UNITED STATES OF AMERICA
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** **PUBLIC DOCUMENT**

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' APPLICATION FOR STAY OF MODIFIED FINAL ORDER PENDING PETITION FOR REVIEW

Pursuant to Commission Rule 3.56, 16 C.F.R. § 3.56, Complaint Counsel submits this Opposition to the Application for Stay Pending Petition for Review filed by Respondents Daniel Chapter One and James Feijo ("Respondents").[1]

[1] The following terms and abbreviations are used herein:
"Opinion" refers to the Opinion of the Commission issued on December 18, 2009;
"IDF" refers to the Findings of Fact accompanying the Initial Decision made by the Administrative Law Judge on August 5, 2009;
"Order" refers to the Modified Final Order issued by the Commission on January 25, 2010; and
"R. Mem." refers to Respondents' Memorandum in Support of Respondents' Application for Stay, filed on February 25, 2010.

I. INTRODUCTION

Respondents advertise that Bio*Shark, 7 Herb Formula, GDU, and BioMixx (the "Challenged Products") treat, cure or prevent cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy. But, as the Commission found, no competent or reliable evidence substantiates these claims, and permitting Respondents to continue to make them threatens the public health.

Commission Rule 3.56 provides that the Commission should consider the following factors when determining whether to grant a stay: (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. The Commission considers the third and fourth prongs together because Complaint Counsel represents the public interest in effective law enforcement. *See Cal. Dental Ass'n,* No. 9259, 1996 FTC LEXIS 277, at *8-9 (May 22, 1996). Respondents satisfy none of these factors.

First, Respondents will not prevail on appeal. Applying long-established precedent, the Commission properly rejected Respondents' main merits argument – namely, that the Commission's substantiation doctrine is untethered to the Commission's authority under Section 5 and, in any event, violates the First Amendment. Time and again, courts have endorsed the Commission's rule that a claim of product effectiveness is deceptive under Section 5 unless the claim is substantiated. This is a garden-variety deception case because Respondents make cancer treatment and prevention claims without even a scintilla of competent evidence to back them up.

Second, Respondents will not be injured in the absence of a stay. To be sure, the Commission's Order deprives Respondents of the ability to continue to disseminate their

deceptive cancer cure advertisements. However, Respondents have no legally-cognizable "right" to engage in deception. An order directing Respondents to stop their illegal practices – and to inform customers of the deception so that they may seek medical attention – does not "injure" Respondents any more than any other obligation to obey the law.

Third, the equities overwhelmingly favor the denial of a stay. As the Commission ruled, Respondents' deceptive marketing of "cancer cures" places especially vulnerable consumers – those suffering from cancer – at grave risk of injury. The Commission's concern should be heightened by the Respondents' argument for a stay – namely, that the Commission's Order unfairly and wrongly requires them to have substantiation for cancer prevention and treatment claims. Permitting Respondents to continue to unleash their deceptive cancer cure claims on the public serves no legitimate end, but rather places cancer patients at an undue risk. Thus, the equities counsel strongly in favor of denying Respondents a stay.

II. RESPONDENTS CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS.

Respondents' assertions regarding their likelihood of success reiterate the same arguments that Respondents presented to the ALJ and the Commission. These reiterations "offer the Commission no sufficient reason to question its prior decision or any of the bases for it, and Respondent[s]' renewal of [their] legal arguments, without more, is insufficient to justify granting a stay." *N. Tex. Specialty Physicians*, No. 9312, at 3 (FTC Jan. 20, 2006) (order granting in part and denying in part respondent's motion for stay of final order).[2]

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[2] Respondents' *ad hominem* attacks on Commissioners Rosch and Harbour do not raise due process issues, but rather show the desperate nature of Respondents' arguments. Complaint Counsel will not dignify those accusations further.

Because Respondents' stay argument adds little that is new, we address the merits only briefly.

A. Respondents' Jurisdictional Arguments Are Meritless.

Respondents attempt, as they have throughout these proceedings, to avoid the merits of this case by claiming that the FTC does not have jurisdiction over them. As the Commission thoroughly discussed, the exercise of jurisdiction is proper here because DCO operates as a commercial enterprise and its profits inure to the benefit of James Feijo. *See Opinion* at 4-8; *IDF* at 22-157.

The ALJ held a day-long evidentiary hearing on the jurisdictional issue and made over ten pages of factual findings, which the Commission adopted, concerning the Respondents' business operations, marketing, and finances.[3] *See IDF* 22-157. Those findings include:

> * DCO was previously a for-profit corporation. *IDF* 23.
>
> * DCO operates a call center and also sells its products over the Internet and through retailers. *IDF* 84, 158.
>
> * DCO offers its customers coupons and volume discounts on their purchases. *IDF* 113 -115.
>
> * DCO sells 150 to 200 products generating approximately $2 million in gross sales, with the acquisition costs for those products being about 30 percent of the sale price. *IDF* 9, 10, 83.
>
> * James Feijo has complete control of DCO's bank accounts, does not maintain his own bank account and instead uses DCO's funds to pay for all of his expenses, including dining out, golf club memberships, homes,

[3] On appeal these factual findings will be given deference by the reviewing court. *See Removatron,* 884 F.2d 1489, 1496 (1st Cir. 1989) ("In reviewing the Commission's determinations, 'the findings of the Commission as to the facts, if supported by the evidence shall be conclusive'") (citing 15 U.S.C. § 45(c) and *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986)).

cars, tennis lessons, and cigars. Neither DCO nor James Feijo keep any records of what DCO spends on Feijo's behalf. *IDF* 55-79.

The facts refute Respondents' jurisdictional challenge, and thus their new arguments about the scope and purpose of DCO's ministry fall flat. Whatever else DCO may do to further its religious objectives, DCO sells cancer cures as part of a commercial enterprise that has none of the hallmarks of a religious endeavor – the products are not used in religious services, the products are not sold only to DCO religious adherents, and DCO's religious exercise does not involve the use of these products. There is no reason to believe that Respondents will prevail on their jurisdictional defenses on appeal.

B. Respondents' Attacks on the Substantiation Doctrine Are Baseless.

Respondents made no effort to produce competent evidence to substantiate their cancer cure claims. Instead, they resort to attacking the FTC's substantiation doctrine, arguing that it has no basis in the FTC Act and is constitutionally unsound. There is no reason for the Commission to revisit this argument.

The substantiation doctrine is rooted in Section 5's hostility to deceptive claims, requiring advertising touting the effectiveness of a product to have competent and reliable evidence that the claim is true. For more than twenty-five years, the Commission has relied on the substantiation doctrine – especially with respect to health claims of the kind at issue here – and there is an unbroken string of judicial decisions approving the doctrine. *See, e.g., FTC v. Nat'l Urological Group*, 645 F. Supp. 2d 1167 (N.D. Ga. 2008), *aff'd*, 2009 U.S. App. LEXIS 27388 (1st Cir. 2009); *FTC v. Bronson Partners, LLC*, 564 F. Supp. 2d 119 (D. Conn. 2008); *FTC v. Direct Mktg. Concepts*, 569 F. Supp. 2d 285 (D. Mass. 2008); *FTC v. QT, Inc.*, 448 F. Supp. 2d 908 (N.D. Ill. 2006), *aff'd*, 512 F.3d 858 (7th Cir. 2008); *FTC v. Natural Solution, Inc.*,

No. CV 06-6112-JFW, 2007 U.S. Dist. LEXIS 60783 (C.D. Cal. Aug. 7, 2007); *FTC v. Sabal*, 32 F. Supp. 2d 1004 (N.D. Ill. 1998); *FTC v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994); *Removatron Int'l Corp.*, 111 F.T.C. 206 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *Sterling Drug*, 102 F.T.C. 395 (1983), *aff'd*, 741 F.2d 1146 (9th Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).

Respondents make no real effort to distinguish this precedent or to explain why a court of appeals is likely to disregard it. There is no basis for a stay.

C. Respondents' Other Arguments Are Equally Unpersuasive.

Respondents make two additional arguments – that their cancer cure advertisements are protected by the free speech and free exercise clauses of the First Amendment – that fail for several reasons.

First, Respondents base their arguments on the fiction that their cancer cure advertisements are not textbook examples of commercial speech, but they are. The ads are just like the ads at issue in *Virginia Pharmacy Board* – they tout the products by making explicit performance claims and by offering the products for sale to all comers at a set price. *See Va. State Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976). As both the ALJ and the Commission found:

* the advertisements contain factual statements regarding the products' efficacy;

* the primary purpose and effect of the advertisements was to promote the sale of Respondents' products;

* the advertisements contain little or no political or religious content; and

* the advertisements are disseminated broadly on the Internet, not just to religious adherents of Daniel Chapter One.

See Opinion at 5, 7, 12, 13; *IDF* at 84, 158, 179-306.

These facts doom Respondents' First Amendment arguments. The law is clear that Respondents' advertisements are entitled only to the limited protection afforded to commercial speech – protection that does not extend to speech that is deceptive. *See Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). Respondents' reliance on *Bolger* only underscores the error in their argument. *Bolger* makes clear that commercial speech is not transformed into pure speech merely because a selling message is mixed with political or religious commentary. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-68 (1983).

Second, Respondents' reliance on the First Amendment's free exercise guarantee and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §2000bb-1(b), also rings hollow. As already noted, the facts found by the ALJ and the Commission refute Respondents' claim that their selling messages were acts of religious expression. The advertisements were virtually devoid of any religious content. And once again, the key case Respondents rely on highlights the weakness of Respondents' case.

To make their RFRA and free exercise claims, Respondents rely on *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006). There, the Court considered whether a religious organization's use of a hallucinogenic tea during religious rites was protected by the Act. In ruling that it was, the Court took pains to emphasize that the use of the tea was central to the entity's religious practices, the tea was not sold or otherwise provided to non-adherents, and the tea was used only by adherents as an integral part of a religious exercise.

None of those factors is present here. Respondents' advertisements are disseminated broadly on the Internet, their products are sold to consumers regardless of religious affiliation, their products are not used as part of a religious service or ritual, and the advertisements themselves are essentially devoid of religious content. The First Amendment and RFRA provide no basis for a stay of the Commission's Order.

III. RESPONDENTS WILL NOT SUFFER IRREPARABLE INJURY IN THE ABSENCE OF A STAY.

The Commission's Order does not require that Respondents cease selling any products. The Commission's Order does not require that Respondents cease operating a religious ministry or alter any of their religious or political beliefs. Respondents' hyperbolic arguments about the effect of the Order on their ability to preach or discuss issues of public concern (*see R. Mem.* at 23-25) ignore that the Order only applies to the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of products, not to non-promotional discussions. Respondents are free to say what they wish; they just cannot make unsubstantiated claims while trying to sell their products.

Respondents make two principal arguments in support of their claim that they will suffer irreparable injury in the absence of a stay. First, and most broadly, Respondents argue that the Order's requirement that they have substantiation for health claims will force them to stop marketing their products. But Respondents have it backwards: Their argument *supports* the injunctive relief ordered by the Commission because it underscores Respondents' callous indifference to the grave public health risks caused by their deceptive advertising for untested cancer cures. *See Opinion* at 18 (citing *IDF* 356-361); *Opinion* at 20. The ALJ's Findings of Fact regarding the harm Respondents' products pose to consumers, which were adopted by the

Commission, include:

> * The progression of cancer from foregoing beneficial and effective therapy in favor of untested therapies such as those sold by Respondents. *IDF* 356.
>
> * Harmful potential side effects from the products sold by Respondents. *IDF* 357 -359, 361.
>
> * Harmful interactions between Respondents' products and other therapies. *IDF* 360.

Without even acknowledging these risks, Respondents argue that forcing them to have substantiation for their claims will deprive them of their ability to disseminate their advertising. But being forced to comply with the law hardly constitutes irreparable harm. Indeed, the Respondents "can have no vested interest in a business activity found to be illegal." *United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 29 (2d Cir. 1972).

Similarly, Respondents' arguments that the Order will ruin their dietary supplement business are unpersuasive given the fact that there are hundreds of other supplement retailers that manage to thrive without making unsubstantiated disease claims. That Respondents have lost the competitive advantage that their deceptive advertising previously provided them over their competitors does not constitute irreparable harm.

Respondents' arguments regarding the purported harm from sending the letter required by Paragraph V of the Order fares no better. Respondents object to being directed to send letters to their customers alerting the customers that: (1) the Commission has found the Respondents' claims for these products deceptive because there is no competent and reliable scientific evidence supporting those claims; (2) competent and reliable scientific evidence does not demonstrate the efficacy of the Challenged Products in treating, preventing, or curing cancer; and (3) purchasers should consult with a physician before using herbal products. The letter that

Respondents are to send to purchasers (Exhibit A to the Order) discloses to those purchasers the very risks that the Commission identified.

Respondents raise First Amendment objections to Part V of the Commission's Order. But the Order significantly furthers First Amendment values by providing purchasers information they need to safeguard their health. The Supreme Court has long held that, where commercial speech is concerned, mandatory disclosure of important consumer information is a preferred remedy. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651-52 (1985) (upholding mandatory disclosures regarding client's responsibility for certain costs in attorney advertising); s*ee also Novartis v. FTC*, 223 F.3d 783, 789 (D.C. Cir. 2000) (rejecting First Amendment challenge to FTC disclosure remedy); *see also USA v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1142-43 (D.C. Cir. 2009) (upholding order requiring tobacco companies to publish broad corrective statements).

Even Respondents concede that the government can require a speaker to make disclosures if the government uses "a narrowly tailored means of serving a compelling state interest." *R. Mem.* at 22 (quoting *Pacific Gas & Electric Co. v. Cal. P.U.C.*,. 475 U.S. 1, 19 (1986)). But that is just what the Commission has ordered. There is no question that the interest here – protecting the health of cancer patients – is a government interest of the highest order. Nor is there any question that the remedy devised by the Commission is one that is tailored carefully to serve the interest of patient health.

IV. THE PUBLIC INTEREST IS FURTHERED BY IMMEDIATE ENFORCEMENT OF THE ORDER.

Because Complaint Counsel represents the public interest in this proceeding, the Commission combines the analysis of whether other parties will be injured if a stay is granted

with the inquiry as to whether a stay is in the public interest. Immediate enforcement of the Order, not a stay, is in the public interest.

In asserting that a stay would not injure any party, Respondents assert that "there is no evidence in the record demonstrating that any one of the four Challenged Products (or any DCO product)" has any harmful effects. *See R. Mem.* at 32. Respondents once again ignore the Commission's findings that the Respondents' products pose a significant health risk. As noted above, the Commission found the following harms: the harm from foregoing a proven cancer treatment in favor of an ineffective treatment; harms from potential side effects from Respondents' products; and harmful interactions that may interfere with other cancer treatments. *Opinion* at 18, *IDF* 356-361. The Commission based these findings on the testimony of Denis Miller, M.D., who was the only medical doctor to testify at trial. Respondents may disagree with what Dr. Miller said, but the Commission made a factual finding crediting his testimony in this regard. In moving for a stay, Respondents simply ignore the Commission's finding and Dr. Miller's testimony, perhaps hoping it will go away. It does not. What also does not go away is the risk that Respondents' deceptive advertising of their products poses to the public, and, for that reason, a stay is contrary to the public interest.

Respondents compound their error of ignoring Dr. Miller's testimony regarding the risks posed by the Respondents' products by attempting to introduce new evidence regarding the efficacy and safety of their products. The declarations containing this evidence should be stricken for two reasons.

First, pursuant to Commission Rule 3.44(c), the Hearing Record in this case was closed on May 7, 2009. Despite this, Respondents offer declarations from two chiropractors (Deane Mink and Karen Orr), a dentist (Charles Sizemore), a radio station manager (Jerry Hughes), and

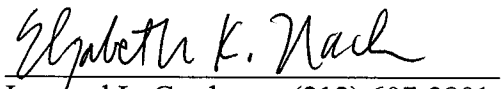
from both Feijos attesting to the efficacy of the Respondents' products. These declarations appear to be a "back door" effort to bolster the Respondents' evidence regarding the efficacy of their products. As the Hearing Record has long since closed, the Mink, Orr, Sizemore, and Hughes declarations, as well as paragraphs 3-38 of Patricia Feijo's declaration and paragraphs 7-10 of James Feijo's declaration should be stricken.

Second, none of these declarants has been qualified to offer expert opinion testimony in this matter. Their declarations are collections of hearsay and anecdotal stories, which do not constitute valid substantiation. As with the evidence the Respondents offered at trial, none of these declarants can testify that there is competent and reliable scientific evidence to substantiate any product claim made by Respondents. As a result, the declarations should be stricken.

V. CONCLUSION

For the reasons set forth herein and in the Commission's Opinion, the Respondents' Application for Stay should be denied.

Respectfully submitted,



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Dated: March 4, 2010

CERTIFICATE OF SERVICE

I certify that on March 4, 2010, I served and filed **Complaint Counsel's Opposition to Respondents' Application for Stay of Modified Final Order Pending Petition for Review**, as follows:

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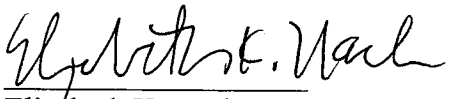

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