UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Maureen K. Ohlhausen, Acting Chairman**
Terrell McSweeny

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 Jerk, LLC.	)	PUBLIC DOCUMENT

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S
BRIEFING ON REMAND

Consistent with the U.S. Court of Appeals for the First Circuit's opinion in this matter, *Fanning v. FTC*, 821 F.3d 164 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 627 (2017), Complaint Counsel recommends reducing the Final Order's compliance monitoring provision for defendant John Fanning (Part VI) from ten to five years, but not changing that provision's scope. This recommendation satisfies the First Circuit's remand order because the specific facts in this case justify broad monitoring of Fanning's business affiliations.

I. The First Circuit's opinion permits the Commission to reissue the compliance monitoring provision ordered in Part VI with adequate guidance.

Contrary to Fanning's argument (Fanning Brief of Apr. 12, 2017 ("Fanning Br.") at 2), the First Circuit did not bar the Commission from revisiting Part VI, which requires Fanning to report changes in his employment or business affiliations. On the contrary, noting the "deliberateness of Fanning's violations," the First Circuit recognized the importance of

"know[ing] about Fanning's other business ventures" in order to ensure his compliance with the Order. *See Fanning*, 821 F.3d at 176. The court, however, concluded that the Commission's opinion did not contain enough information to sustain the specific monitoring provision ordered in Part VI. *Id.* at 176-77. The court explained that "without any guidance from the Commission, we cannot find these provisions are reasonably related to Fanning's violation," and remanded Part VI to the Commission for further proceedings. *Id.* at 177.

Later, the First Circuit dispelled any doubt about the Commission's ability to reconsider the compliance monitoring requirement articulated in Part VI. In denying Fanning's Motion for Clarification, the court explained that "[t]he reconsideration of compliance monitoring provisions is permissibly within the scope of the remand." *See* Declaration of Kelly Ortiz ¶ 2 & Ex. A. Accordingly, the Commission can reissue the compliance monitoring provision—either identical to Part VI or modified—so long as it provides an adequate explanation for why it reasonably relates to Fanning's violations. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965) (upholding the Commission's authority to reconsider and reissue an amended injunctive provision after a circuit court order vacating a prior iteration of that provision).

II. Robust compliance monitoring is necessary to prevent recidivism.

In empowering the Commission to enter cease and desist orders against violators of the FTC Act, Congress gave the Commission "'wide discretion'" to fashion remedies calculated to prevent future illegal conduct. *Fanning*, 821 F.3d at 174 (citing *Colgate-Palmolive*, 380 U.S. at 391); *see also FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) (For "the Commission to attain the objectives Congress envisioned . . . it must be allowed effectively to close all roads to the prohibited goal."). Notwithstanding the Commission's broad ability, Complaint Counsel addresses, in Sections III-V, *infra*, the First Circuit's particular concern that the monitoring

provision is too burdensome.

To monitor order compliance and prevent recidivism, the Commission's injunctive orders routinely require violators to notify the agency of new business affiliations. *See, e.g., In re POM Wonderful, LLC*, 2013 FTC LEXIS 5, at *8-9 (F.T.C. Jan. 10, 2013); *In re Daniel Chapter One*, 149 F.T.C. 1574, 1581 (2010); *In re Telebrands Corp.*, 140 F.T.C. 278, 351-52 (2005). Federal district courts also routinely include such provisions in injunctive orders for violations of the FTC Act. *See, e.g., FTC v. Capital Choice Consumer Credit, Inc*., No. 02-21050-CIV, 2004 U.S. Dist. LEXIS 31476, at *12-13 (S.D. Fla. May 5, 2004) ("'record-keeping and monitoring provisions . . . are also appropriate to permit the Commission to police the defendants' compliance with the order'" (internal citations omitted)); *FTC v. Wellness Support Network, Inc*., No. 10-cv-04879, 2014 WL 644749, at *20-22 (N.D. Cal. 2014) ("While it is true that Defendants will be required to report any changes in title or role with respect to their business activities, that information is necessary in order for the FTC to monitor Defendants' compliance."); *FTC v. RCA Credit Services LLC*, No. 8:08-cv-02062, Dkt. No. 138, Slip Op. at 1 (M.D. Fl. Oct. 8, 2010) (monitoring provisions "deter non-compliance").[1]

III. The specific facts of this case warrant maintaining Part VI's scope.

The facts of this case justify requiring Fanning to report all new business affiliations, and provide ample justification for the First Circuit's mandate.

First, the risk of recidivism is high given the ease of "transferability of Jerk.com's deceptive practices" in this case to other business platforms. *Fanning*, 821 F.3d at 176. In fact, Fanning started a similar website called "Reper," and Jerk.com appeared under different domain

[1] *See* Ortiz Attachment C (unpublished slip opinion); *FTC v. RCA Credit Servs., LLC*, No. 08-cv-2062, 2010 WL 7429863, at *4-5 (M.D. Fla. Oct. 15, 2010) (order requiring defendants to notify the Commission of any changes in employment status).

names, including Jerk.org. *Id.* at 168 n.2, 176; Complaint Counsel's Statement of Material Facts, September 29, 2014 ("SMF") at 4, 20.

Second, the opaque and fluid nature of Fanning's enterprise reinforces the need for full and transparent reporting of all new business affiliations. As the record evidence shows, Fanning operates a private investment company (NetCapital.com LLC) that has formed dozens of ventures (including Jerk LLC and Reper), using comingled staff and informal employment relationships. CX0041 ¶ 3-4; CX0046; SMF at 20, 106-113. And, as described below, Fanning has refused to specify his involvement in this corporate web.

Finally, Fanning's evasiveness about his business dealings justifies requiring him to report all new business affiliations. A robust business affiliation monitoring requirement is particularly appropriate where a defendant has been evasive about his or her business activities. *See RCA Credit Services*, Dkt. No. 138 at 2 (relying on defendant's evasive responses about his business affiliations as justification for the employment notification order provision). In this action, Fanning has demonstrated egregious evasiveness about his business activities and affiliations. Specifically, Fanning:

- evaded questions about his current employment, claiming that he was "not sure" about what work he did for a living or who was paying him (CX0092 (Fanning Dep.) at 43:16–44:13);[2]
- evaded answering basic questions about his business affiliations, claiming he was

[2] Complaint Counsel filed the exhibits cited herein with *Complaint Counsel's Motion for Summary Decision* (Sept. 29, 2014). Although certain exhibits were temporarily treated as confidential during discovery, no party sought permanent confidential treatment for the exhibits cited in this brief. *See Administrative Law Judge's Order on Motions for In Camera Treatment* (Feb. 23, 2015).

"not sure" what the words "business," "transactions," "businessman," and "business address" meant (CX0092 at 16:17–17:9);

- claimed to be "not sure" about what Jerk LLC was, what it did, or the company's status (CX0092 at 53:10-12, 60:20–61:14), while, in fact, he founded the company and was directly involved in its operations (SMF 97-157);
- claimed to be "not sure" about the business of NetCapital.com LLC or whether he ever represented himself to be a partner at the firm (CX0092 at 44:14–46:7), while, in fact, he represented himself to be a partner at NetCapital.com LLC, which was the majority shareholder in Jerk LLC (SMF 105-113);
- claimed to be merely an "advisor" to Jerk LLC (CX0092 at 53:13-20), while, in fact, he controlled the company and directed its business activities (SMF 97-157); and
- claimed a college intern ran Jerk LLC as its CEO (CX0092 at 111:18–113:9), while in fact, Fanning hired and supervised the intern (CX0057).

As Fanning's evasiveness demonstrates, he is unlikely to reliably self-report *relevant* business affiliations. He is the paradigmatic example of a violator who should report *all* business affiliations.

Notification of all business affiliations for violators like Fanning provides a reliable and easily-followed bright line rule. The alternative—a requirement for Fanning to self-report only certain types of business affiliations—invites cheating and creates a less effective monitoring system. A selective self-reporting standard would allow Fanning to decide unilaterally whether or not a new business affiliation falls within the Order's specified category. It could incentivize him to underreport responsive business affiliations – for example, by crafting job descriptions

intended to evade reporting. In response, FTC staff would have to devote resources to root out such cheating; they would have to first unearth Fanning's unreported business affiliations, and then establish that those affiliations do fall within the category specified in the Order. Rather than conduct such inquiries, staff's focus should be whether Fanning is violating the Order. Furthermore, affirmative notification of new business affiliations will not overly burden Fanning. Notification is logistically simple: his attorney sends an email or a letter to the FTC's Division of Enforcement stating Fanning's new business activities or place of employment.

IV. The difference between Fanning's and Jerk LLC's compliance monitoring requirements is justified.

The First Circuit noted that Fanning's compliance reporting requirement (Part VI) is broader in scope than the analogous provision for Respondent Jerk LLC (Part V), which requires Jerk "to report only those changes in its structure 'that may affect compliance obligations *arising under this order*.'" *Fanning*, 821 F.3d at 177 (emphasis in opinion). Fanning proposes a similar limitation for himself in Part VI, should the Commission not strike it altogether. (Fanning Br. at 3.)

Complaint Counsel opposes this limitation. As explained above, a broad provision covering *all* business affiliations is particularly appropriate for Fanning, who has proven evasive about his business dealings and affiliations.

More generally, the difference between the corporate and individual compliance monitoring requirements is rational and justified. The corporate provision (Part V) addresses a company's internal reorganizations, such as dissolutions and mergers. The corporate violator can reasonably be expected to know, or find out, whether its own reorganization would affect its compliance obligations under the Commission's order. By contrast, the individual provision (Part VI) addresses a person's external affiliations, which renders deductions about the impact on

compliance obligations far more difficult. For example, the individual violator who takes a job with a new company—possibly a large conglomerate with many divisions or business lines—may reasonably not know about all the business affairs of her new employer. It may be impossible for her to make a well-informed determination about whether her new business affiliation "may affect compliance obligations" under the Commission's order. The Commission should not impose that requirement on the individual violator.

That requirement would also be unfair to consumers. A key purpose of the business affiliation reporting requirement is to prevent the individual from violating the order through a faceless company. When a company deceives or otherwise harms consumers, consumers may be able to identify the company, but not the individuals behind the corporate veil. Consequently, the consumer complaints that reach the FTC will most likely be about the offending company, not the individuals behind it. Having the ability to connect that company with an individual violator under order is indispensable for the FTC to spot and stop recidivism. That connection would go undetected if the individual failed to self-report the affiliation by deeming it not sufficiently related to her compliance obligations.

V. Part VI's duration can be reduced to five years.

Although the substantive scope of Part VI should remain unchanged, Complaint Counsel recommends a reduction in the provision's duration from ten to five years. That reduction would align with the Order's recordkeeping provision (Part III), which the First Circuit upheld, and address the First Circuit's concern about Part VI being overly "onerous." *See Fanning*, 821 F.3d at 176-177. Five years is also appropriate given the circumstances of the violative practices here, particularly the scheme's duration. Fanning's proposal of three years (Fanning Br. at 3) is too short, especially given that more than two years have already lapsed since the Commission

entered the Order and Fanning has not submitted a single compliance report. Ortiz Decl. ¶ 3.

VI. Recommendation.

Consistent with the foregoing, Complaint Counsel recommends amending Part VI of the Order as follows: substitute "five (5) years" for "ten (10) years" in the first sentence. Given the high risk of recidivism and Fanning's evasiveness about his business affiliations, Complaint Counsel recommends maintaining the remainder of Part VI as is.

Dated: May 3, 2017

Respectfully submitted,

Sarah Schroeder
Boris Yankilovich
Federal Trade Commission
Western Region – San Francisco
901 Market Street, Suite 570
San Francisco, CA 94103

COMPLAINT COUNSEL

PUBLIC

DECLARATION OF KELLY ORTIZ
PURSUANT TO 28 U.S.C. § 1746

1. My name is Kelly Ortiz. I am a citizen of the United States of America. I am employed by the Federal Trade Commission as an Investigator in the Western Region. If called to testify, I could and would competently testify to the facts set forth below.
2. On March 17, 2017, Respondent John Fanning filed a Motion for Clarification with the U.S. Court of Appeals for the First Circuit ("First Circuit"). On March 21, 2017, the First Circuit denied Mr. Fanning's Motion for Clarification. A true and correct copy of the First Circuit's March 21, 2017 opinion is attached to this declaration as **Ortiz Exhibit A**.
3. In 2015, the FTC's Division of Enforcement sent several letters to Mr. Fanning reminding him to submit a compliance report as required by the Commission's Final Order. A true and correct copy of the Division of Enforcement's September 16, 2015 letter to Mr. Fanning is attached as **Ortiz Exhibit B**. To date, Complaint Counsel and the FTC's Division of Enforcement have not received any compliance reports from Respondents John Fanning or Jerk, LLC.
4. Attached as **Ortiz Exhibit C** to this declaration is a true and correct copy of the October 8, 2010 Order in *FTC v. RCA Credit Services, LLC*.

I hereby declare under penalty of perjury that the foregoing is true and correct. Executed On May 2, 2017.

Kelly Ortiz

United States Court of Appeals
For the First Circuit

No. 15-1520

JOHN FANNING

Petitioner

v.

FEDERAL TRADE COMMISSION

Respondent

ORDER OF COURT

Entered: March 21, 2017

Appellant's motion to clarify is denied. The reconsideration of compliance monitoring provisions is permissibly within the scope of the remand.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Peter Carr, II
Pamela Rutkowski
Michael Bergman
Bradley Grossman
Joel Marcus
Leslie Melman
Sarah Schroeder

United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Korin Ewing Felix
Attorney

Division of Enforcement
600 Pennsylvania Ave., N.W.
Mailstop CC-9528
Washington, DC 20580

(202) 326-3556
kfelix@ftc.gov

September 16, 2015

Via Email
Peter F. Carr, II
ECKERT, SEAMANS, CHERIN & MELLOTT, LLC
Two International Place, 16th Floor
Boston, MA 02110
pcarr@eckertseamans.com

RE: *In the Matter of Jerk, LLC, et al.*, FTC Docket No. D-9361

Dear Mr. Carr:

As you know, under the Commission's Final Order ("Order") in this matter, Mr. Fanning was required to submit a report on his Order compliance no later than 60 days after service. That report was due on May 29, 2015.[1] On May 29, 2015, the U.S. Court of Appeals for the First Circuit entered a temporary stay of this matter pending review of Fanning's motion for a stay pending appeal. On July 14, 2015, the Court denied the motion and vacated the temporary stay.

Mr. Fanning should have filed his compliance report immediately after the Court vacated its temporary stay, but he failed to do so. This is a violation of the Order. It has now been more than 60 days since the Court vacated the stay, and Mr. Fanning remains in violation of the Order. Mr. Fanning should immediately submit his compliance report either by email to debrief@ftc.gov or via a delivery service – not the U.S. Postal Service – to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580. Begin the subject line of all email and paper submissions with the name and case number identified above.

[1] Mr. Fanning was aware of his obligation to submit this compliance report as well as the date it was due, as he stated in his motion for stay filed with the U.S. Court of Appeals for the First Circuit. Moreover, Mr. Fanning obviously received my previous letter reminding him of this obligation and providing instructions for submitting his compliance report, as he attached that letter to his motion.

If you have questions regarding this matter, please contact me at (202) 326-3556 or at kfelix@ftc.gov.

Sincerely,

Korin Ewing Felix

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v. **Case No. 8:08-CV-2062-T-27AEP**

RCA CREDIT SERVICES, LLC a Florida Corporation, et al.,

Defendants.
_____/

ORDER

BEFORE THE COURT is Plaintiff Federal Trade Commission's Motion to Alter or Amend Judgment (Dkt. 135). Plaintiff seeks an amendment of the Final Judgment and Permanent Injunction to include compliance monitoring and record-keeping provisions. Upon consideration, the motion is GRANTED.

As noted in a previous Order,[1] it is well settled that compliance monitoring and record-keeping provisions are appropriate to permit the Commission to police compliance with an injunction, and such provisions also deter non-compliance. Plaintiff contends that, to protect consumers, compliance monitoring and record-keeping provisions are particularly appropriate here in light of (a) Defendant Rick Lee Crosby's non-compliance with the temporary restraining order ("TRO") and preliminary injunction in this matter and (b) evidence at trial that, using an alias to conceal his identity, Crosby has associated himself with a new credit repair venture, creditambassador.com, that makes claims resembling those made on the website of Defendant RCA

[1] *See* Dkt. 125 at 20 (citing *FTC v. Capital Choice Consumer Credit, Inc.*, No. 02-21050, 2004 WL 5141452, at *4 (S.D. Fla. May 5, 2004)).

Credit Services, LLC.

In response, Crosby disputes his non-compliance with certain provisions of the TRO and preliminary injunction. Crosby asserts that evidence of his non-compliance with the asset freeze (*e.g.*, evidence at trial indicating Crosby's income and expenditures of approximately $4,500 per month and purchase of a $40,000 vehicle during this lawsuit) either was not adequately proven (for reasons not explained) or does not demonstrate wrongdoing because, in any event, Crosby was unable to meet even his basic living expenses.[2] Additionally, although not denying the FTC's contention that he still appears on the creditamabassador.com website, Crosby evasively asserts that creditamabassador.com does not offer credit repair services.[3] If the record permitted any doubt about the propriety of the proposed compliance monitoring and record-keeping provisions, Crosby's evasive response effectively dispels it.

Accordingly, Plaintiffs' Motion to Alter or Amend Judgment (Dkt. 135) is **GRANTED**. An amended final order and permanent injunction will issue separately.

DONE AND ORDERED in chambers this 8th day of October, 2010.

JAMES D. WHITTEMORE
United States District Judge

Copies to: Counsel of Record; *pro se* Defendant

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[2] Any unnecessary hardship imposed by the asset freeze was the proper subject for a motion to modify the asset freeze. Crosby's initial motion to modify the asset freeze was denied without prejudice owing to Crosby's failure to comply with the disclosure provisions of the preliminary injunction. *See* Dkts. 55, 57. Apparently, Crosby declined to renew the motion or move for any other modification of the asset freeze. *See* Dkt. 135 at 8 ("[T]he FTC has consistently indicated that it would not object to Crosby's use of funds acquired through legitimate employment unrelated to his conduct at issue in this case for personal expenses. Crosby, however, has never sought modification of the asset freeze to fit this condition.").

[3] The Permanent Injunction enjoins Crosby from, *inter alia*, "[a]dvertising, marketing, promoting, offering for sale, or selling any credit repair product or service, including publications, e-books and any form of written and oral communication . . . ." (Dkt. 131 at 3).

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2017, I served a true and correct copy of COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S BRIEFING ON REMAND and DECLARATION OF KELLY ORTIZ on:

The Office of the Secretary:

Donald S. Clark
Office of the Secretary
600 Pennsylvania Avenue, N.W.
Room H-172
Washington, D.C. 20580

The Office of the Administrative Law Judge

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Avenue, N.W.
Room H-106
Washington, D.C. 20580

Counsel for John Fanning:

Peter F. Carr, II
Eckert, Seamans, Cherin & Mellott, LLC
Two International Place, 16th Floor
Boston, MA 02110
Email: pcarr@eckertseamans.com

Counsel for Jerk, LLC:

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

Dated: May 3, 2017

Kelly Ortiz
Investigator, Federal Trade Commission