UNITED STATES OF AMERICA
BEFORE 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.**	**Docket No. 9329**

ORDER DENYING RESPONDENTS' APPLICATION FOR STAY OF MODIFIED FINAL ORDER PENDING PETITION FOR REVIEW

The Commission issued its Opinion on December 18, 2009 ("Opinion") and its Modified Final Order ("Order") on January 25, 2010.[1] The Commission's Order was served on Respondents Daniel Chapter One ("DCO") and James Feijo (collectively "Respondents") and counsel by February 1, 2010. Respondents' compliance is required no later than 60 days after service of the Order; that is, by April 2, 2010. 15 U.S.C. § 45(g)(2).

On February 25, 2010, pursuant to Rule 3.56 of the Commission's Rules of Practice, 16 C.F.R. § 3.56, Respondents moved for a stay of the Order until the later of the following: (1) the expiration of the time for filing a petition for review of the Order in a United States Court of Appeals; (2) the issuance of a final order regarding Respondents' petition for review; (3) the denial of a petition for panel rehearing; (4) the denial of a petition for rehearing *en banc*, or the expiration of the time for filing such petitions for rehearing; or (5) the denial of a petition for certiorari in the United States Supreme Court, or the expiration of time to file such petition.

[1] Citation references to the materials are abbreviated as follows:
"Op." refers to the Opinion of the Commission issued on December 18, 2009;
"Order" refers to the Modified Final Order issued on January 25, 2010; and
"R. Mem." refers to Respondents' Memorandum in Support of Respondents' Application for Stay, filed on February 25, 2010.

Respondents have failed, however, to justify such relief is warranted. All factors for granting a stay weigh against granting the motion. Respondents have shown neither a likelihood of success on the merits on appeal, nor that they will suffer irreparable harm absent the requested relief. Moreover, given that other parties will be harmed if the stay is granted, it is not in the public interest to grant Respondents' motion. Accordingly, the Commission denies the motion.

Background

Respondents, DCO, a corporation sole organized under the laws of the State of Washington, and its overseer and trustee, James Feijo, advertise and sell four DCO products to the public – Bioshark, 7 Herb Formula, GDU, and BioMixx ("Challenged Products").[2] Respondents claim the Challenged Products can prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy. Respondents made these claims during their radio shows, over the internet, and through print media. Respondents' sales of the Challenged Products constitute 20 or 30 percent of the approximately $2 million in annual sales of DCO products for the years 2006, 2007, and 2008.

The Commission's Opinion considered the record and arguments of counsel. The Commission analyzed whether the FTC has jurisdiction over Respondents; the claims Respondents made within their advertisements; whether Respondents' claims were properly substantiated; and Respondents' defenses and constitutional arguments. After finding the Commission has jurisdiction over Respondents and considering the record evidence presented by both parties, we concluded that Respondents did not have competent or reliable evidence to substantiate their claims that the Challenged Products treat, cure or prevent cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy.

Accordingly, the Commission issued a cease-and-desist Order against Respondents. Among other requirements, Respondents may make efficacy claims for products they sell only so long as the representations are true, non-misleading, and, at the time they are made, Respondents possess and rely on competent and reliable scientific evidence to substantiate their claims. The Order limits what they may say relating to the sale of certain products, but it does not otherwise limit their speech or religious practices. The Order also requires Respondents to send to all consumers who have bought the Challenged Products a letter notifying them the FTC found DCO's advertising claims for the Challenged Products to be deceptive because they were not substantiated by competent and reliable scientific evidence, and that the FTC has issued an Order prohibiting Respondents from making the claims in the future.

Before us now is Respondents' Application for Stay of Modified Final Order Pending Judicial Review.

[2] DCO currently sells 150 to 200 products, including the four products challenged in the Complaint.

Applicable Standard

Section 5(g) of the Federal Trade Commission Act provides that Commission cease and desist orders (except divestiture orders) take effect "upon the sixtieth day after such order is served," unless "stayed, in whole or in part and subject to such conditions as may be appropriate, by … the Commission" or "an appropriate court of appeals of the United States." 15 U.S.C. § 45(g)(2); *see also* 16 C.F.R. § 3.56(a). A party seeking a stay must first apply for such relief to the Commission, 15 U.S.C. § 45(g)(2)(A), (B)(ii). Pursuant to Rule 3.56(c) of the Commission's Rules of Practice, an application for a stay must address the following four factors: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) why the stay is in the public interest. 16 C.F.R. § 3.56(c); *see, e.g., In the Matter of Toys "R" Us, Inc.*, 126 F.T.C. 695, 696 (1998). We consider these factors below.

Analysis

1. Likelihood of Respondents' Success on Appeal

Respondents correctly note that in assessing the likelihood of their success on the merits on appeal, the Commission need not "harbor doubt about its decision in order to grant the stay." *In the Matter of California Dental Ass'n*, 1996 FTC LEXIS 277, at *10 (May 22, 1996). Respondents also correctly state they may 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." R. Mem. at 1 (*citations omitted*). Finally, if the equities decidedly tip in favor of the Respondents it is enough that they "raise questions sufficiently serious and substantial to constitute 'fair ground for litigation.'" R. Mem. at 1-2 (*citations omitted*). Respondents' arguments, however, merely disagree with the Opinion of the Commission and raise no serious or substantial questions on the merits; disagreement does not establish a likelihood of success on appeal.

a. Jurisdiction

Respondents argue that the Commission does not have jurisdiction because DCO is a corporation sole operating under the laws of Washington, and as such is dedicated to religious, nonprofit purposes. They assert the Commission misapplied *Community Blood Bank of Kansas City Area, Inc. v. FTC,* 405 F.2d 1011 (8th Cir. 1969) when it found DCO's members derived a profit from DCO's activities. Respondents raised these arguments on appeal to the Commission and the Commission rejected them. *See* Op. at 6-8 (summarizing Respondents' same

jurisdictional arguments).[3] As we stated in *North Texas Specialty Physicians*, Docket No. 9312 (Jan. 20, 2006), merely repeating arguments the Commission rejected before does not provide the Commission with "sufficient reason to question its prior decision or any of the bases for it, and Respondent[s'] renewal of its legal arguments, without more, is insufficient to justify granting a stay." *Id*. at 3 (*citations omitted*).

The Commission does not question the seriousness of Respondents' religious beliefs, but controlling authorities refute their legal arguments. *California Dental Ass'n v. FTC*, 526 U.S. 756, 766-67 (1999) and *Community Blood Bank,* 405 2d at 1022, both hold the Commission's jurisdiction extends to a corporation organized to carry on business for its own profit or that of its members. The record here establishes that DCO carries on a business that inures to the economic benefit of Respondent James Feijo, its sole overseer and trustee of DCO's assets. DCO sells its products through publications, a call center, radio shows, and over the Internet. In addition, a number of retail stores and chiropractic centers in various states sell DCO products. Any consumer may purchase DCO's products. James Feijo's wife, Patricia Feijo, is a signatory to DCO's bank accounts and had check writing authority. DCO's revenue covered all of the Feijos' living expenses including two houses, cars, pool and gardening expenses, tennis and golf club expenses, and expenditures on retail items and restaurant bills. The evidence supports a finding that DCO was engaged in commercial activities and that the beneficiary of DCO's profit was James Feijo. Op. at 7, 8.

b. Substantiation

Respondents also question the propriety of the FTC's substantiation doctrine. They argue that the reasonable basis theory creates presumptions that violate both Sections 5 and 12 of the FTC Act, as well as the First Amendment commercial speech doctrine. Respondents raised these same arguments below and we continue to find them without merit.

Longstanding case law has consistently held that advertising claims can be found deceptive under Sections 5 and 12 of the FTC Act if they are shown either to be false or to lack a reasonable basis substantiating the claims made in the advertisement. *See, e.g.*, *FTC v. National Urological Group*, 645 F. Supp. 2d 1167 (N.D. Ga. 2008), *aff'd*, 2009 U.S. App. LEXIS 27388 (11th Cir. 2009); *FTC v. Pantron I*, 33 F.3d 1088, 1096 n.23 (9th Cir. 1994); *In the Matter of Thompson Med. Co.*, 104 F.T.C. 648, 818-19 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986). Under the reasonable basis standard, claims about a product's attributes, performance or efficacy carry with them the express or implied representation that the advertiser possessed a reasonable basis substantiating the claims at the time they were made. *See Thompson*, 104 F.T.C. 648, at 813; *FTC v. Direct Mktg. Concepts*, 569 F. Supp. 2d 285, 298 (D. Mass. 2008); *In the Matter of Kroger Co.*, Docket No. C-9102, 1978 FTC LEXIS 332, at *15 (May 17, 1978). Although

[3] The Commission's factual findings must be accepted if they are supported by relevant evidence sufficient so that a reasonable mind might agree with the conclusions. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986). *See also* Section 5(c) of the Act, 15 U.S.C. § 45(c), which provides that "(t)he findings of the Commission as to the facts, if supported by evidence, shall be conclusive" upon review in the Court of Appeals.

Respondents may not like the case law, they cannot dispute that courts continue to hold the FTC may show a respondent made deceptive claims if it did not have a reasonable basis for their advertisements. Applying that standard in the matter before us now and after reviewing the evidence, the Administrative Law Judge ("ALJ") and the Commission found Respondents did not possess any adequate substantiation for their health-related efficacy claims.

Respondents assert the ALJ and the Commission misapplied the FTC Guide, *Dietary Supplements: An Advertising Guide for Industry*, ("Guide") contending that the ALJ and the Commission applied the Guide as a fixed rule of law rather than a flexible standard. The standard's flexibility, however, lies in its tailoring the level of substantiation required to the nature of the product claims at issue. Here, Respondents claimed that the Challenged Products could prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy. As the Guide itself notes, such claims about efficacy typically should be supported with competent and reliable scientific evidence. *See* Guide at 9. Further, case law supports holding the Respondents to a competent and reliable scientific standard for the efficacy claims they made. *See FTC v. Natural Solution, Inc*., No. CV 06-6112-JFW, 2007 U.S. Dist. LEXIS 60783, at *11-12 (C.D. Cal. Aug. 7, 2007); *Nat'l Urological Group*, 645 F. Supp. 2d at 1189; *Direct Mktg.*, 569 F. Supp. 2d at 300, 303; *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 961 (N.D. Ill. 2006), *aff'd*, 512 F. 3d 858 (7th Cir. 2008). Finally, the ALJ and the Commission relied on expert testimony to determine what competent and reliable scientific evidence would adequately substantiate Respondents' claims.

c. First Amendment Arguments

Respondents argue the Commission's Opinion and Order unconstitutionally deprives them of free exercise of religion and freedom of speech, denies Respondents' liberty and property without due process, and erroneously dismissed their Religious Freedom Restoration Act Claim. Respondents' arguments are without merit.

The evidence established the primary purpose and effect of the speech at issue here – Respondents' representations relating to the Challenged Products – was to sell those products, not to solicit charitable contributions. Op. at 13. Such commercial speech is accorded less protection than other constitutionally protected forms of speech. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980). Specifically, misleading or deceptive commercial speech is afforded no protection under the First Amendment. *See, e.g., Cent. Hudson*, 447 U.S. 557; *Edenfield v. Fane*, 507 U.S. 761 (1993); and *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999). Respondents' claims about the efficacy of the Challenged Products were not substantiated and were, therefore, deceptive. Op. at 11, 14.

Respondents argue their due process rights were violated because two of the sitting Commissioners pre-judged the matter. Respondents point to a speech made by Commissioner

Rosch in 2008[4] and Commissioner Harbour's statements during oral argument. Respondents' reliance on *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970) is misplaced. In that case, the court noted that the statements relied on to show prejudgment were made while the appeal was pending before the Commission; here Commissioner Rosch made these general statements about a "bogus cancer cure" sweep as only a small part of a larger speech on self-regulation. Commissioner Rosch delivered this speech almost a full year before Respondents had even filed their appeal in this case, before evidence was entered in the matter, and before the ALJ issued his Initial Decision (August 2009). Further, if Respondents had wanted to disqualify Commissioner Rosch, they should have sought his disqualification before now by the filing "of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee." 5 U.S.C. § 556(b). They have never made such a filing.

Nor is there any merit to Respondent's arguments based on Commissioner Harbour's comments during the oral argument before the Commission. Like any appellate tribunal, the Commission may properly probe and even challenge the positions being argued to it, as well as the practical ramifications of its ruling. In the present case, for example, there is no impropriety in inquiring into the potential that the continued sale of "cancer cures" whose efficacy is unsubstantiated could harm consumers who might turn to such products in place of other medical treatment. In any event, none of the statements to which Respondents refer could lead "a disinterested observer [to] conclude that (a commissioner) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959) (describing the grounds for disqualification). Moreover, there was ample evidence in the record to support the Commission's decision in this matter.

Respondents' final two arguments supporting their assertion that they are likely to succeed on the merits are that the FTC erroneously dismissed the Respondents' Religious Freedom Restoration Act claim ("RFRA") and that the FTC is forcing the Respondents to send a letter to consumers to which Respondents object for moral, ethical, and religious reasons. Respondents' arguments again misapply the law to the facts in this matter. RFRA applies when the government substantially burdens a person's exercise of religion. The case upon which Respondents rely is *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). In that case, the use of a hallucinogenic tea was central to the entity's core beliefs, the tea was not sold or otherwise provided to non-believers, and the tea was only used during the sacramental rite of communion. Nothing in the record before us reveals similar facts. DCO was engaged in commercial activity by selling the Challenged Products and DCO engaged in deception to make those sales. DCO's sales were not dependent upon a consumer's belief system or whether they had any religious affiliation at all. DCO sold their products completely outside of any religious ceremony or sacrament.

The Commission has not burdened Respondents' exercise of religion; it has only limited how DCO can sell its products. The Commission found the Respondents violated Section 5 of

[4] J. Thomas Rosch, *Self-Regulation And Consumer Protection: A Complement To Federal Law Enforcement*, before the 2008 National Advertising Division Annual Conference, at 16-17 (Sept. 23, 2008).

the FTC Act, which provides the Commission with the authority to fashion an order requiring respondents to cease and desist from such acts and practices. *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957). The Commission took great care in issuing the Order in this matter and making it clear that the letter informing consumers of the FTC's Opinion and Order plainly state it is the FTC's Order that requires Respondents to transmit the information. The Order does not require that Respondents profess to agree with the FTC or that Respondents modify their religious ministry in any way.

2. Irreparable Injury

Respondents argue that 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.'" R. Mem. at 23. Respondents base this argument on the provisions of Paragraphs II and III which prohibit Respondents from making any representation about the efficacy of any of their products "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 substantiate[s]" their claims. R. Mem. at 25 (*quoting* Paragraph III of the Order). These limitations, Respondents argue, will prevent them from selling any of their products, essentially shut down DCO, and injure the business's goodwill with its steady customers. [5]

Respondents may not recognize it, but the Commission's Order merely requires Respondents to follow the law. Paragraphs II and III of the Order cover both the Challenged Products as well as other products sold by Respondents and permit Respondents to make efficacy claims relating to those products so long as the representations are true, non-misleading, and substantiated. Op. at 24. "In other words, Respondents are only obliged to do that which the case law under Sections 5 and 12 of the FTC Act has defined as necessary to avoid deception." *Id.* The Commission would be hard pressed to find that irreparable injury results from an Order requiring marketers of health-related programs to make only true, substantiated representations about the products they are selling, especially after finding those marketers engaged in deceptive advertising for untested cancer cures. The Order has been tailored narrowly to apply only to their commercial advertising and only to the type of speech that has been found to be deceptive; the Order does not otherwise reach into Respondents' religious speech or practices.

Paragraph V of the Order requires Respondents to send a letter to their customers notifying them of the Commission's Opinion and Order and the findings therein. Respondents assert they will be irreparably harmed if they are compelled to send this letter on their letterhead to certain customers because such a requirement will violate their First Amendment freedoms of speech and religion. Respondents note, however, that if the government can demonstrate "that its mandate is 'a narrowly tailored means of serving a compelling state interest,'" then a speaker can be required to make disclosures. R. Mem. at 22 (*quoting Pacific Gas & Electric Co. v. Cal.*

[5] We accept Respondents' Declarations submitted for the purposes of supporting their irreparable harm argument, but do not find they are sufficient to meet their burden of showing irreparable injury.

P.U.C., 475 U.S. 1, 19 (1986)). The compelling interest here is protecting cancer patients from deceptive advertising claims. The required letter is carefully limited to address only the issues in this matter. In particular, the letter is to be sent only to Respondents' customers who purchased the four Challenged Products; it is drafted to show that the FTC found DCO's advertising claims for those products to be deceptive and that the information about the scientific evidence relating to the products is from the FTC; and it is not drafted to force Respondents to say they agree with the FTC's findings. The letter does not mention Respondents' religious beliefs or teachings. The letter does not compel Respondents to state they have repudiated their faith or endorsed the FTC's Opinion. The letter is narrowly crafted to inform consumers about the FTC's Opinion and Order.

3. Degree of Injury to Other Parties and the Public Interest

The final remaining questions are whether a stay would harm other parties and whether it is in the public interest. *In the Matter of California Dental Ass'n*, 1996 FTC LEXIS 277, at *7-8. These two factors are stated separately, but the FTC considers them together because Complaint Counsel is responsible for representing the public interest by enforcing the law. *See Id.* at *8.

Respondents argue that a stay would not harm any party because they assert there is no evidence that any consumer was economically harmed or misled by Respondents' representations, and that there is no evidence in the record that the four Challenged Products have actually harmed anyone's medical or cancer treatment.

Respondents' argument ignores all the record evidence showing that Respondents engaged in deceptive advertising. And while Respondents may not believe that deception constitutes a "bona fide injury to any consumer," the Commission does. Consumers are harmed when they purchase products that are marketed to prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy, and there is no substantiation for those claims. As the findings of fact show, this harm arises if consumers forego beneficial and effective therapy for untested therapies like the ones at issue here. This harm comes from consumers risking their health to potential side effects and harmful interactions between Respondents' products and other therapies. These harms are real and they are substantial. Because of the nature of the harm, issuing a stay is not in the public interest.

Conclusion

Taking all of these factors into consideration, the Commission has determined that a stay is inappropriate. Respondents are unlikely to succeed on the merits and in the Commission's judgment the potential harm to consumers from granting a stay substantially outweighs the

potential harm to Respondents from denying the request for a stay. We find that DCO and James Feijo have not met their burden for showing a stay of the Modified Final Order pending judicial review is warranted. Accordingly,

IT IS ORDERED THAT the Respondents' Application for Stay of Modified Final Order Pending Judicial Review is **DENIED**.

By the Commission.

Donald S. Clark
Secretary

ISSUED: March 22, 2010