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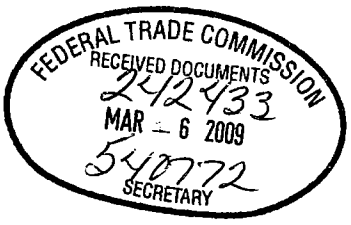

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
DANIEL CHAPTER ONE,	)	
a corporation, and	)	**Docket No. 9329**
JAMES FEIJO,	)	**Public Document**
individually, and as an officer of	)	
Daniel Chapter One	)	

COMPLAINT COUNSEL'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' SECOND MOTION TO AMEND ANSWER

Complaint Counsel oppose Respondents' Second Motion to Amend Answer (the "Second Motion"), which for the reasons set forth below, should be denied.

I. INTRODUCTION

On December 30, 2008, Complaint Counsel and Respondents entered a Stipulation Striking Respondents' Affirmative Defenses from their Answer (the "Joint Stipulation"). On January 8, 2009, this Court entered an Order on the Joint Stipulation, providing, in relevant part, that "[t]he six Affirmative Defenses raised by Respondents in their Answer are hereby stricken since these same defenses are raised in the general denial section of the Answer." *See* Jan. 8, 2009 *Order on Stipulation* (attached hereto as Exhibit A).

On February 24, 2009, the day summary decision briefs were due and over one month after the close of fact discovery, Respondents filed a Second Motion to Amend Answer (the "Second Motion"), seeking to add a new Affirmative Defense. Respondents offer no excuse for the delay. During discovery, Respondents produced essentially no documents and provided

virtually no answers to Complaint Counsel's discovery requests, objecting to most of Complaint Counsel's discovery requests on First Amendment grounds. After not complying with their discovery obligations, Respondents sought leave to amend their Answer in two separate motions.[1]

As with their First Motion to Amend Answer, Respondents are not attempting to correct a mere scrivener's error with their Second Motion. Rather, they are attempting to add a new Affirmative Defense after previously agreeing to strike their Affirmative Defenses in this matter.

On March 4, 2009, this Court issued a thorough and well-reasoned Order Denying Respondents' Motion to Amend Answer. For the reasons stated in the Court's March 4, 2009 Order and for the reasons set forth more fully below, Respondents' dilatory Second Motion prejudices Complaint Counsel and, therefore, should be denied.

II. ARGUMENT

A. Leave to Amend is not automatic and should be denied here.

Leave to amend is not automatic. *See Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993) (noting that leave to amend is not automatic and that the court should consider certain factors that would preclude amendment, such as bad faith and dilatory motive); *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180, 1184 (7th Cir. 1986) (delay and prejudice may preclude automatic grant of amendment). Granting a motion for leave to amend is "discouraged" when "surprises such as new arguments or defense theories" are offered after the completion of

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[1] On February 10, 2009, almost four months after the Respondents answered the Complaint filed by the Federal Trade Commission (the "FTC" or the "Commission") and almost three weeks after the close of fact discovery, Respondents filed a Motion to Amend Answer (the "First Motion"), that this Court denied on March 4, 2009. Respondents did not include in their First Motion the Affirmative Defense they now want to add, thereby necessitating their Second Motion and another opposition by Complaint Counsel.

discovery. *Crest Hill Land Dev., LLC v. City of Joliet*, 396 F.3d 801, 804 (7th Cir. 2005) (citation omitted). Rule 3.15(a) governs amendments to pleadings. As this Court stated in its March 4, 2009 Order, "[u]nlike Federal Rule 15, FTC Rule 3.15(a) does not require that leave to amend be 'freely granted.' Rather, the Rule provides 'appropriate' amendments 'may' be allowed, upon such conditions as will avoid prejudice to the parties and the public interest, if the amendments will facilitate a determination on the merits." Mar. 4, 2009 *Order Denying Respondents' Mot. to Amend Answer* at 5.

To avoid prejudice and delay, courts should deny a motion to amend where the moving party does not provide good cause. *See Ennis v. Sigurdson,* 1999 U.S. App. LEXIS 10898, at *3 (9th Cir. 1999) (denying leave to amend where moving party offered "absolutely no explanation or justification for the delay"); *Sherman v. Winco Fireworks, Inc.,* 532 F.3d 709 (8th Cir. 2008) (denying leave to amend where moving party failed to show good cause to amend). As this Court stated in its March 4, 2009 Order, "the burden is on the party who wishes to amend to provide a satisfactory explanation for the delay." Mar. 4, 2009 *Order Denying Respondents' Mot. to Amend Answer* at 7 (quoting *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 72 (2d Cir. 1990) and finding that "Respondents have failed to meet that burden"). Here, Respondents offer no explanation why the Religious Freedom Restoration Act that is supposedly now central to their case was not previously pled as an affirmative defense.

Further, a motion for leave to amend an answer should be denied when the party seeking leave to amend does not comply with its obligations during discovery, as is the case here. *See Rahn v. Hawkins*, 464 F.3d 813, 822 (8th Cir. 2006) (holding that a court may deny leave to amend if the moving party has not shown diligence in meeting the court's schedule in completing discovery). As more fully explained in Complaint Counsel's Opposition to

Respondents' Second Motion to Dismiss (and incorporated herein by reference), Respondents have failed to respond meaningfully to discovery in this matter despite an Order from this Court to do so. *See* Feb. 11, 2009 *Order Granting Compl. Counsel's Mot. to Compel Answers to Interrogs., Produc. of Docs. and Resp. to Req. for Admis.*

B. Respondents are bound by the Joint Stipulation and are precluded from adding an Affirmative Defense.

"A stipulation and order is a binding agreement between parties to a dispute that is enforceable as a contract." *Patterson v. Newspaper and Mail Deliverers' Union of New York*, No. 73 Civ. 3058, 2005 U.S. Dist. LEXIS 37438, at *21 (S.D.N.Y. July 13, 2005) (quoting *Keiser v. CDC Inv. Mgmt. Corp.*, No. 99 Civ. 12101, 2003 U.S. Dist. LEXIS 25383 (S.D.N.Y. Mar. 25, 2003)). A party to "a stipulation is not entitled to withdraw from the agreement unilaterally." *Patterson*, 2005 U.S. Dist. LEXIS 37438, at *21 (quoting *Sinicropi v. Milone*, 915 F.2d 66, 68-69 (2d Cir. 1990)).

Complaint Counsel sought to strike the six Affirmative Defenses Respondents initially raised in their Answer on October 14, 2008. After conferring with Respondents, on December 30, 2008, the parties filed with the Court a stipulation stating that "[t]he six Affirmative Defenses raised by the Respondents in their Answer are hereby stricken since these same defenses are raised in the general denial section of the Answer." *See* Exhibit A at ¶ 1. The Court entered the parties' Joint Stipulation on January 8, 2009. *Id.*

Included in the Affirmative Defenses that Respondents agreed to strike was their Sixth Affirmative Defense, which provided:

> As and for a sixth separate, distinct and affirmative defense, Respondents allege that the actions of the Federal Trade Commission in filing the Complaint in this case are an unconstitutional ***infringement of Respondents' right to practice religion*** under the First Amendment to the U.S. Constitution.

Answer at 6 (emphasis added). The language of the stricken Affirmative Defense is substantially similar to the language of the Affirmative Defense that Respondents now seek leave to add:

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

Respondents' Second Mot. to Amend Answer at 1 (emphasis added). Respondents offer no rationale for permitting their about-face. Therefore, Respondents' Second Motion to Amend Answer should be denied.

C. Respondents' attempt to add an Affirmative Defense prejudices Complaint Counsel and should not be allowed.

In their Memorandum in Support of their Second Motion to Amend Answer, Respondents claim that Complaint Counsel will not be prejudiced by adding their last-minute Affirmative Defense. Respondents are wrong.

Complaint Counsel were preparing to move to strike Respondents' religious freedom affirmative defense when Respondents' stipulated to striking same. Respondents now have filed their Second Motion asserting this proposed last-minute Affirmative Defense *after* the close of discovery and *after* Complaint Counsel submitted their Motion for Summary Decision and Memorandum in Support thereof. Complaint Counsel did not have the opportunity to address Respondents' proposed new Affirmative Defense since it did not exist at the time Complaint Counsel filed their Motion for Summary Decision. As this Court noted in its March 4, 2009 Order, "allowing Respondents to change their answer at this point in the proceedings, after the close of discovery and approximately two months before trial, would be unduly prejudicial to Complaint Counsel." Mar. 4, 2009 *Order Denying Respondents' Mot. to Amend Answer* at 7.

Similarly, to now add this religious freedom affirmative defense after the close of discovery and the filing of summary decision motions prejudices Complaint Counsel.

D. The Religious Freedom Restoration Act does not shield Respondents from violating the FTC Act.

Respondents now seek to add an Affirmative Defense claiming that the instant lawsuit infringes Respondents' free exercise of religion in violation of 42 U.S.C. Section 2000bb-1(a) and (c). *Respondents' Second Mot. to Amend Answer* at 1. Specifically, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"), prevents the Government from placing a "substantial burden" on the exercise of free religion. *Holy Land Found. For Relief and Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 83 (D.D.C. 2002). Despite Respondents' overblown rhetoric, the FTC is not trying to stop Respondents from practicing their religion, nor is it placing a "substantial burden" on their exercise of free religion. Rather, the FTC brings this suit to stop Respondents from making unsubstantiated, deceptive claims relating to cancer and tumors in connection with the sale of Bio*Shark, 7 Herb Formula, GDU, and BioMixx (referred to collectively as the "Challenged Products"). This Court already has ruled that "the proposed cease and desist order would affect only the sale of the products, and would not affect Respondents' right to advocate alternative medicine or faith-based healing." Feb. 2, 2009 *Order Denying Respondents' Mot. to Dismiss Compl.* at 8; *see also* Feb. 23, 2009 *Order Denying Respondents' Mot. for Reconsideration* at 5.

The RFRA does not provide a blanket immunity to violate the law as Respondents imply. Courts addressing claims invoking the RFRA routinely have dismissed such claims where parties fail to show how a valid law or statute impacts any exercise of religion. *See, e.g., United States v. Mubayyid*, 476 F. Supp. 2d 46, 51-52 (D. Mass. 2007) (denying defendants' motion to

dismiss indictment charging them with making false statements, conspiracy to defraud United States, and making false statements on tax returns and finding that defendants' claim of undue burden of free exercise of religion under RFRA was without merit); *Holy Land Found.*, 219 F. Supp. 2d at 83-85 (granting Government's Motion to Dismiss and Motion for Summary Judgment as to Plaintiff's RFRA claim). For example, in *Holy Land Foundation for Relief and Development v. Ashcroft*, the plaintiff sought to enjoin the United States Government from blocking its assets as a terrorist organization, claiming that the Government's blocking order violated, *inter alia*, the RFRA. *Holy Land Found.*, 219 F. Supp. 2d at 62. In reaching its decision dismissing the plaintiff's RFRA claims, the District Court for the District of Columbia noted that "nowhere in Plaintiff's Complaint does it contend that it is a religious organization." *Id.* at 83. Rather, the plaintiff in that case "define[d] itself as a 'non-profit charitable corporation' without any reference to its religious character or purpose." *Id.* The Court also found that the plaintiff "d[id] not describe any exercise of religion that has been burdened." *Id.*

In *United States v. Mubayyid*, the District Court for the District of Massachusetts found that defendants' claim of undue burden on the free exercise of religion under RFRA was without merit, stating that "[d]efendants do not contend that their religion requires that they conceal information, defraud the government, or make false statements." *Mubayyid*, 476 F. Supp. 2d at 52. The Court also noted that defendants did not contend that the charging statutes at issue in that case burden their free exercise rights. *Id.* The Court concluded by stating that it saw "no reason why providing a complete and truthful description of the organization's planned activities in order to obtain tax-exempt status – whether or not those activities are religiously motivated – inhibits or substantially burdens the exercise of religious freedom." *Id.*

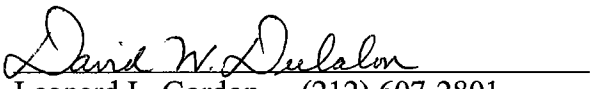
Contrary to the rhetoric of the Second Motion and Respondents' other motions, Complaint Counsel are not trying to stop Respondents from practicing their religion. Complaint Counsel are not seeking to stop Respondents from expressing their views on dietary supplements, nor are Complaint Counsel trying to stop Respondents from selling the Challenged Products. Rather, Complaint Counsel bring this suit to stop Respondents from making unsubstantiated, deceptive claims relating to cancer and tumors in connection with the sale of the Challenged Products. Respondents have failed to explain how this interferes with the exercise of religion.

Because the FTC is not placing a "substantial burden" on Respondents' purported exercise of free religion with this lawsuit and because Respondents' proposed RFRA Affirmative Defense is deficient as a matter of law, Respondents' Second Motion to Amend should be denied.

III. CONCLUSION

For the reasons set forth above, Complaint Counsel respectfully request that the Administrative Law Judge deny Respondents' Second Motion to Amend Answer.

Respectfully submitted,



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Carole A. Paynter (212) 607-2813
David W. Dulabon (212) 607-2814
Elizabeth Nach (202) 326-2611

Federal Trade Commission
Alexander Hamilton U.S. Custom House
One Bowling Green, Suite 318
New York, NY 10004

Dated: March 5, 2009

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 5, 2009, I have filed and served the attached **COMPLAINT COUNSEL'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' SECOND MOTION TO AMEND ANSWER** and **[Proposed] ORDER DENYING RESPONDENTS' SECOND MOTION TO AMEND ANSWER** upon the following as set forth below:

The original and one paper copy via overnight delivery and one electronic copy via email to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room H-159
Washington, DC 20580
E-mail: secretary@ftc.gov

Two paper copies via overnight delivery to:

The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave., N.W., Room H-528
Washington, DC 20580

One electronic copy via email and one paper copy via overnight delivery to:

James S. Turner, Esq.
Betsy Lehrfeld, Esq.
Martin Yerick, Esq.
Swankin & Turner
1400 16th St., N.W., Suite 101
Washington, D.C. 20036
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One electronic copy via email to:

Michael McCormack, Esq.
M.mccormack@mac.com

David W. Dulabon
Complaint Counsel

EXHIBIT A

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

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

ORDER ON STIPULATION

On December 30, 2008, Complaint Counsel and Respondents submitted the attached "Stipulation Striking Respondents' Affirmative Defenses from the Answer and Order." (Attachment 1). The parties stipulate and agree that the six Affirmative Defenses raised by Respondents in their Answer be stricken since these same defenses are raised in the general denial section of the Answer.

It is hereby ORDERED that the Answer be, and is hereby amended, as set forth in Attachment 1.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: January 8, 2009

ATTACHMENT 1

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 Daniel Chapter One.	)	**Public Document**

COMPLAINT COUNSEL AND RESPONDENTS' STIPULATION STRIKING RESPONDENTS' AFFIRMATIVE DEFENSES FROM THE ANSWER AND ORDER.

On September 19, 2008, Complaint Counsel filed its Complaint in this matter against Respondents Daniel Chapter One and James Feijo (collectively, "Respondents") and Respondents filed their Answer to the Complaint on October 14, 2008 ("Answer"), asserting six Affirmative Defenses, to which Complaint Counsel objected. Pursuant to RULE OF PRACTICE § 3.22(f), Complaint Counsel and Respondents subsequently conferred about the Complaint Counsel's intended Motion to Strike the Affirmative Defenses raised in the Answer, in an effort to resolve their differences. The parties were subsequently able to reach an agreement resolving their concerns about the same and now do hereby stipulate and agree that:

1. The six Affirmative Defenses raised by the Respondents in their Answer are hereby stricken since these same defenses are raised in the general denial section of the Answer.
2. The Respondents retain all of their rights to pursue the legal theories of defense which are asserted in the general denial section of their Answer, as amended by this Stipulation and Order.
3. Nothing in this Stipulation impairs or negates Complaint Counsel's rights under the Rules of

Practice to seek to limit discovery as to these defenses or to seek to exclude from the trial, any evidence gathered as to the defenses.

Respectfully submitted:

Dated: December 11, 2008

Theodore Zang, Jr. (212) 607-2816
Carole A. Paynter (212) 607-2813
David W. Dulabon (212) 607-2814
Federal Trade Commission
Alexander Hamilton U.S. Custom House
One Bowling Green, Suite 318
New York, NY 10004

Complaint Counsel

Dated: Dec 18 2008

James S. Turner, Esq.
Swankin & Turner
1400 16th Street NW, Suite 101
Washington, DC 20036

Counsel for Respondents

ORDER

The Parties having agreed to an amendment to the Answer and on review of the proposed amendment, I find that determination of the controversy on the merits will be facilitated thereby:

THEREFORE, IT IS ORDERED THAT

The Answer be, and is hereby, amended as set forth in the Stipulation of the parties dated December ___, 2008, immediately above.

ORDERED:

D. Michael Chappell,
Chief Administrative Law Judge (Acting)

Dated:_____

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,	)	**Public Document**
individually, and as an officer of	)	
Daniel Chapter One	)	

[Proposed] ORDER DENYING RESPONDENTS' SECOND MOTION TO AMEND ANSWER

On February 24, 2009, Respondents filed a Second Motion to Amend Answer. Complaint Counsel filed their Opposition to Respondents' Second Motion to Amend Answer on March 5, 2009.

IT IS HEREBY ORDERED that Respondents' Second Motion To Amend Answer is DENIED.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Dated: