004 ¶ 21.

⁹⁰ *Id.* at 004.

⁹¹ CX0093 ¶ 31.

⁹² CX0093 ¶ 32.

site.⁹⁴ In short, the evidence, including expert analysis of the website itself, demonstrates that the vast majority of the profiles on Jerk.com were not created by users and therefore did not reflect users' views of the profiled persons.

Furthermore, the record shows that Fanning dismissed concerns raised about the true source of the profiles and the mismatch between the large numbers of Jerk.com profiles and the small number of actual users. For example, some members of the Jerk team and investors raised suspicions to Fanning and the Romanian programmers about whether Jerk profiles were really created organically, as Jerk claimed.⁹⁵ Similarly, a Jerk team member raised concerns "that Jerk, by using Facebook users' profiles to build its own profiles, was storing Facebook information for longer than Facebook's Developers Terms of Use permitted."⁹⁶ Team members also voiced concerns to Fanning about the usefulness of a website that displayed many profiles but had few actual users. Fanning responded that Jerk.com having millions of profiles was valuable in itself because that drove traffic to the site.⁹⁷ Indeed, in September 2010, Fanning suggested that Jerk create even more profiles to drive up traffic to Jerk.com and increase the company's acquisition value:

How about this. We try to boost our profiles up by say another 250M, we try to boost our traffic up as high as we can get it. . . . We could do that within 90 days easy and just sell jerk.com to [Intellius] before you graduate. You would make millions.⁹⁸

⁹³ CX0093 ¶ 33.

⁹⁴ CX0093 ¶ 35.

⁹⁵ CX0181-137:17-138:16 (Amram Dep. Tr.); CX0438-42:23-43:10, 57:23-58:7 (Patenaude Dep. Tr.); CX0629-003-004 ¶¶ 11-13; CX0644-001.

⁹⁶ CX0629-004 ¶ 12.

⁹⁷ CX0317-001.

⁹⁸ CX0492-003.

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.⁹⁹

Jerk.com stated that consumers can “use Jerk to manage your reputation and resolve disputes with people who you are in conflict with. There are also additional paid premium features that are available [hyperlink to Jerk’s Sign-in page].”¹⁰⁰ That Sign-in page directed consumers to a Subscription page, which laid out the benefits of subscribing. A large, red “Subscribe” button appeared directly below this list. Clicking on that button took consumers to a payment form, which stated at the top:

“Become a Subscriber

. . . .

You must be a subscriber in order to create a dispute!”¹⁰¹

The page included a billing form where consumers could enter billing information.¹⁰² The form included a choice between a “Gold Membership,” which was “(under development),” or a “standard membership for \$30/year.”¹⁰³ After a consumer entered the required payment

⁹⁹ Fanning’s Answer ¶ 5; Jerk’s Answer ¶ 5; CX0001 ¶ 2; CX0038-001 ¶ 4; CX0047, ¶¶ 10-11 (C. Kauffman Decl.); CX0048-032, -035; CX0258 ¶ 16 (K. Ortiz Decl.); CX0275; CX0276. That Respondents may not have sold many memberships does not negate the illegality of their conduct.

¹⁰⁰ CX0048-032; CX0275-001.

¹⁰¹ CX0276-001.

¹⁰² *Id.*

¹⁰³ CX0047 ¶¶ 10, 11 (C. Kauffman Decl.); CX0276.

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.¹⁰⁴

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

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

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

¹⁰⁴ CX0047 ¶¶ 10-11 (C. Kauffman Decl.).

¹⁰⁵ CX0046-0049; CX0080; CX0112-002; CX0117-004; CX0207-002; CX0438-029:3-10.

¹⁰⁶ CX0117-004. (*Id.*)

¹⁰⁷ CX0438-029:3-10. (*Id.*)

¹⁰⁸ CX0080. (*Id.*)

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

¹¹⁰ CX0040 ¶ 6.

¹¹¹ CX0092-79:14-80:21, 108:12-13; CX0411; CX0418-CX0419; CX0421-001-002; CX0423-

Jerk.com membership to the consumers who bought memberships.¹¹² After purchasing a membership on Jerk.com, the site would display a message stating that Jerk.com would send the consumer a password to activate the membership features.¹¹³ Many consumers, however, never received any password.¹¹⁴ In fact, Respondents did not provide consumers with any benefits whatsoever in exchange for purchasing Jerk.com memberships.¹¹⁵ As one consumer declared, “[t]he membership was a complete waste.”¹¹⁶ An undercover FTC investigation confirmed that Respondents charged the investigator for a membership but never provided a password, let alone any benefits.¹¹⁷

H. Respondents have continued to use consumers’ names and photos in other ventures, even after losing control over Jerk.com in 2013.

Despite pitching Jerk.com to several venture capital firms and at least one potential competitor, Fanning failed to sell Jerk.¹¹⁸ By 2010, Fanning decided to pivot the business to Reper.com, another reputation website that he ran.¹¹⁹ Reper.com was Jerk.com’s “sister site”

CX0424; CX0427-001-003.

¹¹² Jerk’s Answer ¶ 12; CX0001 ¶¶ 2-3; CX0005 ¶ 6; CX0026 ¶ 6; CX0038 ¶ 4; CX0040 ¶ 6; CX0047 ¶¶ 6-16 (C. Kauffman Decl.).

¹¹³ CX0001 ¶ 2; CX0038-001 ¶ 4; CX0047-003 ¶ 11 (C. Kauffman Decl.).

¹¹⁴ CX0001 ¶ 3; CX0038 ¶ 4; CX0047 ¶¶ 6-16 (C. Kauffman Decl.).

¹¹⁵ CX0001 ¶¶ 2-3; CX0005 ¶ 6; CX0026 ¶ 6; CX0038 ¶ 4; CX0040 ¶ 6.

¹¹⁶ CX0038 ¶ 4; CX0450-61:8-10 (Consumer Dep. Tr.). (*Id.*)

¹¹⁷ CX0047 ¶¶ 6-16 (C. Kauffman Decl.); CX0462:18-23 (Kauffman Dep. Tr.).

¹¹⁸ CX0057-002 ¶ 7; CX0077; CX0092-213:2-214:7 (Fanning Dep. Tr.); CX0082-001; CX0122-001; CX0139-001; CX0140-001; CX0141-001; CX0144-001; CX0146-001; CX0147-001; CX0181-154:10-21, 156:13-21 (Amram Dep. Tr.); CX0153-001; CX0206; CX0308-001; CX0367-001; CX0387-001; CX0438-041:22-42:2 (Patenaude Dep. Tr.); CX0492-003; CX0513-001.

¹¹⁹ CX0229-001; CX0309-001; CX0394; CX0432; CX0663; CX0731-002; CX0732.

intended to “leverage the[] same techniques” as Jerk.com without Jerk.com’s “edginess.”¹²⁰

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

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.¹²³ After this lockout, Jerk.com profiles appeared on another domain—Jerk.org.¹²⁴

Currently, the Jerk.com and Jerk.org websites do not contain individual profiles.¹²⁵ However, Reper.com has continued to operate as recently as March 2014,¹²⁶ and since Jerk has refused prior demands to delete the user data it obtained from Facebook,¹²⁷ 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

¹²⁰ CX0231-001.

¹²¹ CX0345; CX0702.

¹²² CX0281, CX0634-001.

¹²³ CX0527-001, -003.

¹²⁴ CX0258 ¶ 17 (K. Ortiz. Decl.).

¹²⁵ CX0258 ¶ 18 (K. Ortiz Decl.).

¹²⁶ 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. *FTC Policy Statement on Deception, appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984) (“Deception Statement”); *In re POM Wonderful LLC*, 2013 FTC LEXIS 6, at *17-19 (Jan. 10, 2013); *In re Stouffer Foods Corp.*, 118 F.T.C. 746, 798 (1994); *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994).

With regard to the first prong, a representation conveys “a claim if consumers, acting reasonably under the circumstances, would interpret the advertisement to contain that message.” *POM Wonderful LLC*, 2013 FTC LEXIS at *20 (citations omitted); *see also* Deception Statement, 103 F.T.C. at 176. If a representation conveys a particular interpretation to “at least a significant minority of reasonable consumers,” that interpretation is reasonable. *POM Wonderful*, 2013 FTC LEXIS at *20 (citations omitted); *see* Deception Statement, 103 F.T.C. at 177 n.20. This is true even if the respondent did not intend to communicate a particular claim. *See In re Novartis Corp.*, 127 F.T.C. 580, 689 (1999) (lack of intent arguments “ring hollow” in the face of respondent’s knowledge that the deceptive claim was being communicated). Moreover, “a showing that an advertiser intended to make particular claims can help demonstrate that the alleged claim was in fact conveyed to consumers.” *POM Wonderful LLC*, 2013 FTC LEXIS at *51. Under the second prong, whether representations were false or misleading, actual deception need not be found; the representation need only be “likely to mislead.” *Cliffdale Associates*, 103 F.T.C. at 105. For the third prong, materiality, “the Commission presumes that express claims

¹²⁷ CX0105 ¶¶ 3-5; CX0106-001; CX0107.

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 all 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, photographs, 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”¹²⁸; users can “post a jerk” on the website¹²⁹; users are “solely responsible for the content of [their] postings on jerk.com”¹³⁰; 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.”¹³¹ 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!”¹³² 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

¹²⁸ *Id.*

¹²⁹ Fanning’s Answer ¶ 4; Jerk’s Answer ¶ 4; CX0048-031; CX0274.

¹³⁰ CX0048-078-79; CX0273.

¹³¹ CX0048-032; CX0275.

¹³² CX0282-001.

documentary evidence and consumer testimony, Respondents disseminated the representation alleged in Count I.

Because this representation was conveyed through express and conspicuous implied statements, the Court need not look to extrinsic evidence to unearth a deeper meaning behind what is plain on its face. *Kraft*, 970 F.2d at 319-20. However, to the extent the Court chooses to assess the extrinsic evidence on the record, all of it points toward the plain interpretation pleaded in Count I. This evidence—including deposition testimony, consumer declarations, and internal emails from Fanning and Jerk staffers—shows that Respondents intended Jerk.com to be perceived as displaying user-generated (i.e., organically created) profiles.¹³³ For example, Fanning brainstormed with his Jerk teammates website language that would convey to consumers that Jerk.com is a site where “someone i[s] going to tell you the answer” to the question, “Are you a jerk?”¹³⁴ Fanning also circulated a draft Wikipedia entry for Jerk.com that compared the site to Facebook:

Jerk.c[o]m was the first website defining the category of anti-social networks on the [I]nternet. On facebook.com internet users were able to tell the world about [t]hemselves. Jerk.com search engine was the first website to popularize posting [a]bout others without their consent.¹³⁵

Jerk insiders also characterized Jerk.com as a user-generated social network to prospective investors, competitors, and government agencies.¹³⁶

¹³³ CX0046-047; CX0107-003-004; CX0112-001; CX0117-002-003; CX0202; CX0291-001; CX0306-002; CX0357; CX0528-001; CX0529-001; CX0636-001; CX0642-002; CX0670.

¹³⁴ CX0357 (emphasis added).

¹³⁵ CX00670.

¹³⁶ CX0046-047; CX0107-003-004; CX0112-001; CX0117-002-003; CX0291-001; CX0528-001; CX0529-001.

The extrinsic evidence also shows that Jerk’s efforts succeeded in convincing consumers that Jerk.com profiles were created by Jerk.com users.¹³⁷ For example, one consumer declared that, upon visiting the Jerk.com profile page that featured him and upon seeing a photograph of himself there, he “immediately thought that someone who didn’t like me put me on there.”¹³⁸ Another consumer had the same reaction when she ran a Google search on her name and found the Jerk.com profile of her displaying a picture that she posted on Facebook with a friends-only privacy setting.¹³⁹ Indeed, an expert analysis of Jerk.com concludes that the majority of visitors to the site would view the profiles as user-generated.¹⁴⁰

2. Falsity

Second, the record demonstrates that this representation was false. As described in Section II.F, documentary and testimonial evidence establishes that Respondents took content, including names and photographs, from Facebook, and used that content to create profiles displayed on Jerk.com.¹⁴¹ Jerk insiders admitted that the company created profiles by “traversing Facebook”¹⁴² and that “[m]ost of the profiles were bulk loaded from Facebook.”¹⁴³ Fanning

¹³⁷ CX0011 ¶¶ 3, 17; CX0027-001 ¶¶ 3, 4; CX0028-001 ¶ 5; CX0036-001 ¶¶ 3, 9; CX0037-001 ¶¶ 3, 7; CX0539; CX0541-003; CX0542; CX0554; CX0565; CX0570; CX0576; CX0577; CX0586; CX0591; CX0604; CX0610; CX0613.

¹³⁸ CX0037.

¹³⁹ CX0036.

¹⁴⁰ CX0108 (Piskorski Expert Report), p. 12, ¶ 59.

¹⁴¹ CX0057 ¶¶ 5, 8; CX0181-134:20-24, 137:22-138:2, 214:9-25, 216:20-217:13 (Amram Dep. Tr.); CX0307-002; CX0438-30:3-20, 56:6-12 (Patenaude Dep. Tr.).

¹⁴² CX0181-134:20-24, 137:22-138:2 (Amram Dep. Tr.).

¹⁴³ CX0057 ¶ 8.

himself concedes that the content on Jerk.com was indeed derived from Facebook.¹⁴⁴

Additionally, internal Jerk documents show Jerk staff discussing auto-generating profiles to boost traffic to the website, at Fanning's direction.¹⁴⁵ 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.¹⁴⁶ 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 Respondents' 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.*, 127 F.T.C. at 685. Representations involving "express claims" and claims "pertaining to the central characteristic of the product" are presumptively material. *See POM Wonderful LLC*, 2013 FTC LEXIS at *121; *Novartis Corp.*, 127 F.T.C. at 686; *In re Am. Home Prods.*, 98 F.T.C. 136, 368 (1981). As explained in Sections II.C and II.D, Respondents' representation that the content on Jerk.com was created by the site's users and reflected those users' views of the profiled individuals is presumptively material because it was express and

¹⁴⁴ Respondent John Fanning's Opposition to Complaint Counsel's Motion for Summary Decision (Nov. 4, 2014), pp. 11-12, 17; Affidavit of John Fanning [in opposition to Complaint Counsel's Motion for Summary Decision] (Nov. 4, 2014), ¶ 5.

¹⁴⁵ CX0307-002; CX0640-001; CX0641-002; CX0724-001.

¹⁴⁶ CX0057 ¶ 8; CX0063-002 ¶¶ 8, 11 (B. Rowe Expert Rep.); CX0093-004-005 (P. Resnick Expert Rep.); CX0151-012; CX0153-002; CX0307-001-002, -003; CX0317; CX0352-001;

pertained to a central characteristic of Jerk.com.

Even if this representation were not disseminated through express 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.¹⁴⁷ 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 was 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, as described in Section II.E above.¹⁴⁸ 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

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

¹⁴⁷ CX0046-047; CX0112-001; CX0117-002-003; CX0636-001; CX0642-002; CX0670.

¹⁴⁸ 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.¹⁴⁹ 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 or photos of them from Jerk.com, as well as to complain to Facebook and law enforcement.¹⁵⁰ Moreover, consumers paid money to Jerk to gain the ability to manage, and delete, profiles of them.¹⁵¹

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 “com[ing] forward with sufficient evidence to support a finding that the claim at 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?”¹⁵² Ignoring all the other statements pleaded in Count I and their net impression, Jerk argues that this “millions of people” statement, taken in isolation, is not material because consumers would not have cared about or relied upon a representation about the exact number of

¹⁴⁹ CX0036-001 ¶ 3; CX0037-001 ¶ 3; CX0028-001 ¶ 3.

¹⁵⁰ CX0004-001 ¶ 5; CX0006-001 ¶ 5-6; CX0007-001 ¶ 4; CX0011 ¶¶ 3, 17; CX0027-001 ¶ 6-7; CX0028-001 ¶ 6; CX0031-001-002 ¶ 5; CX0036 ¶¶ 3, 9; CX0037 ¶¶ 3, 7; CX0738-01. The FTC’s Consumer Sentinel Network has received over 300 complaints about Jerk.com. CX0258 ¶ 26 (K. Ortiz Decl.).

¹⁵¹ Jerk’s Answer ¶ 12; CX0001-001 ¶¶ 2-3; CX0005-001 ¶¶ 5-6; CX0007-001 ¶ 5; CX0026-001-002 ¶ 6; CX0038-001 ¶ 4; CX0040-001 ¶ 6; CX0047 ¶¶ 6-16 (C. Kauffman Decl.); CX0422-CX0425; CX0428.

¹⁵² Respondent Jerk LLC’s Opposition to Complaint Counsel’s Motion for Summary Decision (Jan. 5, 2015), pp. 8-10.

Jerk.com users. Jerk also contends that the reference to “millions” should be ignored as mere puffery.¹⁵³

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 *other 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. *See 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 *that* representation, as established through uncontroverted evidence demonstrating how it affected consumers’ conduct regarding Jerk.com.¹⁵⁴

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

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

¹⁵³ *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.

¹⁵⁴ 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 them. Specifically, Respondents stated that consumers would get access to “additional paid premium features” and that they “must be a subscriber in order to create a dispute.”¹⁵⁵ Moreover, the evidence demonstrates that Respondents intended to convey this representation to consumers who visited Jerk.com.¹⁵⁶ 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.¹⁵⁷ 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.”¹⁵⁸ A facial analysis of Jerk.com and consumer testimony thus shows that Respondents conveyed the membership benefits representation to consumers.

Second, there is no question that this representation was false. Documentary and testimonial evidence establishes that numerous consumers who subscribed to Jerk.com by paying for a membership did not receive the promised additional benefits.¹⁵⁹ In fact, consumers did not

CX0598-001; CX0615-001; CX0627.

¹⁵⁵ CX0047 ¶¶ 10, 11 (C. Kauffman Decl.); CX0048-032; CX0258 ¶ 16 (K. Ortiz Decl.); CX0275; CX0276.

¹⁵⁶ CX0080; CX0112-002; CX0117-004; CX0438-29:3-10.

¹⁵⁷ CX0117.

¹⁵⁸ CX0038 ¶ 4. *See also* CX0005 ¶ 5; CX0026 ¶ 5; CX0040 ¶ 6; CX0450-15:15-19 (Consumer Dep. Tr.).

¹⁵⁹ CX0001 ¶¶ 2-3; CX0005 ¶ 6; CX0026 ¶ 6; CX0038 ¶ 4; CX0040 ¶ 6.

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

Finally, Respondents’ membership-benefits representation was material. It was presumptively material because it was an express claim and the claim pertained to the central characteristic of the Jerk.com membership—its purpose. *Deception Statement*, 103 F.T.C. at 182 (Commission will presume materiality where the claim “concerns the purpose, safety, efficacy, or cost of the product or service”). Even if the representation were not presumptively material, testimony establishes that consumers acted on the representation,¹⁶³ which demonstrates materiality. *See Cliffdale Assocs.*, 103 F.T.C. at 118.

D. Fanning is individually liable for the deceptive conduct alleged.

The evidence shows that Fanning is liable for the conduct alleged in the Complaint. Under the FTC Act, an individual is liable for a business entity’s deceptive acts or practices if the individual either participated directly in or had the authority to control the acts or practices at issue. *POM Wonderful*, 2013 FTC LEXIS at *163-64. The FTC is not required to show that an individual defendant intended to defraud consumers in order to establish personal liability. *FTC v. Publ’g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997). In holding that individuals had the requisite control and/or participation to be liable, the Commission and federal courts

¹⁶⁰ CX0001 ¶ 3; CX0038 ¶ 4.

¹⁶¹ CX0038 ¶ 4; *see also* CX0450-61: 8-10 (Consumer Dep. Tr.).

¹⁶² CX0047 ¶¶ 6-16 (C. Kauffman Decl.); CX0462: 18-26 (Kauffman Dep. Tr.).

¹⁶³ CX0001 ¶¶ 2-3; CX0005 ¶¶ 5-6; CX0026 ¶¶ 5-6; CX0038 ¶ 4; CX0040 ¶ 6.

have weighed evidence that they: (1) were officers or held themselves out as officers of the company; (2) signed contracts on behalf of the company; (3) were signatories on company bank accounts; (4) managed the day-to-day affairs of the company; (5) hired employees; and (6) had employees report to them.¹⁶⁴

Here, the evidence establishes that Fanning both had authority to control the acts and practices at issue and participated in them. First, he was the founder and managing member of Jerk.¹⁶⁵ An early draft of Jerk's executive summary states that "Jerk.com is founded by John Fanning." An investor in Jerk told other potential investors that "[t]he company is started by John Fanning."¹⁶⁶ In January 2009, Fanning hired a registered agent to incorporate Jerk.¹⁶⁷ Certificate of formation records list Fanning as the only "Managing Member" of Jerk.¹⁶⁸ In his role as member, Fanning signed State of Delaware incorporation documents stating that he was

¹⁶⁴ *POM Wonderful*, 2013 FTC LEXIS at *163-64 (control found when individual acted as an officer of the company; signed checks and contracts on behalf of the company; managed the day-to-day affairs of the company; had the authority to determine which advertisements should run; had numerous employees reporting to him directly; and had the authority to hire and fire employees); *FTC v. World Media Brokers*, 415 F.3d 758, 765 (7th Cir. 2005) (control found when individual held herself out as an "authorized officer" of several of the corporate defendants); *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d at 1168, 1170-71 (9th Cir. 1997) (individual's "authority to sign documents on behalf of the corporation demonstrate that she had the requisite control over the corporation"); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989) ("Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy"); *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1271 (S.D. Fla. 2007) (individual held liable where he was a signatory on corporate bank accounts, held himself out as an officer or manager of the company, and had the power to hire and fire employees).

¹⁶⁵ CX0133-002; CX0139-001; CX0181-52:11-18; CX0210-001; CX0368-007; CX0737-003.

¹⁶⁶ CX0133-002; CX0210-001.

¹⁶⁷ CX0041-002 ¶ 4.

¹⁶⁸ CX0737-003.

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

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

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.¹⁷⁶ In his deposition, Fanning admitted that he "opened a checking account on behalf of a member of Jerk at Bank of America" and stated that he was responsible for the account and had control over how the funds were disbursed.¹⁷⁷ Fanning also established accounts for Jerk with two payment processors.¹⁷⁸ One

¹⁶⁹ CX0737-005.

¹⁷⁰ CX0411-001.

¹⁷¹ CX0507.

¹⁷² 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 have shared employees and commingled funds. CX0236-001; CX0239-001; CX00411-004; CX00415; CX0466-001.

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

¹⁷⁴ CX0115-001; CX0119-001; CX0466-008.

¹⁷⁵ CX0401-002-004 ¶ 6; CX0464 ¶ 1; CX0466; CX0526-002; CX0735.

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

¹⁷⁷ CX0092-79:14-80:21 (Fanning Dep. Tr.).

¹⁷⁸ 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 then deposited those funds into the Bank of America account opened and controlled by Fanning.¹⁷⁹ Fanning also handled finances and budgeting for Jerk, met with potential investors to solicit funding Jerk, and attempted to sell the company for millions of dollars by meeting and pitching to potential advisors.¹⁸⁰ He has admitted that he spoke with numerous investors, including venture capital companies, about investing in Jerk.¹⁸¹

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

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

Fanning took steps to meet these goals. He hired contractors and interns to work on Jerk.com, and managed assignments and payments to staff.¹⁸⁴ One staff member testified that he "reported directly to John Fanning" and that "Jerk.com was John Fanning's pet project and at that point in

¹⁷⁹ CX0411; CX0418-CX0419; CX0421; CX0423-CX0424.

¹⁸⁰ CX0057 ¶ 7; CX0076; CX0077; CX0092-213:2-214:7 (Fanning Dep. Tr.); CX0122-001; CX0135-001; CX0139-001; CX0140-001; CX0141-001; CX0144-001; CX0146-001; CX0147-001; CX0153-001; CX0167-001; CX0181-154:10-21, 156:13-21 (Amram Dep. Tr.); CX0206; CX0308-001; CX0361; CX0367-001; CX0411; CX0438-41:22-42:2, 79:2-3 (Patenaude Dep. Tr.); CX0492-003; CX0513-001.

¹⁸¹ CX0092-114:3-5; 213:2-214:4 (J. Fanning Dep. Tr.).

¹⁸² CX0643-001.

¹⁸³ CX0309-001.

¹⁸⁴ CX0057 ¶ 3; CX0181-90:3-25, 105:7-10 (Amram Dep. Tr.); CX0302 ¶ 4; CX0304-003; CX0308; CX0438-10:5-11, 85:25-86:2 (Patenaude Dep. Tr.); CX0464-001 ¶ 1-2; CX0466;

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

Finally, Fanning participated in the creation of content on Jerk.com. He hired a data service company to host Jerk.com’s servers.¹⁹⁰ He hired and collaborated with programmers in Romania and India to write code for and publish Jerk.com.¹⁹¹ He reviewed Jerk.com content.¹⁹² 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.”¹⁹³ In 2009, he participated in the development of the first version of

CX0629-001 ¶ 2; CX0734; CX0735.

¹⁸⁵ CX0057 ¶ 3.

¹⁸⁶ Fanning’s Answer ¶ 2; Respondent John Fanning’s Responses to Complaint Counsel’s First Requests for Admission #4; CX0041-002-003 ¶ 6; CX0056-002; CX0092-5:18-19 (Fanning Dep. Tr.); CX0125-001; CX0239-001; CX0401-004 ¶ 11; CX0412; CX0417-002, 005; CX0427-002.

¹⁸⁷ CX0629-002 ¶ 6, CX0361.

¹⁸⁸ CX0668.

¹⁸⁹ CX0181-103:4-16 (Amram Dep. Tr.).

¹⁹⁰ CX0081-001, 003; CX0401-002-004 ¶¶ 6, 8, -005 ¶ 15.a-e; CX0402-001–023; CX0403-002; CX0468-001.

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

¹⁹² CX0666; CX0669; CX0130.

¹⁹³ CX0092-196:3-6 (Fanning Dep. Tr.).

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

During his deposition, Fanning testified that he was merely an "advisor" to Jerk, hired to advise the company by some other entity the identity of which he now claims he cannot remember.¹⁹⁹ Even if this self-serving testimony could be reconciled with the overwhelming weight of all the evidence to the contrary, as courts have noted, an individual defendant's title is not necessarily "determinative of, or even relevant to, whether he had the required control" to be held individually liable under the FTC Act. *See FTC v. Medicor, LLC*, 217 F. Supp. 2d 1048, 1056 (C.D. Cal. 2002) (rejecting the argument that the individual defendant should not be held liable because he was "merely a consultant" to the corporate defendant where he was involved in company staffing decisions and had authority to formulate and implement company policies and

¹⁹⁴ CX0122-001; CX0128-002; CX0139-004; CX0200-001.

¹⁹⁵ CX0476; CX0666-001; CX0667; CX0669; CX0438-69:22-25 (Patenaude Dep. Tr.).

¹⁹⁶ CX0074; CX0075; CX0130-001; CX0155-001; CX0401-004 ¶ 11; CX0403-007, -016, -023, -099.

¹⁹⁷ CX0640-001; CX0629 ¶ 11; CX0438-17:33:11-22 (Patenaude Dep. Tr.).

¹⁹⁸ CX0181-137:17-138:9 (Amram Dep. Tr.); CX0317-001; CX0438-42:23-43:10, 57:23-58:7 (Patenaude Dep. Tr.); CX0629 ¶ 11-13; CX0492-003.

procedures); *see also* *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1080-81 (C.D. Cal. 2012) (holding that individual defendant “participated in and had authority to control the website marketing of [the company] as a consultant”).

An overwhelming body of evidence, including Fanning’s admissions, conclusively establishes that Fanning both had authority to control the acts and practices at issue and participated in the deceptive conduct. Accordingly, Fanning should be held liable for Jerk’s deceptive conduct.

IV. JERK HAS ADMITTED THE MATERIAL FACTS ESTABLISHING ITS VIOLATION OF SECTION 5

In addition to the overwhelming evidence in this case, Jerk has conclusively admitted the material facts establishing its violation of Section 5 as alleged in the Complaint. Jerk failed to respond to Complaint Counsel’s Second Request for Admissions (“RFAs”),²⁰⁰ even after requesting and receiving a second chance to do so.²⁰¹ Thus, the matters in the RFAs are now “conclusively established.” 16 C.F.R. § 3.32(c); *see also* *United States v. 2204 Barbara Lane*, 960 F.2d 126, 129 (11th Cir. 1992) (defendants’ failure to respond to requests for admissions constituted conclusive admission on decisive matters); *Luick v. Graybar Electric Co.*, 473 F.2d 1360, 1362 (8th Cir. 1973) (holding that, under the Federal Rules of Civil Procedure, “[u]nanswered requests for admissions render the matter requested conclusively established for

¹⁹⁹ CX0092-53:15-20, 65:20-66:2 (Fanning Dep. Tr.).

²⁰⁰ CX0781.

²⁰¹ After Jerk’s initial failure to timely respond to these Request for Admissions by the 10-day deadline prescribed by Rule 3.32(b), the Commission permitted Jerk to seek relief from the ALJ for their failure. Comm’n Order of December 15, 2014. Jerk did so, and Chief Administrative Law Judge Chappell ordered Jerk to file its responses to the RFAs no later than January 13, 2015. ALJ Order of Jan. 9, 2015. Despite that order, Jerk did not timely respond to the RFAs,

the purpose of that suit”).

Specifically, Jerk has admitted, *inter alia*, that:

- Paragraphs 4 through 14 of the Complaint accurately describe Jerk’s acts and practices.
- Jerk has made deceptive representations in violation of Section 5(a) of the FTC Act as described in Paragraphs 15 through 19 of the Complaint.
- John Fanning has been a managing member of Jerk.
- John Fanning has had authority to control Jerk’s acts and practices.
- NetCapital.com, LLC has been the majority shareholder of Jerk.²⁰²

These admissions provide an independent means to hold Jerk liable for its violations of Section 5 of the FTC Act.

V. RESPONDENTS’ AFFIRMATIVE DEFENSES LACK MERIT

Respondents’ affirmative defenses are unavailing. In their respective Answers, Jerk has pleaded six affirmative defenses and Fanning has pleaded eight.²⁰³ All these defenses boil down to four categories: (1) that Complaint Counsel has failed to plead a viable case-in-chief; (2) that this proceeding conflicts with the First Amendment; (3) that this proceeding is moot; and (4) that this proceeding exceeds the Commission’s authority and that the requested relief is against the public interest. None of these defenses has any merit.

A. “Failure to state a claim” is not an affirmative defense.

Respondents assert that the Complaint “fails to state a claim upon which relief may be

thereby conclusively admitting to the matters in the RFAs. *See* 16 C.F.R. § 3.32(b).

²⁰² CX0781-002 (Admission Request Nos. 1-5).

²⁰³ Jerk’s Answer at 4-5; Fanning’s Answer at 4-5.

granted,”²⁰⁴ that the Complaint “fails to state a cognizable claim,”²⁰⁵ and that “[a]ny injury or harm to any individual consumer or to the public . . . was caused by the acts or omissions of a third-party over which Respondent had no authority or control.”²⁰⁶ Jerk also alleges that “[n]o representation alleged to be deceptive is a material representation, omission or practice likely to affect a consumer’s conduct,”²⁰⁷ while Fanning maintains that he “is not responsible or liable for the acts or omissions of any third-party,”²⁰⁸ “did not cause any harm to any consumer,” and “did not make any misrepresentation of material fact . . . upon which any individual consumer relied to his or her detriment.”²⁰⁹

All these assertions amount to a failure-to-state-a-claim defense, which is not a cognizable affirmative defense. *FTC v. North America Mkt’g and Assoc., LLC*, 2012 WL 5034967, at *2 (D. Ariz. Oct. 18, 2012). Moreover, these assertions lack merit. As discussed above, Respondents represented to consumers that (1) Jerk profiles were created by Jerk.com users and reflected those users’ views of the profiled individuals, and (2) consumers who subscribed by paying for a Jerk.com membership would receive additional benefits. The record also demonstrates that both these claims were material and false. Thus, Complaint Counsel have stated valid claims under Section 5 of the FTC Act, and have now presented overwhelming, incontrovertible evidence to support those claims. The record also establishes that Fanning participated in and had authority to control the deceptive conduct at issue. Respondents’ “failure

²⁰⁴ Jerk’s Answer at 4 (1st affirmative defense).

²⁰⁵ Fanning’s Answer at 4 (1st affirmative defense).

²⁰⁶ Jerk’s Answer at 4 (3rd affirmative defense); Fanning Answer at 4 (4th affirmative defense).

²⁰⁷ Jerk’s Answer at 5 (6th affirmative defense).

²⁰⁸ Fanning’s Answer at 4 (5th affirmative defense).

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.”²¹⁰

Fanning echoes this assertion, alleging that the Complaint and Notice Order “unlawfully impinge upon and violate the rights and privileges of Respondent established by and protected under the United States Constitution, including the First Amendment right to free speech.”²¹¹

The First Amendment does not protect Respondents’ false representations to consumers. To qualify for First Amendment protection, commercial speech must at least “concern lawful activity and not be misleading.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980); *see also In re R.M.J.*, 455 U.S. 191, 200 (1982). Here, the record demonstrates that the representations that form the predicate of the Complaint’s deception counts were commercial speech. The very purpose of Jerk.com was commercial—to generate revenue.²¹² That commercial purpose undergirds the representations at issue.²¹³ Respondents admit, for example, that Jerk earned revenue by placing third-party advertisements on Jerk.com,

²⁰⁹ Fanning’s Answer at 4 (6th affirmative defense).

²¹⁰ Jerk’s Answer at 5 (4th affirmative defense).

²¹¹ Fanning’s Answer at 5 (7th affirmative defense).

²¹² CX0046-047-050; CX0057-001 ¶ 4; CX0078; CX0079; CX0109-228:16-18; CX0112-002; CX0117-004-005; CX0119-001; CX0181-148:25-149:2, 150:3-8, 150:23-151:4, 152:12-20 (Amram Dep. Tr.); CX0205-002; CX0302 ¶ 7; CX0421-005; CX0631-004, -010.

²¹³ Respondents also admitted that their acts and practices alleged in the Complaint had been in or affecting commerce under the FTC Act. Fanning’s Answer ¶ 3; Jerk’s Answer ¶ 3.

by selling \$30 memberships, and by charging consumers a \$25 customer service fee.²¹⁴ 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.²¹⁵ Commercial speech such as the representations at issue does 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, Respondents’ user-generated and membership-benefits representations were false and thus not 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.²¹⁶ 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 Respondents did intend for Jerk.com to be a vehicle to critique Facebook, the act of criticizing a competitor’s product in the marketplace is commercial speech. *See Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1276 (10th Cir. 2000) (message that competitor was affiliated with Satan was false commercial speech). Respondents cannot “immunize false or misleading product information from government regulation simply by including references to public issues.” *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983).

²¹⁴ Fanning’s Answer ¶ 5; Jerk’s Answer ¶ 5.

²¹⁵ CX0317-001.

²¹⁶ 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 notice order as “moot” because, according to him, “the site at issue is no longer in operation” and he “does not currently have any right to or control over the domain for the site.”²¹⁷

That Respondents are not purportedly operating Jerk.com at the moment does not render this action moot. Voluntary cessation of allegedly illegal conduct does not render a case moot. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953); *see also In re McWane, Inc.*, 2014 FTC LEXIS 28, at *113 (Jan. 30, 2014) (“[T]he Commission may issue a cease and desist order even when a respondent no longer engages in the illegal conduct if there is sufficient danger of recurrence.”) (citations omitted); *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1237-38 (9th Cir. 1999). Otherwise, “the defendant is . . . free to return to his old ways.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs, Inc.*, 528 U.S. 167, 189 (2000) (citation omitted).

Here, Respondents appear to have stopped operating Jerk.com in 2013 because they had a dispute with Internet Domains, the company from which Respondents leased the Jerk.com domain.²¹⁸ Internet Domains then allegedly posted its own content on the site.²¹⁹ That, however, does not prevent Respondents from resuming the alleged conduct in the future. In fact, Jerk sued Internet Domains for breaching their domain lease agreement for Jerk.com, and recently won the case on default judgment. The very fact that Jerk decided to sue Internet Domains over Jerk.com indicates its intent to continue operating the site.

²¹⁷ Fanning’s Answer at 4 (3rd affirmative defense).

²¹⁸ CX0526; CX0527.

²¹⁹ CX0527-001.

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.²²⁰ 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.²²¹ Respondents thus can easily repost the 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 until 2013 at the earliest—well after the Commission issued a civil investigative demand to Jerk in July 2012. This fact further undercuts Respondents’ mootness defense, because where “discontinuance occurred ‘only after the Commission’s hand was on the Respondents’ shoulder,’” a “claim of abandonment is rarely sustainable as a defense.” *In re Int’l Assoc. of Conf. Interpreters*, 123 F.T.C. 465, 596 (1997) (quoting *In re Zale Corp.*, 78 F.T.C. 1195, 1240 (1971)).

D. The Commission is authorized to protect consumers from Respondents’ deceptive conduct.

Respondents’ final affirmative defense category accuses the Commission of “exceed[ing] and/or abus[ing] its statutory and regulatory authority,”²²² and asserts that “the requested relief is not in the public interest.”²²³

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

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

²²¹ CX0150-002; CX0181-217:18-218:2, 219:18-22, 220:13-16 (Amram Dep. Tr.); CX0231-001; CX0345-001; CX0438-76:2-11 (Patenaude Dep. Tr.); CX0663; CX0664-001; CX0665; CX0702-001.

²²² Jerk’s Answer at 4 (2d affirmative defense); Fanning’s Answer at 4 (2d affirmative defense).

practices under Section 5(a) of the FTC Act. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384-85 (1965); *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1152 (9th Cir. 2010); *Am. Fin. Servs. 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 “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 and time trying to remove their profiles from Jerk.com, including by paying Respondents for worthless memberships.²²⁴ Consumers suffered professionally from being profiled on Jerk.com when the site represented that the profiles were user-generated.²²⁵ Numerous consumers also feared for their safety because they were profiled on Jerk.com.²²⁶ Jerk’s deception has posed, and continues to pose, a serious threat to consumers. The proposed order is in the public’s interest.

²²³ Jerk Answer at 5 (5th affirmative defense).

²²⁴ CX0001-001 ¶ 2-3; CX0005-001 ¶ 5; CX0011-004 ¶ 17; CX0026-001-002 ¶ 6; CX0031-001-002 ¶ 5; CX0036-002 ¶ 9; CX0037-001-002 ¶ 7; CX0038-001 ¶ 4; CX0040-001 ¶ 6; CX0007-001 ¶ 5; CX0422-CX0425; CX0428.

²²⁵ CX0540-001; CX0541; CX0544-001; CX0450-10:23-11:4 (Consumer Dep. Tr.).

²²⁶ 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.²²⁷ The Commission has wide discretion in its choice of a remedy in addressing unlawful practices. *See, e.g., Jacob Seigel Co. v. FTC*, 327 U.S. 608, 611 (1946). Additionally, the proposed order should apply to Fanning because he 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 (citing *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. *Id.*

001; CX0598-001; CX0627.

²²⁷ The proposed order mirrors the notice order attached to the Complaint.

Here, the proposed order’s provisions are appropriate because they are clear and reasonably related to the unlawful practices at issue, and they implement appropriate injunctive provisions and fencing-in relief. Part I addresses the misrepresentations alleged in the Complaint, prohibiting Respondents from misrepresenting (A) the source of any personal information; (B) the benefits of joining any service; and (C) any other fact material to consumers. Part II contains fencing-in relief prohibiting Respondents from misrepresenting that they agree to comply with “any company’s user agreement, privacy policy, or contract provision, pertaining to the collection, use, or disclosure of consumers’ personal information.”²²⁸ This provision is important because Respondents’ use of the Facebook platform to create and publish Jerk.com’s profiles violated Facebook’s terms.²²⁹ Part III contains additional fencing-in relief, prohibiting Respondents from misrepresenting their privacy practices.²³⁰ Part IV prohibits Respondents from disclosing, using, selling, or benefitting from consumers’ personal

²²⁸ The Commission has imposed similar provisions in other orders. *See, e.g., FTC v. ReverseAuction.com, Inc.*, 2000 US Dist. LEXIS 20761 (D.D.C. Jan. 10, 2000) (consent order in matter where respondents violated eBay’s user agreement and privacy policy by harvesting eBay users’ email address for unauthorized purposes, including sending deceptive spam).

²²⁹ Respondents violated Facebook’s policies by (1) failing to obtain users’ explicit consent to collect and use certain Facebook user data, including photos (CX0094-005 ¶¶ 17-18; CX0097-003; CX0105-001 ¶ 3); (2) keeping Facebook user data for longer than permitted (CX0057-002 ¶ 5; CX0095-002; CX0096-003; CX0438-35:11-20, 35:24-36:16 (Patenaude Dep. Tr.); CX0629-004 ¶ 12); (3) failing to provide an easily accessible mechanism for consumers to request deletion of their Facebook data from Jerk.com (CX0004-001 ¶ 5; CX0006-001 ¶ 5-6; CX0007-001 ¶ 4; CX0027-001 ¶ 6-7; CX0028-001 ¶ 6; CX0048-077; CX0098-003; CX0403-025; CX0738-001); (4) failing to delete photos obtained from Facebook despite users’ requests (CX0006-001 ¶ 6; CX0011-001-003 ¶ 5-15; CX0027-001-002 ¶ 7-8; CX0037-001 ¶ 5; CX0043-001-002 ¶¶ 3, 5-6; CX0097-003; CX0528-001; CX0534); and (5) maintaining information obtained through Facebook after Jerk’s Facebook access was disabled (CX0094-005 ¶ 19; CX107-005).

²³⁰ The Commission has imposed similar provisions in other orders. *See, e.g., In re Foru™ Int’l Corp.*, 2014 FTC LEXIS 119, *14 (May 8, 2014) (consent order prohibiting company from misrepresenting “the extent to which it maintains and protects the privacy, confidentiality,

information obtained in connection with Respondents' operation of Jerk.²³¹ 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.²³² Parts V through IX contain reporting and compliance provisions common to many Commission orders.²³³

The proposed order is reasonably related to the unlawful 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.²³⁴

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

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

²³¹ The Commission has included similar provisions in other orders. *See, e.g., FTC v. ReverseAuction.com, Inc.*, 2000 US Dist. LEXIS 20761, at *9-10 (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).

²³² 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).

²³³ *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 that 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 with the terms of injunction itself.”) (citation omitted).

²³⁴ CX0150-002; CX0181-217:18-218:2, -219:18-22, 220:13-16 (Amram Dep. Tr.); CX0231-001; CX0281; CX0345-001; CX0411-009; CX0438-76:2-11 (Patenaude Dep. Tr.); CX0629-001-002 ¶ 5; CX0634-001; CX0663; CX0664-001; CX0702-001.

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.²³⁵ 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."²³⁶ Under the Proposed Order, Fanning will remain free to engage in any business venture so long as he abstains from making specified misrepresentations (Parts I–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

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

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

information). By preventing Respondents from re-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. *Cf. 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 customer information and requiring its destruction).

VII. CONCLUSION

The evidence on the record and the testimony to be 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 those 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. The 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

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