

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



\_\_\_\_\_  
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

**ORIGINAL**

PUBLIC

**RESPONDENT JOHN FANNING’S REPLY BRIEF TO COMPLAINT  
COUNSEL’S RESPONSE TO RESPONDENT’S BRIEFING ON REMAND**

Pursuant to the Federal Trade Commission’s (the “Commission”) April 14, 2017 Order Revising Briefing Schedule on Remand, and Commission Rule 4.3, Respondent John Fanning (“Fanning”) hereby submits this Reply Brief to Complaint Counsel’s Response to Respondent’s Briefing on Remand. Fanning incorporates by reference the arguments set forth in his Briefing on Remand.

Complaint Counsel’s proposal to modify the Final Order’s Compliance Monitoring provision for Fanning from ten (10) to five (5) years without narrowing the provision’s scope contravenes the remand order 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). In finding that the scope of the Compliance Monitoring provision against Fanning was overbroad, the First Circuit noted that, as conceded by the Commission itself, such a provision would “ostensibly require Fanning to report if he was a waiter at a restaurant.” Id. at 177. Such burdensome and

illogical reporting would indeed be required of Fanning under the Complaint Counsel’s proposal to reissue the Compliance Monitoring sanction on remand without limiting its scope.

Moreover, the legal authority cited by Complaint Counsel ostensibly providing an “adequate explanation” for why the Compliance Monitoring provision is reasonably related to Fanning’s alleged violations is unpersuasive. Complaint Counsel states that to “monitor order compliance and prevent recidivism” the Commission routinely issues injunctive orders requiring violators to notify the agency of new business affiliations. Complaint Counsel further cites to district court injunctive orders, including FTC v. Wellness Support Network, Inc., No. 10-cv-04879, 2014 WL 644749 (N.D. Cal. 2014), for the proposition that federal district courts “also routinely include such provisions in injunctive orders for violations of the FTC Act.” However, the First Circuit specifically addressed the Commission’s supporting legal authority in its Opinion, including the analysis in Wellness:

Of the cited cases, only FTC v. Wellness Support Network, Inc. contains an explanation for the compliance reporting requirements. The defendants in that case made misleading representations about diabetes products over the course of eight years. Wellness Support, 2014 WL 644749, at \*2. The district court concluded that lengthy monitoring was necessary because the defendants had been “personally involved in serious violations of the FTC Act over a period of many years.” Id. at \*22. The district court simply states that the Commission must know the defendant's business affiliation "in order. . . to monitor Defendants' compliance." Id. **We do not find this bare analysis persuasive.**

Fanning, 821 F.3d at 177, n. 10 (emphasis added).

By simply restating the same rationale on remand that the First Circuit considered and summarily rejected, Complaint Counsel fails to demonstrate that the remedy bears a “reasonable relation to the unlawful practices found to exist”, and thus runs afoul of the First Circuit’s remand order. *See Id.* at 175 (“We may interfere with a Commission order if ‘the remedy selected bears

no reasonable relation to the unlawful practices found to exist’’) (quoting Removatron Int'l Corp. v. FTC, 884 F.2d 1489, 1499 (1st Cir.1989)).

Further, Complaint Counsel’s invocation of “the risk of recidivism” as a justification for the overbroad scope of the Compliance Monitoring provision is similarly unpersuasive. By its definition, recidivism, “[a] tendency to relapse into a habit of criminal activity or behavior”, *Recidivism*, Black's Law Dictionary (10th ed. 2014), requires a connection between anticipated behavior and some prior conduct. The issues in this proceeding pertain specifically to one reputational and social media website – jerk.com – and alleged misrepresentation of the source of content appearing on this website. Pursuant to Complaint Counsel’s recidivism theory, any required reporting should be accordingly limited in scope to business affiliations or employment in which Fanning could feasibly engage in the same or similar conduct – misrepresenting the source of content on a reputational and social media website.

Fanning thus reasserts his proposal that, if the Commission refuses to strike the Compliance Monitoring provision in its entirety, Paragraph VI should be 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

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617.342.6800

Dated: May 11, 2017

**CERTIFICATE OF SERVICE**

I hereby certify that on May 11, 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](mailto: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  
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One electronic copy to the Office of the Counsel for the Federal Trade Commission:

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

Dated: May 11, 2017

Notice of Electronic Service

**I hereby certify that on May 11, 2017, I filed an electronic copy of the foregoing Respondent John Fanning's Reply Brief to Complaint Counsel's Response to Respondent's Briefing on Remand, with:**

D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Ave., NW  
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Washington, DC, 20580

Donald Clark  
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**I hereby certify that on May 11, 2017, I served via E-Service an electronic copy of the foregoing Respondent John Fanning's Reply Brief to Complaint Counsel's Response to Respondent's Briefing on Remand, upon:**

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**I hereby certify that on May 11, 2017, I served via other means, as provided in 4.4(b) of the foregoing Respondent John Fanning's Reply Brief to Complaint Counsel's Response to Respondent's Briefing on Remand, upon:**

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