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.	)	

ORDER ON REMAND REVISING COMPLIANCE MONITORING REQUIREMENT

On March 13, 2015, the Commission issued an Opinion deciding that Respondents Jerk, LLC ("Jerk") and John Fanning had engaged in deceptive conduct in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). *Jerk, LLC*, 159 F.T.C. 885 (2015). An accompanying Final Order imposed cease-and-desist and other relief. *Id*. at 939-44. The United States Court of Appeals for the First Circuit affirmed the Commission's finding of liability and sustained all aspects of the Commission's remedial order other than a compliance monitoring provision, which it remanded to the Commission for further consideration. *Fanning v. FTC*, 821 F.3d 164 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 627 (Jan. 9, 2017). This Order addresses the remanded issue and modifies the compliance monitoring requirement to reflect the court's rulings.

I. BACKGROUND

This proceeding arose from an administrative complaint, which alleged that Respondents had engaged in deceptive acts or practices through the operations of their website, Jerk.com. Jerk.com was a social media website that invited users to create profiles of other individuals and to rate them as a "jerk" or "not a jerk." The Commission found that Respondents had falsely represented that content on Jerk.com, including the names and photographs in profiles, had been created by the website's users and reflected users' views of the profiled individuals, when in fact that content was almost entirely "scraped" from Facebook by Jerk itself or those under Jerk's control. 159 F.T.C. at 902-06. The Commission further determined that Jerk.com had falsely

claimed that consumers who paid a $30 membership fee would receive additional benefits, including the ability to dispute information posted on the site, but in fact had provided nothing in return for the membership fees. *Id.* at 912-16. The Commission found that Mr. Fanning had the authority to control, and controlled and participated directly in, Jerk's unlawful conduct and concluded that he was individually liable for Jerk's deceptive acts. *Id.* at 917-27.

Mr. Fanning sought judicial review.[1] The court of appeals sustained the Commission's findings that the Jerk.com website contained material and false representations about the source of its content and the benefits of the $30 paid membership. *Fanning*, 821 F.3d at 170-74. It observed that Mr. Fanning had developed no argument as to why the Commission's finding of personal liability was wrong and ruled that this contention had been waived. *Id.* at 169 n.4. As to remedy, the court affirmed the core of the Commission's Final Order, which enjoined Mr. Fanning from making any misrepresentation about the source of any content on a website or regarding the benefits of joining any service. *Id.* at 174-75. The court also affirmed, *inter alia*, provisions requiring that for five years Mr. Fanning notify the Commission of any complaints or inquiries relating to any website or other online service and that he maintain and make available advertisements and promotional materials containing any representations covered by the order. *Id.* at 175-76.

The court of appeals, however, remanded one portion of the Commission's Final Order, Paragraph VI, which reads:

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 was unable to find a reasonable relation between this provision and Mr. Fanning's violation. 821 F.3d at 176. It noted that the provision requires that Mr. Fanning notify the Commission of business affiliations and employment "regardless of whether or not the affiliate or employer has responsibilities relating to the order." *Id.* at 177 (stating that the provision "would ostensibly require Fanning to report if he was a waiter at a restaurant"). It observed that while courts in a number of previous FTC Act cases had imposed orders requiring individuals to report any change of business for twenty years, none of the cited orders required individuals to also provide descriptions of their employers and business for more than five years. *Id.* at 177 &

[1] Jerk did not file a petition for review.

n.9. It found that the prior compliance monitoring orders had been "almost entirely bereft of analysis that might explain the rationale for such a requirement." *Id.* at 177. "Without any guidance from the Commission," the court concluded, "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." *Id.*

II. Analysis

On remand Mr. Fanning first argues that "[t]he First Circuit's Order and Judgment does not permit the FTC another opportunity to formulate a new Compliance Monitoring sanction against Fanning," so that 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." Respondent John Fanning's Response to Order Scheduling Briefing Following Remand, Docket No. 9361, at 2 (F.T.C. Apr. 12, 2017) (hereinafter "Fanning Brief"). The First Circuit's ruling, however, permits the Commission to reinstate an appropriate compliance monitoring provision so long as it demonstrates that the relief is reasonably related to Mr. Fanning's violation. Indeed, the First Circuit has already heard and directly rejected Mr. Fanning's contentions regarding the scope of the remand. On March 17, 2017, Mr. Fanning filed with the court of appeals a Motion for Clarification, in which he (i) argued that "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" and (ii) asked the court "to clarify th[e] 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." Petitioner's Mot. for Clarification, at 4, *Fanning v. FTC*, No. 15-1520 (1st Cir. Mar. 17, 2017). Four days later, the court of appeals ruled, "Appellant's motion to clarify is denied. The reconsideration of compliance monitoring provisions is permissibly within the scope of the remand." Order of Court, *Fanning*, No. 15-1520 (1st Cir. Mar. 21, 2017). In view of the First Circuit's express holding to the contrary, Mr. Fanning's continued insistence that the court has required the FTC to strike the entire Compliance Monitoring provision is unpersuasive.

Mr. Fanning further argues that – if the Commission retains any compliance monitoring provision – it must significantly revise both the scope and duration of the requirement. He urges that (i) the required notification regarding affiliations with any new business or employment be limited to any new business or employment "that may affect compliance obligations arising under this order" and (ii) the compliance monitoring requirement be reduced from ten to three years. Fanning Brief at 3. Complaint Counsel respond that a robust compliance monitoring mechanism that includes notification of new business affiliations and new employment is necessary to prevent recidivism. They argue that the specific facts of this case warrant maintaining the original scope of the compliance monitoring provision. Complaint Counsel's Response to Resp't's Briefing on Remand, Docket No. 9361, at 2-3 (F.T.C. May 3, 2017) ("Complaint Counsel Brief"). Complaint Counsel concede, however, that the duration of the

compliance monitoring requirement could be reduced to five years while still providing appropriate protection. *Id.* at 7-8.

Requiring individual respondents who have previously controlled or participated in deceptive conduct to report changes in employment and business affiliation is generally an important element in remedying deception. It has long been recognized that, once the Commission has found a respondent to have engaged in deceptive practices, it may impose remedies that reach broadly enough "to prevent respondent[] from engaging in similarly illegal practices in [the] future." *FTC v. Colgate Palmolive Co.*, 380 U.S. 374, 395 (1965); *cf. FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) (noting, in a price discrimination case, that the Commission "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity") (citations omitted). Thus, the Commission's Final Order prohibits Mr. Fanning not just from future deceptive use of Jerk.com, but rather from misrepresenting the source of any content on a website and the benefits of joining any service.

With an individual respondent, the first step in monitoring such future conduct requires knowledge as to where the individual is employed or otherwise conducting business. Consumer complaints regarding deceptive conduct typically identify the allegedly offending company, not the individuals behind it. Having the ability to connect Mr. Fanning to any such consumer complaints is a prerequisite for identifying signs of recidivistic deception that would again harm consumers.

Numerous courts that have imposed remedial orders for FTC Act violations have recognized the contribution of compliance monitoring to achieving remedial goals.[2] In particular, requiring individual respondents to report changes in their employment or business activities has been found "necessary in order for the FTC to monitor Defendants' compliance," *FTC v. Wellness Support Network, Inc.*, 2014 WL 644749, at *22 (N.D. Cal. Feb. 19, 2014); "appropriate to permit the Commission to police" compliance, *FTC v. Capital Choice Consumer Credit, Inc.*, 2004 WL 5141452, at *4 (M.D. Fla. May 4, 2004) (internal quotation marks omitted) (retaining employment reporting provision in *FTC v. Capital Choice Consumer Credit, Inc.*, 2004 WL 5149998, at *52 (M.D. Fla. Feb. 20, 2004)); and "necessary to effectuate enforcement of Section 5 of the FTC Act and to deter future violations by the[] Defendants," *FTC v. US Sales Corp.*, 785 F. Supp. 737, 753 (N.D. Ill. 1992).[3] Similarly, in *FTC v. Direct*

---

[2] *See, e.g., United States Dep't of Justice v. Daniel Chapter One*, 89 F.Supp. 3d 132, 145-46 (D.D.C. 2015), *aff'd*, 650 F. App'x 20 (D.C. Cir. 2016) (monitoring provisions "provide an oversight mechanism to better ensure that the defendants do not engage in future recidivism"); *FTC v. Alcoholism Cure Corp.*, 2012 WL 12903173, at *5 (M.D. Fla. July 3, 2012) (providing that "[b]road compliance monitoring provisions are necessary to ensure Defendants' compliance"); *FTC v. Slimamerica, Inc.*, 77 F. Supp. 2d 1263, 1276 (S.D. Fla. 1999) (finding monitoring provisions "appropriate to permit the Commission to police the defendants' compliance with the order").

[3] Other cases in which the courts have imposed or affirmed orders requiring individual defendants to report changes in employment status or business activities include *POM Wonderful, LLC*, 155 F.T.C. 1, 196 (Jan. 10, 2013), *aff'd in relevant part, POM Wonderful LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015); *FTC v. Think Achievement Corp.*, 144

Mktg Concepts, Inc., 648 F. Supp. 2d 202 (D. Mass. 2009), *aff'd*, 624 F.3d 1 (1st Cir. 2010), the trial court characterized monitoring provisions of two orders that, *inter alia*, required defendants to inform the FTC of changes in their employment or business activities as "reasonable and necessary to ensure that . . . the FTC has the ability to monitor compliance with the orders and prevent future illegal conduct."[4]

Here, the Commission has good reason to require that Mr. Fanning report changes in his employment or business activities as part of the Commission's compliance monitoring. The Commission found Mr. Fanning individually liable for multiple deceptive acts that affected several aspects of Jerk.com's website. *See Jerk, LLC*, 159 F.T.C. at 917-27 (finding liability for misrepresentations concerning (i) website content and (ii) membership benefits). The Commission also found that over time Mr. Fanning had shifted his deceptive activity from Jerk.com to a new website and had applied similar techniques to new iterations of his business activity. *Id.* at 934 (finding that Jerk and Mr. Fanning had moved content from Jerk.com to Jerk.org and used automatically generated profiles to populate reper.com). Of particular concern, Mr. Fanning has demonstrated a proclivity to disregard compliance obligations. For example, Paragraph VII of the Final Order required Mr. Fanning and Jerk to file a compliance report with the Commission within sixty days after service of the order. More than two years after the Final Order was served,[5] no compliance report had been filed. *See* Declaration of Kelly Ortiz at ¶ 3.[6] Mr. Fanning's failure to file the required compliance report simultaneously

---

F.Supp. 2d 1013, 1027 (N.D. Ind. 2000); *FTC v. Micom Corp.*, 1997 WL 226232, at *7 (S.D.N.Y. Mar. 12, 1997); *FTC v. Freedom Med., Inc.*, 1996 WL 86826, at *5 (S.D. Ohio Jan. 5, 1996); *FTC v. Alliance Commc'n, Inc.*, 1996 WL 812939, at *3 (S.D.N.Y. Nov. 6, 1996); *FTC v. Renaissance Fine Arts, Ltd.*, 1995 WL 523620, at *4 (N.D. Ohio Aug. 10, 1995); *FTC v. Fed. Coin Repository, Inc.*, 1993 WL 356177, at *4 (E.D.N.Y. Aug. 9, 1993); *FTC v. T.G. Morgan, Inc.*, 1992 WL 88162, at *3 (D. Minn. Mar. 4, 1992), *aff'd* sub nom. *FTC. v. Blodgett*, 54 F.3d 782 (8th Cir. 1995) (without reported opinion); *FTC v. U.S. Rarities, Inc.*, 1992 WL 696962, at *6 (S.D. Fla. May 26, 1992); *FTC v. Oak Tree Numismatics, Inc.*, 1991 WL 11242190, at *4 (D.N.J. Sept. 10, 1991).

[4] 648 F. Supp. 2d at 216-17 (referencing, *inter alia*, ¶ XIV.A.1 of the proposed Order and Judgment for Permanent Injunction and other Equitable Relief against Defendants Direct Marketing Concepts, Inc., ITV Direct, Inc., and Donald W. Barrett, and Robert Maihos at 21-22, *FTC v. Direct Marketing Concepts, Inc.*, 648 F. Supp. 2d 202 (D. Mass. 2009) (Civ. No. 04-11136-GAO), and ¶ IX.A.1 of the proposed Order and Judgment for Permanent Injunction and other Equitable Relief against Defendants Allen Stern, King Media, Inc., and Triad ML Marketing, Inc., and Relief Defendants Lisa Stern, Steven Ritchey, and BP International, Inc. at 13-14, *FTC v. Direct Marketing Concepts, Inc.*, 648 F. Supp. 2d 202 (D. Mass. 2009) (Civ. No. 04-11136-GAO)). The First Circuit found the trial court's remedy "appropriate," 624 F.3d at 18, but the monitoring provisions were not topics of appeal.

[5] The Commission's Opinion and Final Order was served on March 30, 2015. *See* Petition for Review, *Fanning v. FTC*, No. 15-1520, (1st Cir. 2015). The sixty day period allotted for filing a compliance report ran to May 29, 2015. On that day, the Court of Appeals for the First Circuit temporarily stayed the Commission's order pending review of Mr. Fanning's motion for a stay pending appeal. On July 14, 2015, the court denied the motion and vacated the temporary stay. The temporary stay was in place for only 47 days.

[6] The Ortiz Declaration, dated May 2, 2017, and attached to Complaint Counsel's Brief, states that in 2015, the FTC's Division of Enforcement sent several letters to Mr. Fanning reminding him of his obligation to submit a compliance report. Ortiz Exhibit B is copy of a September 16, 2015 letter from the Division of Enforcement to Mr. Fanning's attorney, reminding him that Mr. Fanning's failure to file a compliance report placed him in violation of the Final Order. According to the Declaration, "To date, Complaint Counsel and the FTC's Division of

establishes a history of disregard for the Final Order's constraints and deprives the Commission of information it needs to protect the public interest. It illustrates and reinforces the Commission's ongoing need for knowledge of changes in Mr. Fanning's places of employment and business activities in order to monitor his future compliance.

Mr. Fanning argues that if the FTC refuses to strike his compliance monitoring obligations in their entirety, the requirement that he report his affiliation with any new business or employment should be limited to affiliations "that may affect compliance obligations arising under [the Final] [O]rder." Fanning Brief at 3. Mr. Fanning, however has demonstrated a pattern of evasiveness about his employment and affiliations that leaves us unwilling to rely solely on his discretion as to what affiliations need to be reported. For example, in his September 4, 2014, deposition, Mr. Fanning dodged questions about his then current employment, stating that he was "not sure" what type of work he did for compensation or who paid him to work. *See* CX0092-0012 (exhibit to Complaint Counsel's Mot. for Summ. Decision). Mr. Fanning also evaded questions about his business affiliations, stating that he was "not sure" what the terms "businessman," and "your business address" meant and whether the word "business" covered his transactions. *See* CX0092-005-006. Mr. Fanning further testified that he was "not sure" what Jerk LLC was, CX0092-0015, and when asked what Jerk LLC "did for a business," his answer was "I'm not sure what you mean by 'for a business.'" CX0092-0016.

In view of Mr. Fanning's demonstrated refusal to assign common meanings to common terms and his wholesale default on compliance reporting obligations, we cannot rely on him to determine what affiliations "may affect compliance obligations" under the Final Order. Indeed, these considerations could arguably justify maintaining the full scope of compliance reporting obligations provided by the Final Order. Nonetheless, we can address the concerns expressed by the court of appeals through a revised order provision focused on the types of activities carried on by Mr. Fanning and Jerk while limiting new opportunities for verbal gamesmanship. Accordingly, we will narrow Paragraph VI of the Final Order to require notification of affiliations with any new business or employment "that involves electronic commerce, social media, or the online collection or use of consumer data that can be reasonably linked to a specific consumer, computer, or other device."

With regard to duration of the reporting, courts have recognized that "a sustained period of monitoring" may sometimes be needed for the FTC "to ensure adequate compliance." *US Sales Corp.*, 785 F.Supp. at 754. Here, Complaint Counsel urge that the Final Order's remedial purposes may be served by a five-year requirement. This corresponds to the five-year period endorsed by the court of appeals for other reporting and monitoring provisions of the Final Order. *See Fanning*, 821 F.3d at 175-76 (affirming five-year requirements for notifications

---

Enforcement have not received any compliance reports from Respondents John Fanning or Jerk, LLC." Ortiz Decl. at ¶ 3.

regarding complaints or inquiries and for the maintenance and availability of advertisements and promotional materials). In view of the totality of concerns raised by Mr. Fanning's conduct, including his deceptive conduct in connection with Jerk.com and his failure to file a required compliance report, we find a five-year compliance monitoring requirement – running from the time of issuance of the Final Order and requiring retroactive notification for the specified changes of business or employment that occurred between issuance of the Final Order and the effective date of this order – necessary and appropriate for the continued protection of the public. Accordingly,

IT IS ORDERED THAT:

1. Section VI of the Commission's Final Order in this proceeding, issued on March 13, 2015, is hereby amended to read:

VI.

COMPLIANCE MONITORING – JOHN FANNING

IT IS FURTHER ORDERED that John Fanning, for a period of five (5) 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 involves electronic commerce, social media, or the online collection or use of consumer data that can be reasonably linked to a specific consumer, computer, or other device. 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. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington DC 20580. The subject line must begin: In re Jerk, LLC.

2. All portions of the Commission's Final Order in this proceeding, issued on March 13, 2015, other than Section VI, shall remain in effect without modification.

By the Commission.

Donald S. Clark,
Secretary

SEAL:
ISSUED: September 28, 2017