

**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,)	DOCKET NO. 9361
also d/b/a JERK.COM, and,)	
)	
John Fanning,)	
individually and as a member of)	
Jerk, LLC.)	
)	

ORDER REVISING BRIEFING SCHEDULE ON REMAND

On March 3, 2017, the Commission issued an Order Scheduling Briefing on Remand following entry of judgment by the United States Court of Appeals for the First Circuit denying Respondent John Fanning’s petition for review in this proceeding, and denial by the Supreme Court of Mr. Fanning’s petition for a writ of *certiorari*. The March 3 Order noted that the Court of Appeals had affirmed “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 only that portion of the Commission’s order for further proceedings consistent with the court’s opinion. *Id.* at 178.

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 determined that briefing by Mr. Fanning and Complaint Counsel would assist it in resolving the issue presented on remand. In the March 3 Order, the Commission therefore ordered that briefs be filed, beginning with an opening brief from Mr. Fanning that was to be filed on or before March 20, 2017.

On March 17, 2017, Mr. Fanning filed a Motion for Clarification with the court of appeals. In that motion, Mr. Fanning argued that that court's order and judgment "does not permit the FTC another opportunity to formulate a new Compliance Monitoring sanction." He requested that the court clarify its 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. . . ." On March 20, 2017, Mr. Fanning filed a motion with the Commission asking for a stay of the briefing schedule pending the appellate court's ruling on the Motion for Clarification.

On March 21, 2017, the Court of Appeals for the First Circuit denied Mr. Fanning's Motion for Clarification. The court explained, "The reconsideration of compliance monitoring provisions is permissibly within the scope of the remand." In light of this order, Mr. Fanning's motion for stay is moot. On March 22, 2017, Mr. Fanning filed a Motion to enlarge the March 3 Order briefing schedule. On April 12, 2017, Mr. Fanning filed a Response to the March 3 Order in which he restates his position that the Court of Appeals had precluded imposition of a new Compliance Monitoring provision and provides his views regarding the content of such a provision if the FTC declines to strike it in its entirety.

The Commission has determined to accept Mr. Fanning's April 12 filing as his opening brief and to revise the remainder of the briefing schedule. Accordingly,

IT IS ORDERED THAT:

1. The Motion of John Fanning to Stay and Continue Remand Proceedings Pending Ruling on Motion for Clarification is **DENIED** as moot;
2. The Unopposed Motion of Respondent John Fanning to Enlarge the Time to File Brief is **GRANTED IN PART**, and Respondent John Fanning's Response to Order Scheduling Briefing Following Remand is accepted as Mr. Fanning's opening brief;
3. On or before May 5, 2017, Complaint Counsel may file an answering brief not to exceed 2,000 words; and
4. 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.

SEAL:
ISSUED: April 14, 2017

Donald S. Clark
Secretary