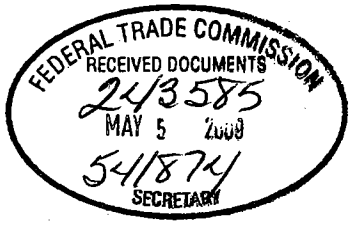

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

ORDER DENYING RESPONDENTS' MOTION FOR RULE 3.23(b) CERTIFICATION FOR INTERLOCUTORY APPEAL

I.

On April 23, 2009, Respondents submitted a Motion for a Rule 3.23(b) Determination Authorizing Respondents to Immediately Appeal the Denial of Respondents' Motion to Dismiss for Lack of Jurisdiction ("Motion"). Complaint Counsel submitted its Opposition to the Motion on April 28, 2009 ("Opposition").

Having fully considered all arguments in the Motion and Opposition, and as further discussed below, the Motion is DENIED.

II.

A. Standards for Allowing Application for Review Under Rule 3.23(b)

Respondents seek an interlocutory appeal to the Commission, through application to the Administrative Law Judge, pursuant to Rule 3.23(b). 16 C.F.R. § 3.23(b). Interlocutory appeals are disfavored, as intrusions on the orderly and expeditious conduct of the adjudicative process. *In Re Schering-Plough Corp.*, Docket No. 9297, 2002 WL 31433937 (Feb. 12, 2002). Accordingly, the movant must satisfy a very stringent three-prong test by demonstrating that: (1) the ruling involves a controlling question of law or policy; (2) there is substantial ground for difference of opinion as to that controlling issue; *and* (3) immediate appeal from the ruling may materially advance the ultimate termination of the litigation *or* subsequent review will be an inadequate remedy. 16 C.F.R. § 3.23(b) (emphasis added); *In Re Automotive Breakthrough Sciences, Inc.*, Docket Nos. 9275 and 9277, 1996 FTC LEXIS 478, at *1 (November 5, 1996); *In Re BASF Wyandotte Corp.*, Docket No. 9125, 1979 FTC LEXIS 77, at *1 (November 20, 1979).

B. The Ruling for Which Interlocutory Review is Sought

While the title of Respondents' Motion refers to the ruling on Respondents' Motion to Dismiss for Lack of Jurisdiction, it is apparent from the substance of the Motion that the ruling for which Respondents seek interlocutory review is not the denial of that motion, but the affirmative ruling that the Commission has jurisdiction in this matter. Specifically, Respondents "respectfully request interlocutory review of the Administrative Law Judge's ('ALJ') April 22, 2009 Order ('Order') that the FTC has jurisdiction over Respondents Daniel Chapter One (DCO), a religious corporation sole, and its overseer James Feijo." Motion, p. 1.

On April 22, 2009, following a day-long evidentiary hearing, and oral argument, the following ruling was made:

> I have reviewed all the evidence and considered all the arguments of the parties regarding jurisdiction as presented in the briefs, including, without limitation, Respondents' February 24, 2009 motion to dismiss, complaint counsel's opposition to that motion, respondent and complaint counsel's pretrial briefs on jurisdiction and each party's reply thereto.
>
> In addition, I've considered all the evidence presented at the hearing on jurisdiction conducted yesterday, April 21, 2009, including the exhibits admitted into evidence.
>
> I have concluded that complaint counsel has demonstrated by a preponderance of the evidence that jurisdiction does exist in this case.
>
> Regarding respondents' jurisdictional argument arising from DCO's purported nonprofit status, I find that complaint counsel has proved by a preponderance of the evidence there is jurisdiction over both respondents, DCO and James Feijo, under sections 4 and 5 of the FTC Act, 15 U.S. Code sections 44 and 45.
>
> I also find that the conduct challenged in this case is in or affecting commerce within the meaning of sections 4 and 5 of the FTC Act, which is 15 U.S.C. sections 44 and 45.
>
> My findings of fact and conclusions of law and my analysis on jurisdiction will be detailed in my initial decision[] in this case.

Transcript of Hearing on Jurisdiction, April 22, 2009, pp. 3-4. *See also* Transcript of Final Pre-Hearing Conference, April 22, 2009, p. 4 ("On the motion to dismiss, . . . as to respondents' jurisdictional defenses, I have already ruled that complaint counsel has demonstrated by a preponderance of the evidence that jurisdiction does exist. Therefore,

there's no basis for dismissal on that ground."); Order Memorializing Bench Rulings, April 27, 2009.

C. Arguments of the Parties

Respondents assert that DCO is a non-profit religious ministry organized as a corporation sole and that whether the FTC has jurisdiction over DCO and its overseer, is a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling on jurisdiction may materially advance the ultimate termination of the litigation and/or subsequent review will be an inadequate remedy. Motion, p. 1.

In support of these assertions, Respondents state that: (1) a former director of the Commission's Bureau of Consumer Protection testified before a congressional subcommittee, sometime between 1986 and 1990, that "purely charitable organizations have been considered outside the Commission's jurisdiction" under the FTC Act. . . [and that the Bureau was] unlikely to open an investigation into charities that have been granted tax-exempt status by the IRS under Section 501(c)(3) of the Internal Revenue Code," Motion, p. 2; (2) Daniel Chapter One is a "religious ministry" and is exempt from 501(c)(3) requirements, pursuant to an exception for churches contained in IRS Code Section 508 (c)(1)(A), *Id.*; (3) the Supreme Court has left open the "highly controversial" question of "where to draw the line" between non-profit organizations within the FTC's jurisdiction, and those outside such jurisdiction, Motion, pp. 3-4; (4) the Commission should be given an "immediate chance" to determine whether it "desires to assert FTC jurisdiction" over a "bona fide religious organization" which, according to Respondents, would be unconstitutional, *Id.*; and (5) the Commission should have the opportunity to decide the matter immediately because of "its profound implications." *Id.*, p. 5.

Complaint Counsel contends that Respondents fail to meet the test for interlocutory appeal under Commission Rule 3.23(b). First, Complaint Counsel argues that Respondents' assertion of a "controlling question of law" is purely speculative because the Court has yet to issue its findings of fact or conclusions of law underlying its jurisdictional ruling. In addition, Complaint Counsel contends that Respondents cannot show a "substantial ground for difference of opinion" on jurisdiction because they have failed to demonstrate a likelihood of success on the merits. According to Complaint Counsel, Respondents fall within the FTC's jurisdiction under any test, regardless of any varying articulation in the case law.

Complaint Counsel further asserts that Respondents do not explain how an immediate appeal will materially advance the ultimate termination of the litigation or why subsequent review will be an inadequate remedy. Because trial has concluded and an initial decision is expected within 90 days after the closing of the record, pursuant to Commission Rule 3.51(a), 16 C.F.R. § 3.51(a), Complaint Counsel argues, piecemeal litigation will only extend the litigation. Finally, Complaint Counsel contends that any purported immediate need for appeal is due to Respondents' own failure to present their factual attack on the Commission's jurisdiction in a timely and adequate manner.

III.

The first prong of Rule 3.23 requires the movant to demonstrate that the ruling involves a controlling question of law or policy. Interpreting 26 U.S.C. 1292(b), upon which Rule 3.23(b) is modeled, it has been held:

> "question of law". . . [refers] to a "pure" question of law rather than merely to an issue that might be free from a factual contest. The idea was that if a case turned on a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record, the court should be enabled to do so without having to wait till the end of the case.

Ahrenholz v. University of Illinois, 219 F.3d 674, 677 (7th Cir. 2000). *See also In re Calimlim,* Docket No. 9199, 1987 FTC LEXIS 71, at *1-2 (May 20, 1987) (denying motion for interlocutory appeal where order involved a factual issue and therefore did not raise a controlling question of law.)

A decision on jurisdiction, in contrast, "is controlled by issues of fact, not law." *In Re International Association of Conference Interpreters*, Docket No. 9270, 1995 FTC LEXIS 452, at *3 (Feb. 15, 1995) (denying motion to certify ruling finding personal jurisdiction). This is particularly true on questions of jurisdiction over purported non-profit corporations under Section 4 of the FTC Act. *Community Blood Bank of the Kansas City Area v. Fed. Trade Comm'n*, 405 F.2d 1011, 1018 (8th Cir. 1969) (holding that the question of jurisdiction over alleged non-profit corporations under Section 4 "should be determined on an *ad hoc* basis"); *see also In Re American Medical Association*, Docket No. 9064, 1976 FTC LEXIS 280, at *5 (June 8, 1976) and 1976 FTC LEXIS 397, at *5 (May 24, 1976) (refusing to certify denial of trade associations' motions for summary decision on question of jurisdiction under Section 4, and noting that decision as to whether respondents' activities were purely charitable required factual determinations).

That facts control the determination of jurisdiction in this case is exemplified by the Order of March 20, 2009, which set an evidentiary hearing on the issue. The Order stated in part: "Where jurisdiction is challenged on the *facts*, as opposed to the face of the complaint, the proper procedure is for the court to determine the existence of jurisdiction. . . . The existence of *disputed facts* does not preclude the court from evaluating for itself whether jurisdiction exists. Rather, *the court has the duty to resolve any such disputes*. . . . In order to properly, with due consideration, resolve the issue, a hearing will be held for the limited purpose of determining whether DCO is a corporation within the meaning of 15 U.S.C. § 44 and applicable case law. *The parties are required to present evidence, including relevant documents and testimony*, on this limited issue." http://www.ftc.gov/os/adjpro/d9329/090320ordsethearingonjuris.pdf (citations omitted) (emphasis added).

Significantly, Respondents' arguments confirm the importance of the factual inquiry by presuming disputed material facts in their favor, including that Daniel Chapter One is a "bona fide religious organization" engaged in "purely charitable" activities, without economic benefit to itself or its overseer. Respondents fail to demonstrate that the jurisdictional ruling involves a controlling issue of law or policy, and therefore, Respondents have not satisfied the first requirement for certification under Rule 3.23(b).

Even if the jurisdictional ruling involved a controlling question of law or policy, which it does not, Respondents' Motion still fails. Respondents do not demonstrate that there is substantial ground for difference of opinion on the issue of jurisdiction, and therefore have not satisfied the second prong of the Rule 3.23(b) test. To establish substantial ground for difference of opinion, a party seeking certification must show that a controlling legal question involves novel or unsettled authority. *Int'l Assoc. of Conf. Interpreters*, 1995 FTC LEXIS 452, at *5. *See also Fed. Election Comm'n v. Club for Growth, Inc.*, No.: 5-851 (RMU), 2006 U.S. Dist. LEXIS 73933 (D.D.C. Oct. 10, 2006) (stating that "one method for demonstrating a substantial ground for difference of opinion is 'by adducing conflicting and contradictory opinions of courts which have ruled on the issue'"). This prong has been held to require that the movant show a likelihood of success on the merits. *Int'l Assoc. of Conf. Interpreters*, 1995 FTC LEXIS 452, at *4-5; *BASF Wyandotte Corp.*, 1979 FTC LEXIS 77, at *3 (stating that the substantial ground for difference of opinion test "has been held to mean that appellant must show a probability of success on appeal of the issue."). Respondents' allegations of a "highly controversial" or "open" question of "where to draw the line" on Commission jurisdiction, even if having "profound implications," is insufficient to show a substantial ground for difference of opinion. Thus, Respondents' Motion does not meet the second requirement for certification under Rule 3.23(b).

Finally, Respondents have not demonstrated that immediate appeal from the ruling may materially advance the ultimate termination of the litigation or that subsequent review will be an inadequate remedy. Respondents' reliance on bare assertions in this regard, without any supporting facts or legal authority, is insufficient to override the policy disfavoring interlocutory appeals. *In Re Schering-Plough Corp.*, 2002 WL 31433937. *See also CSX Transportation, Inc. v. Union Tank Car Co.*, Case No.: 01-70299, 2002 U.S. Dist. LEXIS 26323 (E.D. Mich. April 11, 2002) (stating that "[f]ederal law expresses a strong policy against piecemeal appeals. As such permission to appeal pursuant to 1292(b) should only be granted in exceptional circumstances") (citations omitted). Here, where trial has concluded, immediate appeal from the ruling would not materially advance the ultimate termination of the litigation and subsequent review will not be an inadequate remedy. Moreover, Respondents may appeal the decision on jurisdiction following the issuance of the Initial Decision in this case.

Accordingly, Respondents have failed to satisfy any of the three prongs of a very stringent three-prong test that: (1) the ruling involves a controlling question of law or policy; (2) there is substantial ground for difference of opinion as to that controlling issue; *and* (3) immediate appeal from the ruling may materially advance the ultimate termination of the litigation *or* subsequent review will be an inadequate remedy.

IV.

After full consideration of Respondents' Motion and Complaint Counsel's Opposition, and having fully considered all arguments and contentions therein, Respondents' Motion for a Rule 3.23(b) Determination Authorizing Respondents to Immediately Appeal the Denial of Respondents' Motion to Dismiss for Lack of Jurisdiction is DENIED.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: May 5, 2009