

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

In the Matter of)	
)	
DANIEL CHAPTER ONE,)	
a corporation, and)	
)	DOCKET NO. 9329
JAMES FEIJO,)	
individually, and as an officer of)	PUBLIC DOCUMENT
Daniel Chapter One)	
_____)	

**RESPONDENTS' MOTION TO RECONSIDER
ORDER DENYING RESPONDENTS'
MOTION TO DISMISS COMPLAINT,
AND
SUPPORTING MEMORANDUM
OF POINTS AND AUTHORITIES**

MOTION TO RECONSIDER

On January 13, 2009, pursuant to Section 3.22(a) of the Commission's Rules of Practice, Respondents submitted their Motion to Dismiss and Supporting Memorandum of Points and Authorities ("Motion to Dismiss"). On January 22, 2009, Complaint Counsel submitted a Memorandum in Opposition to the Motion to Dismiss ("Memorandum in Opposition"). On February 2, 2009, the Administrative Law Judge ("ALJ") issued an Order denying Respondents' Motion to Dismiss ("Order").

In their Motion to Dismiss, Respondents submitted three independent statutory grounds and six independent constitutional claims, any one of which, if granted, would require dismissal of the Complaint for lack of jurisdiction. See Motion to Dismiss, pp. 5-27. Among their constitutional challenges to the Federal Trade Commission's ("FTC") jurisdiction was the claim

that this FTC action violates the Fifth Amendment due process guarantee of a fair and impartial hearing and the constitutional guarantee of separation of powers. *See* Motion to Dismiss, pp. 24-27. Yet, neither the Complaint Counsel’s Memorandum in Opposition, nor the Order, addresses this constitutional claim, treating Respondents’ constitutional objections to jurisdiction as if they were limited to the First Amendment. *See* Memorandum in Opposition, pp. 10-15; Order, pp. 4-9. Additionally, the Order fails to address Respondents’ First Amendment prior restraint claim. *See* Order, pp. 4-6.

Section 3.22(a) of the Commission’s Rules of Practice provides that “[d]uring the time a proceeding is before an [ALJ], all motions therein, except those filed under §3.26, §3.42(g), or §4.17, shall be ... ruled upon, if within his or her authority, by the [ALJ].” (Emphasis added.) The ALJ, having failed to “rule upon” Respondents’ due process and separation of powers claims, and their First Amendment prior restraint claim, Respondents file this Motion for Reconsideration of their Motion to Dismiss and renew their Motion to Dismiss the Complaint on the grounds set forth in their previous Motion and the further grounds stated herein.

ARGUMENT

I. THIS PROCEEDING, INCLUDING THE INJUNCTIVE RELIEF SOUGHT OPERATES AS A UNCONSTITUTIONAL PRIOR RESTRAINT IN VIOLATION OF THE FIRST AMENDMENT.

Although the Memorandum in Opposition addressed all of Respondents’ First Amendment claims, including their claim that these proceedings operate as an unconstitutional prior restraint¹, the Order did not. *Compare* Order, pp. 6-8 *with* Motion to Dismiss, pp. 21-24. At best, the Order could be presumed to have viewed Respondents’ prior restraint claim, like

their other First Amendment claims, as resting upon factual claims about the noncommercial nature of their activities, factual claims that, with respect to a motion to dismiss, must be resolved in favor of Complaint Counsel. *See* Order, p. 8.

Respondents' prior restraint claim is not so limited. Rather, it rests upon the constitutional insufficiency of the administrative process whereby Respondents' First Amendment claims are being denied a "prompt judicial determination," a safeguard that the Supreme Court has applied to government efforts to suppress even pornography. *See* Motion to Dismiss, p. 22, citing Freedman v. Maryland, 380 U.S. 54, 58-59 (1965). Even if Respondents' speech is, in part, commercial, the FTC's claim that Respondents' communications about their products are "misleading," and thus, unprotected by the First Amendment, deserves a prompt judicial assessment comparable to that afforded purveyors of sexually explicit materials. Surely, it cannot be the position of the ALJ that pornographers have greater First Amendment procedural protections than any other citizens, let alone Respondents' holistic religious ministry.

Additionally, Respondents' prior restraint claim rests upon the constitutional insufficiency of the FTC's justification for seeking injunctive relief that would grant to the FTC censorship power over Respondents' future communications. *See* Motion to Dismiss, pp. 22-24. According to Supreme Court precedent, such a claim of right to censor Respondents' communicative activities requires the FTC to demonstrate a compelling government interest of the highest order, lest Respondents be denied their freedom of the press. *See* Motion to Dismiss, p. 24.

¹

See Memorandum in Opposition, pp. 10-11.

At a minimum, Respondents deserve, and we believe that the law requires that Respondents receive, a ruling on this question from the ALJ, a ruling which we believe the law requires should be favorable to our motion to dismiss.

II. RESPONDENT'S DUE PROCESS AND FIRST AMENDMENT RIGHTS ARE BEING VIOLATED BY THIS ADMINISTRATIVE PROCEEDING.

As noted above, Complaint Counsel completely disregarded Respondents' Due Process Claim. *See* Memorandum in Opposition, pp. 10-14. Likewise, the Order denied the entire Motion to Dismiss, without even addressing Respondents' Due Process claim. *See* Order, pp. 4-9. Such cavalier dismissal of Respondents' claim demonstrates a profound disrespect for an ancient right that dates back to Section 39 of the 1215 Magna Carta, "no clause of [which] has been cited more often as a guarantee of the liberties of the citizen." *See Sources of Our Liberties*, p. 5 (R. Perry and J. Cooper, eds., American Bar Foundation: Rev. Ed. 1978) (hereinafter "Sources"). While the language of Section 39 is not the same as that of the Fifth Amendment, there is no question that the "due process of law" guarantee therein is considered "to be identical" to the Magna Carta's warrant that "[n]o free man shall be ... dispossessed ... except by the law of the land." *Id.*, p. 6, 17.

As pointed out in Respondents' Motion to Dismiss, the deliberate filing of the September 18, 2008 FTC news release in the docket of this proceeding prejudices Respondents, having poisoned this hearing by associating Respondents with alleged "cancer scams" of others. *See* Motion to Dismiss, pp. 25-26. Instead of proceeding according to the "law of the land," the FTC's decision to docket its news release, along with its complaint, is calculated to identify Respondents' religious ministry with the alleged scams of other persons and entities of which

neither Respondent is a part. By this action of “misjoinder,” the FTC has “implicate[d] the independent value of individual responsibility and our deep abhorrence of the notion of ‘guilt by association.’” See United States v. Lane, 474 U.S. 438, 475 (1986) (Stevens, J., concurring and dissenting). Indeed, as Justice Stevens pointed out in Lane, “[t]he rule against misjoinder [is] an ultimate safeguard of our cherished principle that one is tried for one’s own deeds, and not for another’s.” *Id.*

Ordinarily, “the harmfulness of misjoinder is ... the type of error that has consequences difficult to measure with precision” (*id.*), but the fairness principle upon which it rests is especially applicable in cases, such as this one, involving threats to the First Amendment freedoms of religion, speech, and press. As the Supreme Court “recogniz[ed]” in NAACP v. Clairborne Hardware Co., 458 U.S. 886 (1982), “guilt by association is a philosophy alien to the traditions of a free society ... and the First Amendment itself.” *Id.*, 459 U.S. at 932. Thus, the Court ruled that “[t]he First Amendment ... restricts the ability of the State to impose liability on an individual solely because of his association with another.” *Id.*, 459 U.S. at 918-19.

Notwithstanding these principles and warnings, the FTC has filed a document in this proceeding which, by design and effect, has lumped Respondents in with a group of “companies [allegedly] making unsupported claims that their products cured or treated one of more types of cancer.” See “FTC Sweep Stops Peddlers of Bogus Cancer Cures,” p. 1. The FTC has done so without a scintilla of evidence that Respondents knew the identities of these other companies, much less have actively participated in their activities. Any attribution of wrongdoing by Respondents impliedly based upon the allegedly parallel activities of others, such as made in the

FTC news release, is itself a direct assault on Respondents' First Amendment rights. *See NAACP v. Clairborne*, 458 U.S. at 919-920.

While the Order ostensibly rests upon an analysis of Respondents' Motion to Dismiss in relation to the allegations in the Complaint (*see, e.g.*, Order, p. 4), the Order also expressly states the general proposition that “[i]n ruling on a motion to dismiss, it is appropriate to consider the allegations of the complaint, as well as documents attached to or specifically referenced in the complaint, and **matters of public record.**” Order, p. 4 (emphasis added). Because the FTC news release is part of the “public record” in this case, it is clearly within the parameters of the scope of inquiry sanctioned by the ALJ. Further, the Order essentially adopts the First Amendment theory of Complaint Counsel, that this case involves only commercial speech. *Compare* Order, pp. 6-8 *with* Memorandum in Opposition, pp. 12-14. In so doing, the Order reflects the picture painted by the September 2008 news release which portrays Respondents, “along with 23 U.S. companies and two foreign individuals,” of being engaged in the “market[ing] [of] products claimed to cure, treat, mitigate or prevent cancer.” *See* “FTC Sweep Stops Peddlers of Bogus Cancer Cures,” p. 1. Furthermore, while the Order maintains that “the required standard for substantiation of [Respondents’ claims] does not shift the burden of proof” on the question whether Respondents’ communications are misleading,² the press release states the opposite, stating that: “[T]he Commission seeks an order prohibiting the respondents from representing that their products prevent, treat, or cure any type of cancer **unless the**

² *See* Order, p. 6.

representation is true, non-misleading, and supported by reliable scientific evidence.” *See* “FTC Sweep Stops Peddlers of Bogus Cancer Cures, p. 1 (emphasis added).

In sum, the fairness and impartiality of the administrative process in this case has been tainted by the FTC press release, the filing of which is not only unauthorized by the FTC Rules of Practice, but violative of Respondents’ right not to be denied their liberty and their property without due process of law.

III. RESPONDENTS’ RIGHTS ARE BEING DENIED BY THE FTC’S FAILURE TO ADHERE TO THE CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS.

As noted in Respondents’ Motion to Dismiss, the FTC September press release was issued by the FTC Office of Public Affairs, which reports directly to the FTC members, through the Commission’s chairman. Motion to Dismiss, p. 26. Because the press release appears in this case docket, having been filed on the same date as the Complaint, one could infer that Complaint Counsel placed the document into the official record of this proceeding. Although Respondents are not certain about that, it is self-evident that such a document would never have been filed, had this proceeding been initiated in an Article III court.

Rule 7 of the Federal Rules of Civil Procedure simply does not contemplate the filing of such a self-serving, prosecutorial document. And neither do the FTC Rules of Practice. Rather 16 CFR Section 3.11 contemplates only the filing of a complaint in order to commence an adjudicative hearing. *See* 16 CFR Section 3.11(a). Further, Section 3.11(b) provides that such complaint contain: (1) a “[r]ecital of the legal authority and jurisdiction for institution of the proceeding”; (2) “[a] clear and concise factual statement sufficient to inform each respondent with reasonable definiteness the types of acts and practices alleged to be in violation of the law”;

(3) “a form of the order which the Commission has reason to believe should issue”; and (4) [n]otice of the specific time and place for the evidentiary hearing.” In short, there is no provision in the FTC Rules of Practice permitting the filing of a document containing the kind of general enforcement action information appearing in the FTC’s September 2008 press release.

For what purpose, then, was the press release filed as part of the docket of this proceeding? Surely, not for the purpose of informing the public of the action that the FTC has taken against Respondents, and the reason for such action. After all, the press release, including the identification of the docket and file numbers of this proceeding, was made available to the general public via the FTC Web site as part of a “Public Education Campaign Counsel[ing] Consumers, ‘Talk to Your Doctor.’” *See* Federal Trade Commission, Protecting America’s Consumers at <http://www.ftc.gov/opa/2008/09/boguscures.shtm>. Indeed, in its September 2008 press release, the FTC announced that it had launched a “new Web site about bogus cancer cures” — www.ftc.gov/curious — “tell[ing] consumers how to spot and report bogus claims they see on line, and urg[ing] people with cancer to talk to their treatment team about any products they’d like to try.” *See* “FTC Sweep Stops Peddlers of Bogus Cancer Cures,” p. 1.

It appears, then, that the only plausible purpose for filing the press release as part of the docket in this proceeding would be to influence its outcome by informing the ALJ that the case before him was one of “11 law enforcement actions challenging deceptive advertising of bogus cancer cures.” *See* “FTC Sweep Stops Peddlers of Bogus Cancer Cures, p. 1. Not only is this effort a violation of the fairness and impartiality principles guaranteed by the Fifth Amendment Due Process Clause, but a breach of the separation of powers principles embodied in Articles I, II and III of the United States Constitution.

As James Madison wrote in Federalist No. 47, the central purpose of separating legislative, executive and judicial powers was to protect the people from “tyranny.” And, as the Supreme Court observed in 1881, “it is essential to the successful working of this system [of separated powers], that the persons entrusted with power in any one of the[] [three] branches shall not be permitted to encroach upon the powers confided to the others, but each shall by the law of its creation be limited to the exercise of powers appropriate to its own department and none other.” Kilbourn v. Thompson, 103 U.S. 168, 191 (1881).

To be sure, strict adherence to this principle has eroded significantly since these words were written. With the creation of independent regulatory commissions, such as the FTC, Congress has chosen, and been permitted by the courts, to blend legislative, executive and judicial powers into one body. *See* B. Schwartz, Administrative Law, Sections 1.5 - 1.7, pp. 9-16. Such concentration of powers has led to serious abuses, including the active participation of the enforcement arm of an administrative agency to prejudice a case before its adjudicatory arm. *See id.*, Section 6.18, pp. 320-25. Such appears to be the case here, where there is no apparent reason for the FTC’s having filed in this proceeding its press release indiscriminately labeling activities engaged in by persons and entities, including Respondents, as “scams,” “bogus,” “deceptive,” “fraudulent,” and “false,” other than to prejudice the adjudication of this case.

In its zeal to regulate what the FTC perceives to be “deceptive claims,” the FTC should not be permitted to run roughshod over Respondents in disregard of its duty not to allow its executive function to despoil its judicial duty. By unnecessarily filing in this docket such obviously prejudicial material, this proceeding is irretrievably corrupted and should be dismissed.

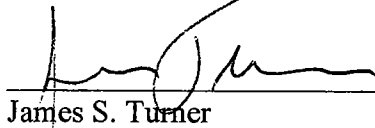
IV. CONCLUSION

For the reasons stated herein, and in the Motion to Dismiss, Respondents' Motion for Reconsideration should be granted and this proceeding be dismissed for lack of jurisdiction.

February 6, 2009.

Respectfully submitted:

Swankin & Turner
Attorneys for Respondents



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3 **IN THE UNITED STATES OF AMERICA**
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5 **OFFICE OF ADMINISTRATIVE LAW JUDGES**

6 **In the Matter of**) **Docket No.: 9329**
7 **DANIEL CHAPTER ONE,**)
8 **a corporation, and**)
9 **JAMES FEIJO,**) **PUBLIC DOCUMENT**
10 **individually, and as an officer of**)
11 **Daniel Chapter One**)
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13 **[PROPOSED] ORDER**
14 **GRANTING RESPONDENTS' MOTION TO RECONSIDER ORDER**
15 **DENYING RESPONDENTS' MOTION TO DISMISS COMPLAINT,**
16 **AND DISMISSING COMPLAINT**

16 On January 11, 2009, counsel for Respondents filed a motion to dismiss the Complaint *In*
17 *the Matter of Daniel Chapter One*, Docket No. 9329. Complaint Counsel submitted a
18 Memorandum in Opposition to the Motion to Dismiss on January 22, 2009, and the
19 Administrative Law Judge issued an Order denying Respondents' Motion to Dismiss on
20 February 2, 2009. The Court being fully advised,
21

22 IT IS ORDERED that the administrative action *In the Matter of Daniel Chapter One*,
23 Docket No. 9329, be, and is hereby DISMISSED WITH PREJUDICE against all Respondents.
24

25 Dated this ___ day of _____, 2009.
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27

28 _____
D. Michael Chappell
Administrative Law Judge

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11
12 **CERTIFICATE OF SERVICE**

13
14 I certify that on February 6, 2009, I served or caused to be served the following
15 documents on the individuals listed below by electronic mail, followed by Federal Express
16 delivery:

17 Respondents' Motion to Reconsider Order Denying Respondents' Motion to Dismiss Complaint,
18 and Supporting Memorandum of Points and Authorities
19 [Proposed] Order Granting Respondents' Motion to Reconsider Order Denying Respondents'
20 Motion to Dismiss Complaint, and Dismissing Complaint

21 Service to:


22 Donald S. Clark
23 Office of the Secretary
24 Federal Trade Commission
25 600 Pennsylvania Avenue, NW, Room H-135
26 Washington, DC 20580
27 Email: secretary@ftc.gov

28 Leonard L. Gordon, Esq. (lgordon@ftc.gov)
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Courtesy Copies:

Hon. D. Michael Chappell
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