

UNITED STATES OF AMERICA **Federal Trade Commission**

WASHINGTON, D.C. 20580

Concurring Statement of Commissioner Andrew N. Ferguson In the Matter of Sitejabber Matter No. 2323060

November 6, 2024

Today, the Commission issues an administrative complaint and accepts a proposed consent agreement with Sitejabber. Sitejabber provided its clients, e-commerce stores, with the ability to collect instant shopping-experience and product reviews from customers on order confirmation screens—immediately after placing an order but before the customer could have received or used the products. For posting these reviews and average ratings on its clients' profile pages on Sitejabber.com, and misrepresenting that the reviews were from customers who had actually received and used the products, the complaint accuses Sitejabber of deceiving consumers in violation of Section 5 of the FTC Act.² For giving its clients the ability to embed those same product ratings on their own websites, the complaint accuses Sitejabber of a further Section 5 violation for furnishing its clients with the means and instrumentalities to deceive consumers. I concur in both counts.

This case presents some of the same issues presented in the Commission's recent action against the artificial-intelligence platform Rytr, from which I dissented.³ The Commission raises the same means-and-instrumentalities theory of Section 5 liability that it deployed against Rytr for offering an AI-powered consumer review generator. Sitejabber's alleged business practices, however, are very different from Rytr's. Although someone could have used Rytr's tool to deceive consumers, the tool also had substantial lawful uses. Sitejabber's instant product reviews and the widgets by which its clients displayed them on their own websites, however, served no purpose other than to deceive consumers. Indeed, it appears that Sitejabber's very purpose in offering the widgets was to assist its clients in deceiving consumers.

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Sitejabber collected two types of reviews from consumers. Instant Feedback Surveys (IFSs) asked customers to comment on their shopping experience immediately after concluding a purchase, and to rate that experience on a scale of one-to-five stars. Instant Feedback Product Reviews (IFPRs) also took the form of a written response and a one-to-five-star rating, but asked customers why they chose the product they had just purchased. Sitejabber would collect these

¹ In re GGL Projects, Inc., a corporation, also d/b/a Sitejabber, Complaint & Decision and Order.

³ Dissenting Statement of Commissioner Andrew N. Ferguson, Joined by Commissioner Melissa Holyoak, In the Matter of Rytr LLC, Matter No. 2323052 (Sept. 25, 2024) ("Ferguson Rytr Dissent").

reviews from the consumer on the retailer's webpage. Prompts to collect the reviews would pop up on the retailer webpage almost immediately after the consumer had finalized a purchase.





Instant Feedback Survey (IFS)

Instant Feedback Product Reviews (IFPRs)

Sitejabber maintained a public profile page on Sitejabber.com for each of its retail clients showing their average rating and individual reviews, including IFS-derived ratings and reviews. Additionally, on a "Products" tab on that same page, Sitejabber listed the products sold by that client alongside the average IFPR ratings for each. Consumers browsing these profile pages would reasonably believe that all of these reviews and ratings were from customers who had received and had a chance to use the products sold by the retailers. The Commission alleges that Sitejabber did not adequately disclose that these reviews and ratings were obtained at the point of sale, before the customers could have received, let alone used, the purchased products. For misrepresenting IFSs and IFPRs as authentic reviews from customers who had received and had a chance to use the products, the complaint charges Sitejabber with deceptive conduct in violation of Section 5.

Sitejabber is also accused of having provided its retail clients with widgets by which the retailers could embed the IFPR-derived product ratings on their own websites. These widgets had no purpose other than to represent that those product ratings were derived from the reviews of consumers who had received and had a chance to use the product in question. This representation was false given that the ratings were obtained from consumers who had not received the product when they provided the rating. For offering this widget, the complaint charges Sitejabber with a further Section 5 violation for providing the means and instrumentalities for the commission of deceptive acts and practices.

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⁴ For some of Sitejabber's clients, the ratings would also incorporate reviews from consumers who had a chance to receive and use the products. Such reviews are not inherently deceptive, and nothing in the Commission's proposed consent order would prohibit Sitejabber from displaying those reviews, and the average ratings derived from them, on its own site or through widgets. See Decision & Order at 5–6 (prohibiting Sitejabber from misrepresenting that reviews collected at the point of sale were from customers who had an opportunity to receive and use the product, from misrepresenting that ratings were derived only from reviews left by customers who had such an opportunity, and from providing the means and instrumentalities to make such misrepresentations). But comingling such reviews with reviews collected at the point-of-sale, before the consumer could have received and used the product, renders the entire star rating deceptive. See *United States v. Phillip Morris USA Inc.*, 566 F.3d 1095, 1128 (D.C. Cir. 2009) ("[E]ven partially true statements can be actionable fraud if intentionally misleading as to facts.").

Sitejabber's condemned business practices are very different from Rytr's. Rytr provided an AI-powered writing tool which could be used to generate draft consumer reviews.⁵ Although a consumer or business could have used Rytr's tool to generate a false product review, and that false product review could in some circumstances violate Section 5's prohibition on deceptive acts or practices, that was not necessarily the case.⁶ Indeed, the Commission did not supply a single example of someone having used Rytr's tool to violate Section 5.⁷ A consumer also could have used Rytr's tool to generate an initial draft of a perfectly honest consumer review.⁸ The mere fact that someone could use a product to commit fraud does not make that product the means and instrumentalities to commit fraud.⁹ In my view, the provision of a product or service with potential unlawful uses is not the provision of the means and instrumentalities to violate Section 5 unless (1) the instrumentality in question "has no or de minimis legal use";¹⁰ (2) the provider of the instrumentality had the purpose of facilitating the Section 5 violation;¹¹ or (3) the provider "knows, or has reason to know, that the person to whom the product or service was supplied will use it to violate Section 5."¹²

Whereas Rytr's review generator tool satisfied none of those requirements, the allegations in the complaint here show that Sitejabber's product satisfies all three. First, there is no legitimate purpose for a widget displaying an instant product review rating. No reasonable consumer would be interested in a one-to-five-star product rating derived from reviews left by other consumers who had not yet received or used the product. When a consumer views a *product* rating, he reasonably assumes that the rating is based on reviewers' experiences with *the product*, not with the purchasing process. Second, because the widgets had no use other than to deceive consumers, we can reasonably infer that Sitejabber knew that every single one of its clients was using them for that purpose. Finally, there is ample evidence that Sitejabber's very purpose in offering the widgets was to assist in the deception of consumers. The widgets were nothing but an extension of the same deception that Sitejabber was carrying out on its own website using the same deceptive ratings and on behalf of the same clients.

I therefore concur in the Commission's complaint and proposed consent order against Sitejabber.

⁵ Ferguson Rytr Dissent at 1–2.

⁶ *Id.* at 6–7.

⁷ *Id.* at 2.

⁸ *Id.* at 7.

⁹ *Id.* at 5-6.

¹⁰ *Id*. at 6.

¹¹ *Id.* at 7–9.

¹² *Ibid*.

¹³ FTC Policy Statement on Deception, 103 F.T.C. 174, 175 (1984), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception, *appended to In Re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984) (in determining whether a practice is deceptive "we examine the practice from the perspective of a consumer acting reasonably").