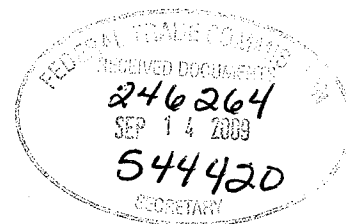


ORIGINAL



IN THE UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

Commissioners: Jon Leibowitz, Chairman
Pamela Jones Harbour
William E. Kovacic
J. Thomas Roach

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

RESPONDENTS' APPEAL BRIEF

Pursuant to Rule 3.52(b) of the Commission's Rules of Practice, Respondents Daniel Chapter one, a corporation, and James Feijo, individually and as an officer of Daniel Chapter One hereby submit the following Appeal Brief in the above-captioned action.

Dated: September 14, 2009

Respectfully Submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE CASE.....	1
STATEMENT OF THE QUESTIONS PRESENTED.....	3
ARGUMENT.....	5
I. INTRODUCTION.....	5
A. Overview: Policy Considerations	6
1. FTC and the National Health Debate: Rodale Press	6
2. FTC Tries to Ban the Words “Natural,” “Organic,” and “Health Food” from Commerce	7
3. <i>United States v. Johnson</i> : Constitutional Logic to Decide this Case	10
B. The Initial Decision is in Error and Violates Respondents’ Statutory and Constitutional Rights	12
II. THE INITIAL DECISION VIOLATES PROCEDURAL DUE PROCESS IN SEVERAL FUNDAMENTAL WAYS	14
A. The Initial Decision Violates Due Process by Ignoring The Fact That The Government Has The Burden Of Proof When Regulating Protected Speech	14
1. The Federal Trade Commission Cannot Ignore the <i>Pearson</i> Case	16
2. Respondents’ Speech Deserves First Amendment Protection	20
3. The FTC has the Burden to Prove that the Information about the Challenged Products Shared by Respondents is Misleading and that Suppression of such Information is a Direct and Necessary Means to Achieve a Substantial Government Interest	22
4. The FTC has not met its Burden to Prove that Respondents’ Statements are Misleading	25
B. The Initial Decision Violates Due Process By Replacing Evidence With Presumptions.....	28
C. The “Preponderance” Standard Violates Due Process.....	30
III. THE FTC LACKS JURISDICTION	32
A. The Initial Decision’s Extension Of Authority Over Respondents’ Religious Ministry Is Improper And Unprecedented	32
1. The FTC has no Jurisdiction over Non-Profit Businesses or	

Associations Except those Associations that Engage in Anti-Competitive Practices that Provide Substantial Benefits to their For-Profit Members	33
2. As a Corporation Sole, Respondent DCO Exists as a Legitimate Entity Outside the Jurisdiction of the FTC	35
a. A corporate Sole may Engage in Commerce to Further its Charitable Purpose	36
b. Respondents' Articles of Incorporation establish a Religious Trust	36
3. It is the FTC's Burden of Proof to show that Respondent DCO is Organized to Carry on Business for its own Profit or that of its Members	37
B. The FTC Has Not Met Its Burden Of Showing That DCO Is Not A Non-Profit Corporation Organized And Operated For Charitable Purposes As A Corporate Sole Under Washington State Law	38
1. The Evidence Does Not Prove that DCO is Organized and Operated for its own Profit	39
2. The ALJ did not Require the FTC to meet its Burden of Showing that DCO was Operated for the Profit of its Member, James Feijo	40
3. The ALJ Failed to Consider Evidence Bearing on James Feijo's Status	41
a. Exempt Business Activity	41
b. Religious Workers' Special Exemptions	42
IV. THE ALJ'S FINDINGS AND CONCLUSIONS IN REGARD TO 15 U.S.C. §§ 45 AND 52 WERE UNCONSTITUTIONAL, INCLUDED ERRORS OF LAW AND LACKED SUBSTANTIAL EVIDENCE	43
A. The ALJ Has Improperly Regulated By Adjudication	43
B. The ALJ Erred As A Matter Of Law In Finding That Respondents' Products Are Drugs	45
1. The ALJ Erroneously Shifted the Burden of Proof on the Elements of Deception	46
2. The ALJ Misapplied the Element of Intention	47
3. The ALJ Ignored Respondents' Structure/Function Claims	48
C. The Initial Decision Improperly Requires Double-Blind, Placebo-Controlled Clinical Trials As Substantiation For Structure-Function Claims	48
D. The ALJ Erred As a Matter Of Law Concerning The Elements Of 15 U.S.C. §§ 45 and 52	51
1. The FTC's Case Failed to Establish Necessary Elements of Proof	51
a. General Elements of Proof	51

b. The Elements of Proof under a Reasonable Basis Test	52
c. The Elements of Proof for an Overall Net Impression Case	53
d. Specific Elements of Proof for Dietary Supplement Claims	55
E. The ALJ Improperly Perpetuated Adjudication By Presumption In The Way He Weighed Expert Testimony On Structure/Function Claims	57
1. The ALJ Ignored Obvious Shortcomings in the Testimony of the Government's Expert	57
2. The ALJ Improperly Perpetuated Adjudication by Presumption by Ignoring the Qualifications of Respondents' Experts on Structure/Function Claims	58
V. THE PROPOSED REMEDY IS ILLEGAL	59
A. Recent Developments In The Law Require The Commission To Take A Close And Critical Look At The Remedy Here	59
B. The Proposed Remedy Would Constitute An Arbitrary, Capricious And Retaliatory Attack On Respondents' Constitutional Rights	61
C. The Proposed Remedy Would Violated The Religious Freedom Restoration Act As Well As The First Amendment	62
D. The Remedy Imposes An Unconstitutional Prior Restraint On Truthful Speech	65
E. The Proposed Remedy Would Unconstitutionally Establish Government Religious Speech By Coercing Respondents To Disseminate Government-Sanctioned Speech That Is Expressly Contrary To Their Religious Beliefs And Ministry	65
1. The Modification is Inadequate to Protect Religious Free Exercise	66
IV . CONCLUSION	69

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Addington v. Texas</i> , 441 U.S. 418 (1979)	28, 30-31
<i>American Medical Assn. v. Federal Trade Commission</i> , 455 U.S. 676 (1982)	35
<i>American School v. McAnnulty</i> , 187 U.S. 94	10
<i>Boy Scouts v. Dale</i> , 530 U.S. 640 (2000)	62-63
<i>California Dental Association v. Federal Trade Commission</i> , 526 U.S. 756 (1999)	34-35
<i>Central Hudson Gas & Electric Corp. v. Public Service Commission</i> , 447 U.S. 557 (1980)	3, 20, 22, 23, 24, 64
<i>Cliffdale Associates, Inc.</i> , 103 F.T.C. 110 (1984)	52,54
<i>Coleman v. Anne Arundel Cty. Police Dept.</i> , 797 A.2d 770 (Md. 2002)	29
<i>Community Blood Bank of the Kansas City Area, Inc. v. FTC</i> , 405 F.2d 1011 (8th Cir. 1969)	37, 38, 39
<i>Daubert v. Merrell Dow Pharmaceuticals</i> , 509 U.S. 579 (1993)	56
<i>Edenfield v. Fane</i> , 507 U.S. 761 (1995)	18, 25, 27
<i>Florida Bar v. Went For It, Inc.</i> , 515 U.S. 618 (1995)	22
<i>FTC v. Lane Labs</i> , Civil Action no. 00-cv-3174 (D.NJ. August 11, 2009) (Not for publication)	60
<i>FTC v. Pharmatec</i> , 576 F. Supp. 294 (D.D.C., 1983)	52
<i>FTC v. QT</i> , 512 F.3d 858 (7th Cir. 2008)	49-50
<i>Gonzales v. O Centro</i> , 546 U.S. 418 (2006)	62
<i>Greater New Orleans Broadcasting Ass'n, Inc. v. United States</i> , 527 U.S. 173 (1999)	25
<i>Ibanez v. Florida Dept. of Business and Professional Regulation Board of</i>	15, 17,

<i>Accountancy</i> , 512 U.S. 136 (1994)	20, 24, 25, 27
<i>Illinois ex rel Madigan v. Telemarketing Associates, Inc.</i> , 538 U.S. 600 (2003)	65
<i>In re the Catholic Bishop of Spokane</i> , 329 B.R. 304 (U.S. Bank. Ct., E.D. Wash. 2005)	35-36
<i>In the Matter of R. M. J.</i> 455 U.S. 191 (1982)	20,23
<i>In re Ohio Christian College</i> , No. 8820, 80 F.T.C. 815, 1972 FTC LEXIS 223	39
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	28, 29
<i>Montgomery Ward v. FTC</i> , 691 F.2d 1322 (9 th Cir. 1982); 1982 U.S. App. LEXIS 24194	44
<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964)	66
<i>NNFA v. FDA</i> , 504 F.2d 761 (2 nd Cir. 1975)	48
<i>NNFA v. Mathews, et. al</i> , 557 F. 2d 325 (2 nd Cir. 1977)	48
<i>Pearson v. Shalala</i> , 164 F.3d 650 (D.C. Cir. 1999)	16,17,18, 28, 45, 55
<i>Peel v. Attorney Registration and Disciplinary Commission of Illinois</i> , 496 U.S. 91 (1990)	17,18, 20, 23, 27
<i>Pfizer, Inc.</i> 81 F.T.C. 23 (1972)	52
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989)	31
<i>Rodale Press, Inc.</i> , 71 F.T.C. 1184	6
<i>Rubin v. Coors Brewery Co.</i> , 514 U.S. 476 (1995)	25
<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972)	28, 29
<i>State v Biggs</i> , 133 N.C. 729, 46 S.E. 401 (1903)	63
<i>State v MacKight</i> , 131 N.C. 717, 42 S.E. 580, (1902)	63
<i>Thompson v. Western States Medical Center</i> , 535 U.S. 357 (2002)	20, 21, 24, 25, 64
<i>Thompson Medical</i> , 104 F.T.C. 648 (1984), aff'd 791 F. 2d 189 (D.C.Cir 1986)	19, 54

<i>Thompson Medical v. F.T.C.</i> , 791 F.2d 189, 197 (D.C.Cir. 1986)	53, 54
<i>Tippett v. Maryland</i> , 436 F.2d 1153 (4 th Cir. 1971)	29
<i>Universal Life Church, Inc. vs. United States</i> , 372 F.Supp. 770, 776 (E.D. Cal 1974)	65
<i>United States v. Johnson</i> , 221 U.S. 488 (1911)	10
<i>U.S. v. Lane Labs</i> , 324 F.Supp. 2d 547 (D.N.J., 2004)	56
<i>Village of Schaumburg v. Citizens for a Better Environment</i> , 444 U.S. 620 (1980)	65
<i>Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976)	18, 19, 26
<i>Weight Watchers v. F.T.C.</i> , 830 F.Supp. 539 (W.D. WA 1993); 1993 U.S. Dist. LEXIS 12555	43
<i>West Virginia State Board of Education v. Barnette</i> , 319 U.S. 624 (1943)	7, 68
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977)	68

Constitution

First Amendment	2,4,18, 20, 21, 22, 26, 27
Due Process Clause	4,5

Statutes

15 U.S.C. § 44	37
15 U.S.C. § 45	4, 37, 43, 45, 51
15 U.S.C. § 45(a)	52
15 U.S.C. § 45(n)	51-52, 54
15 U.S.C. § 52	4, 43, 45, 51

21 U.S.C. § 343(r)(6)	55
26 U.S.C. § 107	42
26 U.S.C. § 3401(A)(9)	42
26 U.S.C. § 3306(c)(8)	42
42 U. S. C. §2000bb-1	62
Dietary Supplement Health and Education Act of 1994 (DSHEA)	13, 47, 49, 55, 56, 57
Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, as amended, 42 U. S. C. §2000bb et seq.	62
RCW Chapter 24	32
RCW 24.12.010	38
RCW 24.12.030	38

Regulations

26 C.F.R. § 1.107-1	43
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Statements

Regulations on Statements Made for Dietary Supplements Concerning the Effect of the Product on the Structure or Function of the Body, FDA Proposed Rule, 63 Fed. Reg. 23624 (April 29, 1998)	44
FTC Comments in response to “FDA Proposed Rule: Regulations on Statements Made for Dietary Supplements Concerning the Effect of the Product on the Structure or Function of the Body, FDA Proposed Rule, 63 Fed. Reg. 23624 (April 29, 1998)” (August 27, 1998)	44
Regulations on Statements Made for Dietary Supplements Concerning the Effect of the Product on the Structure or Function of the Body, FDA Final Rule, 65 Fed. Reg. 1000 (January 6, 2000)	45
FTC Guide: Dietary Supplements, An Advertising Guide for Industry (June 8, 2007)	50, 51, 56

Law Review Article

O'Hara, <i>The Modern Corporate Sole</i> , 93 Dickinson L. Rev. 23 (1988)	36
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STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS

The Federal Trade Commission ("FTC") issued the Complaint in this matter on September 16, 2008 against Daniel Chapter One ("DCO") and James Feijo ("Respondents"). The Complaint alleged that Respondents engaged in deceptive acts or practices in connection with the advertising, promotion, offering for sale, sale, and distribution of four products: BioShark, 7 Herb Formula, GDU, and BioMixx (collectively, the "Challenged Products"). The Complaint also alleged that Respondents operated linked web pages on the website, www.danielchapterone.com, through which they advertised and sold the Challenged Products.

The Complaint alleged that the Challenged Products are advertised to prevent, treat, or cure cancer or tumors, and specifically charged that the advertisements represent, expressly or impliedly, that:

- Bio*Shark inhibits tumor growth;
- Bio*Shark is effective in the treatment of cancer;
- 7 Herb Formula is effective in the treatment or cure of cancer;
- 7 Herb Formula inhibits tumor formation;
- GDU eliminates tumors;
- GDU is effective in the treatment of cancer;
- BioMixx is effective in the treatment of cancer; and
- BioMixx heals the destructive effects of radiation and chemotherapy.

The Complaint further alleged that Respondents represented, either expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the claims made, but that Respondents did not, in fact, possess and rely upon such reasonable basis. The Complaint charged Respondents with unfair or deceptive acts or practices, in or affecting commerce, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act ("FTC Act").

In their Answer, Respondents admitted that they operate a website that provides information on the Challenged Products in a religious and educational context, but otherwise denied allegations that they engaged in deceptive acts or practices in connection with the advertising or sale of the Challenged Products. Respondents averred that they did possess and rely upon a reasonable basis that substantiated the representations made about the Challenged Products at the time the representations were made. Respondents further asserted, and the record reflects, that Respondents did not expressly make any of the foregoing claims.

At the hearing before the Administrative Law Judge, Complaint Counsel provided one expert witness, Dr. Denis Miller, a research oncologist, who testified concerning the standard for chemotherapeutic agents used in the treatment of cancer. Respondents offered five, and were permitted two, expert witnesses, Dr. James Duke, a widely known ethnobotanist formerly with the U.S. Department of Agriculture, and Dr. Sally Lamont, a licensed naturopathic doctor, both of whom testified that in their opinions the statements made by Respondents on their website and in their materials were supported by competent and reliable scientific evidence concerning herbal dietary supplements. Respondent James Feijo and Patricia Feijo, his wife, testified that for over 26 years Daniel Chapter One had operated as a religious ministry and was organized as a religious corporation sole under the laws of Washington State. They further testified that James Feijo, as Overseer of Daniel Chapter One, held all assets in trust for its religious purposes, and that they took no salary.

B. SUMMARY OF THE ARGUMENT

In this brief Respondents argue that the FTC lacks jurisdiction over them on the grounds that Respondents are a religious ministry organized and operated for charitable purposes.

Respondents also argue that the Initial Decision violates the FTC Act and their right to due process of law by shifting the burden of proof from Complaint Counsel to Respondents, that their speech is protected by the First Amendment to the U.S. Constitution, that Complaint Counsel has the burden of proving that the information provided by Respondents is misleading and that its suppression is necessary to achieve a substantial government interest, and that Complaint Counsel failed to do so.

Respondents also argue that the Administrative Law Judge (ALJ) improperly regulated their conduct by adjudication, that the Challenged Products are not drugs as found by the ALJ, that Respondents' claims were permitted structure/function claims for dietary supplements and that an incorrect standard was applied to those claims.

Finally, Respondents argue that adoption of the proposed order contained would violate their constitutional and statutory rights.

STATEMENT OF THE QUESTIONS PRESENTED

1. Should the Initial Decision of the Administrative Law Judge finding that the Federal Trade Commission has jurisdiction over respondents Daniel Chapter One, a non profit religious organization, and its single member and overseer James Feijo, be rejected as mistaken?
2. Did the Initial Decision of the Administrative Law Judge violate the FTC Act, the Due Process Clause and/or the First Amendment to the U.S. Constitution by:
 - (a) improperly shifting the burden of proof to Respondents on certain key Constitutional and statutory elements, including but not limited to (i) the governmental burdens associated with Free Speech under *Central Hudson*; (ii) the elements of allegedly

deceptive and misleading speech; and (iii) the required perceptions of consumers allegedly misled or harmed by Respondents' speech?

(b) permitting "evidence by presumption"?

(c) applying the incorrect standard of proof, to substantive elements of their charges against Respondents, including but not limited to the elements of alleged violations under 15 U.S.C. §§45 and 52?

(d) attempting to exercise FTC jurisdiction over Respondent Daniel Chapter One despite an express finding by the Administrative Law Judge that Respondent Daniel Chapter One is a religious organization?

(e) its overbroad ban on truthful statements about dietary supplements?

(f) engaging in illegal rule-making by adjudication, in that the Administrative Law Judge substituted his own presumptions for the evidence required for an "overall net impression" case?

(g) failing to consider the element of "intent" and arbitrarily rejecting Respondents' evidence while permitting presumptions to substitute for the evidence the statute requires Complaint Counsel to produce?

(h) improperly requiring double-blind, placebo-based clinical trials as the only acceptable substantiation for structure-function claims authorized by the Dietary Supplement Health and Education Act (DSHEA)?

(i) improperly accepting Complaint Counsel's testifying oncologist as an expert witness regarding the express structure/function claims authorized by DSHEA, despite that oncologist's admission that he did not know what a structure/function claim was?