

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



ORIGINAL

In the matter of:)
)
Jerk, LLC, a limited liability company,)
)
Also d/b/a JERK.COM, and)
)
John Fanning,)
Individually and as a member of)
Jerk, LLC,)
)
Respondents.)
_____)

DOCKET NO. 9361

PUBLIC

**RESPONDENT JOHN FANNING’S RESPONSE TO
ORDER SCHEDULING BRIEFING FOLLOWING REMAND**

Respondent John Fanning (“Fanning”) hereby responds to the Federal Trade Commission’s (the “Commission”) March 3, 2016 “Order Scheduling Briefing on Remand” (the “Briefing Order”).

The Briefing Order requiring a brief pertaining to “the compliance monitoring applicable to Mr. Fanning addressed in Paragraph VI of the Commission’s Final Order” . . . “including proposed order language” contravenes the opinion of the United States Court of Appeals for the First Circuit (“First Circuit”) in Fanning v. Federal Trade Commission, 821 F.3d 164 (1st Cir. 2016). The First Circuit struck in its entirety the Commission’s Compliance Monitoring provision at Paragraph VI requiring Fanning, for a period of ten (10) years, to notify the Commission of “the discontinuance of his current business or employment, or of his affiliation with any new business or employment” including addresses, telephone numbers, and a description of the nature of the business or employment and Fanning’s duties and responsibilities:

Without any guidance from the Commission, we cannot find these [compliance monitoring] provisions are reasonably related to Fanning's violation. As a result, we conclude the Commission's order, in this respect, **must be vacated and remanded.**

Fanning v. Federal Trade Commission, 821 F.3d at 177 (emphasis added). The First Circuit rejected the Commission's explanation that "it has traditionally required such reporting" and discounted the cases cited by the Commission purportedly containing similar provisions, noting that "the orders, however, are not only less onerous than the one imposed on Fanning, but also almost entirely bereft of analysis that might explain the rationale for such a requirement." Id. The First Circuit vacated and remanded that portion of its order "for proceedings consistent with this opinion." Id. at 178.

Thus, the First Circuit thoroughly considered and ultimately rejected the FTC's Compliance Monitoring provision against Fanning. Entry of a revised Final Order deleting "Paragraph VI. COMPLIANCE MONITORING – JOHN FANNING" is "consistent with [the First Circuit's] opinion" as directed. The "[w]ithout any guidance from the Commission" language in the First Circuit's opinion is fairly construed as an assessment that the FTC had no support to justify the sanction when it issued the Final Order and on appellate review, and was not an invitation for the FTC to provide "guidance" after the fact. The First Circuit's Order and Judgment does not permit the FTC another opportunity to formulate a new Compliance Monitoring sanction against Fanning that the FTC deems appropriate. Thus, Paragraph VI of the Commission's Final Order should be stricken in its entirety and excised from a revised Final Order consistent with the First Circuit's ruling.

Without waiving and expressly opposing any revised Compliance Monitoring, if the FTC refuses to strike Paragraph VI in its entirety, Paragraph VI must be significantly revised in both time and scope. In finding that the case law cited by the FTC was inapposite, the First Circuit

further specifically noted that the orders cited by the FTC were far less burdensome in terms of duration than the ten (10) year notification period the FTC imposed upon Fanning:

Those orders that do require individuals to also provide descriptions of their employers and business last only for three to five years. See FTC v. Neovi, No. 3:06-cv-1952, ECF No. 118, at 10 (S.D. Cal. Jan. 7, 2009) (requiring defendant to report change in employment with name, address, and description of business for five years); FTC v. Pac. First Benefit, 472 F. Supp. 2d 981, 988 (N.D. Ill. 2007) (requiring defendant to report name, address, and description of employment or business for five years); FTC v. Gill, 71 F. Supp. 2d 1030, 1051 (C.D. Cal. 1999) (requiring defendant to report name, address, and description of employment or business for three years).

Fanning v. Federal Trade Commission, 821 F.3d at 177, n. 9.

Additionally, the First Circuit found that Paragraph VI's lack of a "requirement of relevance" rendered it overbroad, and invalid. The First Circuit noted that while the FTC's compliance monitoring provisions applicable to Jerk.com "require it only to report those changes in its structure 'that might affect compliance obligations arising under this order,'" the Compliance Monitoring provision applicable to Fanning impermissibly required Fanning to notify the Commission of all business affiliations and employment "regardless of whether or not the affiliate or employer has responsibilities relating to the order". Id. at 177.

Thus, in accordance with the First Circuit's opinion, if the FTC refuses to strike the Compliance Monitoring provision in its entirety, Fanning proposes that Paragraph VI be alternatively revised to read as follows:

VI.
COMPLIANCE MONITORING – JOHN FANNING

IT IS FURTHER ORDERED that respondent John Fanning, for a period of ~~ten (10)~~ **three (3)** years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment **that may affect compliance obligations arising under this order**. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities.

Respectfully submitted,

JOHN FANNING,

By his attorney,

/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

Dated: April 12, 2017

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2017, 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: ojl@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: April 12, 2017

Notice of Electronic Service

I hereby certify that on April 12, 2017, I filed an electronic copy of the foregoing Respondent John Fanning's Response to Order Scheduling Briefing Following Remand, 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 April 12, 2017, I served via E-Service an electronic copy of the foregoing Respondent John Fanning's Response to Order Scheduling Briefing Following Remand, upon:

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Complaint

I hereby certify that on April 12, 2017, I served via other means, as provided in 4.4(b) of the foregoing Respondent John Fanning's Response to Order Scheduling Briefing Following Remand, upon:

Alexandria Lynn
Alexandria Beth Lynn
Alexandria B. Lynn, Esq.
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Respondent

Peter Carr
Attorney