

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



ORIGINAL

_____)
In the matter of:)
)
Jerk, LLC, a limited liability company,) DOCKET NO. 9361
)
Also d/b/a JERK.COM, and)
) PUBLIC
John Fanning,)
Individually and as a member of)
Jerk, LLC,)
)
Respondents.)
_____)

TRIAL BRIEF OF RESPONDENT JOHN FANNING

I. INTRODUCTION

Respondent John Fanning (“Fanning”) is not personally liable for any alleged deceptive conduct by Respondent Jerk, LLC in violation of Section 5 of the Federal Trade Commission Act (the “Act”). The statements contained on the jerk.com website relied upon by Complaint Counsel for the deception claims are not false representations that possibly misled reasonable consumers. Rather, the statements are actually part of the standard terms and conditions of use of the jerk.com site. (CX0273, attached hereto at **Tab A**). The terms and conditions posted on the jerk.com site are no different than those appearing on virtually every website that hosts content. Complaint Counsel takes the words out of context. The standard terms and conditions of use do not represent that all content on the jerk.com site is generated by users, whatever the term “user” may mean. In any event, the inquiry is immaterial. Jerk.com had an absolute right to gather and publish information publicly available. Complaint Counsel stretches to conjure a

Section 5 deception claim because, in reality, Complaint Counsel is offended by the content on the jerk.com site. Notwithstanding the personal tastes and sensibilities of Complaint Counsel, the First Amendment to the Constitution bars such governmental intrusion into freedom of speech and expression. Complaint Counsel's censorship masked as an exercise of regulatory authority is a blatant, unlawful abuse of power.

Complaint Counsel seeks to admit at trial hundreds of irrelevant exhibits and to call 56 witnesses to wear down Mr. Fanning by piling on a host of immaterial allegations to portray Mr. Fanning as a rogue and a scoundrel to convince this Court to intervene. Complaint Counsel expects this Court merely to rubberstamp the Complaint. Mr. Fanning believes otherwise. Mr. Fanning anticipates that this Court will examine the evidence fairly and objectively, and will not be persuaded by Complaint Counsel's personal attacks, innuendo, and speculation. Mr. Fanning is confident that this Court will hold Complaint Counsel to its burden of proof. When that happens, Complaint Counsel's claims of deception will evaporate, and the Complaint will be exposed as purely punitive.

II. FACTUAL SUMMARY

Jerk, LLC was launched in approximately 2009 to develop an alternate social media and reputational website. Fanning served as an advisor to Jerk, LLC through a company called NetCapital.com, LLC. NetCapital.com, LLC is a private equity/venture capital firm that provides advisory services to technology start-ups. NetCapital.com, LLC did not own Jerk, LLC, and Fanning did not own Jerk, LLC. Fanning's authority was limited, and at all times Fanning acted on behalf of NetCapital.com, LLC, never in his individual capacity. Fanning did not write any software code for jerk.com, and did not place any consumer content on jerk.com.

Jerk, LLC operated the jerk.com site through a lease with an option to purchase agreement entered into with a company called Internet Domains in February 2011. In or about May 2013, Internet Domains and its owner Louis Lardass terminated the lease agreement and took control of the jerk.com domain. Information posted on jerk.com while Internet Domains and Louis Lardass controlled the site is highly suspect. In addition, the jerk.com site was hacked on at least one occasion. Also, the FTC during its investigation reportedly interfered with the proper operation of the site. Jerk, LLC terminated involvement with jerk.com, and profiles previously posted on jerk.com no longer existed.

While it operated the site, Jerk, LLC maintained a lawyer in Phoenix, Arizona to accept service of complaints about jerk.com. Upon receipt of a valid complaint, Jerk, LLC took proper action including to remove content from the jerk.com site. Jerk, LLC also consistently complied with the FTC's demands to take corrective action despite denying any wrongful conduct.

Facebook was threatened by the innovative jerk.com site, and issued complaints falsely alleging that Jerk, LLC was violating policies and procedures concerning use of Facebook. Neither Jerk, LLC nor Fanning violated any valid agreement with Facebook with respect to jerk.com. Also, nothing prohibited the publication on jerk.com information made accessible to the public by Facebook through the internet. In fact, it is undisputed that during the relevant time period, the Facebook directory containing user personal information, postings, and photographs was readily available through the internet without anyone having to agree to Facebook's terms of service.

In 2009, the FTC filed an enforcement action against Facebook because Facebook deceived the consuming public by representing that consumers could keep their information posted on Facebook private, and then publicly disseminating the information. Facebook treated

broad categories and data as “publicly available information” such as user names, profiles, photos, lists of friends, gender, geographic regions, and networks to which users belonged. Facebook disclosed “publicly available information” to search engines, to internet users whether or not they used Facebook, and other third-parties. Facebook eventually entered into a consent order with FTC.

In 2012, Complaint Counsel commenced an investigation of jerk.com with respect to content on the jerk.com site. The investigation was driven by angry consumers who allegedly learned that personal information they had posted on Facebook, and was led to believe was private, appeared on jerk.com. Complaint Counsel served broad Civil Investigative Demands on Jerk, LLC and numerous third-parties. The FTC became upset when Fanning exercised his rights and refused to cooperate. Thereafter, Complaint Counsel embarked on a mission to discredit and destroy Fanning, and to shut down jerk.com to censor the website content that was unsavory in Complaint Counsel’s estimation.

III. LAW AND ARGUMENT

A. Complaint Counsel Fails to State a Legal Claim For Deception

Complaint Counsel fails to meet its substantial burden of proving every essential element of each alleged violation of law. Section 5 of the Act expressly provides, “[t]he commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.” FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 235 (1972), quoting 15 U.S.C. § 45(a)(6). The elements of a deceptive act or practice are: (1) a representation that is (2) likely to mislead the consumer acting reasonably in the circumstances that is (3) material. FTC Policy Statement on Deception, appended to In re Cliffdale Assocs., Inc., 103 F.T.C. 1, 10, appendix at pp. 175-84

(1984). Complaint Counsel either ignores or improperly attempts to expand the FTC's deception jurisdiction specifically granted by the Act.¹

1. There is no material misrepresentation about Jerk.com content

The heart of a “representation” giving rise to Section 5 liability is a “claim” communicated to the consuming public. Cliffdale Assocs., 103 F.T.C. at 176. See also POM Wonderful, LLC, 2013 Lexis 6, at *20 (FTC Jan. 10, 2013) (actionable representation is one that conveys a particular interpretation to a reasonable consumer); Kraft, Inc. v. FTC, 970 F.2d 311, 322 (7th Cir. 1992) (FTC authority is limited to (1) express claims; (2) implied claims where there is evidence that the seller intended to make the claim; and (3) claims that significantly involve health, safety, or other areas with which reasonable consumers would be concerned). A representation conveys “a claim if consumers, acting reasonably under the circumstances, would interpret the advertisement to contain that message.” POM Wonderful, at *20. The Court in FTC v. Direct Marketing Concepts, Inc., 569 F.Supp.2d 285, 298-299 (D.Mass. 2008) further outlined the governing law, as follows:

Generally, claims can be divided into two categories-establishment claims and non-establishment claims. Establishment claims are those that contain “statements regarding the amount of support the advertiser has for the product claim.” Policy Statement on Advertising Substantiation. They are in effect statements “that scientific tests establish that a product works.” Removatron, 884 F.2d at 1492 n. 3. Common examples include statements such as “tests prove,” “doctors recommend,” or “studies show.” Policy Statement on Advertising Substantiation; see also Thompson Med. Co. v. Fed. Trade Comm'n, 791 F.2d 189, 194 (D.C.Cir. 1986); Spalding Sports Worldwide, Inc. v. Wilson Sporting Goods Co., 198 F.Supp.2d 59, 67 (D.Mass. 2002); Gillette Co. v. Norelco Consumer Prods. Co., 946 F.Supp. 115, 121 (D.Mass. 1996) (“An establishment claim is one that says, in substance, that ‘tests or studies prove’ a certain fact.”). In the case of establishment claims, the advertiser must be able to demonstrate that it has at least the advertised level of substantiation.

¹ Complaint Counsel did not include in the Complaint any claim for “unfairness” under Section 5 because of the more stringent standard that applies in unfairness cases, including the required showing of substantial injury to consumers. See 15 U.S.C. § 45(n).

In contrast, for non-establishment claims, what constitutes sufficient substantiation may depend on multiple factors, such as the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable. Removatron, 884 F.2d at 1492 n. 3; QT, 448 F.Supp.2d at 959 (citing Policy Statement Regarding Advertising Substantiation). For health-related efficacy and safety claims, the FTC has commonly insisted on “competent and reliable scientific evidence.” See, e.g., Removatron, 884 F.2d at 1498 (reviewing Commission Order that required claims to be supported by “competent and reliable scientific evidence”); Sterling Drug, Inc. v. Fed. Trade Comm'n, 741 F.2d 1146, 1156-57 (9th Cir. 1984) (same).

Complaint Counsel cites as the lynchpin of Count I as follows: “Respondents represented that content on Jerk, including names, photographs, and other content, was created by Jerk.com users and reflected those users’ views of the profiled individuals.” Complaint Counsel relies on and allegedly quotes language previously featured on the jerk.com homepage at the “About Us” and “Welcome to Jerk” tabs. Complaint Counsel far exceeds the legal bounds of a “claim” by parsing and characterizing the language on the homepage. In reality, the language cited by Complaint Counsel is part of the boilerplate legal terms and conditions of the jerk.com site posted to advise of the restrictions on use and limitation of liability. Jerk had the lawful right to disclaim liability for information provided by other sources. See 47 U.S.C. 230(c)(1). It would defy common sense and public policy if notification of statutory rights and limitation of liability were found to constitute a deceptive trade practice. Similarly, any language on the homepage construed as promoting the jerk.com site is mere puffery that does not trigger an actionable claim. “In the FTC context, we have recognized puffery in advertising to be ‘claims [which] are either vague or highly subjective.’” Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F. 2d 242, 246 (9th Cir. 1990), quoting Sterling Drug, Inc. v. Federal Trade Commission, 741 F.2d 1146, 1150 (9th Cir. 1984), cert. denied, 470 U.S. 1084 (1985).

Complaint Counsel also ignores the paragraph titled “Online Content” that expressly states, “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 and should not necessarily be relied upon,” and goes on to advise that “Jerk LLC does not guarantee the accuracy, completeness, or usefulness of any information on jerk.com and neither adopts nor endorses nor is responsible for the accuracy or reliability of any opinion, advice or statement made.” The website makes crystal clear that jerk.com provides a forum and platform for posting information “through jerk.com” from various sources. This is consistent with another prominent statement contained on the website: “No one's profile is ever removed, *because Jerk is based on searching free open Internet searching databases and it's not possible to remove things from the Internet.*” Complaint Counsel fails to point to any specific, affirmative statements that were made to advertise or promote jerk.com. Consequently, as a matter of law, Complaint Counsel has no legal basis to invoke the FTC’s deception jurisdiction.

Moreover, 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. Kraft, 970 F.2d at 322, quoting Cliffdale Assocs., 103 F.T.C. at 165 (claim considered material if it “involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product.”). Here, Complaint Counsel speculates that any reasonable consumer would have read the homepage language advising on limitations of liability, prohibited practices, and other technical information as concerning the purpose, safety, efficacy, or cost of the product or service. Of course, few users of any website pay close attention, or any attention, to the terms and conditions, which are commonly viewed as boilerplate legalese. See, e.g., F.T.C. v. Commerce Planet, Inc., 878 F. Supp. 2d 1048, 1065

(C.D. Cal. 2012) (“[t]he information about the continuity plan ... is buried with other densely packed information and legalese, which makes it unlikely that the average consumer will wade through the material and understand that she is signing up for a negative option plan.”).

Nonetheless, Complaint Counsel’s leap is unsubstantiated. The mere fact that consumers who viewed content on the site may have believed that it was posted by a friend or family member or could not understand how the information appeared on the site fails to establish inducement.

Complaint Counsel boot-straps an alleged violation of Facebook terms and conditions as a basis for a Section 5 action. (Complaint, ¶¶ 10-11). Complaint Counsel only speculates that profiles appeared on jerk.com as a result of a violation of Facebook policies. Nonetheless, Complaint Counsel’s interpretation of Facebook’s terms of use are of no consequence. The mere fact that individuals were upset that information they had posted on Facebook, and believed was private, appeared on jerk.com fails to prove actionable marketplace deception. Any claim founded on Facebook terms of use unlawfully expands Section 5 liability.

In contrast, the prior enforcement action against Facebook is highly probative. The FTC charged Facebook with deception by representing to consumers that information posted in individual profiles was private when Facebook actually made information available through the internet. The FTC specifically identified information that was publicly available, and not private contrary to Facebook’s representations, to include user names, photographs, lists of friends, pages users are fans of, and other personal information. This is the exact information that Complaint Counsel now contends was accessed improperly and posted on jerk.com. Jerk.com was not banned by Section 5 of the Act from re-publishing or hosting content that the FTC knows was already placed in the public domain by Facebook. Complaint Counsel’s position is,

at best, frivolous, and truly underscores the intent to drag Respondents through a punitive and abusive process.

Complaint Counsel also fails to provide admissible evidence to prove a Section 5 deception claim based on statements about the benefits of a paid membership, as generally asserted in Count II of the Complaint. Count II is a total throw-in. Fanning expects the evidence to show that there was a legitimate process for rectifying complaints and removing profiles. “Impressions” of FTC investigators do not suffice to prove deception.²

2. Complaint Counsel cannot lawfully regulate the content of free public expression of thoughts, opinions, and ideas

This case is being driven by the substantive content of individual profiles on jerk.com, not “claims” as required by the Act. This alone mandates a finding in favor of Fanning. Complaint Counsel is offended by or uncomfortable with the actual content of individual profiles appearing on the jerk.com site, and the alleged practice of jerk.com posting publicly available information derived from the internet. Complaint Counsel plans to spend substantial time at trial talking about content on the jerk.com site. Control of content far exceeds the Commission’s regulatory authority.

Jerk.com provided a platform to exchange opinions in the free-flow of human relationships at the essence of social media. The FTC has no power to determine what is proper content on any website. Complaint Counsel would seek unlawfully to restrain the flow of information and public dialogue, which may involve posting a statement on the internet that someone is or acted like a jerk, and then receiving broader feedback on the opinions. Complaint

² Fanning has moved *in limine* to exclude from trial various alleged inadmissible information Complaint Counsel intends to introduce to prove a deception claim, including statements involving investors, interns, programmers, web designers, and other consultants never conveyed to or involving consumers. All such information must be barred including because no reasonable consumer could have acted on any statement that was not publicly communicated.

Counsel's disagreement with the views and opinions of citizens, no matter the source, does not permit repression through government regulation. Complaint Counsel is not the arbiter of proper conversation between and among users, and cannot prevent the flow of information in society under the pretext of protecting against imagined fear of public harm. See Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 96 (1977) (striking ordinance banning "for sale" signs on residential property enacted for the goal of promoting stable, racially integrated housing, where Court found that the town council unlawfully "acted to prevent its residents from obtaining certain information" and "sought to restrict the free flow of data" out of fear that homeowners would leave town). Complaint Counsel has no right to regulate, control, or halt the exchange and flow of ideas and information that are at the core of First Amendment freedoms. See, e.g., Kleindienst v. Mandel, 408 U.S. 753, 762-753 (1972) (First Amendment includes the right to "receive information and ideas" and freedom of speech "necessarily protects the right to receive."); Central Hudson, 447 U.S. at 575 (Blackmun, J., concurring) ("If the First Amendment guarantee means anything, it means that, absent a clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public."); Linmark Assocs., Inc. v. Louisiana, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government.")

Jerk.com also collaterally served as a public referendum on Facebook. The proclamations of privacy made by Facebook to increase its user base, and its revenue, were open to criticism. The FTC's enforcement action against Facebook was predicated on the false promise of privacy. Public exposure serves the public interest. As Justice Brandeis once forcefully and artfully opined:

If there be time to expose through discussion the falsehood and falacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

To avoid the First Amendment, Complaint Counsel incorrectly attempts to portray the conduct as commercial speech subject to restraint. In the first instance, the speech and debate actually championed and fostered by the jerk.com site does not solely involve economic interests. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 561 (1980) (commercial speech is defined as “expression related solely to the economic interests of the speaker and its audience.”). Nonetheless, Complaint Counsel ignores that commercial speech is likewise protected from government repression. Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762-764 (1976) (commercial speech protected by First Amendment because society has a strong interest “in the free flow of commercial information” critical to a free market economy and “consumer’s interest in the free flow of commercial information” may be “as keen, if not keener by far, than his interest in the day’s most urgent political debate.”). The central First Amendment tenet of generating marketplace discussion reigns supreme even where commercial speech is involved.

3. Complaint Counsel’s theory of liability unlawfully expands the FTC’s regulatory reach contrary to its own prior rulings

The FTC’s observations in the case of FTC v. ReverseAuction.com, Inc., 2000 US Dist. LEXIS 20761 (D.D.C. 2000) bear on Complaint Counsel’s unlawful expansion of regulatory authority exercised in this case.³ The FTC asserted that ReverseAuction, a competing auction website, willfully misled eBay by registering as an eBay user and representing that it would comply with the terms and conditions of eBay’s User Agreement, including the agreement to

³ Available at http://www.ftc.gov/sites/default/files/documents/cases/2000/01/www.ftc_.gov-reversecmp.htm

refrain from using any personal identifying information of any eBay user obtained through the site for sending unsolicited commercial e-mails. The findings of the Commissioners in approving the Complaint are instructive. Commissioners Swindle and Leary, concurring and dissenting in part, stated as follows:

ReverseAuction represented to eBay that it would not use the information it obtained about other members to send unsolicited commercial e-mail. ReverseAuction, however, sent unsolicited e-mails promoting its auction site to eBay members using e-mail addresses harvested from eBay's site. ReverseAuction thereby deceived eBay directly and, in doing so, also misled other members of the eBay community who believed that all participants in the eBay marketplace would abide by the same privacy rules.

We recognize that the Commission's decision to proceed against the deception alleged in Count One could be construed as placing the Commission in the position of enforcing eBay's privacy policy. Nevertheless, we want to emphasize that our decision to challenge ReverseAuction's deception is an effort to buttress, not supplant or detract from, initiatives of private parties (like eBay) who develop and implement their own privacy arrangements. We further believe that it is in the public interest for the Commission to pursue the deception allegation in Count One because such deceptive conduct undermines consumer confidence in the nascent electronic marketplace at a critical point in time and may thereby inhibit its development.

See Statement of Commissioners Orson Swindle and Thomas B. Leary Concurring in Part and Dissenting in Part, in ReverseAuction.com, Inc., File No. 0023046.⁴

These observations, analyses, and conclusions underscore the unlawful expansion of regulatory authority practiced by Complaint Counsel in this case. The interests underlying the novel decision reached in ReverseAuction, which guided the FTC's approval of expanded Section 5 authority in that case, are not present here. The Commissioners in ReverseAuction justified enforcement action to protect the emerging electronic marketplace that existed at that specific time in 2000. The current electronic marketplace, including the social media space, cannot possibly be described as "nascent" requiring protection. Commissioner Swindle

⁴ http://www.ftc.gov/sites/default/files/documents/cases/2000/01/www.ftc_gov-reversesl.htm

emphasized that “our decision to challenge ReverseAuction's deception is an effort to buttress, not supplant or detract from, initiatives of private parties (like eBay) who develop and implement their own privacy arrangements.” Facebook did not develop and implement “privacy arrangements” aimed at protecting the public from disclosure, according to the Commission’s own prior enforcement action. Complaint Counsel provides no legitimate basis for further expanding Section 5 liability.

B. Fanning Is Not Individually Liable

Complaint Counsel likewise unlawfully seeks to expand individual liability under Section 5 of the Act. The concept of “control” over any entity or organization for the purpose of imposing Section 5 liability is grounded in traditional notions of common law agency, which depends on the authority granted to the agent by the principal. See White’s Farm Dairy, Inc. v. DeLaval Separator Company, 433 F.2d 63, 66-67 (1st Cir. 1970) (citations omitted). Here, Fanning did not have express authority to control Jerk, LLC or jerk.com. Instead, Fanning had specific limited authority as an agent of NetCapital.com, LLC. Fanning, individually, took no action with respect to Jerk, LLC. The mere fact that Fanning signed documents or solicited investments has no bearing on personal liability under Section 5, because Complaint Counsel cannot alter Fanning’s actual authority granted. Complaint Counsel’s leap that Fanning is personally liable eviscerates all notions of agency and corporate existence.

Moreover, the true focus of this case is control over website content, and not control over Jerk, LLC as an entity. The stringent test for individual liability requires proof that Fanning “participated directly in the practices or acts or had authority to control them.” FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 573 (7th Cir. 1989). Fanning did not control site content. Fanning was not a developer for jerk.com. Louis Lardass of Internet Domains owned the

Jerk.com domain, and foreign developers who were reportedly supported by various interns, college students, and independent contractors maintained the site. Complaint Counsel is not entitled to the illogical inference that Fanning controlled Jerk, LLC and therefore Fanning must have controlled the entire website.⁵

C. The Remedies Sought by Complaint Counsel are Unlawful⁶

Any injunctive relief entered under the Act must bear a reasonable relation to the unlawful practices found to have occurred. Litton Industries, Inc. v. FTC, 676 F.2d 364, 370 (9th Cir. 1982), citing FTC v. Colgate-Palmolive Co., 380 U.S. 374, 394-95 (1965). Yet, Complaint Counsel abuses the process by seeking to punish Fanning with a *pro forma* demand to restrain for twenty (20) or even ten (10) years Fanning's involvement with each and every actual or potential business venture involving the internet, public information, or personal data without exception. Such request fails to consider the seriousness and deliberateness of the violation, the ease in which the violative claim may be transferred to other products, and a history of prior adjudicated violations. See FTC v. John Beck Amazing Profits, 888 F.Supp.2d 1006, 1012 (C.D. Cal. 2012) (citations omitted). The Proposed Order lacks all specificity. Colgate-Palmolive Co., 380 U.S. at 393 (FTC orders should be "as specific as the circumstances will permit"); FTC v. Henry Broch & Co., 368 U.S. 360, 367-68 (1962) (FTC orders must be sufficiently precise to "avoid raising serious questions as to their meaning and application"). Even so-called "fencing in" provisions must bear a "reasonable relation to the unlawful practices found to exist." Colgate-Palmolive Co., 380 U.S. at 394-95 (footnote omitted). See also Standard Oil of California v. FTC, 577 F.2d 653, 663 (9th Cir. 1978) (court rejected order that applied to all of

⁵ Fanning has moved to strike certain evidence that Complaint Counsel asserts bears on the issue of control.

⁶ Fanning reserves all rights to argue further concerning remedies in the event Complaint Counsel prevails.

respondent's products, not just those involved in the violation, absent circumstances justifying broad coverage, such as a long history of violations).

The most chilling aspect of the Proposed Order is the prior restraint of free speech, including restriction on use and dissemination of information gathered from public sources. Imposing any prospective restrictions on Fanning's speech is an extreme abrogation of Fanning's First Amendment rights and privileges. See Beneficial Corp. v. FTC, 542 F.2d 611, 619-620 (3rd Cir. 1976), cert. denied, 430 U.S. 983 (1977) ("The Commission, like any governmental agency, must start from the premise that any prior restraint is suspect, and that a remedy, even for deceptive advertising, can go no further than is necessary for the elimination of the deception."). Complaint Counsel's Proposed Order as drafted would even unlawfully regulate or prohibit Fanning from making or publishing statements that are true. See Cotherman v. FTC, 417 F.2d 587, 595-596 (5th Cir. 1969). The relief requested must be rejected in its entirety.

IV. CONCLUSION

For the foregoing reasons, Respondent John Fanning requests this Court to find in his favor on all claims asserted by Complaint Counsel in its Complaint, to dismiss all claims, to deny the relief requested, and to grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

JOHN FANNING,

By his attorneys,

/s/ Peter F. Carr, II

Peter F. Carr, II

ECKERT, SEAMANS, CHERIN & MELLOTT, LLC

Two International Place, 16th Floor

Boston, MA 02110

617.342.6800

617.342.6899 (FAX)

Email: pcarr@eckertseamans.com

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2015, I caused a true and accurate copy of the foregoing to be served electronically through the FTC's e-filing system and I caused a true and accurate copy of the foregoing to be served as follows:

One electronic copy to the Office of the Secretary:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room H-159
Washington, DC 20580
Email: secretary@ftc.gov

One electronic copy to the Office of the Administrative Law Judge:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Avenue, N.E., Room H-110
Washington, DC 20580
Email: oalj@ftc.gov

One electronic copy to the Office of the Counsel for the Federal Trade Commission:

Sarah Schroeder
Federal Trade Commission
901 Market Street, Suite 670
San Francisco, CA 94103
Email: sschroeder@ftc.gov

One electronic copy via email to Counsel for Jerk, LLC:

Alexandria B. Lynn
48 Dartmouth Street
Watertown, MA 02472
Email: ab.lynn@outlook.com

/s/ Peter F. Carr, II

Peter F. Carr, II

Dated: March 13, 2015

TAB A

About Us: jerk.com and Jerk LLC

1. jerk.com Membership Terms & Conditions

To use this service, you must be at least 14 years old. jerk.com is an online web application created to help keep consumers informed. Jerk LLC is operated by Jerk LLC. This is a legal agreement ("Agreement") between you and Jerk LLC. Please read the Agreement carefully before registering for jerk.com. By using jerk.com, you agree to be bound by the terms and conditions of this Agreement (the "Terms"). If you do not agree to the Terms, you are not permitted to use jerk.com. The Terms are subject to change by Jerk LLC, at any time, without notice, effective upon posting of a link to same on our website. Persons who are under 14 years old may not use jerk.com. By using jerk.com, you represent and warrant that you are at least 14 years old. Jerk LLC reserves the right to immediately suspend or terminate your registration with jerk.com, without notice, upon any breach of this Agreement by you which is brought to Jerk LLC's attention. Your registration with jerk.com is for your sole, personal use. You may not authorize others to use your user identification and password, and you may not assign or otherwise transfer your account to any other person or entity.

2. Online Conduct

You agree that: You are solely responsible for the content or information you publish or display (hereinafter, "post") on jerk.com. You will NOT post on jerk.com any defamatory, inaccurate, abusive, obscene, profane, offensive, threatening, harassing, racially offensive, or illegal material, or any material that infringes or violates another party's rights (including, but not limited to, intellectual property rights, and rights of privacy and publicity). You will use jerk.com in a manner consistent with any and all applicable laws and regulations. By posting information on jerk.com, you warrant and represent that the information is truthful and accurate. You will not post, distribute or reproduce in any way any copyrighted material, trademarks, or other proprietary information without obtaining the prior written consent of the owner of such proprietary rights and except as otherwise permitted by law.

3. Indemnity

You will defend, indemnify, and hold harmless Jerk LLC, its officers, directors, employees, agents and third parties, for any losses, costs, liabilities and expenses (including reasonable attorneys' fees) relating to or arising out of your use of jerk.com, including, but not limited to, any breach by you of the terms of this Agreement.

4. Online Content

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, and should not necessarily be relied upon. Such authors are solely responsible for the accuracy of such content. Jerk LLC does not guarantee the accuracy, completeness, or usefulness of any information on jerk.com and neither adopts nor endorses nor is responsible for the accuracy or reliability of any opinion, advice or statement made. Under no circumstances will Jerk LLC be responsible for any loss or damage resulting from anyone's reliance on information or other content posted on jerk.com.

5. Removal of Information

By posting information on jerk.com, you understand and agree that the material will not be removed even at your request. You shall remain solely responsible for the content of your postings on jerk.com. While we do not and cannot review every message posted by users of the Service, and are not responsible for any content of these messages, we reserve the right, but are not obligated, to delete or remove profanity, obscenities, threats of physical violence or damage to property, and private financial information such as social security numbers and credit card information.

6. Proprietary Rights/Grant of Exclusive Rights

By posting information or content to any public area of Jerk LLC, you automatically grant, and you represent and warrant that you have the right to grant, to Jerk LLC an irrevocable, perpetual, fully-paid, worldwide exclusive license to use, copy, perform, display and distribute such information and content and to prepare derivative works of, or incorporate into other works, such information and content, and to grant and authorize sublicenses of the foregoing.

7. Information Supplied by You

Except as provided otherwise in its privacy policy, Jerk LLC will not keep confidential information supplied by you to Jerk LLC, and shall use or disclose such information for the purposes for which such information was collected, or as required by law. Whereas you are legally entitled to publish your comments anonymously, at the discretion of Jerk LLC, the personally identifying information of any user may lose any confidential protections.

8. Disclaimer of Warranty

Jerk LLC provides jerk.com on an "as is" basis and grants no warranties of any kind, express, implied, statutory, in connection with jerk.com or in connection with any communication with Jerk LLC or its representatives, or otherwise with respect to jerk.com. Jerk LLC specifically disclaims any implied warranties of merchantability, fitness for a particular purpose, or non-infringement. Jerk LLC does not warrant that jerk.com's connection to the Internet will be secure, uninterrupted, always available, or error-free, or will meet your requirements, or that any defects in jerk.com will be corrected.

9. Limitation of Liability

In no event will Jerk LLC be liable (i) to you for any incidental, consequential, or indirect damages arising out of the use of or inability to use jerk.com, even if Jerk LLC or its agents or representatives know or have been advised of the possibility of such damages or; (ii) to any person other than you. In addition, Jerk LLC disclaims all liability, regardless of the form of action, for the acts or omissions of other members or users (including, but not limited to, unauthorized users, or "hackers") of jerk.com.

10. State by State Variations

Certain jurisdictions limit the applicability of warranty disclaimers and limitations of liability so the above disclaimers of warranty and limitations of liability may not apply to you.

11. General Provisions

You agree that Arizona law (regardless of conflicts of law principles) shall govern this Agreement, that any dispute arising out of or relating to this Agreement shall be subject to the exclusive venue of the federal and state courts in the State of Arizona, and that you submit to the exclusive jurisdiction of the federal and state courts in the State of Arizona in connection with jerk.com or this Agreement. The failure of Jerk LLC to exercise or enforce any right or provision of the Terms of Service shall not constitute a waiver of such right or provision. The failure of Jerk LLC or You to exercise in any respect any right provided for herein shall not be deemed a waiver of any further rights hereunder. This Agreement, accepted upon registering for jerk.com, contains the entire agreement between you and Jerk LLC regarding the use of jerk.com. This Agreement may only be amended upon notice by Jerk LLC to you, or by a writing signed by you and an authorized official of Jerk LLC. Unless otherwise explicitly stated, the Terms will survive termination of your registration with jerk.com. If any provision of this Agreement is held invalid, the remainder of this Agreement shall continue in full force and effect.

12. Copyright Policy/Termination of User Privileges for Infringement and Contact Information for Suspected Copyright Infringement/DMCA Notices

We will terminate the privileges of any user who uses jerk.com to unlawfully transmit copyrighted material without a license, express consent, valid defense or fair use exemption to do so. In particular, users who submit user content to jerk.com, whether articles, images, stories, software or other copyrightable material must ensure that the content they upload does not infringe the copyrights of third parties. If you believe that your copyright has been infringed through the use of jerk.com, please contact our Customer Service.

Notice of Electronic Service for Public Filings

I hereby certify that on March 13, 2015, I filed via hand a paper original and electronic copy of the foregoing Trial Brief of Respondent John Fanning, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on March 13, 2015, I filed via E-Service of the foregoing Trial Brief of Respondent John Fanning, with:

Sarah Schroeder
Attorney
Federal Trade Commission
sschroeder@ftc.gov
Complaint

Yan Fang
Attorney
Federal Trade Commission
yfang@ftc.gov
Complaint

Kerry O'Brien
Attorney
Federal Trade Commission
kobrien@ftc.gov
Complaint

Maria Speth
Attorney
Jaburg & Wilk, P.C.
mcs@jaburgwilk.com
Respondent

Boris Yankilovich
Attorney
Federal Trade Commission
byankilovich@ftc.gov
Complaint

Kenneth H. Abbe
Attorney
Federal Trade Commission
kabbe@ftc.gov
Complaint

I hereby certify that on March 13, 2015, I filed via other means, as provided in 4.4(b) of the foregoing Trial Brief of Respondent John Fanning, with:

Alexandria Lynn
Alexandria B. Lynn, Esq.
alex.lynn@codelaw.com

Peter Carr
Attorney
Eckert Seamans Cherin & Mellott, LLC
pcarr@ecertseamans.com
Respondent

Peter Carr
Attorney