

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Maureen K. Ohlhausen, Acting Chairman
Terrell McSweeney

)
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



**MOTION OF JOHN FANNING TO STAY AND CONTINUE REMAND PROCEEDINGS
PENDING RULING ON MOTION FOR CLARIFICATION**

Respondent John Fanning respectfully requests the Commission to stay and continue its Order Scheduling Briefing on Remand, including the requirement that John Fanning (“Fanning”) submit a brief by March 20, 2017, until the First Circuit Court of Appeals (“First Circuit”) rules on Fanning’s pending Motion for Clarification, filed on March 17, 2017 (See Motion for Clarification, at Ex. 1). Judicial economy and efficiency support a stay until the First Circuit clarifies its Opinion so that the Parties can avoid or otherwise streamline further proceedings on remand consistent with the First Circuit’s Opinion. In support of a stay, Fanning states as follows:

1. On May 9, 2016, the First Circuit vacated Paragraph VI of the Commission’s Final Order, the mandate, inter alia, that Fanning for 10 years “shall notify the Commission of the discontinuance of his current business or employment, or his affiliation with any new business or employment.”

2. The First Circuit thoroughly considered and ultimately rejected the FTC's Compliance Monitoring remedy imposed on Fanning, vacated the FTC's Final Order in this respect, and remanded to the FTC for "proceedings consistent with this opinion." (Opinion, at p. 25).

3. Fanning contends that the First Circuit remanded for the FTC to delete in its entirety the Compliance Monitoring provision from any revised administrative final order. The FTC alternatively construes the Court's Opinion and Judgment as permitting the FTC on remand to reconsider and re-impose a Compliance Monitoring remedy on Fanning.

4. Due to these conflicting interpretations, Fanning has requested that the First Circuit clarify its Opinion with respect to its remand order.

5. All Parties will benefit from clarification of the First Circuit's Order. If Fanning is correct in his interpretation, clarification by the Court will avoid further proceedings before the FTC and eliminate unnecessary expense, time, and effort by all parties. If the First Circuit provides that further proceedings are necessary, such clarification will assist in specifically identifying the nature of further remand proceedings consistent with the First Circuit's opinion.

CONCLUSION

For the foregoing reasons, Respondent John Fanning requests that the briefing schedule ordered in the Federal Trade Commission's March 3, 2017 Order Scheduling Briefing on Remand be stayed pending the First Circuit's ruling on Fanning's Motion for Clarification.¹

¹ Complaint Counsel has agreed not to oppose this request.

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

617.342.6899 (FAX)

Dated: March 20, 2017

CERTIFICATE OF COMPLIANCE WITH MEET AND CONFER OBLIGATION

I, Peter F. Carr, II, Esquire, counsel to Respondent John Fanning, hereby certify that I have spoken with Complaint Counsel in a good faith effort to resolve the issues addressed in the within motion. Complaint Counsel has agreed not to oppose this motion.

/s/ Peter F. Carr, II
Peter F. Carr, II

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 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: 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 20, 2017

EXHIBIT 1

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

| | | |
|---------------------------|---|------------------|
| _____ |) | |
| JOHN FANNING, |) | |
| |) | |
| Petitioner, |) | Case No: 15-1520 |
| v. |) | |
| |) | |
| FEDERAL TRADE COMMISSION, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

PETITIONER'S MOTION FOR CLARIFICATION

Petitioner John Fanning (“Fanning”) hereby moves for clarification of this Court’s May 9, 2016 Opinion and Judgment solely with respect to its remand order concerning the Federal Trade Commission’s “Compliance Monitoring” of Fanning. The Court struck from the FTC’s Final Order at Paragraph VI the mandate, *inter alia*, that Fanning for 10 years “shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment.” Fanning contends that this Court remanded for the FTC to delete in its entirety this specific Compliance Monitoring provision from a revised administrative final order to enter. In contrast, the FTC construes this Court’s Opinion and Judgment as permitting the FTC on remand to reconsider and re-impose a Compliance Monitoring remedy on Fanning. This difference in interpretation is material, where the FTC has ordered the parties to submit briefing on the scope of a Compliance Monitoring provision, instead of merely entering a revised final order with the contested Compliance Monitoring provision stricken. (See FTC Remand Order, at **Ex. 1**). In further support of clarification, Fanning states as follows:

1. On April 2, 2014, the FTC issued a complaint against Fanning claiming violations of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45.

2. On March 25, 2015, the FTC granted summary decision against Fanning, and entered its Final Order. As part of its Final Order, the FTC sanctioned Fanning with Compliance Monitoring, as follows:

VI.
COMPLIANCE MONITORING – JOHN FANNING

IT IS FURTHER ORDERED that respondent John Fanning, for a period of ten (10) 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. 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.

(Final Order, at p. 4).

3. On April 28, 2015, Fanning filed with this Court a Petition for Review from the Final Order. Fanning's appeal challenged as a matter of law both the FTC's finding of liability under the Act, and the FTC's administrative sanctions. Particularly, Fanning on appeal requested this Court, in the event liability was affirmed, to strike and vacate Paragraph VI of the Final Order as a violation of law. The parties fully briefed and argued the legality of this Compliance Monitoring provision.

4. During oral argument held on December 8, 2015, this Court directly addressed the propriety of the contested Compliance Monitoring provision, and queried the FTC about precedent to maintain the sanction against Fanning in Paragraph VI of the Final Order. The FTC asserted, in substance, that the factual record and the case law supported the remedy imposed.

5. On December 10, 2015, the Commission submitted a supplemental filing of cases purportedly involving similar remedial administrative orders to justify the Final Order.

6. This Court subsequently affirmed the FTC's summary decision ruling against Fanning for violation of the Federal Trade Commission Act, but vacated Paragraph VI of the Commission's Final Order. The Court concluded that the supplemental cases proffered by the FTC were inapposite, and that the sanction imposed on Fanning was not reasonably related to his violation. This Court held:

[T]he 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. Without any guidance from the Commission, we cannot find these 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.

(Opinion, at pp. 24-25). The Court remanded to the FTC for "proceedings consistent with this opinion." (Opinion, at p. 25).

7. Thereafter, the FTC issued its remand order requiring Fanning to submit a brief "addressing the foregoing issue regarding Paragraph VI of the Commission's Final Order and including proposed alternative language for Paragraph VI." (**Ex. 1**).

8. Rather than enter a revised final order with Paragraph VI deleted in its entirety, the FTC is apparently prepared on remand to impose an alternate Compliance Monitoring sanction on Fanning, or perhaps the same or similar sanction. This Court thoroughly considered and ultimately rejected the FTC's Compliance Monitoring remedy imposed on Fanning. Entry of a revised Final Order deleting "Paragraph VI. COMPLIANCE MONITORING – JOHN FANNING" is "consistent with this opinion" as directed. In light of the arguments below and on appeal, to include the supplemental filing by the FTC, the "[w]ithout any guidance from the Commission" language in the Court'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 not an invitation for the FTC to provide "guidance" after the fact. Based on the history of the

proceedings, the Court'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.

9. If Fanning is correct in his interpretation of this Court's Opinion and Judgment, clarification by this Court will avoid further proceedings before the FTC and eliminate the unnecessary expense, time, and effort by all parties.

CONCLUSION

For the foregoing reasons, Petitioner John Fanning respectfully requests this Court to grant his motion, and to clarify this Court's Opinion and Judgment to express that the Federal Trade Commission on remand shall strike in its entirety Paragraph VI - Compliance Monitoring from the revised final administrative order that shall enter against John Fanning.

Respectfully submitted,

JOHN FANNING,

By his attorney,

/s/ Peter F. Carr, II

Peter F. Carr, II (US Court of Appeals #47600)

ECKERT, SEAMANS, CHERIN & MELLOTT, LLC

Two International Place, 16th Floor

Boston, MA 02110

617.342.6800

617.342.6899 (FAX)

Email: pcarr@eckertseamans.com

Date: March 17, 2017

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2017, I served the foregoing with the Court's appellate CM/ECF system on the following counsel of record for Respondent Federal Trade Commission who are registered as ECF filers and that they will be served by the CM/ECF system:

Joel R. Marcus
Leslie Rice Melman
Bradley Grossman
Michael D. Bergman
Federal Trade Commission
600 Pennsylvania Ave, N.W., Rm. H-576
Washington, DC 20580
(202) 326-2478
(202) 326-2477 (FAX)
jmarcuskurn@ftc.gov
lmelman@ftc.gov
bgrossman@ftc.gov
mbergman@ftc.gov

/s/ Peter F. Carr, II

Peter F. Carr, II

Dated: March 17, 2017

EXHIBIT 1

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Maureen K. Ohlhausen, Acting Chairman
 Terrell McSweeney

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.)

))
))
))

DOCKET NO. 9361

ORDER SCHEDULING BRIEFING ON REMAND

On May 9, 2016, the United States Court of Appeals for the First Circuit issued an opinion affirming “the Commission’s entry of summary decision as to liability [in this proceeding] and all provisions of its remedial order except for compliance monitoring as to Fanning.” *Fanning v. Federal Trade Commission*, 821 F.3d 164, 177-78 (1st Cir. 2016). The court vacated and remanded that single portion of the Commission’s order for further proceedings consistent with the court’s opinion. *Id.* at 178. The court’s judgment was entered on May 9, 2016; on January 9, 2017, the Supreme Court denied Mr. Fanning’s petition for a writ of *certiorari*; and the time period for filing a petition for rehearing ended on February 3, 2017 with no such petition having been filed. This proceeding is therefore now pending before the Commission on remand.¹

¹ On August 23, 2016, the Commission issued an *Order Scheduling Briefing On Remand* in this matter, based on the understanding that Mr. Fanning had neither filed a petition for rehearing or rehearing *en banc* with the Court of Appeals nor filed a petition for writ of *certiorari* with the Supreme Court. However, Mr. Fanning subsequently advised the Commission that he had attempted to file a petition for writ of *certiorari* with the Supreme Court; that his petition had been returned to him for failure to comply with the Rules of the Supreme Court; and that the Clerk of Court subsequently granted him an additional sixty days within which to file a corrected petition. The Commission therefore vacated the briefing schedule in the August 23 Order. *Order Modifying August 23, 2016 Order* (Sept. 14, 2016), at <https://www.ftc.gov/system/files/documents/cases/160914jerkorder.pdf>.

The court's remand applies to a single paragraph of the Commission's Final Order issued on March 13, 2015. Paragraph VI of that Order reads, in relevant part:

**VI.
COMPLIANCE MONITORING – JOHN FANNING**

IT IS FURTHER ORDERED that respondent John Fanning, for a period of ten (10) 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. 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.

The court of appeals stated that this provision requires Mr. 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.” *Fanning*, 821 F.3d at 177. It explained that, “[w]ithout any guidance from the Commission, we cannot find these provisions are reasonably related to Fanning’s violation.” *Id.* at 177.

The Commission has determined that briefing by Mr. Fanning and Complaint Counsel would assist it in resolving the issue presented on remand. Such briefing shall be confined solely to that issue remanded by the court of appeals; that is, the compliance monitoring applicable to Mr. Fanning addressed in Paragraph VI of the Commission’s Final Order. Accordingly,

IT IS ORDERED THAT:

1. On or before March 20, 2017, Mr. Fanning shall file a brief, not to exceed 2,000 words, addressing the foregoing issue regarding Paragraph VI of the Commission’s Final Order and including proposed alternative language for Paragraph VI;
2. On or before fourteen days after service of Mr. Fanning’s brief, Complaint Counsel may file an answering brief not to exceed 2,000 words; and
3. On or before five days after service of Complaint Counsel’s answering brief, Mr. Fanning may file a reply brief not to exceed 1,250 words.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: March 3, 2017