

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

PUBLIC

ORIGINAL

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

Complaint Counsel’s refusal to narrow the scope of the Compliance Monitoring Provision applicable to John Fanning exceeds the Commission’s regulatory authority, violates Fanning’s due process rights, and contravenes prior precedent to include the remand order of the First Circuit Court of Appeals 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 unrelated to any legitimate regulatory purposes and intended to harass, annoy, and invade the privacy rights of Fanning would indeed be required under the Complaint Counsel’s proposal to reissue the Compliance Monitoring sanction on remand without limiting its scope.

Moreover, the Compliance Monitoring provision is not a reasonably related to the violations as required by law. 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. The legal authority relied upon by Complaint Counsel does not justify the argument. Complaint Counsel cites to district court injunctive orders, including in 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 rejected previously such legal authority cited in support of the entry of blanket compliance monitoring order against Fanning, including the analysis in Wellness, stating:

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).

Complaint Counsel again posits “bare analysis” that cannot prevail, as a matter of law. The proposed revised order does not bear a “reasonable relation to the unlawful practices found to exist” and thus runs afoul of the law to include 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)).

Complaint Counsel cannot justify the unlawful remedial order by invoking a “the risk of recidivism” in general fashion. Complaint Counsel’s opinion that Fanning may likely reoffend is wholly speculative and devoid of any factual basis. Assuming the validity of the Commission’s Order, which Fanning continues to contest as unlawful, Fanning never previously “offended” and has not “offended” since the issuance of the original order over three (3) years ago. Also, recidivism is defined as, “[a] tendency to relapse into a habit of criminal activity or behavior”, Black’s Law Dictionary (10th ed. 2014). Thus, there must be a causal connection between anticipated behavior and some prior conduct. Here, the issues pertain specifically to one reputational and social media website – jerk.com – and the alleged misrepresentation of the source of content appearing on this website. If possible relapse justifies regulatory intervention, any required reporting must be accordingly limited in scope to business affiliations or employment in which Fanning could feasibly engage in the same or similar conduct of misrepresenting the source of content on a reputational and social media website targeting individual consumers. The Commission does not enjoy and Compliant Counsel cannot press unlimited “fencing in” authority.

Respectfully submitted,

JOHN FANNING,

By his attorney,

/s/ Peter F. Carr, II

Peter F. Carr, II

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Dated: May 12, 2017

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 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:

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Federal Trade Commission
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One electronic copy to the Office of the Administrative Law Judge:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
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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 12, 2017

Notice of Electronic Service

I hereby certify that on May 12, 2017, I filed an electronic copy of the foregoing Respondent John Fanning's Amended and Supplemental Reply Brief to Complaint Counsel's Response to Respondent's Briefing on Remand, with:

D. Michael Chappell
Chief Administrative Law Judge
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Donald Clark
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I hereby certify that on May 12, 2017, I served via E-Service an electronic copy of the foregoing Respondent John Fanning's Amended and Supplemental Reply Brief to Complaint Counsel's Response to Respondent's Briefing on Remand, upon:

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I hereby certify that on May 12, 2017, I served via other means, as provided in 4.4(b) of the foregoing Respondent John Fanning's Amended and Supplemental Reply Brief to Complaint Counsel's Response to

Respondent's Briefing on Remand, upon:

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