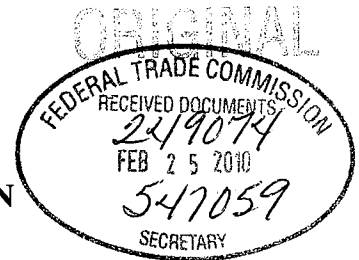


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



COMMISSIONERS: Jon Leibowitz, Chairman
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch

FEDERAL TRADE COMMISSION
2010 FEB 25 AM 10:26
DOCUMENT PROCESSING

_____)
In the Matter of)
DANIEL CHAPTER ONE,)
a corporation, and)
_____)
JAMES FEIJO,)
individually, and as an officer of)
Daniel Chapter One.)
_____)
_____)

DOCKET NO. 9329

PUBLIC DOCUMENT

**RESPONDENTS' APPLICATION FOR STAY OF MODIFIED FINAL ORDER
PENDING JUDICIAL REVIEW**

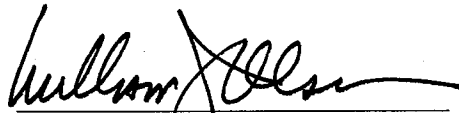
The Respondents, pursuant to 15 U.S.C. section 45(g)(2)(A) and section 3.56(b) of the Rules of Practice of the Federal Trade Commission ("FTC"), 16 C.F.R. section 3.56(b), respectfully apply to the Commission for a stay of the Modified Final Order ("Order") issued on January 25, 2010 and served on January 29, 2009, in the above-entitled matter, pending judicial review by a United States court of appeals in an appropriate federal judicial circuit.

For reasons therefor, Respondents submit: (i) that their arguments for overturning the Order on appeal are likely to succeed on the merits or, alternatively, are substantially meritorious; (ii) that the injuries to Respondents if enforcement of the Order were not stayed would be irreparable; (iii) that no party or the public would be injured by the granting of the requested stay; and (iv) that a stay of the Order would be in the public interest, all as more fully set forth in the attached Memorandum of Law in support of this Application, together

with the Declarations of James Fieijo, Patricia Feijo, Deane Mink, D.C., Karen S. Orr, D.C., Charles Sizemore, D.D.S., and Jerry Hughes.

WHEREFORE, Respondents pray that their Application be granted, and that the Commission enter an Order staying enforcement of the Modified Final Order herein until the later of the following — the expiration of the time for filing a petition for review of the Modified Final Order in a United States court of appeals, the issuance of a final order regarding Respondents' petition for review, the denial of a petition for panel rehearing, the denial of a petition for rehearing *en banc*, or the expiration of the time for filing such petitions for rehearing, the denial of a petition for certiorari in the United States Supreme Court, or the expiration of time to file such petition.

Respectfully submitted,



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February 25, 2010

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS: Jon Leibowitz, Chairman
 Pamela Jones Harbour
 William E. Kovacic
 J. Thomas Rosch**

In the Matter of)
DANIEL CHAPTER ONE,)
a corporation, and)

JAMES FEIJO,)
individually, and as an officer of)
Daniel Chapter One.)

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PUBLIC DOCUMENT

**MEMORANDUM IN SUPPORT OF RESPONDENTS'
APPLICATION FOR STAY OF MODIFIED FINAL ORDER
PENDING PETITION FOR REVIEW**

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February 25, 2010

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INTRODUCTION

This Memorandum is submitted, pursuant to 16 C.F.R. section 3.56(b) and 15 U.S.C. section 45(g)(2)(A), in support of Respondents' Application for Stay of the Modified Final Order ("Order") of the Federal Trade Commission ("FTC") issued on January 25, 2010.

The Order should be stayed pending judicial review because:

- (I) Respondents' legal and constitutional challenges are substantial;
- (II) if a stay is not granted, Respondents will suffer irreparable harm;
- (III) if the stay is granted, no party will be injured and if the stay is granted, the public interest would be benefitted.

See Washington Metropolitan Area Transit Co. v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); FTC Rule 3.56(c).

ARGUMENT

I. RESPONDENTS' LEGAL AND CONSTITUTIONAL CHALLENGES TO THE ORDER ARE SUBSTANTIAL.

In assessing the likelihood of Respondents' success on the merits on appeal, the Commission need not "harbor doubt about its decision in order to grant the stay." *In re California Dental Ass'n.*, 1996 FTC LEXIS 277, at *9 (May 22, 1996). Respondents satisfy the "merits" factor if their argument on at least one claim is "substantial" — so long as the other three factors weigh in their favor. *See* Deu Thapa v. Gonzales, 460 F.3d 323, 335-36 (2d Cir. 2006). *See also* WMAT v. Holiday Tours, 559 F.2d at 844-45; Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150 (6th Cir. 1991); Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991). Because the balance of the equities weighs in favor of Respondents, as shown in Parts II and III below, it is enough that

Respondents raise questions sufficiently serious and substantial to constitute “fair ground for litigation.” Safety-Kleen, Inc. v. Wyche, 274 F.3d 846, 859 (4th Cir. 2001). *See also* United States v. Baylor University Medical Center, 711 F.2d 38, 39-40 (5th Cir. 1983).

A. The FTC Failed to Apply the Statutory Requirements Governing FTC Jurisdiction over Respondents’ Nonprofit Religious Ministry.

The FTC complaint charged that, beginning in 2005 and continuing to the present, Respondents engaged in the allegedly-deceptive practices specified therein. *See* Complaint, ¶ 5. During this entire period, Daniel Chapter One (“DCO”) was operating as a “corporation sole,” having been so organized in 2002 under the laws of the State of Washington. Opinion of the Commission (“Op.”), p. 4. Under Washington law, only **churches or religious societies** may “become a corporation sole.” RCW 24.12.010. A corporation sole is permitted to engage in commerce (RCW 24.12.020), but its “overseer” is required to hold all property gained from such commerce “**in trust** for the use, purpose, benefit, and behoof of his religious ... society or church.” RCW 24.12.030 (emphasis added).

The FTC stated that DCO’s Articles of Incorporation failed to “specifically declare that DCO was organized exclusively for charitable or other clearly nonprofit purposes.” Op., p. 4. To the contrary, the Articles clearly state that DCO is a “church” dedicated to “promote the Kingdom of God.”¹ *See* DCO Articles of Incorporation. Indeed, by definition, a Washington corporation sole is dedicated to engage in “religious” activities. *See* RCW 24.12.030.

The FTC found fault, however, with DCO’s Articles for not expressly stating that, “upon dissolution,” none of DCO’s assets or earnings may distributed to “any individual or

¹ Luke 4:43 (“[Jesus] said ... I must preach the kingdom of God.”).

for-profit corporation.” Op., p. 4. But Article 4 of DCO’s Articles ensures the same result — having created an express trust whereby all assets, are held in trust for DCO’s overarching religious purpose. See In re Catholic Bishop of Spokane, 329 Bankr. Rep. 304, 325-26 (E.D. Wash. 2005).

The FTC also incorrectly presumed that, by engaging in money-generating sales of products, DCO must necessarily be engaged in such activities for a commercial, profit-making purpose. See Op., pp. 4-8. Under Washington law, however, a corporation sole is authorized to “transact[] business” without negating the corporation’s charitable purpose. See Catholic Bishop, 329 Bankr. Rep. at 327-28. Indeed, the history and modern use of the corporation sole form strongly establish their essential “ecclesiastical” nature and purpose. See J. O’Hara, “The Modern Corporation Sole,” 93 *Dickinson L. Rev.* 23 (1988).

The FTC compounded its misunderstanding of state law by its misapplication of the federal law that circumscribes FTC jurisdiction over nonprofit corporations. Purporting to apply the rule in Community Blood Bank of the Kansas City Area, Inc. v. FTC, 504 F.2d 1011, 1015 (8th Cir. 1969), the FTC erroneously ruled that DCO was subject to FTC jurisdiction because “**by engaging in commercial activities**, DCO operates a commercial enterprise and thereby is not ... organized or engaged in only charitable purposes.” Op., p. 7 (emphasis added). By this statement, the FTC repeated the same error that it made in Community Blood Bank when it claimed jurisdiction over “any corporation engaged in business only for charitable purposes ... that receives income in excess of expenses.” See *id.*, 405 F.2d at 1016.

However, the court in Community Blood Bank expressly rejected that argument, ruling that “even though a corporation’s income exceeds its disbursements its nonprofit character is not necessarily destroyed.” *Id.*, 405 F.2d at 1017. Instead, the court adopted the rule that an entity’s nonprofit character is lost **only if it can be shown that** either the entity or its members “derived a profit **over and above** the ability to **perpetuate or maintain** [its] existence.” *Id.*, 405 F.2d at 1019 (emphasis added).

Applying this rule here, the FTC must prove that the income from DCO’s marketed products was **not** being “used exclusively for the purposes authorized by law and their articles of incorporation.” *See id.*, 405 F.2d at 1020. As pointed out above, the FTC erroneously presumed that simply “by engaging in commercial activities, DCO operates a commercial enterprise and thereby is not a business organized or engaged in only charitable purposes.” *Op.*, p. 7. But DCO is fully authorized by Washington state law governing corporation soles to engage in commercial activities for the benefit of its religious purpose of advancing the Kingdom of God. The mere fact that it “engages in commercial activities” does not transform the organization into a “commercial enterprise.” Indeed, if the FTC’s reasoning were adopted, it would extend FTC jurisdiction to cover **any** nonprofit organization that engages in **any** commercial activity, no matter what the purpose and use of the income.

In the alternative, the FTC determined that it had jurisdiction over DCO because Mr. Feijo, as overseer, “distributed [DCO] funds to himself and his wife for their benefit.” *Op.*, p. 8. In support of this finding, the FTC observed that the Feijos lived in two homes and used two cars, each of which was owned by “DCO or its affiliate,” and DCO “was the source of all of [the Feijos’] living expenses.” *Id.* But the legal test whether the FTC has jurisdiction over

DCO as a nonprofit organization is not whether the Feijos utilized DCO's assets, or even benefitted from DCO's payment of their expenses. Rather, the question is whether Mr. Feijo "derived a profit" for his personal "pecuniary gain," that is, whether DCO was "merely [a] vehicle through which a pecuniary profit could be realized for [himself and his wife]." *See Community Blood Bank*, 405 F.2d at 1017.

Notably absent from the Commission's ruling was any finding about the specific use to which the two homes and the two cars were put, and the reason for payment of certain expenses reimbursed to the Feijos'. *See Op.*, p. 8. Under the rule of *Community Blood Bank*, it is incumbent upon the FTC to prove that such use and payments were for the Feijos' "personal profit, benefit, or advantage[,]" and not for the purpose of perpetuating and maintaining DCO's religious services and programs. *See id.*, 405 F.2d at 1021. The record shows that the Feijos, as the sole officers of DCO, are engaged full-time in the DCO "house ministry" — including, "spiritual counseling," health education, marketing DCO products, producing its publications, maintaining its website, and hosting its radio program. *See Op.*, pp. 2, 4-6. As the court pointed out in *Community Blood Bank*, the **FTC has the burden** to show that the Feijos' use of DCO properties and receipt of payment for certain expenses were "infected with commercial intent," not with the intent of "promoting [DCO's] program in the public interest." *See id.*, 405 F.2d at 1022. **The FTC never met this burden.**

B. As Applied Here, the FTC's "Reasonable Basis Theory" Is Unauthorized by Statute and Violative of Respondents' First Amendment Rights.

The FTC has characterized its ruling as one in which it “found” DCO’s representations with respect to BioShark, 7 Herb Formula, GDU, and BioMixx (hereinafter “the four Challenged Products”) to be “deceptive because they were not substantiated by competent and reliable scientific evidence.” *See* Order, Attachment A. Throughout the administrative proceedings, the FTC made **no effort** to demonstrate that Respondents’ representations were, in fact, **untruthful** or **misleading**. *See* ALJ Initial Decision (“ALJ Dec.”), p. 99 n.4; Op., pp. 11-12. Instead, utilizing its “reasonable basis theory,” the FTC foisted upon Respondents the burden to “substantiate” their representations by what the FTC deemed to be “competent and reliable scientific evidence.” ALJ Dec., pp. 99-100; Op., p. 20. The FTC’s “**reasonable basis theory**” **presumes** that, if Respondents’ representations are “**unsubstantiated**,” they are inherently **deceptive**. *See* Op., pp. 11-12. Such a presumption violates both sections 5 and 12 of the FTC Act, as well as the First Amendment commercial speech doctrine.

1. The FTC’s “Reasonable Basis Theory” Is a Not a Rule of Law, but Only a Policy Guide Wholly Inapplicable to this Case.

The FTC claims that its “reasonable basis theory” is established by “Commission and federal case law.” *Id.*, p. 11. However, neither of the two cases cited by the FTC demonstrates how the language of either section 5 or 12 of the FTC Act could possibly be construed to require marketing representations to meet an FTC-contrived standard of “reasonableness.” Rather, it appears that the courts in the two cited cases simply assumed that the FTC’s construct is authorized by law. *See F.T.C. v. Pantron I*, 33 F.3d 1088 (9th Cir. 1994); *Thompson Medical Co., Inc. v. FTC*, 791 F.2d 189 (D.C. Cir. 1986). While the parties in these (and other) cases have “concede[d] the validity of the reasonable basis theory,”

along with its “competent-and-reliable-scientific-evidence” offspring,² Respondents vigorously contest them both.

The FTC standard of “competent and reliable scientific evidence” is not derived from the statutory language, but from the “reasonable basis theory,” itself. *See* FTC v. National Urological Group, Inc., 2008 U.S. Dist. LEXIS 44145, *45-*44 (N.D. Ga. 2008). And the “reasonable basis theory” appears to have been created “because it does not require the FTC to prove that [a] message was false in order to prevail.” *See* FTC v. Garvey, 383 F.3d 891, 901 (9th Cir. 2004). If the FTC is **not required** to shoulder its statutory burden of having to prove an advertisement to be, in fact, “false” or “deceptive,” as it chose not to do in this case,³ “it is difficult to imagine **how the Commission could fail to prevail** on a reasonable basis theory.” Pantron I, 33 F.3d at 1096 (emphasis added). According to that theory, the advertiser has the burden to substantiate by “competent and reliable scientific evidence” any health-benefit claim, and the FTC is free to set the bar as high or as low as it wants. *See, e.g.,* Thompson Medical, 791 F.2d at 193-96.

The reasonable basis/scientific evidence standard is **not** a rule enacted pursuant to the Administrative Procedure Act’s (“APA”) rulemaking procedures. Rather, as FTC Commissioner J. Thomas Rosch has explained, the FTC aborted its effort to adopt a regulation

² *See, e.g.* American Home Products Corp. v. FTC, 695 F.2d 681, 693, 710 (9th Cir. 1982).

³ *See* ALJ Dec., p. 99, n.4.

because “there did not appear to be a way to develop workable rules.”⁴ Instead, the FTC resorted to the promulgation of an Industry Guide to establish its policy governing health claims about dietary supplements. FTC Guide, *Dietary Supplements: An Advertising Guide for Industry* (hereinafter “DSG”) (Apr. 2001).⁵ Industry Guides are “administrative interpretations of the law intended to help advertisers comply with the [FTC] Act; [but] they are **not binding law themselves.**” See “FTC Publishes Final Guides Governing Endorsements, Testimonials,” (“Testimony Guide”) p. 2 (Oct. 5, 2009) (emphasis added).

As an Industry Guide, the “require[ment] [that] claims about the efficacy or safety of dietary supplements ... be supported with ‘competent and reliable scientific evidence’” is **not a fixed legal standard**, but is “‘flexible.’” See *Op.*, p. 16 (emphasis added). As the court noted in the *American Home Products*, “the Commission has chosen not to bind itself in advance to rules as to the interpretation of the phrase ‘reasonable basis,’” and therefore any order issued by the FTC is deliberately “imprecise.” *Id.*, 695 F.2d at 710. Thus, the Guide states that the standard is only “**typically** require[d] [of] claims about the efficacy and safety of dietary supplements.” DSG, p. 9 (emphasis added). Further, the evidentiary standard is “sufficiently flexible” so that it may be raised or lowered depending upon the FTC’s assessment of the type of product or claim, the cost/feasibility of developing substantiation of the claim, the risk of harm, and the opinions of experts. *Id.*, pp. 8-9, 25.

⁴ J. T. Rosch, “Self-Regulation and Consumer Protection: A Complement to Federal Law Enforcement,” (hereinafter “Rosch”) pp. 10-11 (Sep. 23, 2008). This article is provided to the public on the FTC website, <http://www.ftc.gov/>.

⁵ <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus09.shtm>.

In this case, however, the FTC has presented the reasonable basis theory, with its companion “competent and reliable scientific evidence” standard, as if it were a fixed rule of law governing every FTC enforcement action against allegedly misleading health claims concerning dietary supplements:

[W]here ... Respondents represented that the four Challenged Products would treat or cure cancer, prevent or shrink tumors, and/or ameliorate the destructive side effects of radiation or chemotherapy, the competent and reliable scientific standard **applies** under the Guide. [Op., p. 16 (emphasis added).]

The use of such flexible standard in an enforcement case is the rule of man masquerading as the rule of law. Not only does the Guide fail to provide any fixed rule of application, it does not purport to set the “competent and reliable scientific evidence” as the rule governing FTC enforcement actions. Rather, the Guide is “intended to help advertisers comply with the [FTC] Act.” DSG, p. 2. As a “help to comply,” the Guide serves the practical goal of ensuring an advertiser that — if he affirmatively substantiates “each interpretation” of every express and implied claim by competent and reliable scientific evidence — then the ad would be in “compliance with FTC law.” DSG, p. 25. By imposing upon the advertiser this affirmative burden, the Guide is designed to provide a kind of “safe harbor” from a subsequent FTC enforcement action, **not** to impose upon the advertiser in that enforcement action the affirmative — and extra-statutory — burden of substantiating his health-benefit claims by what the FTC deems to be competent and reliable scientific evidence. Yet that is what happened in this case.

2. The Reasonable Basis Theory Erroneously Shifted the Burden of Proof to Respondents.

Both the ALJ and the Commission asserted that “**Respondents have the burden** of establishing what substantiation they relied on for their product claims.” *See* ALJ Dec., p. 99; Op., p. 12 (emphasis added). This ruling is not derived from sections 5 and 12 of the FTC Act, but from the DSG, which states that “advertising for ... dietary supplements ... must be truthful, not misleading, **and substantiated.**” DSG, p. 1 (emphasis added). Further, “supplement marketers are cautioned that the FTC will require **both** [i] strong scientific support **and** [ii] careful presentation for [health] claims.” *Id.*, p. 2 (emphasis added). These two statements demonstrate why an Industry Guide is ill-suited to provide a legal standard governing an FTC enforcement action. It makes sense to advise an advertiser who is seeking a wide berth from an FTC enforcement action to assume the burden of affirmatively substantiating his product claims **before** he makes them. It does not make sense, however, to impose upon an advertiser **after** he has run an ad to affirmatively substantiate his claims in an enforcement proceeding in which the FTC has the statutory burden of proving that the claims are false or deceptive. But that is exactly what has occurred here.

While the FTC claims that “Complaint Counsel had borne the burden of proving that Respondents’ representations were not substantiated” by competent and reliable scientific evidence (Op., p. 22), that is quite different from the burden imposed on the FTC under a fair construction of the language of the FTC Act. Section 5 declares that “false” advertisements are unlawful; section 12 declares “deceptive” ones to be so. It naturally follows from such language that the burden is upon the FTC to prove falsity or deceptiveness. *See* ALJ Dec., p. 99 n.4.

In this case, however, the Commission finds fault with Respondents for “hav[ing] not produced anything to show that they possessed and relied on any competent and reliable scientific evidence to support the overall net impressions conveyed by the advertisements at issue.” Op., p. 18. If the FTC’s theory is that an advertising claim is false or deceptive because there is no “competent and reliable scientific evidence” to support the claim, then the FTC should be required to “produce” such evidence showing that the “overall net impression” of Respondents’ claims was demonstrably **false or deceptive**. Instead, the FTC has the burden only to show that the advertiser does **not** have sufficient scientific evidence acceptable to the FTC that his claim is demonstrably **true or nonmisleading**. See Op., p. 20. Thus, the Commission has characterized its ruling against Respondents as one in which the FTC “found [DCO’s] claims for the [four Challenged Products] to be deceptive because they were **not substantiated** by competent and reliable scientific evidence.” See Order, Attachment A (emphasis added).

As the court of appeals observed in Pantron I, “it is difficult to imagine how the Commission could fail to prevail ... on a reasonable basis theory,”⁶ whereby the FTC has complete discretion to impose whatever evidentiary standard of reasonableness that it chooses and then, to require the advertiser to prove affirmatively that his claims meet that standard.

3. The Reasonable Basis Theory Is *Ultra Vires*, an FTC Add-On that Prejudiced Respondents.

⁶ Pantron I, 33 F.3d at 1096 n.23.

The DSG insists not merely that “that advertising for any product — including dietary supplements — must be truthful, not misleading, **and substantiated.**” DSG, p. 1 (underlining original; bold added). To be substantiated, an advertisement for a dietary supplement must “typically” rest upon “competent and reliable scientific evidence.” *Id.* at 3. But the DSG cites neither statutory provision nor agency regulation that imposes an affirmative duty upon any advertiser that “before disseminating an ad, [he] must have adequate substantiation for all objective product claims.” *Id.* at 3. Rather, it is based on **yet another** FTC “policy” statement, purportedly resting upon “the FTC’s deception authority.” *Id.* n.6. In fact, it is an FTC add-on, a usurpation of authority never conferred by Congress.

Paragraphs II and III of the Order mandate not only that each of Respondents’ representations concerning their products be “true” and “nonmisleading,” but that “at the time it is made, Respondents **possess and rely** upon competent and reliable scientific evidence that substantiates the representation.” (Emphasis added.) Further, the Commission affirmed the ALJ’s decision not because it found DCO’s claims “false” and “misleading,” but because Respondents had failed to substantiate its claims “by ‘competent and reliable scientific evidence.’” *Op.*, p. 20.

Although the DSG claims that the FTC’s “role” is “to ensure that consumers get **accurate** information about dietary supplements so that they can make an **informed decision** about these products” (DSG, p. 1 (emphasis added)), **the FTC makes the decision** for the consumer under the Guide’s “reasonable basis theory.” For example, the Guide states that “[i]t is not enough that a testimonial represents the honest opinion of the endorser. Advertisers **must also** have **appropriate scientific evidence** to back up the underlying claim.” *Id.*, p. 18

(emphasis added). Thus, no matter how truthful and nonmisleading an advertising representation based upon an individual testimony may be, “**anecdotal evidence** of a product’s effect, based solely on the experiences of individual consumers, is **generally insufficient** to substantiate a claim.” *Id.*, p. 18 (emphasis added). In like manner, the Guide states that in “**some situations ... traditional use evidence** alone will be inadequate to substantiate a claim, even if that claim is carefully qualified to convey the limited nature of the support.” *Id.*, p. 21 (emphasis added). In both instances, the Guide substitutes its standard of “competent and relevant scientific evidence” (*id.*, pp. 19-21), as the Commission did in this case. *See Op.*, pp. 19-22.

In short, the FTC has presumptuously assumed a paternalistic role, selectively usurping the part of American consumers to choose, instead of enforcing the Congressional mandate to police false and deceptive ads so that **consumers can make an informed decision for themselves**. This is not only contrary to statute, but contrary to the First Amendment commercial speech doctrine.

4. The FTC’s “Reasonable Basis Theory” Collided with Respondents’ Rights under the First Amendment Commercial Speech Doctrine.

Throughout this proceeding, the FTC has rejected Respondents’ claim that the FTC action against them violated the Supreme Court’s First Amendment commercial speech doctrine. The Commission ruled that because the ALJ found “Respondents’ commercial speech deceptive[,] no further analysis is necessary.” *See Op.*, p. 14. But the ALJ did **not** find that Respondents’ representations were **actually** misleading or deceptive; rather, he presumed, and the Commission agreed, that they were misleading **solely** because they were not

supported by “competent and reliable scientific evidence.” *See* ALJ Dec., pp. 99-106; Op., pp. 18-22. Such bootstrapping is constitutionally impermissible.

In Pearson v. Shalala, 164 F.3d 650 (D.C. Cir. 1999), marketers of dietary supplements made claims that their products would help people in their battle against cancer, similar to DCO’s representations here. *Compare Pearson*, 164 F.3d at 652, *with* ALJ Dec., pp. 83-95. In Pearson, as here, the government agency found such claims to be misleading because, as here, they did not meet a pre-determined “scientific” standard. *Compare Pearson*, 164 F.3d at 652-55, *with* ALJ Dec., pp. 99-106. In Pearson, the agency, as here, ruled that the health claims made were “entirely outside the protection of the First Amendment.” *Compare Pearson*, 164 F.3d at 655, *with* ALJ Dec., pp. 115-16. In Pearson, the court rejected this ruling as “almost frivolous,” based as it was upon a “paternalistic assumption” that “claims lacking ‘significant scientific agreement’ are inherently misleading.” *Id.*, 164 F.3d at 655.

Unquestionably, the FTC case against Respondents is on all fours with Pearson. The FTC’s predetermined standard of “competent and reliable scientific evidence” played the same role in this case as did the FDA’s “significant scientific agreement” standard — establishing that DCO’s advertising claims were *per se* misleading. In a futile effort to show that “*Pearson* bears no resemblance to this case,” the Commission asserted that “[t]his case involves a purely **adjudicatory challenge to specific representations** made in [DCO’s] advertisements.” Op., p. 21 (emphasis added). But, from beginning to end, the FTC’s case has been exclusively based upon the asserted lack of “competent and reliable scientific evidence” for DCO’s claims. And the standard by which those claims were measured to be “misleading” was pre-set in an

Industry Guide, which, in turn, was not even subjected to the APA rulemaking procedure, much less to the adversarial process characteristic of an adjudication.

C. Paragraphs II and III of the Final Order Unconstitutionally Deny Respondents Free Exercise of Religion and Freedom of Speech.

The FTC also misapplied Bolger v. Young Drugs Prods. Corp., 463 U.S. 60 (1983), to cut off Respondents' broader First Amendment claim that DCO's product claims must be considered in the context of its active engagement in the national debate on health care. *See Op.*, p. 13. While the Bolger Court found that the ads in that case were "properly characterized as commercial speech," it warned that "an **economic motivation** ... would clearly be **insufficient** by itself to turn the materials into commercial speech." *See Bolger*, 463 U.S. at 66. (emphasis added). The FTC, however, did not heed that warning, having already erroneously and summarily concluded that "the **primary purpose and effect** of Respondents' representations concerning the four Challenged Products was to **sell** those products." *Op.*, p. 13 (emphasis added).

In remarks delivered just five days after the FTC announced its Cancer Cure Sweep, FTC Commissioner Rosch acknowledged that the First Amendment raised a higher barrier to FTC regulation where an entity was engaged in an activity that "blend[ed] commercial speech [with] noncommercial speech and debate on an issue of public importance." Rosch, p. 5. Citing Nike, Inc. v. Kasky, 539 U.S. 654 (2003), Commissioner Rosch acknowledged that such blending of speech "pose[s] difficult constitutional issues." *Id.* Yet, despite Justice Stevens' strong suggestion in Nike that the New York Times rule of knowing falsity or

reckless disregard of such falsity,⁷ would apply when “commercial speech, noncommercial speech and debate on an issue of public importance” converge,⁸ Commissioner Rosch found the Supreme Court’s New York Times rule totally inapplicable. *See Op.*, p. 13.

Commissioner Rosch was equally dismissive of the Schaumburg test⁹ that requires proof of actual fraud or deception in the regulation of money solicitations by nonprofit organizations.

Id. In short, the FTC decided that neither New York Times nor Schaumburg applied because Respondents were engaged in a commercial activity.

The First Amendment cannot be divorced from the money that is required to participate fully in the marketplace of ideas, whether it be the ongoing debate over healthcare, or the solicitation of money by nonprofit organizations, or the election of candidates for public office. Just a few weeks ago, the U.S. Supreme Court ruled that the government cannot deprive the people of vital “information, knowledge and opinion” by erecting economic barriers of entry into the electioneering marketplace. *See Citizens United v. FEC*, __ U.S. __, Majority Slip Opinion, p. 38 (Jan. 21, 2010). Nor does the First Amendment permit “[p]roliferous laws [that] chill speech,” as the Federal Election Commission (“FEC”) is wont to do by “amorphous regulatory interpretation.” *Id.*, Slip Op., p. 7. Neither can the FTC censor Respondents’ overall healthcare speech by its overly complex “scientific” evidentiary standard.

⁷ New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).

⁸ Nike, 539 U.S. at 664 (Stevens, J., concurring).

⁹ *See Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612, 619-20 (2003).

D. The FTC Denied Respondents' Liberty and Property without Due Process of Law.

On September 23, 2008, five days after the FTC had issued its press release announcing its "Bogus Cancer Cures" sweep, Commissioner Rosch made public comments prejudicial to Respondents. *See* Rosch, p. 16. With specific reference to the "sweep," the Commissioner stressed that the FTC was most concerned about "consumer injury [that] goes beyond the consumer's pocketbook." *Id.*, pp. 16-17. Unwittingly, the Commissioner revealed that the FTC was partial to "conventional" medicine, decrying marketing:

- (i) "'natural' cures" to cancer patients who are "afraid of conventional treatment [and] find out too late that the treatment does not work";
- (ii) "'natural' remedies [that] cause[] unexpected side effects"; and
- (iii) "'natural' remedies [that] made conventional treatment less effective." [*Id.*, pp. 16-17.]¹⁰

The FTC's press release, however, stated nothing about misleading claims about medical safety, only about "efficacy."¹¹ Indeed, the FTC's litigation of this case in no way correlates

¹⁰ Commissioner Rosch's official biography indicates no health-related qualifications or experience undergirding these opinions. <http://www.ftc.gov/commissioners/rosch/index.shtml>. Interestingly, "[t]he [sweep] began through an Internet surf conducted by the FTC, the U.S. Food and Drug Administration (FDA), and Competition Bureau Canada in June 2007." <http://www.ftc.gov/opa/2008/09/boguscures.shtml>.) This raises the question as to whether the FTC's decision to support "conventional" medicine against "natural remedies" originated with the FDA or the government of Canada, creating the appearance that the FTC may be using its statutory enforcement powers against "false" and "deceptive" advertising in pursuit of what may be a political agenda of the FDA or a foreign government.

¹¹ *See* "FTC Sweep Stops Peddlers of Bogus Cancer Cures" (Sept. 18, 2008) <http://www.ftc.gov/opa/2008/09/boguscures.shtml>.

with the FTC's stated concerns — as there is **no allegation** in the complaint, and **no record proof**, that the four Challenged Products pose a danger to consumer safety. *See Op.*, pp. 1-2.

In Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970), the court of appeals observed:

There is a marked difference between the issuance of a **press release** which states that the Commission has filed a complaint because it has “reason to believe” that there may have been a violation, and **statements by a Commissioner** ... which give the appearance that he has already prejudged the case. [*Id.*, 425 F.2d at 590 (emphasis added).]

Indeed, a Commissioner is duty-bound to take care not to “prejudge cases or **to make speeches which give the appearance that the case has been prejudged.**” *Id.* (emphasis added). In his September 23, 2008 remarks, Commissioner Rosch described the FTC “bogus cancer cure” targets, among which was DCO, as actively engaged in “particularly harmful practice[s].” Rosch, p. 16. Clearly, Commissioner Rosch had already made up his mind that DCO was “marketing ... bogus cancer cures,” and that such marketing was a “particularly harmful practice.” While Commissioner Rosch claims that the views expressed in his 2008 speech are only his own, the speech appears on the official FTC website, accessible from the FTC home page. Additionally, the speech appears on official FTC stationery. Altogether, Commissioner Rosch has created the public perception that he, the author of the FTC 2009 opinion against DCO, had made up his mind as far back as September 23, 2008.

Additionally, at the December 3, 2009 oral argument there is evidence that Commissioner Pamela Harbour shared Commissioner Rosch's personal bias. Twice she expressed concern about the potential impact that the four Challenged Products might have on

“[p]eople who are terminally ill [who] are relying on these medicines to cure them.” Tr. Oral Arg., p. 21, ll. 16-21; and p. 24, ll. 8-10. And in a breach of judicial propriety, Commissioner Harbour warned Respondents that they faced what could only be understood as divine judgment:

You know, ultimately the Commission will render its judgment, but I know that your clients must realize that **there will come a time** when their actions will be judged by a **higher tribunal**.... [*Id.*, Oral Arg. Tr., p. 26, ll. 7- 11 (emphasis added).]

Not only did Commissioner Harbour’s words bespeak an attitude of partiality, they rested on a charge that the four Challenged Products threatened consumer health and safety, totally unsupported by the record. *Id.*, p. 26, ll. 12-15. As a matter of due process of law, an FTC Commissioner, sitting in final judgment of an adjudicated case, can neither prejudge the case nor rely on information *dehors* the record, nor give the impression that such information might be relied on. See Cinderella, 425 F.2d at 589.

E. The FTC Erroneously Dismissed Respondents’ Religious Freedom Restoration Act Claim.

The Commission summarily dismissed Respondents’ Religious Freedom Restoration Act (“RFRA”) claim on the ground that the “Order imposes no burden on Respondents’ exercise of religion; it only applies to their commercial advertising.” Op., p. 24. This ruling is clearly erroneous.

The Order is not limited to Respondents’ “advertising.” Rather, Paragraph V of the Order mandates that Respondents both produce the names of the consumers who purchased one or more of the four Challenged Products, and to write a letter to them, imposing upon them duties that would be violative of their religious convictions and practices. Declaration of

James Feijo (“J. Feijo Decl.”) ¶¶ 21, 24-25; Declaration of Patricia Feijo (“P. Feijo Decl.”) ¶ 40. Enforcement of such an order against Respondents would substantially burden Respondents’ “exercise of religion” which, by definition includes more than mere “belief and profession,” but includes ... **abstention from physical acts.**” See Employment Division, Dept. of Human Resources v. Smith, 494 U.S. 872, 877 (1990) (emphasis added).

The Order also is not limited to the “commercial” aspect of Respondents’ advertising. Rather, it would require Respondents to embrace the FTC’s **secular belief in science as their own**, thereby “fencing” Respondents out of the dietary supplement market because Respondents rely upon God’s revelation and individual testimonials, rather than so-called “science.” See J. Feijo Decl. ¶¶ 7-11. Indeed, individual testimonies appear to be anathema to the FTC. See DSG, pp. 18-19. The Bible, however, states that they set the standard of truth. See, e.g., Deuteronomy 19:15; John 8:17. In McDaniel v. Paty, 435 U.S. 618 (1978), the Supreme Court warned against the civil enforcement of a standard that denied “[r]eligionists ... the full measure of protection afforded speech [and] association.” *Id.*, 435 U.S. at 641. Indeed, the law should not be used as a sword to “justify repression of religion or its adherents from any aspect of public life,”¹² including participation in healthcare or commerce.

In Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006), the Supreme Court ruled that “RFRA expressly adopted the compelling interest test ‘as set forth in Sherbert v. Verner ... and Wisconsin v. Yoder....’ § 2000bb(b)(1).” O Centro, 546

¹²

Id.

U.S. 418, 431 (2006). Accordingly, on a petition for review, the court of appeals would decide whether RFRA applies, and if so, whether its compelling interest test has been met. *See id.*, 546 U.S. at 430-31. Thus, the 15 U.S.C. section 45(c) rule of due deference to FTC factual findings would not apply.

F. Paragraph V of the Final Order Violates the Well-Established First Amendment Principle of Speaker Autonomy.

The FTC has treated Respondents' objection to Paragraph V and the Attachment A letter as if it were based solely upon the religious guarantee of the First Amendment. *See Op.*, p. 25. But Respondents' moral, ethical, and religious objection to this paragraph and the coerced letter has also been based on the First Amendment guarantees of the freedom of speech and of the press.¹³ In *Wooley v. Maynard*, 430 U.S. 705 (1977), the petitioner filed an affidavit wherein he stated that he "refused to be coerced by the State into advertising a slogan which [he found] morally, ethically, religiously and politically abhorrent." *Id.*, 430 U.S. at 713. The Court ruled that government may not "require" persons to "use their private property ... for the State's ideological message — or suffer a penalty" for noncompliance. *Id.*, 430 U.S. at 715.

Respondents have repeatedly voiced their moral, ethical, and religious objections to the FTC-extrapolated secular standard of "competent and reliable scientific evidence," prompting both the ALJ and the Commission to make changes in the Attachment A letter. *See ALJ Dec.*, p. 121; *Op.*, p. 25. Nevertheless, the Order would still require that the FTC "scientific" viewpoint be sent at Respondents' expense, on Respondents' stationery, and in an envelope

¹³ *See* Respondents' Appeal Brief, p. 65 and Respondents' Reply Brief, p. 64.

with Respondents' return address — mandating that Respondents use their private property as a vehicle for the FTC's infomercial, or suffer a crushing “civil” sanction of up to \$11,000 for each letter unsent. *See* 15 U.S.C. § 45(m).

Neither the ALJ's nor the Commission's modifications are of constitutional avail. In Pacific Gas and Electric Company v. California P.U.C., 475 U.S. 1 (1986), the Supreme Court extended the Wooley rule to a company “billing envelope[] to distribute the message of another.” *See id.*, 475 U.S. at 17. Citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the Court in Pacific Gas ruled that “[f]or corporations as for individuals, the choice to speak, includes within it the choice of what not to say.” *Id.*, 475 U.S. at 16, citing Tornillo, 418 U.S. at 258. Thus, the Court held that the California P.U.C. Commission's order to disseminate a message “in envelopes that [Pacific Gas] owns and that bear [its] return address” would unconstitutionally “forc[e] [Pacific Gas] to speak where it would prefer to remain silent.” Pacific Gas, 475 U.S. at 18.

This principle of “speaker autonomy” — the right “to choose the content of his own message” — is a “fundamental rule of protection under the First Amendment.” *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573 (1995). To be sure, the Court has acknowledged that even this bedrock principle must yield if the government can demonstrate that its mandate is “a narrowly tailored means of serving a compelling state interest.” *See* Pacific Gas, 475 U.S. at 19. But neither the ALJ nor the FTC made any such

attempt. And even if such an attempt were made, it would fail, just as such efforts by the government failed in Wooley,¹⁴ Pacific Gas,¹⁵ Tornillo,¹⁶ Hurley,¹⁷ and Barnette.¹⁸

II. IF THE STAY IS NOT GRANTED, RESPONDENTS WILL SUFFER IRREPARABLE HARM.

Compliance with the Order would be nearly fatal to the DCO ministry, imposing incalculable losses that can neither be accurately measured nor compensated, and causing serious harm to its “good will.” See Ross-Simmons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 18-19 (2d Cir. 1996). Indeed, even if the court of appeals eventually reversed the Order, having to comply would cause such disruption in the Respondents’ ability to maintain contact and credibility with their current ministry base that it would threaten the “viability” of the product line currently offered by DCO. See Reuters Limited v. United Press International, Inc., 903 F.2d 904, 907-08 (2d Cir. 1990). And it would cause Respondents other irreparable injury as described below.

A. The Cease and Desist Sections of the Order Will Cause Irreparable Harm.

The cease and desist sections (*i.e.*, Paragraphs II and III) of the Order apply to:

[A]ny efficacy claims [and] embraces not just the four Challenged Products, but other dietary supplements, foods, drugs, or other health and related programs, services, or products. [Op., p. 24.]

¹⁴ 430 U.S. at 715-17.

¹⁵ 475 U.S. at 19-21.

¹⁶ 418 U.S. at 247-54.

¹⁷ 515 U.S. at 575-81.

¹⁸ West Virginia State Board of Education v. Barnette, 319 U.S. 624 at 633-41 (1943).

Thus, the Order is designed to “fence in” DCO’s entire ministry, not just the “cancer and tumor” representations¹⁹ about the four Challenged Products, which were the exclusive subjects of this case.

1. Paragraph III Shuts Down Respondents’ Health Ministry.

According to Paragraph III, the Order extends to:

[A]ny representation, in any manner, directly or by implication ... about the efficacy, performance, or health-related benefits of any [dietary supplement, food, drug, or health-related product, service or program]. [Emphasis added.]

Thus, Paragraph III applies to each and every:

- **product** (150-200) that DCO currently markets.
- claimed “**efficacy, performance, or other health-related benefit**” — cancer, tumor or otherwise — for such products.
- health-related DCO “**services or programs**” (as defined in Paragraph I.B) whether or not those programs include the marketing or distribution of any health-related product.
- DCO representation made **directly or by implication**, such as through **any person** by means of an “**endorsement**,” including any testimonial about the efficacy, performance or health-related benefit of any health-related product, service or program.

¹⁹ The FTC objected not to DCO’s **actual** claims that it made about the four Challenged Products, but alleged claims as drafted by complaint counsel and characterized as “Respondents’ Unsubstantiated Representations.” *Compare* Complaint ¶¶ 9-13 *with* ¶¶ 14-17. By its “restatement,” the FTC not only erroneously placed upon Respondents the burden of proving “the [alleged] representation [to be] true, non-misleading, and at the time it was made, [that] Respondents possess[ed] and rel[ied] upon competent and reliable scientific evidence that substantiates the representation” (*see* Part I.B above), but based its entire case on allegations, not evidence.

- DCO “**promotion**” or “**distribution**” of any health-related product, service, or program, whether or not offered for sale by DCO.²⁰
- representation of any health-related product, service or program, in **any** manner, whether by book, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase, display, packaging, package insert, label, film, slide, radio, television, or cable television, video news release, audio program transmitted over a telephone system, infomercial, the Internet, e-mail, or in **any other medium**. [Order, Paragraph I.D (emphasis added).²¹]

Paragraph III permits no representation as to the encompassed matters:

unless the representation is **true, non-misleading**, and, at the time it is made, [DCO] **possess[es] and rel[ies]** upon **competent and reliable scientific evidence** that **substantiates** the representation.

According to Paragraph I.A of the Order:

“Competent and reliable scientific evidence” shall mean **tests, analyses, research, studies, or other evidence** based on the **expertise of professionals in the relevant area**, that has been conducted and evaluated in an **objective manner by persons qualified** to do so, using **procedures generally accepted in the profession** to yield accurate and reliable results. [Emphasis added.]

Thus, under Paragraph III of the Order, Respondents would have the burden:

- **of proving** that a representation is “**true**.”

²⁰ Although the Order states that it is limited to those activities “**affecting commerce**,” that broad term reaches any “purely local activity ... not itself, ‘commercial’,” if there is a “rational basis” for believing that, “when viewed in the aggregate,” leaving such noncommercial intrastate activity “outside” the FTC “regulatory scheme” would have a “substantial” effect on the commercial marketing and promotion of health-related products, services, and programs. See Gonzales v. Raich, 545 U.S. 1, 18-19 (2005).

²¹ No “medium” would be a safe harbor. Not even one-on-one personal conversations, seminar discussions, classroom lectures, nor **church sermons** would be outside the Order’s “fence.”

- **of proving** that a representation is “**nonmisleading.**”
- to “**substantiate**” a representation by competent and reliable scientific evidence.”
- **of proving** that, **at the time** that the representation was made DCO, in fact, “**possess[ed]**” the substantiating competent and reliable scientific evidence.
- **of proving** that **at the time** that the representation was made, DCO, in fact, “**relie[d] upon**” the substantiating competent and reliable scientific evidence.
- **of proving** that the “tests, analyses, research, studies, or other evidence” relied upon meets the FTC’s standard of “**competency and reliability.**”
- **of proving** to the satisfaction of the FTC that the evidence was “**based on the expertise of professionals in the relevant area.**”
- **of proving** that the test or study that produced the evidence “has been **evaluated** in an **objective** manner by persons **qualified** to do so.”
- **of proving** that the “**procedures**” were “**generally accepted in the profession** to yield **accurate and reliable results.**”

It appears impossible for Respondents to continue any aspect of their healthcare ministry and, at the same time, to comply with Paragraph III of the Order, because:

- DCO **does not currently possess** the kind of “competent and reliable scientific evidence” required by the FTC to **substantiate** any **representation** of the **health-benefits** of any of its 150-200 products. J. Feijo Decl. ¶¶ 5-9, 19.
- The health-benefit qualities of DCO’s products are not ordinarily detectible by the kinds of studies, tests, and analyses, making it almost **impossible** for DCO to obtain the kind of “scientific evidence” required by the FTC to **substantiate** any **representation** of the **health-benefits** of DCO’s many products. J. Feijo Decl. ¶¶ 5-10, 19.
- There would be no assurance that the FTC would be satisfied that the evidence presented met its discretionary standards of relevance, objectivity, qualifications, and accuracy or reliability. J. Feijo Decl. ¶¶ 9-10, 19.

- The Order requires not only that Respondents **possess** the requisite “scientific evidence,” but that Respondents must **“rely upon”** that evidence to **substantiate** DCO’s **representations** when, because of their religious faith, Respondents can **rely** only upon Almighty God, such scientific evidence that it may or may not have serving only to confirm God’s revelation and natural reason. J. Feijo Decl. ¶¶ 5-10, 13-14, 18-19.
- Virtually **all** of DCO’s current income is generated by the sales of its products, the stoppage of such sales would immediately **deprive DCO of its major source of income**, thereby bringing DCO’s healing ministry to a screeching halt, ending its Internet outreach, its daily Monday through Friday radio programs, its e-mail, telephone, and other one-on-one contacts, discontinuing DCO’s health-benefit services and programs until funds from other sources were provided. J. Feijo Decl. ¶ 11-17, 19.

2. Paragraph II Shuts Down the DCO Health Ministry.

Although Paragraph II is limited to representations that DCO might make concerning the “prevent[ion], treat[ment] or cure[] of any type of **tumor or cancer**,” enforcement of that paragraph would have the same effect on Respondents as Paragraph III. DCO’s cancer-and-tumor-treatment representations are no more amenable to the FTC’s so-called scientific standards than any of its other health-related representations. Although, if read apart from Paragraph III, Paragraph II would permit Respondents to make other health-related-benefit-representations as to all of its products, including the four challenged ones, enforcement of that paragraph, alone, would shut down the current DCO health ministry in the following ways:

- DCO’s Monday through Friday radio program regularly receives calls from persons who are battling cancer, or are concerned about tumors, or are worried about nutritional problems during or following chemotherapy, or who have other like concerns. Taking such a call would **imply** that DCO was representing that its products, services, or program would treat or assist in the treatment of cancer. Such calls would have to be screened out. J. Feijo Decl. ¶ 15.
- DCO’s radio program regularly receives calls from persons who give testimony of how DCO’s products or services or program has assisted them in the treatment of cancer, such as “healing the destructive effects of radiation or

chemotherapy.” Taking such a call would be an “endorsement” of DCO’s product, service, or program. Such calls would have to be screened out. J. Feijo Decl. ¶ 15.

- Because of past cancer/tumor representations about some of its products, and past ministry on the radio, by e-mail, by telephone, and other means, DCO would be required to take affirmative steps to establish that it is an anything-but-cancer healing ministry lest it be implied by silence that those products so marketed in the past have not changed. J. Feijo Decl. ¶ 16. *See also* Declaration of Karen Orr, D.C. (“Orr Decl.”) ¶ 8.
- God’s call on DCO as a healing ministry is governed by the principle against “respect of persons.” Paragraph II would require DCO to violate that entrustment, cutting off those suffering from cancer for only one reason: that the FTC requires it. DCO must answer to God, not man. Refusing to reach out to cancer victims would be analogous to being ordered **not** to heal on the Sabbath, reserving to DCO the same condemnation as the Pharisees. J. Feijo Decl. ¶ 16.

3. **The Harm Caused by Paragraphs II and III Would Be without Remedy.**

Since 2002, James and Patricia Feijo have worked full-time building DCO as a Christian ministry, the marketing of DCO’s products being an integral part of that ministry. J. Feijo Decl. ¶¶ 1, 3-7; P. Feijo Decl. ¶¶ 1, 10, 35-39. Unlike an ordinary commercial enterprise, Respondents’ ministry cannot be measured by a valuation in dollars and cents. The Order would force upon the Feijos a Hobson’s choice, whether to obey God or man. *See* J. Feijo Decl. ¶¶ 5, 10, 13; *Acts* 3:1-10; 4:1-20. They should not be put at loggerheads with the civil governing authorities before being afforded the opportunity to seek judicial relief from an Article III court. *See Baylor Medical Center*, 711 F.2d at 40. Respondents have substantial grounds for their petition for review that, if decided in their favor, could avert a confrontation between church and state. *See Acts* 5:17-40.

Courts generally recognize that an order should be stayed in those cases where the moving party can show injury to a business's goodwill in relation to its steady customers. *See Reuters v. UPI*, 903 F. 2d at 908. Not only is there evidence that DCO's goodwill would be jeopardized by the enforcement of Paragraphs II and/or III of the Order (*see* J. Feijo Decl. ¶¶ 12-17), but a cessation of the current ministry under either of those paragraphs would undermine Respondents' goodwill with those depending upon their ministry. *See* P. Feijo Decl. ¶¶ 6-10, 35-38; Declaration of Jerry Hughes ("Hughes Decl.") ¶¶ 4, 6; Orr Decl. ¶¶ 4-5, 8; Declaration of Deane Mink, D.C. ("Mink Decl.") ¶¶ 4-5, 8; Declaration of Charles Sizemore, D.D.S. ("Sizemore Decl") ¶ 4.

B. The Paragraph V Mandate Would Cause Irreparable Harm.

Paragraph V of the Final Order would require Respondents to disclose its list of consumers of one or more of the four Challenged Products, and to send a letter to such consumers that would tell them (a) that the FTC found Respondents' advertising claims with respect to those four products to be "deceptive" for lack of "scientific evidence," and (b) there is "information from the FTC" about how those products and other "herbal products" generally are either ineffective or unsafe, in contrast to other "cancer treatments that have been scientifically proven to be safe and effective." Furthermore, Paragraph V would require that the letter be sent on DCO letterhead in an envelope with DCO's return address, and that the letter be signed by James Feijo as Overseer of DCO.

Brushing aside Respondents' religious and constitutional objections to both the disclosure of the names of DCO's customers and the contents of the coerced letter, the Commission asserted that it "it did not "see[] any evidence that the ALJ punished Respondents

for their political or religious beliefs in his proposed order.” Op., p. 25 (emphasis added). However, the question is not whether the letter “punishes,” but whether Respondents can be faulted for failing to have produced any “evidence” that might satisfy the FTC that Respondents’ religious conscience is violated by the disclosure and letter mandates. It is not within the FTC’s jurisdiction to put Respondents “to the proof of their religious doctrines or beliefs.” See United States v. Ballard, 322 U.S. 78, 86 (1944). Indeed, “[m]en may believe what they cannot prove,”²² and thus, it is not within the FTC’s domain to hold Respondents accountable for the truth or falsity of their beliefs. *Id.*, 322 U.S. at 87; see also Founding Church of Scientology v. United States, 409 F.2d 1146, 1157 (D.C. Cir. 1969). It is enough that Respondents’ religious beliefs are sincerely held. See J. Feijo Decl. ¶¶ 21, 24-25; P. Feijo Decl. ¶ 40.

C. Respondents Will Suffer Irreparable Harm from the Entire Order.

This is not an ordinary false advertising/deceptive practice case. From the beginning, Respondents have made it clear — because of their duty to Almighty God — that they can neither ignore Biblical and testimonial evidence, nor conform their advertising practices to meet an undefined government-prescribed secular standard of scientific evidence. Thus, early in these administrative proceedings, Respondents sought dismissal of this case on the grounds that the FTC policy requiring that Respondents justify their health-benefit claims by “competent and reliable scientific evidence” unconstitutionally violates Respondents’ freedom

²²

Id.

of religion. *See* Respondents' Motion to Dismiss for Lack of Jurisdiction and Violation of Respondents' Constitutional Rights and Memorandum in Support, pp. 9-12.

Throughout this administrative proceeding, the FTC has turned a deaf ear to Respondents' objections, refusing even to entertain the possibility that rigid adherence to its so-called scientific test is, in reality, an unconstitutional endorsement of "scientism," namely, that materialistic science is the sole source of truth. *See* H. Schlossburg, Idols for Destruction, pp. 142-46 (Thomas Nelson, NY: 1986). Not surprisingly, the entire Order issued by the FTC in this case rests upon its singular devotion to "competent and reliable scientific evidence," a term that is neither defined by regulation, nor authorized by statute. Yet, unrelentingly, the FTC insists upon conformity, including in its cease and desist order that not only must Respondents "possess," but "rely" on "competent and reliable scientific evidence." To meet this standard, the FTC would coerce Respondents to subordinate their religious faith to the state. When "First Amendment freedoms, for even minimal periods of time" are "threatened," there is "irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion).

III. GRANTING A STAY WOULD NOT INJURE ANY PARTY AND WOULD PROMOTE THE PUBLIC INTEREST.

The only remaining question is whether, as demonstrated above, the factors supporting a stay are outweighed by a showing that a stay would harm other parties to the case and/or the public interest. *See, e.g.,* WMAT, 559 F.2d at 844-45; In re California Dental Ass'n, 1996 FTC LEXIS 277, at *7-8. While these two factors are stated separately, the FTC considers them together in cases where Complaint Counsel purports to represent the public by enforcing

the law. *See California Dental*, 1996 FTC LEXIS 277 at 8. *See also* Order Granting Partial Stay, *In the Matter of Toys “R” Us, Inc.*, Docket No. 9278 (Dec. 1, 1998).

A. A Stay Would Not Injure Any Party.

The letter mandated by Paragraph V of the Order requires Respondents to send a letter to some DCO customers “information from the FTC,” including the statement: “Some herbal products may **interfere or affect** your cancer or other medical treatment, may **keep** your medicines **from doing** what they are supposed to do, or could be **harmful** when taken with other medicines or high doses.” Order, Attachment A (emphasis added). Yet, there is no evidence in the record demonstrating that any one of the four Challenged Products (or any other DCO product) (i) interfered with or adversely affected any cancer or other medical treatment, (ii) kept any medicine from working the way it is supposed to, or (iii) harmed anyone. *See Op.*, pp. 1-3; ALJ Dec., pp. 56-58. Nor is there any evidence that the FTC has ever been recognized by Congress as an agency endowed with the expertise to give medical advice, nor for that matter the expertise to establish scientific standards governing dietary supplements.

Nor is there a scintilla of evidence in this record that any consumer was economically harmed, or actually misled by Respondents’s representations with respect to the four Challenged Products (or any other product). *See Op.*, p. 10. Indeed, Complaint Counsel deliberately elected to try this case on the “reasonable basis” theory, rather than the “falsity theory,” and thereby bypassed having to prove that anyone was actually deceived. *See ALJ Dec.*, p. 99; *Op.*, p. 12. To bolster its case that it need not adduce proof of actual injury, physical or otherwise, the FTC relied solely on the claim that “[f]ederal courts have long held

that the Commission has the common sense and expertise” to ascertain the “claims, including implied ones [that] are conveyed in a challenged advertisement.” Op., pp. 10-11. In fact, Respondents have received no complaints from any person using their products; rather, they have received “hundreds of expressions of thanks for [DCO’s] work.” P. Feijo Decl. ¶ 9. *See also* Mink Decl. ¶¶ 4-6; Orr Decl. ¶¶ 4, 6; Hughes Decl. ¶ 3.

In short, the record in this case fails to document any bona fide injury to any consumer. Quite simply, the only harm to the FTC/Complaint Counsel and/or consumers resulting from granting a stay of the Order (assuming the FTC prevailed on appeal) would be a period of delay in obtaining compliance with the Order. Respondents submit that the prospect of such delay carries no prejudice or risk of harm to the FTC — or even to the public. Indeed, delay in obtaining compliance simply does not measure up as a significant factor under the traditional federal standards governing stays pending appeal or judicial review. *See Baylor Medical Center*, 711 F.2d at 40. *See also EEOC v. Quad/Graphics Inc.*, 875 F. Supp. 558, 560-61 (E.D. Wis. 1995); *A & B Steel Shearing and Processing, Inc. v. United States*, 174 F.R.D. 65, 69-70 (E.D. Mich. 1997).

B. A Stay Would Be in the Public Interest.

The letter mandated by Paragraph V to be sent to DCO customers includes the statement that “[i]t is important that you talk to your doctor or health care provider before you decide to take any herbal product instead of taking treatments that have been **scientifically proven to be safe and effective.**” Order, Attachment A (emphasis added). Not only is there nothing in the record identifying any such “safe and effective” treatments, there was evidence

of significant safety risks of conventional cancer treatment testified to by the FTC's own expert witness. *See* Tr. 1/55-56, 221-22, 227; P. Feijo Decl. ¶¶ 3, 27.

By endorsing without qualification the "safe[ty] and effective[ness]" of conventional cancer treatments, the required letter is highly misleading. In addition to the specific risks identified by the FTC's expert oncologist, there are numerous others, including:

- (i) glandular and brain injury (P. Feijo Decl. ¶¶ 23-24, 27);
- (ii) secondary cancers from treatment for primary cancers (*Id.* ¶¶ 19-20); and
- (iii) serious damage to bodily organs. *Id.* ¶ 27.

There is also evidence that so-called "scientific studies" are oftentimes sullied by:

- (i) special interest group financial interests (*Id.* ¶¶ 12-14, 21); and
- (ii) human jealousies, rivalries, and other like foibles (*Id.* ¶¶ 16-18).

Not surprisingly, a survey documented that 64 out of 79 oncologists indicated that they would not personally have undergone the same chemotherapy treatment that they had prescribed for their patients. *Id.* ¶ 28.

There are also studies that demonstrate that dietary supplements and nutritional programs, such as those promoted by Respondents, are helpful, as evidenced by:

- (i) the growth of alternative health-care in America (*Id.* ¶¶ 19-21);
- (ii) officially-recognized studies showing that nutrients and other dietary supplements help prevent diseases, including cancer and tumors. *Id.* ¶¶ 29-34; Orr Decl. ¶ 4.

Indeed, Respondents have received numerous testimonies from people who have benefitted in the past from their nutritional programs and dietary supplements (P. Feijo Decl. ¶¶ 6-9, 36-

37), and who are continuing to benefit today from DCO products,²³ the ingredients of which are “GRAS” — “Generally Recognized as Safe.” P. Feijo Decl. ¶ 38.

In sum, the public interest would actually benefit from the grant of a stay. As demonstrated above, enforcement of the Order would threaten the continued existence of Respondents’ ministry. Hughes Decl. ¶¶ 4, 6. Even a severe cut-back in DCO’s outreach would deprive persons who are continuing to benefit from DCO’s nutritional programs, dietary supplements, and herbal products. Orr Decl. ¶¶ 4-8; Mink Decl. ¶¶ 4-6; Hughes Decl. ¶¶ 3-6. This is particularly true for those persons who have been through surgery, chemotherapy, and/or radiation unsuccessfully and been sent home by their doctors to die. *See* P. Feijo Decl. ¶ 6.

While the FTC has faulted Respondents for not being able to substantiate their representations by “competent and reliable scientific evidence,” it has done so blindly, assuming that “modern medicine” must be based solely upon “science,” and “science” displaces God. But, in recognition of the limits of “science,” the practice of modern medicine is based on faith. *See* P. Feijo Decl. ¶¶ 11,14-15. Ours is a nation built on the foundation that matters of faith are for the individual and family to choose for themselves, not for a regulatory commission and the state to choose for them. *See Ballard*, 322 U.S. at 86-87.

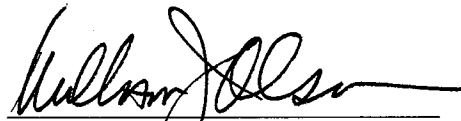
²³

See P. Feijo Decl. ¶ 36; Orr Decl. ¶¶ 4-7; Mink Decl. ¶¶ 4-6.

CONCLUSION

For the reasons set out above, the FTC should stay its Order pending review.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William J. Olson", written over a horizontal line.

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February 25, 2010

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Jon Leibowitz, Chairman**
 Pamela Jones Harbour
 William E. Kovacic
 J. Thomas Rosch

)))))))
In the Matter of)))))))
DANIEL CHAPTER ONE,))))))	DOCKET NO. 9329
a corporation, and))))))	
))))))	
JAMES FEJO,))))))	PUBLIC DOCUMENT
individually, and as an officer of))))))	
Daniel Chapter One.))))))	
))))))	
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RESPONDENTS' CERTIFICATE OF COMPLIANCE

IT IS HEREBY CERTIFIED that, in compliance with Rule 3.22(c) of the FTC Rules of Practice, this Memorandum in Support of Respondents' Application for Stay of Modified Final Order Pending Petition for Review, contains 9,867 words, excluding the parts of the document that are exempted by Rule 3.22(c).

I declare under penalty of perjury that the foregoing is true and correct.



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February 25, 2010

efficacy of BioShark, 7 Herb Formula, GDU and Bio Mixx (hereinafter “the four Challenged Products”) in the “treatment of cancer” or “tumor growth,” Respondents violated Sections 5(a) and 12 of the Federal Trade Commission Act. The Commission’s Order was issued pursuant to that Complaint about those four Challenged Products. As I understand it, the FTC “found” DCO’s “advertising claims for [the four Challenged] products to be deceptive because they were not substantiated by competent and reliable scientific evidence.” *See Modified Final Order, Paragraph V, Attachment A, Letter to be Sent by First Class Mail.* Importantly, however, Respondents market not just the four Challenged Products, but also 150 to 200 additional dietary supplements, foods, and other health-related products, services and programs, among which are BioMolecular nutritionals, Kalcifate Plus, Alimentz, Amino Acids, Biotropins, Body Care, CoEnzymes, Electrolytes, Enzymes, Ergo and Thermogenics, Essential Fats, Fiber, Herbs, Homeopathy, Hormonal, Immune Boosters, Minerals, Oils, Speciality, Sportsline, Vitamins, Water Kleen, and Weight Loss.

4. Principally through its website, e-mails, radio show, and printed materials, DCO conducts a world-wide apostolic and healing church ministry serving the physical, emotional and spiritual needs of people under the direct authority of Our Savior and Head of the Church, the Lord Jesus Christ.

5. My wife, Patricia Feijo, who serves as Secretary of DCO, and I believe that we have been provided by God with spiritual gifts in the area of healing and apostleship (*see 1 Corinthians 12:1, 4-7, 9, and 11*), and therefore, this has been a large part of our ministry since even before the formation of DCO. We have engaged in outreach to the poor and sick, taking the healing gospel of the Kingdom of God throughout the world, according to the

principles of the Holy Bible, as led by the Holy Spirit, and informed by study of God's natural world. *See* Romans 12. Additionally, we have been continuously engaged in what is known as an apostolic ministry aiding in the formation and support of local bodies of believers, primarily house churches, in the United States and in other countries. *See* 1 Corinthians 4:9-10. DCO ministers, educates and engages in commerce to accomplish its objectives, presenting the life-giving Gospel to nonbelievers, functioning as a local body of believers, assisting other local bodies of believers, and teaching the life-sustaining principles by which believers are to care for and preserve our bodies, as temples of the Holy Spirit, on earth. *See* 1 Corinthians 3:16-17, 6:19-20. As a husband and wife team (*see* Acts 18:1-3), we educate and minister to the public Biblical principles of wellness, and we make available a variety of dietary supplements designed to improve the spiritual and physical well-being of people regardless of their current spiritual condition, or religious affiliation.

6. Since 2005 our healing ministry has utilized several Internet websites (*e.g.*, www.danielchapterone.com, www.dc1pages.com, www.dc1store.com, www.7herbformula.com, and www.gdu2000.com) through which we educate the public and those affiliated with our ministry, and market and promote a wide variety of herbal and other dietary and nutritional supplements. One of the most important educational methods we use to share information involves the publication of the **personal testimonies** of individuals who have been helped by such products in their fight against cancer and other serious illnesses and infirmities. We believe from Scripture that personal testimonies are the most important evidence of the power of God with respect to a person's spiritual condition, and that the same

principle applies to a person's physical condition. *See, e.g.*, John 9:1-34; Acts 3:1-11. God tells us, "You are My witnesses, that I am God." Isaiah 43:12.

7. Offering the highest quality dietary supplements available, together with unique Biomolecular nutritional formulas, Respondents have relied upon God's revelation, God-endowed natural reason, empirical science rightly-understood, God-confirming individual testimonial evidence, and the 6,000-year recorded human history — beginning with God's provision of plants for food, as recorded in Genesis 1:29 — as the foundation for Respondents' health-beneficial product claims. God's Word teaches us that "He causeth the grass to grow for the cattle, and **herb for the service of man**: that he may bring forth food out of the earth." Psalm 104:14. As an example, one of the four Challenged Products, **7 Herb Formula** contains God-given herbs that have been used for thousands of years. Initially a 6-herb formula developed by friends of the DCO ministry, through reliance on divine revelation and human experience, I added a seventh herb, Eleuthero (Siberian ginseng), which was verified in this case for safety and improved effectiveness by a world-renown herbal expert, Jim Dews (J. Dews Deposition (Feb. 11, 2009), pp. 46, l. 7 - 47, l. 24).

8. Respondents believe that permanent truth is found in God's revelation (*see* John 8:31-32), and that falsity is often found in what passes for science in each generation. *See* 1 Timothy 6:20. Over the years, bleeding, purging, administration of toxic mercury, etc. have all passed as state-of-the-art science. Even today, studies conducted by expert panels prove faulty and inadequate protection against medical practices that, instead of healing the body, cause severe side effects, such as strokes and heart attacks. *See* J. Groopman, "Health Care: Who Knows 'Best'?", Vol. 57, No. 2 (Feb. 11, 2010). The Bible teaches that "there is a way

that seemeth right unto man, but the end thereof are the ways of death.” Proverbs 14:12.

Thus, the Bible warns against adopting a system of knowledge based upon reason alone, commanding instead reliance on God’s revelation in the Holy Scriptures and testimony. *See* Matthew 16:1-17. Modern science is often atheistic at its core, ridiculing the God of the Bible and those of the family of God. *See, e.g.,* Richard Dawkins, The God Delusion, Mariner Books (2006).

9. The limitations of the modern “scientific method” and the value of personal testimonials are increasingly obvious, even to physicians. Bhaswati Bhattacharya, M.D., MPH, an Assistant Clinical Professor of Family Medicine at Weill Cornell Medical College in New York stated it this way in a letter to the editor of the Wall Street Journal:

While most of the medical orthodoxy is blind to the fact that its gold standard of proof is largely ineffective for anything other than drugs, the public has used its common sense and moved on, to their solid data of personal experiences. [Bhaswati Bhattacharya, M.D., MPH, “Shouldn’t Scientific Medicine Be More Open-Minded?” Wall Street Journal (Jan. 12, 2009).]

10. In recognition of the limitations of materialistic science to discover the true health benefit and efficacious qualities of herbs and foods, Respondents have relied upon God’s Holy Scriptures as the source of “all the treasures of wisdom and knowledge.” *See* Colossians 2:2-3. The very purpose of Respondents’ teaching and healing ministry is to empower people with wisdom and knowledge to choose affordable and sustainable health care plans and programs as an alternative to government-regulated and approved programs. The FTC would allow the marketing of dietary supplements only if such marketing meets the FTC’s “flexible,” but exclusive, requirement that **all** health-efficacy and health beneficial claims of **all** dietary

supplements, drugs, foods, and other health-related products **must be** substantiated by “scientific evidence” that the FTC deems, in its complete discretion, to be “competent and reliable.”

11. The income received by DCO from the marketing of health-related products provides almost all of the funds necessary for the operation of the DCO ministry, including the costs of DCO’s Monday-through-Friday radio outreach. Without this income, the DCO ministry could not function.

12. As I understand it, the FTC did not find that Respondent had made any “deceptive” representation with respect to any products other than the four Challenged Products. However, the FTC’s Order against Respondents is much broader. For example:

- Paragraph II of the FTC’s Order prohibits Respondents from making any cancer or tumor treatment representation in the “manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution” of **any** dietary supplement, food, drug, or other health-related product, service or program, and
- Paragraph III of the Order prohibits Respondents from making **any representation** “about the **efficacy**, performance, or **health-related benefits**” of “**any** dietary supplement, food, drug, or other health-related service or program unless Respondents prove to the satisfaction of the FTC that such representation “is true, non-misleading, and, at the time that it is made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.” (Emphasis added.)

13. Compliance with Paragraph III of the Order would require Respondents to suspend reliance on God's revelation, God-endowed natural reason, and God-confirming individual testimonial evidence as the foundation for their health-efficacy and health-beneficial claims of their products, and would make it impossible for Respondents to continue their current ministry to offer people a choice between health care benefits and efficacies in a marketplace free from government-imposed health-benefit standards.

14. While Paragraph II of the Order would apply only to cancer-or-tumor treatment representations, and not to other health benefit claims, enforcement of Paragraph II would have the same impact as enforcement of Paragraph III because Paragraph II applies to all of Respondents' products, resulting in the complete shut-down of the DCO's current healing ministry.

15. DCO's Monday-through-Friday radio program regularly receives calls from persons who are battling cancer, or are concerned about tumors, or are worried about nutritional problems during or following chemotherapy, or who have other like concerns. DCO's radio program also regularly receives calls from persons who give testimony of how DCO's products or services or program has assisted them in the treatment of cancer, such as healing the destructive effects of radiation or chemotherapy. Paragraph II appears to prevent the taking of such calls because the mere taking of the call would imply that DCO was representing that its products, services, or program would treat or assist in the treatment of cancer or that such a call from a person helped by a DCO product would be an "endorsement" of that product. Screening out calls would be contrary to DCO's long-standing practice of

taking all callers in the order of their call, requiring a profound change in DCO's ministry outreach.

16. Even if physically possible, compliance with Paragraph II of the Order would require Respondents to take affirmative steps to demonstrate that DCO's healing outreach does not include ministry to persons with cancer or tumors, thereby threatening not only Respondents' economic survival, but their credibility and integrity as a healing ministry open to everyone without respect of persons, need, or rank. *See James 2:1*. Indeed, enforcement of Paragraph II of the Order would be comparable to the enforcement of the Pharisaical doctrine against Jesus healing people on the Sabbath Day, preventing Respondents from responding to a person's dire physical need to meet the FTC's legalistic standard. *See Matthew 12:9-14*.

17. Paragraph II of the Order, whether combined with Paragraph III or standing alone, would cause a shut-down of the current ministry of DCO, the products being an integral part of Respondents' overall ministry of bringing God's wisdom and healing power to the people, and the sale of such products being the dominant source of income for the entire DCO ministry.

18. While Paragraph IV of the Order would allow Respondents to make claims about the safety and efficacy of products if they were based on prior drug approvals of the FDA, Respondents could not morally, ethically, or religiously surrender their judgment to a federal bureaucracy that demonstrably has approved dangerous drugs which harm people, and demonstrably withheld approval from potentially helpful drugs which could help heal people. For example, the New York Times just reported that GlaxoSmithKline manipulated research findings for the FDA to minimize damaging reports that its drug Avandia actually increased

cardiovascular risk (being linked to 304 deaths in the third quarter of 2009). *See* G. Harris, “Research Ties Diabetes Drug to Heart Woes,” N.Y. Times, Feb. 19, 2010, p. A1.

19. Moreover, the FDA approval procedures are suitable only for patentable drugs where the company making them can recoup the millions of dollars necessary for completing the product testing. Products which are nutritional, and herbal, are more analagous to foods than to highly-toxic commodities like manufactured pharmaceuticals. DCO could never afford to have its herbal products tested according to government standards. If DCO were effectively forced to comply with FDA Investigational New Drug procedures, DCO would be unable to sell any products. Nor would Respondents be able to meet the kind of studies, tests, and analyses that would yield the “competent and reliable scientific evidence” required by the FTC to substantiate any representation of the health benefits of any of its 150-200 products. The FTC requirement, like the FDA one, would be cost-prohibitive. *See* Bhaswati Bhattacharya, M.D., MPH, Letter to the Editor, “Shouldn’t Scientific Medicine Be More Open-Minded?” Wall Street Journal (Jan. 12, 2009) (“Financial incentive is lacking for large clinical trials using ancient modalities that are not patentable nor profit-engendering like a new drug.”)

20. Paragraph V.A of the Order would unalterably, irretrievably and irremediably disparage Respondents’ reputations and integrity by coercing them to furnish the names, addresses, telephone numbers, e-mail addresses, and products purchased by the consumers of one or more of the four Challenged Products. This would breach such consumers’ confidence in Respondents to protect their privacy, including their reasonable expectation that such vital information (i) would not be provided by Respondents to any person or entity without their express permission, (ii) would not be used by any person or entity except for the limited

purpose of purchasing one or more of the four Challenged Products, and (iii) would not be shared in such a way as to put them in jeopardy of receiving unwanted mail, e-mail or telephone call at the risk of such intrusion impairing their health and well-being.

21. Additionally, Paragraph V.A of the Order would unalterably, irretrievably, and irremediably violate my religious convictions and professional conscience, in that such disclosure to a third party of vital and personal information would breach the confidence placed by such consumers in me, both individually and as overseer of DCO. It could very well result in communications (like those contained in the Attachment A letter) that would undermine the health and well-being of persons who are suffering from serious, even terminal, illnesses, causing such persons to be traumatized by communications that are adverse and negative about the healing properties not only of one or more of the four Challenged Products, but any other herbal product, without regard to whether such products would put their health at risk in the way intimated by the content of the Attachment A letter or other like communication.

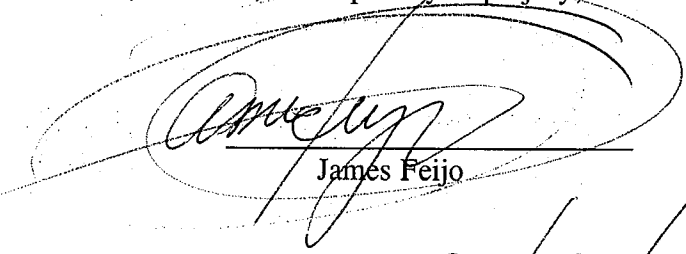
22. Paragraph V.B of the Order would unalterably, irretrievably, and irremediably disparage Respondents' reputations and integrity, by coercing them to send a letter "to be printed on letterhead of DCO" that, together with the first paragraph of the body of the letter, would create the impression that Respondents are voluntarily writing the letter as part of a consent decree, whereas, in truth, the letter has not been consented to by Respondents, but has been entirely composed by the FTC, an "exact copy" of which is required by Paragraph V.B of the Order to be sent to all consumers who purchased one or more of the four Challenged Products.

23. Paragraph V.B of the Order would also unalterably, irretrievably, and irremediably damage Respondents' reputations and integrity because the letter would create the misimpression that Respondents agree with the FTC's "information" about herbal products and conventional cancer treatments, as stated in the letter's second paragraph.

24. Paragraph V.B of the Order would substantially burden Respondents' free exercise of religion by mandating that Respondents associate with viewpoints with which they disagree, and which Respondents find morally, ethically, religiously, and politically abhorrent. Yet, Paragraph V prohibits Respondents from making their contrary viewpoints known, thereby creating the risk that the ordinary reader of the letter would think that Respondents agree with the FTC's views, putting Respondents at risk of violating their duty to God under the Ninth Commandment: "Thou shall not bear false witness."

25. Paragraph V.B would unalterably, irretrievably, and irremediably violate my religious convictions and professional conscience in that the contents of the letter could jeopardize the health and well-being of persons who are suffering from serious, even terminal, illnesses, causing such persons to be traumatized by unspecified, undocumented, and unsubstantiated information that unnamed and unidentified herbal products may pose a serious threat to their health.

Pursuant to 28 U.S.C. Section 1746, I declare, under penalty of perjury, that the foregoing is true and correct.



James Feijo

Executed on 02/23/2010

substances found in nature to trigger the body to cure itself. It is based on the work of Samuel Christian Hahnemann M.D. (1755-1843) and is used in many places throughout the world.

Homeopathy is recognized as a complete system of medicine and is nontoxic.

B. Why People Come to DCO.

6. The overwhelming percentage of people who have turned to DCO for information and our products in dealing with cancer have already tried conventional cancer approaches, and these approaches have not worked, and they have been sent home by medical and radiation oncologists to die. Tr. 2/364-65. If the DCO order goes into effect, these people will be deprived of DCO's information and products which have been demonstrated to be helpful to many in achieving a better quality of life, and, in many cases, unleashing the healing power that God placed in the human body when we were created. By way of illustration, two of the people who came to testify for DCO at the hearing — Ernie Jensen and Traci Kulikowski — had literally been “sent home to die,” but they were healed using God-given herbs and nutrients. They and many others would be kept from such life-saving information and products by the Order, and would be denied the right to make up their own minds about their treatment.

7. Other people have come to DCO because they have been unable to tolerate the toxic effect of chemotherapy and radiation. Some people are so sensitive to chemicals that they cannot even be in the same room with people wearing perfume, and cannot tolerate the current conventional treatment regimes. These people would be deprived by the Order of some of the only alternatives available to support their body to deal with cancer.

8. Finally, some people have come to DCO because they know the problems with the safety and efficacy of chemotherapy and radiation, and/or have been led by the Spirit of God

reality only highlights **the importance of patient opinions, views, and desires**. Physicians are only, after all, **consultants** to the health of others.... [W]hen a doctor says, "I don't know," it is rarely a sign of weakness or ignorance. More often it's a sign of a physician who knows and appreciates the **limits of our science** and is willing to be a **partner**. [Hippocrates' Shadow, Scribner (2008), p. 17.]

12. Pharmaceutical manufacturers, surgeons, medical oncologists, and radiation oncologists are not neutral scientific observers of modern cancer-treatments. They make their living from ordering and administering expensive treatments. Former National Academy of Sciences epidemiologist Devra Davis gives illustrations of how "many of the leading figures in the war on cancer profited both from producing cancer-causing chemicals and from producing anti-cancer drugs." Devra Davis, The Secret History of the War on Cancer, Basic Books (2007), p. 11. FTC Expert Witness Dr Miller was quite candid when at the hearing he said of the chemotherapy studies he manages: "you set your statistical design so that you power the study **to prove your point**." Tr. 1/76 (emphasis added).

13. In an interview with cancer-survivor and alternative medicine supporter Suzanne Somers, former Sloan-Kettering Cancer Center employee Ralph Moss, Ph.D., explained how remedies which cannot be patented are not approved by the FDA.

[I]n the thirty-five years that I've been studying the situation, the FDA has never approved any nontoxic drug, herb, vitamin, or anything like that for cancer. The rule seems to be that nothing of a nonpatented, less profitable nature gets through the FDA system. The only things that get through are these synthetic patented agents that are generally very toxic and ineffective. They are so ineffective that the FDA keeps lowering the bar and allowing things to be approved on lower and lower standards of effectiveness and lower and lower standards of safety. [Suzanne Somers, Knockout, Crown Publishers (2009), p. 46.]

14. Generally, modern medicine circles the wagons, and trains physicians how to deny evidence of patient improvement from alternative therapies. In a section entitled "When families

Chronicles 16:12, King Asa died after he “was diseased in his feet, until his disease was exceeding great: yet in his disease he sought not to the LORD, but to the physicians.”

16. In the field of climatology, the American people have been recently treated to an illustration of how science can work.

Scientists sometimes like to portray what they do as divorced from the everyday jealousies, rivalries and tribalism of human relationships. What makes science special is that data and results can be replicated are what matters and the scientific truth will come out in the end.

But a close reading of the emails hacked from the University of East Anglia in November **exposes the real process of everyday science** in lurid detail.

Many of the emails reveal strenuous efforts by the mainstream climate scientists to do what outside observers would regard as **censoring their critics**. And the correspondence raises **awkward questions about the effectiveness of peer review** — the supposed gold standard of scientific merit....” [Fred Pearce, “Climate Change Emails Between Scientists Reveal Flaws in Peer Review,” The Guardian, February 2, 2010.]¹

17. Recent revelations in the New York Times about supposed medical science and its reporting in peer-reviewed journals show that physicians demonstrate similar weaknesses.

Six of the top medical journals published a significant number of articles in 2008 that were written by ghostwriters, according to a study released Thursday by editors of The Journal of the American Medical Association.....

In the scientific literature, ghostwriting usually refers to medical writers, often sponsored by a drug or medical device company, who make major research or writing contributions to articles published under the names of academic authors.

The concern, the researchers said, is that the work of industry-sponsored writers has the **potential to introduce bias, affecting treatment decisions by doctors and, ultimately, patient care.**

According to the study, responding authors reported a 10.9 percent rate of ghostwriting in The New England Journal of Medicine, the highest rate among the journals. [“Ghostwriting Is Called Rife in Medical Journals,” New York Times, Sep. 10, 2009 (emphasis added), <http://www.nytimes.com/2009/09/11/business/11ghost.html>]

¹ <http://www.guardian.co.uk/environment/2010/feb/02/hacked-climate-emails-flaws-peer-review>

the Federal Trade Commission -- which would discourage use of the type of medical care preferred by tens of millions of Americans — for their own good, of course. This problem is not new. Beginning in the 19th Century, allopathic medicine began its efforts to destroy homeopathy, not because it was unsuccessful or expensive, but because it was successful and inexpensive. Harris Coulter, 3 Divided Legacy (1982), pp. 140-236. Pharmacy Professor Richard Henry Parrish II explains that health care providers turned to government to do by compulsion what they could not do by reason:

Government became the **arbiter of pharmaceutical fact** because the professions of **pharmacy** and **medicine**, as well as the **pharmaceutical industry**, could enforce **their standards** only through **police powers** reserved to government ... at the expense of others' rights of association, speech, and property. [Richard Henry Parrish II, Defining Drugs: How Government Became the Arbiter of Pharmaceutical Fact, Transaction Publishers, (2003), p. 132.]

D. Conventional Cancer Treatment Leaves Much to Be Desired

22. Oncologist Guy B. Faguet, M.D., attributes most “improvements in cancer mortality [since 1950] to the introduction of food refrigeration, to improved dietary and sanitary habits, to early detection, and to better supportive medical care, rather than to improved cancer therapy.”

Guy B. Faguet, The War on Cancer, Springer (2008), p. 14 (footnote omitted).

23. The National Cancer Institute’s website candidly identifies serious risks of radiation therapy:

Radiation may harm the pituitary gland and other areas of the brain. For children, this damage could cause learning problems or slow down growth and development. In addition, radiation increases the risk of secondary tumors later in life. [<http://www.cancer.gov/cancertopics/wyntk/brain/page7>]

24. Chemotherapy has been demonstrated to create long-lasting cognitive impairments.

something less toxic, less devastating to the different organs of the body.” Tr. 1/227. This is a disturbing statement, that such a doctor makes the decision for patients that their organs can and must be devastated. Hippocrates said “First do no harm” -- an oath that all doctors used to take. Vitalistic healers still uphold that in the interest of life, health, and healing. (FTC Complaint Counsel Expert Witness Dr. Miller had not practiced oncology for over 10 years, but, rather, **manages chemotherapy drug trials for pharmaceutical companies.** Tr. 1/47-48, 157.)

28. Although oncologists use chemotherapy liberally to treat their patients, they see the problems with their methods more clearly when they consider using it for themselves. In 1986, McGill Cancer Center scientists sent a questionnaire to 118 doctors who treated non-small-cell lung cancer. More than three-quarters of them recruited patients and carried out trials of toxic drugs for lung cancer. They were asked to imagine that they themselves had cancer, and were asked which of six current trials they themselves would choose. **Sixty-four of the 79 respondents would not consent to be in a trial** containing cisplatin, a common chemotherapy drug. Fifty-eight found all the trials unacceptable based on the ineffectiveness of chemotherapy and its unacceptable degree of toxicity. Ralph Moss, Ph.D., Questioning Chemotherapy, Equinox Press (2000), p. 40.

E. Sound Conventional Medicine Does Not Deny the Importance of Nutrition and Herbal Remedies

29. British physician "Alec Forbes, who helped found the Bristol Cancer Help Center, said that he chose cancer as the disease to treat by alternative medicine because it is the condition which is treated particularly badly by conventional medicine and particularly well by unorthodox

two of the remedies investigated ... appeared similar to the activity of paclitaxel (Taxol) the most commonly used chemotherapeutic drug for breast cancer, when it was tested in the same two adenocarcinoma cell lines investigated in this study." R. Moss, "A Tipping Point for Homeopathy?" (Feb. 21, 2010).

<http://www.cancerdecisions.com/content/view/414/2/lang.english/>

33 The literature contains many reports of the specific benefits of numerous vitamins and minerals in the treatment of cancer. For example, one study showed that garlic's chemical properties produce numerous effects that inhibit cancer, including activation of lymphocytes, stimulating immune response, with antitumor effects. "Allicin Stimulates Lymphocytes and Elicits an Antitumor Effect," International Immunology, Vol. 16, No. 2, pp. 275-281, February 2004.

34. Dr Sally Lamont, an expert witness for DCO, testified that all of the DCO challenged products' components are supported by scientific literature as to what DCO claims the products can do (*e.g.*, boost the immune system, detoxify the blood, etc.). *See* Tr. 1/572-74.

F. Stopping DCO's Healing Ministry Impedes its Healing Ministry

35. There is much Biblical support for the proposition that God cares much about, and gives much instruction about, our health and well being.

- When God created the world, including food and herbs, he declared it was good. Genesis 1:11-12, 29-31.
- Old Testament dietary laws were, in part, given to His people based on sound health, hygiene and medical advice not understood by man until thousands of years later. *See, e.g.*, Lev. 11:3; Deut. 14:6. "Kashrut: Jewish Dietary Laws." <http://www.jewfaq.org/kashrut.htm>
- For believers in Christ, our bodies belong to God, and are considered "a temple of the Holy Spirit, who is in you, whom you have received from God? You are not

38. All DCO products are made with ingredients that are "GRAS" — Generally Recognized As Safe. Ingredients in DCO products are not drugs and simply nourish the body as God intended. It would be inhumane and unconscionable to demand DCO not tell what it knows because it has not conducted studies that DCO could never afford and that would take years to complete, and to meanwhile cut off the information that can and has saved lives. It would make no sense to sell the products if DCO could not explain what bodily functions they were useful in assisting. The products can be of no benefit to people if they have no idea what to use in a given situation, or how to use them.

G. Stopping DCO's Healing Ministry Impedes its Free Exercise of Religion

39. According to Hebrews 9:27, "And as it is appointed unto men once to die, but after this the judgment...." Nevertheless, some people who get cancer have spent a lifetime avoiding the reality that they are eternal beings, and will spend eternity in either Heaven or Hell. They may have heard the claims of Christ (*e.g.*, "Jesus saith unto him, I am the way, the truth, and the life: no man cometh unto the Father, but by me." John 14:6), but have never responded. People who have physical illness often become sensitive to the things of God, asking questions that lead to their acknowledgment that they are sinners, separated from God, and need a Savior. In the weakness of their illness, they focus on the world to come, and many come to accept Christ's substitutionary death on a cross as payment for their sin — entering into a saving relationship with the living God. As new believers, they are freed from the power of sin, and able to spiritually discern truth. (I Corinthians 2:14 "But the natural man receiveth not the things of the Spirit of God: for they are foolishness unto him: neither can he know [them], because they are spiritually discerned.") The role that God gave the Church is both to minister to the body and to

3. This Declaration is submitted in support of Respondents' Application for Stay of the Modified Final Order (hereinafter "the Order") issued by the Federal Trade Commission (hereinafter "FTC") on January 25, 2010, and served upon Respondents on January 29, 2010.

4. As a Chiropractor, I have been responsible for supplying my patients with vitamins and other nutritional supplements. I started using Daniel Chapter One ("DCO") products approximately eight years ago — beginning slowly with several products and as my patients began experiencing more and more fantastic results, I expanded to using DCO's full line of products. I have used many different brands but have come to the point where 90 percent of our nutritional sales are for DCO products.

5. I recommend DCO products because they work. My patients tell me that they work and my patients aren't stupid — they know what works. For example, 7-Herb Formula was designed to detoxify and cleanse the liver and the blood, and to encourage the functioning of the immune system. In my experience, it is the single best such product on the market. For some of my patients with serious health problems and limited resources, I would call Jim Feijo and he would provide me a couple of cases of 7-Herb Formula at deep discount so my patients can afford to take it frequently.

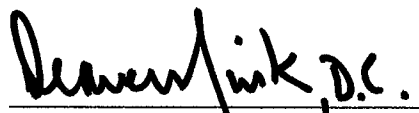
6. Most of these customers are patients in our chiropractic center and most DCO product sales are repeat customers. Why? Because the products work — they're readily absorbable, they're powerful and they're affordable. Our patients depend on us for chiropractic treatments, exercise and rehab advice, and nutritional advice. Daniel Chapter One products never let us down. I know of no patients of mine, or anyone else, who have ever had any adverse result from a DCO product. I have never seen any type of

advertising by DCO that could be considered false or deceptive. Jim and Tricia Feijo are fine people who are running a Christian ministry of great value to America, and I have no idea why a branch of the U.S. Government would be attacking DCO for telling the truth about their great products. I am outraged that my taxes are being used by the FTC to harm the health of my patients.

7. I felt so strongly about the FTC effort to impair Daniel Chapter One's ministry and products, that I drove to Washington, D.C. at my own expense to attend and testify at the hearing before the FTC Administrative Law Judge, so I am very familiar with the facts of this case. From that experience, it appears to me that the FTC is using enforcement powers that Congress gave it to do the bidding of the FDA, almost acting as its subsidiary.

8. If my patients were unable to purchase Daniel Chapter One products, I have no doubt that the several hundred persons who obtain their DCO products through our practice would see a decline in their health, and an acceleration of their aging process.

Pursuant to 28 U.S.C. Section 1746, I declare, under penalty of perjury, that the foregoing is true and correct.


Deane Mink, D.C.

Executed on 2-19-10

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Jon Leibowitz, Chairman**
 Pamela Jones Harbour
 William E. Kovacic
 J. Thomas Rosch

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In the Matter of)	
DANIEL CHAPTER ONE,)	DOCKET NO. 9329
a corporation, and)	
)	
JAMES FEIJO,)	PUBLIC DOCUMENT
individually, and as an officer of)	
Daniel Chapter One.)	
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**DECLARATION OF KAREN S. ORR, D.C.
IN SUPPORT OF APPLICATION FOR STAY
OF MODIFIED FINAL ORDER PENDING PETITION FOR REVIEW**

1. My name is Karen S. Orr. I am licensed by the State of Pennsylvania as a Chiropractor, and have been in private practice since 1993. I currently am the owner of Orr Family Chiropractic, 1200 Washington Road, Washington, PA, 15301.

2. This Declaration is submitted in support of Respondents' Application for Stay of the Modified Final Order (hereinafter "the Order") issued by the Federal Trade Commission (hereinafter "FTC") on January 25, 2010, and served upon Respondents on January 29, 2010.

3. I first became aware of Daniel Chapter One about 12 years ago when I heard their radio show. I was impressed by their understanding of the human body and the wisdom of their approaches to strengthen the body to heal itself. I telephoned DCO to find out more about their ministry, and have been working informally with DCO since

them. I have great respect for Jim Feijo, as a scientist and as a leading spokesman for the application of Biblical principles to wellness. Tricia Feijo is an outstanding homeopath -- indeed, she has counseled me and my family with respect to homeopathic remedies for many years.

4. All members of my family have used DCO products. I personally take, Endo-24 (i.e., a BioMolecular source of easily-assimilated nutrition), GDU, Omega 3, and Micro Cal, regularly, with great success. When I feel like I need a real lift, I bless my body with 7 Herb Formula, taking advantage of its many healing properties. By way of specific illustration, my husband had a well-established tendency to develop lipomas (benign fatty tumors) on his back, but after a course of taking GDU and L-Lysine, they went away and have not returned. Moreover, I have used various DCO products for my children as they have dealt with various health issues. More specifically, when any of us are fighting an infection or virus, we first utilize Genesis Oil (grapefruit seed extract), this combined with rest and fluids, allows the body to heal very quickly. Before I knew of the wonderful healing properties of this product, the one and only time I gave my son (who was 4 years old at the time) an antibiotic, he had a severe allergic reaction to it. With the use of Genesis Oil, he has not had, or needed an antibiotic since. This is a real benefit, as we don't worry about a reaction with this product. In my 12 years of experience with DCO, I have come believe in DCO products as being well designed, and of the highest quality. It would be very upsetting to me, and others, who use these products as an alternative, for them to be unavailable.

5. For a period of four or five years, I carried a range of DCO products in my practice to offer to my patients, and sold them to those who needed them. In fact, when it

became known that we stocked DCO products, a large number of people came to our office to buy DCO products even though they were not our patients. The only reason that I do not stock their product now is based on choice of mine to be more available to my family and, the easy availability of the product on the DCO website. I direct all of my patients, as well as, non patient DCO customers to the website and order center. Being the mother of two boys, who keep me very active, I have scaled back my time at the office. In doing so, my priorities at the office changed; the time I spend there is now only dedicated to chiropractic care for my patients.

6. In the course of my chiropractic practice, I have often recommended that my patients use nutritional supplements and herbal products sold at the Daniel Chapter One website -- <http://www.danielchapterone.com>. I have even recommended these products to my colleagues, and continue to do so. None of my patients have ever been harmed by the products sold by DCO. In fact, while selling the product at my office, I never received one complaint from a person who purchased DCO products from me. Many people who have used DCO products have been helped greatly. Just one of many, examples, a forty-five year old woman who has suffered with rheumatoid arthritis for years came in once a month religiously to purchase her GDU, which in her terms "she couldn't live, or work without." Pharmaceuticals given to her for the same diagnosis, "just didn't work as well for her." This is just one of many customers who purchased DCO products.

7. Over the years, I have examined the statements that DCO has made about the products offered by DCO, and have never found false or deceptive statements. DCO products are described consistent with my understanding of how those products are

manufactured, and how they work.

8. If the FTC's stay were to go into effect, I fear whether the DCO ministry could survive. Certainly, Jim and Tricia Feijo would be unable to share their wealth of experience about healthcare with their radio listeners. It would be difficult to sell products on their website if they could not candidly describe what they should be used for. Although many of the products sold by DCO are available elsewhere, some of their most important products (*e.g.*, ENDO-24, Bio-Mixx, 7-Herb formula) are not manufactured and sold by others. If my family, my patients, and I were unable to obtain these products, it would be harmful to our health, especially my son, who is allergic to most antibiotics. Just because many educated people choose a different path to healing, does not make it false or wrong. In my opinion, any impairment on the ability of DCO and the Feijos to share their wealth of information about how to achieve and maintain good health would harm the health of many persons now using their product, and many more that would otherwise learn of it and be benefited.

Pursuant to 28 U.S.C. Section 1746, I declare, under penalty of perjury, that the foregoing is true and correct.



Karen S. Orr, D.C.

Executed on February 16, 2010

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Jon Leibowitz, Chairman**
 Pamela Jones Harbour
 William E. Kovacic
 J. Thomas Rosch

In the Matter of)	
DANIEL CHAPTER ONE,)	DOCKET NO. 9329
a corporation, and)	
)	
JAMES FEJO,)	PUBLIC DOCUMENT
individually, and as an officer of)	
Daniel Chapter One.)	
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**DECLARATION OF CHARLES SIZEMORE, D.D.S.
IN SUPPORT OF APPLICATION FOR STAY
OF MODIFIED FINAL ORDER PENDING PETITION FOR REVIEW**

1. My name is Charles Sizemore. I am licensed by the State of Texas to practice as a General Dentist, and have been in private practice at 3020 Legacy Drive, Suite 210, Plano, Texas 75023 since 1995. Before that, I practiced for approximately 20 years in Dallas, Texas.

2. This Declaration is submitted in support of Respondents' Application for Stay of the Modified Final Order (hereinafter "the Order") issued by the Federal Trade Commission (hereinafter "FTC") on January 25, 2010, and served upon Respondents on January 29, 2010.

3. In the course of my practice of dentistry over the past 30 years, I have often recommended that my patients use nutritional supplements and herbal products of the sort sold at the Daniel Chapter One website --

In my

**UNITED STATES OF AMERICA
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**DECLARATION OF JERRY HUGHES
IN SUPPORT OF APPLICATION FOR STAY
OF MODIFIED FINAL ORDER PENDING PETITION FOR REVIEW**

1. My name is Jerry Hughes. I am General Manager of radio station WWAB, 1330 AM, P.O. Box 65, Lakeland, FL 33802, a family owned business.

2. This Declaration is submitted in support of Respondents= Application for Stay of the Modified Final Order (hereinafter Athe Order@) issued by the Federal Trade Commission (hereinafter AFTC@) on January 25, 2010, and served upon Respondents on January 29, 2010.

3. For approximately 10 years, our radio station has carried the Daniel Chapter One Health Watch radio show. This is one of the most popular programs that we have ever offered, and I doubt that we have had a program which has done as much good for our listening audience. From reports we receive, the healing ministry of Daniel Chapter One has helped many detoxify their bodies, strengthen their immune system, and improve their general health. I have also heard

of many listeners who have reported that Daniel Chapter One products have helped their bodies deal with diseases that conventional medicine was unable to address.

4. Our radio station has a branch called Eagles Wings Ministry which serves as an outlet for DCO products. Since the news has gotten around that DCO could be enjoined by the FTC from sharing information, and that they could be unable to tell people how to use their products, and that this could undermine the financial basis of their show, I have had many customers with physical problems telling me that they did not know what they would do without DCO products.

5. Over the years, I have become friends with Jim and Tricia Feijo, and believe that they are doing a great job in promoting wellness, and explaining Biblical principles applicable to health, diet, and nutrition. Their products embody those principles.

6. Lastly, the Daniel Chapter One Health Watch radio show generates revenue for WWAB radio. It has a good listening audience, and we are able to sell local availability spots for that show to businesses and advertisers. Moreover, we generate revenue from the sale of their products. America is currently in the worst economic recession since the Great Depression, many media outlets are having difficulty maintaining revenue, and each such revenue source for a small radio station such as ours is important to our success. It is very difficult to replace a good program, and replacing a program with a 10-year success record likely would be impossible. If the Daniel Chapter One Health Watch were off the air or if we were unable to sell its products to customers who knew from the radio show and the DCO website how and when to use the DCO products, it would create a great additional economic pressure on our station.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury, that the foregoing
is true and correct.


Jerry Hughes

Executed on 2-19-2010

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Jon Leibowitz, Chairman**
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[PROPOSED] ORDER GRANTING PARTIAL STAY

Upon consideration of the Respondents' application to stay enforcement of the Commission's Modified Final Order, issued January 25, 2009, and the response of FTC Complaint Counsel thereto,

IT IS ORDERED that enforcement of the Commission's Modified Final Order be stayed until the later of the following — the expiration of the time for filing a petition for review of the Modified Final Order in a United States court of appeals, the issuance of a final order regarding Respondents' petition for review, the denial of a petition for panel rehearing, the denial of a petition for rehearing *en banc*, or the expiration of the time for filing such petitions for rehearing, the denial of a petition for certiorari in the United States Supreme Court, or the expiration of time to file such petition.

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED: _____, 2010

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Jon Leibowitz, Chairman**
 Pamela Jones Harbour
 William E. Kovacic
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CERTIFICATE OF SERVICE

I certify that on February 25, 2010, I served or caused to be served the attached Respondents' Application for Stay of Modified Final Order Pending Judicial Review, Memorandum in Support of Respondents' Application for Stay of Modified Final Order Pending Judicial Review, and Declarations of James Fieijo, Patricia Feijo, Deane Mink, D.C., Karen S. Orr, D.C., Charles Sizemore, D.D.S., and Jerry Hughes, Respondents' Certificate of Compliance, and a proposed form of order, on the following individuals by the means indicated:

By hand delivery and e-mail:

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Room H-159
Washington, DC 20580

By mail:

Theodore Zang, Jr., Esq.
Carole A. Paynter, Esq.
David W. Dulabon, Esq.
Federal Trade Commission – Northeast Region
One Bowling Green, Suite 318
New York, NY 10004

Courtesy Copy:
Hon. D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Avenue, NW
Room H-528
Washington, DC 20580



John S. Miles
WILLIAM J. OLSON, P.C.
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(703) 356-5070
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Attorneys for Respondents