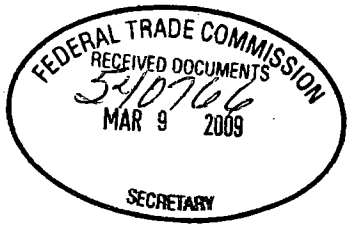

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
DANIEL CHAPTER ONE, a corporation, and	)	DOCKET NO. 9329
JAMES FEIJO, Respondents.	)	

ORDER DENYING RESPONDENTS' SECOND MOTION TO AMEND ANSWER

I.

On February 24, 2009, Respondents submitted a Second Motion to Amend Answer and Memorandum in Support ("Second Motion to Amend"). Complaint Counsel submitted its Memorandum in Opposition to the Second Motion to Amend on March 5, 2009 ("Opposition").

Having fully considered the Second Motion to Amend and the Opposition, the Second Motion to Amend is DENIED.

II.

On February 10, 2009, pursuant to Commission Rule 3.15, 16 C.F.R. § 3.15, Respondents submitted a Motion to Amend their Answer to revise their responses to paragraphs 3, 5 and 14 of the Complaint ("First Motion to Amend"). Complaint Counsel opposed the First Motion to Amend on February 20, 2009. On March 4, 2009, an order was issued denying the First Motion to Amend ("Order Denying First Motion to Amend"). Respondents again seek leave to amend their Answer, pursuant to Rule 3.15, this time to add a First Affirmative Defense, as follows:

FIRST AFFIRMATIVE DEFENSE

> As and for a first separate, distinct and affirmative defense, Respondents allege that the action of the Federal Trade Commission in filing the Complaint and seeking the Order included therewith substantially burden Respondents' free exercise of religion in violation of 42 U.S.C. Section 2000bb-1(a) and (c).

Second Motion to Amend, p.1.

Respondents contend that the proposed amendment "facilitates the determination of this controversy and prevents prejudice to Respondents." Second Motion to Amend, p. 2. Respondents further contend that the proposed amendment conforms to the evidence adduced in discovery, and is in the interest of justice. *Id.*, at pp. 3-4. Respondents assert that no prejudice will result because the amendment does not create the need for any additional discovery, or delay the proceedings because Complaint Counsel "has been amply forewarned of the religious nature of Respondents' ministry and of their claims of religious freedom based upon the free exercise guarantee of the First Amendment. *See, e.g.*, Respondents' Motion to Dismiss and Supporting Memorandum of Points and Authorities, pp. 1-4, 17-21." Second Motion to Amend, p. 4. Respondents rely on federal cases stating that leave to amend under the Federal Rules of Civil Procedure should be "freely given." *Id.*

Complaint Counsel asserts that Respondents unduly delayed seeking leave to amend the Answer, by waiting four months after submitting their original Answer, one month after the close of fact discovery, two weeks after submitting their First Motion to Amend, and one day after Complaint Counsel submitted its Motion for Summary Decision, and that Respondents have failed to provide any justification for the delay. Complaint Counsel further argues that Respondents should not be allowed leave to amend because Respondents did not cooperate in providing discovery. In addition, Complaint Counsel contends that Respondents should be bound by the parties' joint stipulation and subsequent order, pursuant to which all Respondents' affirmative defenses in their Answer were withdrawn. Complaint Counsel also argues that allowing the proposed amendment would be unduly prejudicial. Finally, Complaint Counsel asserts that the proposed affirmative defense should not be allowed because it has no merit.

III.

A. Standard for Evaluating Motion for Leave To Amend

Commission Rule 3.15(a) governs amendments to pleadings. That Rule states in pertinent part:

> (a) *Amendments*-- (1) *By leave.* If and whenever determination of a controversy on the merits will be facilitated thereby, the Administrative

> Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to pleadings or notice of hearing . . . .
>
> (2) *Conformance to evidence.* When issues not raised by the pleadings or notice of hearing but reasonably within the scope of the original complaint or notice of hearing are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings or notice of hearing; and such amendments of the pleadings or notice as may be necessary to make them conform to the evidence and to raise such issues shall be allowed at any time.

16 C.F.R. § 3.15(a) (italics in original).

When "a determination of a controversy on the merits will be facilitated" by allowing an "appropriate" amendment is not defined in FTC decisions discussing that Rule. In the case of *Conley v. Gibson*, the Supreme Court explained the federal rule regarding leave to amend as follows: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson,* 355 U.S. 41, 48 (1957).

In contrast to Federal Rule 15, FTC Rule 3.15(a), which requires that leave to amend be freely granted, FTC Rule 3.15(a) provides that "appropriate" amendments "may" be allowed, upon such conditions as will avoid prejudice to the parties and the public interest, if the amendments will facilitate a determination on the merits. 16 C.F.R § 3.15(a)(1). Even under the federal rules' liberal amendment policy, the federal courts exercise discretion to deny leave to amend where there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. . . ." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

B. Proposed Amendment to Add Affirmative Defense Under Religious Freedom Restoration Act

The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2008) ("RFRA"), provides:

> (a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

Respondents argue that they should be allowed leave to add RFRA as an affirmative defense because "[o]ne of Respondents' foremost claims in this proceeding is FTC standards governing deceptive and false advertising, as applied to Respondents, substantially burden Respondents' free exercise of religion. *See Respondents'* Objection and Memorandum in Opposition to Complaint Counsel's Motion to Compel Production of Documents, pp. 13-17." Second Motion to Amend, p. 2. Respondents do not explain or demonstrate why they failed to seek leave to amend until: (i) four months after filing their Answer; (ii) nearly two months after submitting their cited Opposition to Complaint Counsel's Motion to Compel; (iii) one month after the close of discovery; (iv) two weeks after filing their First Motion to Amend; (v) one day after submission of Complaint Counsel's Motion for Summary Decision; and (vi) less than two months before the April 23, 2009 trial date.

As in their First Motion to Amend, Respondents do not contend that they discovered new evidence, or provide any other justification for their undue delay in seeking to amend. While it has been held that undue delay is insufficient by itself to justify denying a motion to amend, *e.g., Reiffin v. Microsoft Corp.*, 270 F. Supp. 2d 1132, 1160 (N.D. Cal. 2003), it has also been held that "[u]ndue delay 'might give rise to an inference of bad faith, justifying denial of leave to amend.'" *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 140 (5th Cir. 1993). *See Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d at 599 (stating that absent special circumstances, a party's awareness of facts and failure to include them in pleading might give rise to the inference that the party was engaging in tactical maneuvers). "The burden is on the party who wishes to amend to provide a satisfactory explanation for the delay, . . ." *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 72 (2d Cir. 1990) (citations omitted) (affirming lower court's denial of leave to amend complaint to add statutory claim, six months after plaintiffs submitted a prior amended complaint, and after the close of discovery). Respondents have failed to meet that burden.

Significantly, on December 18, 2008, more than two months before submitting the Second Motion to Amend, counsel for Respondents signed a stipulation agreeing to withdraw all six affirmative defenses raised in their Answer. Complaint Counsel and Respondents' Stipulation Striking Respondents' Affirmative Defenses from the Answer and Order, December 30, 2008, p. 1 ("Stipulation"). According to the document, the Stipulation was the result of the parties' Rule 3.22(f) conference to resolve Complaint Counsel's planned Motion to Strike Respondents' affirmative defenses. The parties

stipulated that Respondents' affirmative defenses were the "same defenses raised in the general denial section of the Answer." *Id.* at ¶1. Pursuant to the Stipulation, an order was entered on January 8, 2009 striking Respondents' affirmative defenses. Among the defenses Respondents agreed to have stricken was their Sixth Affirmative Defense, alleging "that the actions of the Federal Trade Commission in filing the Complaint in the case are an unconstitutional infringement of Respondents' right to practice religion under the First Amendment to the U.S. Constitution." Answer, p. 6. Given the content of the Stipulation, and the undue delay in requesting this amended pleading, Respondents have failed to show how adding an affirmative defense under RFRA is appropriate, or necessary to "facilitate a determination of the controversy on the merits." 16 C.F.R. § 3.15(a)(1).

Moreover, allowing the belated amendment, particularly in light of the Stipulation, would be unduly prejudicial to Complaint Counsel and the adjudicative process. To assert, as Respondents do, that allowing a new affirmative defense to be added at this point in these proceedings would not require additional discovery or delay the trial belies logic and reason. Complaint Counsel is entitled to rely on the Stipulation, and the scope of defenses that the Stipulation and resulting order established. While, theoretically, prejudice could be mitigated by allowing additional discovery, and/or delaying the trial, such remedies are themselves prejudicial – not just to Complaint Counsel, but also to the adjudicative process, and consequently, the public interest. As the district court noted in *Crest Hill Land Dev., LLC v. City of Joliet,* No. 03 C 3343, 2004 U.S. Dist. LEXIS 9453, at *8-9 (N.D. Ill. May 24, 2004), *aff'd* 396 F.3d 801 (7th Cir. 2005), to allow such a material amendment after the close of discovery, and after the filing of a motion for summary judgment, is:

> prejudicial to [the opposing party] and to the judicial system. *See Fort Howard Paper Co. v. Standard Havens, Inc.*, 901 F.2d 1373, 1379-80 (7th Cir. 1990) (stating that "it is wholly within a district court's discretion to deny an amendment to the pleadings for delay and prejudice to the opposing party. . . [and that] beyond prejudice to the parties, a trial court can deny amendment when concerned with the costs that protracted litigation places on the courts [because] delay impairs the 'public interest in the prompt resolution of legal disputes [and] the interests of justice go beyond the interests of the parties to the particular suit [and] extreme, 'delay itself may be considered prejudicial.") (quoting *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 838 F.2d 904, 909 (7th Cir.1988)); *Jupiter Aluminum Corp. v. Home Ins. Co.*, 181 F.R.D. 605, 609 (N.D. Ill. 1998) (stating that "an amendment should not be denied merely due to the passage of time between the original filing and the attempted amendment," but should be denied if there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party" or "futility of the amendment.") (quoting *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)).

Respondents' other contention, that the amendment is justified because it "conforms to the evidence," Second Motion to Amend, at p. 3, is also without merit. Pursuant to Rule 3.15(a)(2), "conformance to the evidence" only applies "[w]hen issues not raised by the pleadings or notice of hearing but reasonably within the scope of the original complaint or notice of hearing are *tried* by express or implied *consent of the parties.*" 16 C.F.R. § 3.15(a)(2) (emphasis added). *See In Re Horizon Corporation*, No. 9017, 97 F.T.C. 464, 1981 FTC LEXIS 47, at *50 (May 15, 1981) (citing Rule 3.15(a)(2) and holding that where claimed section 5 violation was not within the scope of complaint, and was not tried by the express or implied consent of the parties, no such violation could be found); *In Re Chrysler Corporation*, No. 9072, 1979 FTC LEXIS 420, at *2-3 (April 24, 1979) (denying request to amend complaint to add new theory of liability, allegedly to "conform the pleadings to the evidence already admitted," because theory was not "reasonably within the scope of the original complaint or notice" and was not tried by express or implied consent of the parties). Accordingly, Rule 3.15(a)(2) does not apply in this instance and does not provide a basis for granting Respondents' Second Motion to Amend.

Due to the multiple bases found for denying Respondents' Second Motion to Amend, the merits of the RFRA defense need not be addressed.

IV.

After full consideration of Respondents' Second Motion to Amend, and Complaint Counsel's Opposition thereto, and having fully considered all arguments and contentions therein, Respondents' Second Motion to Amend their answer is DENIED.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Dated: March 9, 2009