

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 RESPONSE AND OPPOSITION TO
ORDER SCHEDULING BRIEFING FOLLOWING REMAND**

Respondent John Fanning (“Fanning”) hereby responds to the Federal Trade Commission’s (the “Commission”) August 23, 2016 “Order Scheduling Briefing on Remand” (the “Briefing Order”). The Commission’s efforts to end-run the decision and order of the United States Court of Appeals for the First Circuit must be rejected.

The Briefing Order requiring a brief pertaining to “the compliance monitoring applicable to Mr. Fanning addressed in Paragraph VI of the Commission’s Final Order” . . . “including proposed order language” violates the opinion of the United States Court of Appeals for the First Circuit in Fanning v. Federal Trade Commission, 821 F.3d 164 (1st Cir. 2016). The First Circuit struck as unlawful the Commission’s Compliance Monitoring provision at Paragraph VI requiring Fanning, for a period of ten (10) years, to notify the Commission of “the discontinuance of his current business or employment, or of his affiliation with any new business or employment” including addresses, telephone numbers, and a description of the nature of the

business or employment and Fanning's duties and responsibilities. The First Circuit invalidated this provision in its entirety:

Without any guidance from the Commission, we cannot find these [compliance monitoring] 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.**

Fanning v. Federal Trade Commission, 821 F.3d at 177. The First Circuit rejected the Commission's explanation that "it has traditionally required such reporting" and discounted the cases cited by the Commission purportedly containing similar provisions, noting that "the 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." Id.

The Briefing Order is tantamount to contempt by the Commission of the First Circuit's order. The First Circuit did not invite the Commission to revise its Compliance Monitoring portion of the Final Order. The First Circuit voided Paragraph VI, remanded the case, and ordered the Commission to enter a revised Final Order without Paragraph VI of the original Final Order. 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.

In the event the Commission continues to press an interpretation of the First Circuit's opinion and remand order whereby the Commission intends to rewrite instead of delete Paragraph VI of the Final Order, the Commission must first obtain clarification from the First Circuit given the clear analysis and the unambiguous ruling by the First Circuit. The Commission should not just ignore and flout the First Circuit's order.

Moreover, the Commission's justification for further briefing that "no petition for rehearing or for *certiorari*" was filed is inaccurate. Fanning filed a timely Petition for Writ of Certiorari ("Petition") to the Supreme Court of the United States on August 8, 2016, and

provided notice and a copy of the Petition to the Solicitor General. Due to nonconformity with certain Supreme Court formatting requirements, the Supreme Court provided Fanning 60 days within which to submit a conforming Petition pursuant to Supreme Court Rule 14.5. (See Attached Order). Fanning plans to submit a timely conforming Petition.

If the First Circuit rules on a motion for clarification that it remanded with the intent to permit the Commission a chance to rewrite Paragraph IV instead of to strike it in its entirety and the Petition is denied, Fanning reserves the right at that point to address revised proposed language with respect to Compliance Monitoring. Until that time and until such orders, any further briefing is premature, unwarranted, and a derogation of due process.

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

Dated: September 6, 2016

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2016, 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

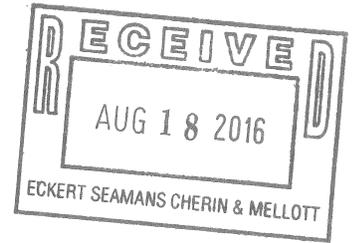
One electronic copy via email to Counsel for Jerk, LLC:

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

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

Dated: September 6, 2016

**SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001**



August 15, 2016

Peter F. Carr
Eckert Seamans Cherin & Mellott, LLC
Two International Place
16th Floor
Boston, MA 02110

RE: Fanning v. Federal Trade Commission
(USAP1 No. 15-1520)

Dear Mr. Carr:

Returned are 10 copies of the petition for writ of certiorari in the above-entitled case postmarked on August 8, 2016 and received on August 15, 2016, which fails to comply with the Rules of this Court.

If you intend to pay the \$300 docket fee, the petition must be in booklet format and on paper that measures 6 1/8 by 9 1/4 inches. Rule 33.1(a).

The appendix to the petition as required by Rule 14 must be in booklet format and on paper that measures 6 1/8 by 9 1/4 inches. Rule 33.1(a).

Rule 33.1(c) prohibits the use of spiral, plastic, metal or string bindings. Staples may be used, at least two, along the left margin covered with tape.

The petition must bear a suitable cover consisting of heavy paper, front and back. Rule 33.1(e).

The text of the petition and appendix must be typeset in a Century family (e.g., Century Expanded, New Century Schoolbook, or Century Schoolbook) 12-point type with 2-point or more leading between lines. The typeface of footnotes must be 10-point or larger with 2-point or more leading between lines. Rule 33.1(b).

All of the pages in the petition and appendix must contain margins of at least three-fourths of an inch on all sides. The text field, including footnotes, may not exceed 4 1/8 by 7 1/8 inches. Rule 33.1(c).

The text of the document must appear on both sides of the pages. Rule 33.1(b).

The lower court caption, showing the name of the issuing court or agency, the title and number of the case, and the date of entry, must be included with the opinion in the appendix to the petition. Rule 14.1(i)(ii).

In accordance with Rule 29.4(a), please serve three copies of your petition upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, and forward proof of said service to this office.

Your petitions and check in the amount of \$300.00 are herewith returned.

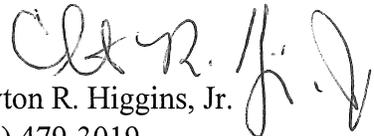
Kindly correct the petition and appendix so that it complies in all respects with the Rules of this Court and return it to this Office promptly so that it may be docketed. Unless the petition is submitted to this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

Three copies of the corrected petition must be served on opposing counsel. Rule 29.3.

When making the required corrections to a petition, no change to the substance of the petition may be made.

Sincerely,
Scott S. Harris, Clerk

By:


Clayton R. Higgins, Jr.
(202) 479-3019

Enclosures

Notice of Electronic Service

I hereby certify that on September 06, 2016, I filed an electronic copy of the foregoing Respondent John Fanning's Response and Opposition to Order Scheduling Briefing Following Remand, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on September 06, 2016, I served via E-Service an electronic copy of the foregoing Respondent John Fanning's Response and Opposition to Order Scheduling Briefing Following Remand, upon:

Sarah Schroeder
Attorney
Federal Trade Commission
sschroeder@ftc.gov
Complaint

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Respondent

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Complaint

Kenneth H. Abbe
Attorney
Federal Trade Commission
kabbe@ftc.gov
Complaint

I hereby certify that on September 06, 2016, I served via other means, as provided in 4.4(b) of the foregoing Respondent John Fanning's Response and Opposition to Order Scheduling Briefing Following Remand, upon:

Alexandria Lynn
Alexandria Beth Lynn
Alexandria B. Lynn, Esq.
alex.lynn@codelaw.com
Respondent

Peter Carr
Attorney