JERK, LLC AND JOHN FANNING

Docket No. 9361. *Order, May 28, 2015.*

Commission order denying respondents' applications to stay the Commission's final order pending review by the United States Court of Appeals for the First Circuit, as respondents failed to demonstrate the order will cause irreparable injury and as a stay would risk harm to consumers.

COMMISSION ORDER DENYING RESPONDENTS' MOTION TO STAY FINAL ORDER PENDING JUDICIAL REVIEW

Respondent John Fanning has applied for a stay of the Commission's Final Order, pending review by the United States Court of Appeals for the First Circuit. Respondent Jerk, LLC ("Jerk") has filed an application "adopt[ing] and incorporat[ing]" Mr. Fanning's application. Complaint Counsel oppose the requests for stay. For the reasons discussed below, Respondents have not shown that a stay is warranted and we deny their applications.[1]

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[1] The Commission's opinion in this matter is available at https://www.ftc.gov/system/files/documents/cases/150325jerkopinion_0.pdf. The order is available at https://www.ftc.gov/system/files/documents/cases/150325jerkorder.pdf.

BACKGROUND

From 2009 to 2013, Respondents operated Jerk.com, a social media website that invited users to create profiles for other people and rate each as a "jerk" or "not a jerk." Op. 1, 2. The site encouraged users to post photos of their friends and acquaintances with comments and reviews about them. Op. 9. Jerk earned revenues from selling "memberships" promising "additional paid premium features," including the ability to dispute information posted on the site. Op. 2. The website contained more than 80 million unique profiles, including several million with pictures of children. Op. 2, 27, 33. The Commission and state law enforcement agencies received hundreds of complaints about Jerk.com from consumers who reported that they spent time and money attempting to get their profiles removed. Op. 33-34.

In 2014, the Commission issued a two-count administrative complaint alleging that Jerk and its member and manager, John Fanning, engaged in deceptive acts and practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). Count I alleged that Respondents falsely represented that the names, photographs, and other content that appeared on the website were posted by users and reflected users' views of the profiled persons, when in fact Respondents harvested nearly all of the content from Facebook. Count II alleged that Respondents falsely represented that consumers who purchased a $30 "standard membership" would receive benefits, including the ability to dispute information posted on Jerk.com about them. But customers who purchased the memberships received no benefits in return.

On March 13, 2015, we granted summary decision to Complaint Counsel against both Respondents on both counts.[2] With regard to Count I, we held that Jerk's statements on its website constitute an implied representation that Jerk.com

[2] Rule 3.24 of the Commission's Rules of Practice permits the Commission to issue summary decision when it "determines that there is no genuine issue as to any material fact regarding liability or relief." 16 C.F.R. § 3.24(a)(2); *see Polygram Holdings, Inc.*, 2002 WL 31433923, at *1 (FTC Feb. 26, 2002) (Rule 3.24(a)(2) is "virtually identical" to the summary judgment provisions in Federal Rule of Civil Procedure 56).

content, including names and photographs, was created by Jerk users and reflected their views of the profiled individuals. Respondents did not dispute that Jerk itself had taken the "vast majority" of the content from Facebook and posted it on Jerk.com. Respondents also offered nothing to rebut evidence that consumers sought removal of their profiles and purchased memberships because of the "embarrass[ment]" and "alarm[]" that people they knew had created Jerk.com profiles about them. Op. 14, 16. Thus, Complaint Counsel sustained their burden to demonstrate that Respondents' representations about the source of the content on the website were both false and material.

Respondents barely responded to Complaint Counsel's motion for summary decision on Count II. Complaint Counsel produced testimony by consumers (confirmed by an FTC investigator) who bought Jerk.com memberships but were unable to dispute or remove information from their profiles. Respondents did not rebut or address any of that evidence. They offered instead only John Fanning's vague and nonresponsive declaration, which stated that "[a]s far as [he was] aware," Jerk "remove[d] content from Jerk.com whenever it was obligated to do so" and "would refund money to users who claimed they had paid but had not received membership services." Op. 20-21.

Finally, we found beyond genuine dispute Mr. Fanning's individual liability for Jerk's violations. He instructed programmers to create Jerk.com profiles by taking information from Facebook, advocated a business model in which Jerk charged consumers for "dispute resolution" services, and defended these decisions to investors and business partners. Op. 26-28. Mr. Fanning's declaration asserted that he was merely an "advisor" to Jerk, Op. 24, but because the declaration did not provide "*any* evidence to support his bare assertions," we found it did not create a genuine factual dispute. Op. 28.

As a remedy, Paragraph I of the Final Order bars Respondents, "in connection with the marketing, promoting, or offering for sale of any good or service," from misrepresenting the source of any content on a website or the benefits of joining any service. Paragraph II forbids Respondents from disclosing, using, selling, or benefitting from Jerk's customer information or consumers' personal information obtained in connection with

Respondents' operation of Jerk. To ensure that Respondents do not use this information for future deceptive claims, Paragraph II also requires Respondents to dispose of the information within 30 days of the effective date of the Final Order. Paragraphs III through VII contain various recordkeeping, notification, and reporting requirements.

STANDARD FOR A STAY

Section 5(g) of the Federal Trade Commission Act provides that the Commission's cease and desist orders (except divestiture orders) will take effect "upon the sixtieth day after such order is served," unless "stayed, in whole or in part and subject to such conditions as may be appropriate, by . . . the Commission" or "an appropriate court of appeals of the United States." 15 U.S.C. § 45(g)(2). Respondents and Respondents' counsel were served with the Order and Final Opinion of the Commission on March 30, 2015. Thus, absent a stay, the Final Order will become effective on May 29, 2015. *See* 15 U.S.C. § 45(g)(2); 16 C.F.R. § 3.56(a).

Under Commission Rule 3.56(c), an application for a stay must address the following four factors: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm absent a stay; (3) the degree of injury to other parties if a stay is granted; and (4) whether the stay is in the public interest. *See* 16 C.F.R. § 3.56(c); *In re McWane, Inc.*, 2014 WL 1630460, at *1 (FTC Apr. 11, 2014); *In re Toys "R" Us, Inc.*, 126 F.T.C. 695, 696 (1998). The required likelihood of success is "inversely proportional to the amount of irreparable injury suffered absent the stay." *In re North Texas Specialty Physicians*, 141 F.T.C. 456, 457-58 & n.2 (2006). If the balance of the equities does not support a stay, the movant must make a higher showing of likely success on the merits. *In re North Carolina Board of Dental Examiners*, 2012 WL 588756, at *1 (FTC Feb. 10, 2012). Respondents have not satisfied any of the four factors.

LIKELIHOOD OF SUCCESS ON APPEAL

As to the first factor, Respondents are unlikely to succeed on appeal because their legal claims are without merit.

Respondents first contend that they were deprived of fair notice and "an opportunity to present their objections," Fanning Mtn. to Stay 3, because the Commission found Respondents liable for *implied* misrepresentations whereas (according to Respondents) the Complaint and Complaint Counsel's motion for summary decision predicated liability on a theory of *express* misrepresentations. That claim misstates the record. In fact, Count I of the Complaint alleged that "respondents represented, expressly ***or by implication***, that content on Jerk . . . was created by Jerk users." Compl. ¶ 15 (emphasis added). Consistent with that allegation of implied misrepresentation, Complaint Counsel's motion for summary decision argued that Respondents had violated the FTC Act by making both express *and* implied misrepresentations about the source of the content posted on Jerk.com.[3] Respondents plainly had notice of the implied representation theory because their oppositions to Complaint Counsel's motion for summary decision argued that "[n]othing contained in the homepage disclaimer constitutes a 'claim' about the source of the content, ***either express or implied***, or could possibly be construed as an advertisement intended to lure users to the Jerk.com site."[4] Respondents' notice theory is thus without merit.

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[3] *See* Complaint Counsel's Memorandum in Support of Motion for Summary Decision 20 ("Even if this representation were not disseminated through express statements, it would still be presumptively material because Respondents intended to convey it to consumers visiting Jerk.com."); *see also id.* 7-8 (arguing that Respondents' reposting of photographs from Facebook created an "implication" that Jerk.com's content was user-generated); Complaint Counsel's Reply to Respondent Jerk, LLC's Opposition to Complaint Counsel's Motion for Summary Decision 6 ("Here, it is beyond dispute that Jerk made the misrepresentation alleged in Count I through multiple explicit and clearly implied statements."); *id.* at 9 ("Because the representation alleged in Count I was conveyed through express and conspicuous implied statements, the Commission need not look to extrinsic evidence to unearth a deeper meaning beyond what is plain on its face.").

[4] John Fanning's Memorandum in Opposition to Complaint Counsel's Motion for Summary Decision 9 (emphasis added) (citing *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992)); *see also* Jerk, LLC's Memorandum in Opposition to Complaint Counsel's Motion for Summary Decision 7, 10 (characterizing Complaint Counsel as arguing that (1) the Jerk website's terms and conditions "*implicitly* represented that all profiles on jerk.com were created by jerk.com users," and (2) Respondents' misrepresentations were material because they were made "explicitly or *implicitly* but intentionally." (emphasis added)). Nor does Respondents' notice theory have merit as to Count II,

Respondents next assert that they cannot lawfully be held liable because their misrepresentations that the content on Jerk.com was created by users "could not possibly be construed as an advertisement." Fanning Mtn. to Stay 4-5. As we explained in granting summary decision, however, the Commission's authority to prevent deceptive practices is not limited to "advertising" or "promotional" claims; it applies to *any* type of commercial representation likely to deceive a reasonable consumer. Op. 11-12, citing *FTC v. AMG Servs., Inc.*, 29 F. Supp. 3d 1338, 1349-52 (D. Nev. 2014) (loan note disclosure); *FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 626, 631 (D. N.J. 2014) (statements on website about privacy policy). In any case, the representation that content was user-generated "drove traffic to the Jerk.com website" and "was indeed promotional." Op. 11-12. This argument, too, is thus meritless**.**

Respondents are also wrong to argue that the Commission improperly granted summary disposition because a "fact question" exists concerning whether they deceived consumers into purchasing Jerk.com memberships by claiming they would receive benefits, including the right to dispute information in their profiles. Fanning Mtn. to Stay 6. Beyond their bare assertion of a factual dispute, Respondents cite no actual evidence demonstrating one. Nor did they cite any such evidence in their opposition to Complaint Counsel's motion for summary decision. Indeed, Jerk did not even address Count II in its brief in opposition, and Mr. Fanning addressed Count II only with a self-serving, conclusory declaration that did not rebut the testimonial and documentary evidence cited by Complaint Counsel. *See* Op. 17-22.

There is also no merit to Respondents' claims concerning the injunctive provisions of the Final Order. Paragraph I prohibits Respondents, "in connection with the marketing, promoting, or offering for sale of any good or service," from misrepresenting (1) "the source of any content on a website, including personal information;" and (2) "the benefits of joining any service." Respondents claim they have an "absolute right" under the First

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regarding which the Commission identified express statements that "represent exactly what the Complaint alleges." Op. 18-19.

Amendment to publish information gathered from public sources and to engage in speech on social media. Fanning Mtn. to Stay 7. But Paragraph I of the Final Order does not apply to non-commercial speech and, even as to commercial speech, does not bar Respondents from disseminating information from public sources or engaging in truthful, non-misleading speech on social media. *See* Op. 31, 33, 36. It merely prohibits misleading commercial speech, which is not protected by the First Amendment. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980) ("For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading."); *see also In re R.M.J.*, 455 U.S. 191, 203 (1982) ("Misleading advertising may be prohibited entirely."). The Order's ban on misleading commercial speech "merely requires Respondents to follow the law," and is tailored to apply to the types of "speech that ha[ve] been found to be deceptive." *Daniel Chapter One*, 149 F.T.C. at 1598-99. Although Paragraph I prohibits deception concerning websites and services other than Jerk.com, "the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. . . . [I]t must be allowed effectively to close all roads to the prohibited goal . . . ." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). There is thus no basis for Respondents' charge that the Final Order is an infringement of their First Amendment rights.

Finally, Respondents object to the monitoring and recordkeeping provisions in the Final Order. Fanning Mtn. to Stay 7-8. Respondents assert that these provisions are "punitive and not related to the finding of liability based solely on the finding of an implied representation concerning [the] source of website content." Fanning Mtn. to Stay 7. That is incorrect. To begin with, the remedial provisions are not "solely" based on Jerk's misrepresentations about the source of website content. Respondents also deceived consumers into paying "membership" fees based on false representations to consumers that they could remove or modify their Jerk.com profiles, as alleged in Count II. Moreover, all of these violations were knowing, deliberate, and serious, and such practices could be easily repeated in connection with other web-based services. *See* Op. 34 & n.41. The Order's monitoring and recordkeeping requirements therefore bear a "reasonable relation to the unlawful practices found to exist,"

FTC v. Colgate-Palmolive Co., 380 U.S. 374, 394-95 (1965), because they are reasonably designed to ensure that Mr. Fanning and Jerk do not commit similar violations in the future. Federal courts routinely uphold similar monitoring and recordkeeping requirements in deception cases. *See, e.g.*, *Dep't of Justice v. Daniel Chapter One*, --- F. Supp. 3d ----, 2015 WL 1502137, at *7 (D.D.C. Mar. 31, 2015); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1018 (N.D. Ind. 2000).

In sum, Respondents have identified no plausible appellate challenge to the Commission's order. That failure is a sufficient basis for denying their stay requests. In any event, for the reasons discussed below, Respondents do not satisfy the remaining stay factors either.

IRREPARABLE INJURY

Respondents bear the burden of demonstrating irreparable injury that is "both substantial and likely to occur absent the stay." *North Texas*, 141 F.T.C. at 460. "Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice." *In re California Dental Ass'n*, 1996 FTC LEXIS 277, at *6 (May 22, 1996). Respondents have not met this burden.[5]

Mr. Fanning's principal claim of harm is that the Commission was motivated to proceed against him and Jerk.com because it disliked the website's content and that the allegedly improper motivation somehow deprives him of First Amendment rights. Fanning Mtn. to Stay at 10. The claim does not address any actual effect on Mr. Fanning of the Final Order and does not identify any harm that would be relieved if the Final Order were stayed. It is also wrong. Our opinion makes clear that the Commission has not targeted the content of Jerk.com profiles, and the Final Order does not restrict such content. Mr. Fanning remains free to create websites that "provide[] a platform to exchange opinions in the free-flow of human relationships," Fanning Mtn. to Stay at 10, and the Final Order does not restrict any speech protected by the First Amendment. The Final Order

[5] Although Jerk has joined Mr. Fanning's motion to stay, his motion only claims that Mr. Fanning will suffer irreparable harm, and it thus does not support any claim of injury against Jerk itself.

does prohibit Mr. Fanning, "in connection with the marketing, promoting, or offering for sale of any good or service," from making *misrepresentations* about the source of website contents and the benefits of website membership. As explained above, the First Amendment does not protect such misrepresentations, and Mr. Fanning thus can suffer no cognizable harm from an order restricting them. *See* Op. 30-31.[6]

Mr. Fanning also asserts that the monitoring and compliance reporting provisions will "affect my livelihood[,] . . . will infringe upon my privacy rights, will potentially infringe upon the privacy rights of my clients, and will contravene certain non-disclosure agreements." Declaration of John Fanning in Support of Motion to Stay ¶ 6. But Mr. Fanning provides no facts to support these bare allegations, let alone to demonstrate irreparable harm. A party cannot establish irreparable harm simply by claiming that compliance monitoring will reveal sensitive or confidential information. The FTC Act, as well as the Commission's Rules of Practice, provide Mr. Fanning with ample protection for any sensitive information that his documents might contain. *See, e.g.*, 15 U.S.C. § 57b-2; 16 C.F.R. § 4.10.

Finally, Mr. Fanning objects to the Final Order's requirement that, for the next ten years, he notify the Commission when becoming affiliated with a new business or employment or when discontinuing any such affiliation. Mr. Fanning asserts that this reporting requirement is "unduly burdensome, as I conduct business with a large number of companies on a regular basis." Fanning Decl. ¶ 7. But Mr. Fanning fails to explain how reporting even a large number of business affiliations could cause him "irreparable harm," especially given the protections offered by the FTC Act and Rules of Practice for commercially sensitive information.

Of course, equitable relief will always impose at least incidental burdens on a person found to violate the law through

[6] Mr. Fanning incorrectly claims that the Final Order prohibits him from making true statements. Declaration of John Fanning in Support of Motion to Stay ¶ 5. As discussed, the Order prohibits only commercial misrepresentations.

deception, and Mr. Fanning is no exception. But he has provided no concrete facts showing that the Final Order will cause irreparable harm.

DEGREE OF INJURY TO OTHER PARTIES AND THE PUBLIC INTEREST

The remaining stay factors concern whether the stay would harm other parties and whether it is in the public interest. The FTC considers these factors together because Complaint Counsel are responsible for representing the public interest by enforcing the law. *Daniel Chapter One*, 149 F.T.C. at 1600; *California Dental*, 1996 FTC LEXIS 277, at *8. We conclude that granting Respondents a stay would risk harm to consumers and therefore is not in the public interest.

The Final Order's prohibitions on misrepresentation, restrictions on the use of consumers' personal data, and required monitoring and recordkeeping measures are necessary to protect consumers. Respondents have injured numerous consumers by (1) creating Jerk.com profiles using information derived from Facebook while passing off such profiles as if they were created by actual Jerk.com users; and (2) offering profiled persons the right to dispute their profiles for a fee and then failing to honor that commitment. *See* Op. 33-34. These practices triggered hundreds of complaints with the Commission and state law enforcement agencies. *Id*. 13, 34 & n.15. Respondents' misrepresentations were knowing, and their violations of the FTC Act were serious, deliberate, and capable of repetition. *See id.* 34.

Mr. Fanning argues that a stay creates "no possible risk of harm" because Jerk.com is "not currently operating." Fanning Mtn. to Stay 12. But the risks to consumers continue even if Jerk.com does not.[1] As we noted in our Opinion, Respondents have a history of making similar misrepresentations and transferring consumers' personal data across various websites. *See* Op. 34 ("When Respondents lost the Jerk.com domain name they moved the content to Jerk.org and continued making the

[1] Although Mr. Fanning claims that Jerk.com is inoperative, Complaint Counsel note that, as of May 1, 2015, Jerk.com remains an active website.

same misrepresentations. . . . Similarly, Respondents used automatically generated profiles on the reper.com website when they began the next iteration of their business in 2010."). Such practices may continue unless the Final Order becomes effective. Issuing a stay would therefore disserve the public interest.

CONCLUSION

Having considered the factors set forth in Commission Rule 3.56(c), we conclude that John Fanning and Jerk, LLC have not met their burden for showing that a stay of the Final Order pending judicial review is warranted. Accordingly,

IT IS ORDERED THAT Respondents' Motions to Stay Enforcement of the Commission's Order Pending Review by the United States Court of Appeals for the First Circuit are **DENIED**.

By the Commission.

ECM BIOFILMS, INC.

Docket No. 9358. Order, May 29, 2015.

Commission order requesting both parties to file briefs with the Commission, limited to specific issues, that supplement the parties' respective statements made during oral argument.

COMMISSION ORDER SCHEDULING SUPPLEMENTAL BRIEFING AND DENYING CORRECTION REGARDING STATEMENTS MADE DURING ORAL ARGUMENT

This matter having been heard by the Commission upon the appeal of ECM Biofilms and the cross-appeal of Complaint Counsel and upon the respective briefs and oral arguments in support of their positions, the Commission has determined that supplemental briefing would assist it in resolving the issues presented. In accordance with Commission Rule 3.54, the