



“know[ing] about Fanning’s other business ventures” in order to ~~sure~~ ensure his compliance with the Order. See Fanning

provision is too burdensome.

To monitor order compliance and prevent recidivism, the Commission's injunctive orders routinely require violators to notify the agency of new business affiliations, e.g. *In re POM Wonderful, LLC*, 2013 FTC LEXIS 5, at \*8-9 (F.T.C. Jan. 10, 2013); *In re Daniel Chapter One*, 149 F.T.C. 1574, 1581 (2010); *In re Telebrands Corp.*, 140 F.T.C. 278, 351-52 (2005). Federal district courts also routinely include such provisions in injunctive orders for violations of the FTC Act. See, e.g. *FTC v. Capital Choice Consumer Credit, Inc.*, No. 02-21050-CIV, 2004 U.S. Dist. LEXIS 31476, at \*12-13 (S.D. Fla. May 5, 2004) (“record-keeping and monitoring provisions . . . are also appropriate to permit the Commission to police the defendants’ compliance with the order” (internal citations omitted)); *FTC v. Wellness Support Network, Inc.*, No. 10-cv-04879, 2014 WL 644749, at \*20-22 (N.D.I. 2014) (“While it is true that Defendants will be required to report any changes in their role with respect to their business activities, that information is necessary in order for the FTC to monitor Defendants’ compliance.”); *FTC v. RCA Credit Services LLC*, No. 8:08-cv-02062, Dkt. No. 138, Slip Op. at 1 (M.D. Fla. Oct. 8, 2010) (monitoring provisions “deter non-compliance”<sup>1</sup>).

III. The specific facts of this case warrant maintaining Part VI’s scope.

names, including Jerk.orgd. at 168 n.2, 176; Complaint Counsel's

“not sure” what the words “business transactions,” “businessman,” and “business address” meant (CX0092 at 16:17–17:9);

claimed to be “not sure” about what Jerk LLC was, what it did, or the company’s status (CX0092 at 53:10-12, 60:20–61:14), while, in fact, he founded the company and was directly involved in its operations (SMF 97-157);

claimed to be “not sure” about the basis of NetCapital.com LLC or whether he ever represented himself to be a partner at the firm (CX0092 at 44:14–46:7), while, in fact, he represented himself to be a partner at NetCapital.com LLC, which was the majority shareholder of Jerk LLC (SMF 105-113);

claimed to be merely an “advisor” to Jerk LLC (CX0092 at 53:13-20), while, in fact, he controlled the company and directed its business activities (SMF 97-157);

and

claimed a college intern ran Jerk LLC as its CEO (CX0092 at 111:18–113:9), while in fact, Fanning hired and supervised the intern (CX0057).

As Fanning’s evasiveness demonstrates, he is unlikely to reliably self-report relevant business affiliations. He is the paradigmatic example of a violator who should report all business affiliations.

Notification of all business affiliations for violators like Fanning provides a reliable and easily-followed bright line rule. The alternative—a requirement for Fanning to self-report only certain types of business affiliations—invites evasion and creates a less effective monitoring system. A selective self-reporting standard would allow Fanning to decide unilaterally whether or not a new business affiliation falls within the Order’s specified category. It could incentivize him to underreport responsive business affiliations, for example, by crafting job descriptions

intended to evade reporting. In response, FTC staff would have devoted resources to root out such cheating; they would have to first unearth Fanning's unreported business affiliations, and then establish that those affiliations do fall within the category specified in the Order. Rather than conduct such inquiries, staff's focus should be whether Fanning is violating the Order. Furthermore, affirmative notification of new business affiliations will not overly burden Fanning. Notification is logistically simple: his attorney sends an email or a letter to the FTC's Division of Enforcement stating Fanning's new business activities or place of employment.

- IV. The difference between Fanning's and Jerk LLC's compliance monitoring requirements is justified.

The First Circuit noted that Fanning's compliance reporting requirement (Part VI) is broader in scope than the analogous provision for Respondent Jerk LLC (Part V), which requires Jerk "to report only those changes in its structure 'that may affect compliance obligations arising under this order'" Fanning 821 F.3d at 177 (emphasis in opinion). Fanning proposes a similar limitation for himself in Part VI, should the Commission not strike it altogether. (Fanning Br. at 3.)

Complaint Counsel opposes this limitation. As explained above, a broad provision covering all business affiliations is particularly appropriate for Fanning, who has proven evasive about his business dealings and affiliations.

More generally, the difference between the corporate and individual compliance monitoring requirements is rational and justified. The corporate provision (Part V) addresses a company's internal reorganizations, such as dissolutions and mergers. The corporate violator can reasonably be expected to know, or find out, whether its own reorganization would affect its compliance obligations under the Commission's order. By contrast, the individual provision (Part VI) addresses a person's external affiliations, which renders deductions about the impact on

compliance obligations far more difficult. For example, the individual violator who takes a job with a new company—possibly a large conglomerate with many divisions or business lines—may reasonably not know about all the business affairs of her new employer. It may be impossible for her to make a well-informed determination about whether her new business affiliation “may affect compliance obligations” under the Commission’s order. The Commission should not impose that requirement on the individual violator.

That requirement would also be unfair to consumers. A key purpose of the business affiliation reporting requirement is to prevent the individual from violating the order through a faceless company. When a company deceives or otherwise harms consumers, consumers may be able to identify the company, but not the individuals behind the corporate veil. Consequently, the consumer complaints that reach the FTC most likely be about the offending company, not the individuals behind it. Having the ability to connect a company with an individual violator under order is indispensable for the FTC to spot and stop recidivism. That connection would go undetected if the individual failed to self-report the affiliation by deeming it not sufficiently related to her compliance obligations.

V. Part VI’s duration can be reduced to five years.

Although the substantive scope of Part VI should remain unchanged, Complaint Counsel recommends a reduction in the provision’s duration from ten to five years. That reduction would align with the Order’s recordkeeping provision (Part III), which the First Circuit upheld, and address the First Circuit’s concern about Part VI being overly “onerous.” See *Fanning*, 821 F.3d at 176-177. Five years is also appropriate given the circumstances of the violative practices here, particularly the scheme’s duration. *Fanning*’s proposal of three years (*Fanning Br.* at 3) is too short, especially given that more than two years have already lapsed since the Commission

entered the Order and Fanning has not submitted a single compliance report. Ortiz Decl. ¶ 3.

VI. Recommendation.

Consistent with the foregoing, Complaint Counsel recommends amending Part VI of the Order as follows: substitute “five (5) years” for “ten (10) years” in the first sentence. Given the high risk of recidivism and Fanning’s evasiveness about his business affiliations, Complaint Counsel recommends maintaining the remainder of Part VI as is.



**DECLARATION OF KELLY ORTIZ  
PURSUANT TO 28 U.S.C. § 1746**

1. My name is Kelly Ortiz. I am a citizen of the United States of America. I am employed by the Federal Trade Commission as an Investigator in the Western Region. If called to testify, I could and would competently testify to the facts set forth below.
2. On March 17, 2017, Respondent John Fanning filed a Motion for Clarification with the U.S. Court of Appeals for the First Circuit (“First Ci





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If you have any questions on this matter, please contact me at (202) 336-3150.

Very truly yours,  
[Redacted]

From: [Redacted]

[Redacted]

cc:

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