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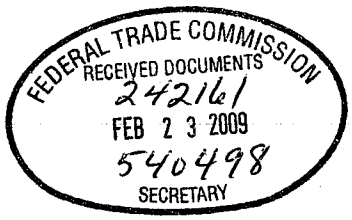

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

ORDER DENYING RESPONDENTS' MOTION FOR RECONSIDERATION

I.

On February 6, 2009, Respondents submitted a Motion to Reconsider Order Denying Respondents' Motion to Dismiss Complaint and Supporting Memorandum of Points and Authorities ("Motion"). Complaint Counsel submitted a Memorandum in Opposition to the Motion on February 12, 2009 ("Opposition").

Having fully considered the Motion and Opposition, the Motion is DENIED.

II.

Respondents assert that they are entitled to reconsideration of the January 13, 2009 Order ("Order") denying Respondents' motion to dismiss the Complaint ("Motion to Dismiss") because the Order did not specifically address the following contentions raised in the Motion to Dismiss: (1) that these administrative proceedings are an unconstitutional "prior restraint" on Respondents' freedom of expression because Respondents face the "prospect of a cease and desist order that would establish the FTC as censor" of Respondents' communications about their products, without the availability of "prompt judicial review" during the administrative process; and (2) that a press release issued by the FTC on the same day as the Complaint, which referred to the charges against Daniel Chapter One, along with other entities charged with deceptive advertising of cancer cures, and which was posted on the FTC's website under the docket listing for this case, was improper "guilt by association" and indicates that the FTC cannot be impartial in these adjudicative proceedings, as required by due process principles and the doctrine of separation of powers.

Complaint Counsel opposes the Motion, and argues that: (1) the Order addressed Respondents' prior restraint argument; and (2) judicial precedent has squarely rejected

the contention that the issuance of a press release in connection with an adjudicative proceeding violates due process or the separation of powers doctrine.

III.

A. Standard for Granting Reconsideration

A motion for reconsideration of a decision may be made only on the grounds of: (a) a material difference in fact or law from that presented to the administrative law judge before such decision, that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision; (b) the emergence of new material facts or a change of law occurring after the time of such decision; or (c) a manifest showing of a failure to consider material facts presented to the Administrative Law Judge before such decision. *In Re Int'l Ass'n of Conference Interpreters*, No. 9270, 1996 FTC LEXIS 126, at *1 (April 12, 1996); *In Re Champion Spark Plug Co.*, No. 9141, 1981 FTC LEXIS 119, at *1 (November 18, 1981).

No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion. *Conference Interpreters*, 1996 FTC LEXIS 126, at *2; *Champion Spark Plug Co.*, 1981 FTC LEXIS 119, at *1. Reconsideration motions are not intended to be opportunities "to take a second bite at the apple" and relitigate previously decided matters. *In re Rambus*, No. 9302, 2003 FTC LEXIS 49, at *12 (March 26, 2003). Moreover, a motion for reconsideration may not be used to rehash rejected arguments. *LeClerc v. Webb,* 419 F.3d 405, 412 (5th Cir. 2005); *Caisse Nationale de Credit Agricole v. CBI Indus.*, 90 F.3d 1264, 1270 (7th Cir. 1996). Nor may a motion for reconsideration raise new arguments. *Karr v. Castle,* 768 F. Supp. 1087, 1093 (D. Del. 1991), *aff'd sub nom. United States v. Carper*, 22 F.3d 303 (3d Cir. 1994).

Accordingly, such motions should be granted only sparingly. *Karr v. Castle,* 768 F. Supp. at 1090; *In Re Basic Research*, No. 9318, 2006 FTC LEXIS 7, at *4 (January 10, 2006); *Rambus*, 2003 FTC LEXIS 49, at *11. Courts have granted motions to reconsider where it appears the court mistakenly overlooked facts or precedent which, had they been considered, might reasonably have altered the result, or where reconsideration is necessary to remedy a clear error or to prevent manifest injustice. *E.g.*, *Karr*, 768 F. Supp. at 1093 (reconsidering order that granted motion to intervene, where order was based on court's mistaken assumption that intervention was unopposed, and reconsidering order holding that certain National Guard regulations violated officer's due process rights because subsequent briefing indicated that court overlooked precedent that might have changed the holding); *Rambus*, 2003 FTC LEXIS 49, at *21–22 (reconsidering order that rejected privilege claim and compelled production of documents, because order's application of criminal procedural standard to determine applicability of crime-fraud exception in civil case impermissibly detracted from "fundamental concepts of due process" and was "manifestly unjust"). *Cf. Basic Research*, 2006 FTC LEXIS 7, at *5–6 (denying reconsideration of order addressing remedies for expert witness' failure to include studies containing fraudulent data on

curriculum vitae, because movant failed to meet "heavy burden" of demonstrating a change in law, new evidence, or a need to correct clear error or manifest injustice).

Respondents do not assert any change in the law or facts since the denial of their Motion to Dismiss. Instead, Respondents contend that because the analysis in the Order did not expressly address and reject their prior restraint, due process, and separation of powers arguments, the Order did not "rule upon" the Motion to Dismiss, as required by Commission Rule 3.22(a).

Respondents recite the following language of Rule 3.22 in support of their motion: "During the time a proceeding is before an Administrative Law Judge, all motions therein, except [specified motions filed under other Rules] shall be . . . ruled upon, if within his or her authority, by the Administrative Law Judge." 16 C.F.R. § 3.22(a) (emphases omitted). The plain language of Rule 3.22 does not, however, require that each of the movant's claims individually and explicitly be discussed, and individually and explicitly be ruled upon, by the Administrative Law Judge. The plain language of this Rule requires only that each such "motion . . . be addressed to and ruled upon . . . by the Administrative Law Judge." 16 C.F.R. § 3.22(a). Respondents' Motion to Dismiss was ruled upon and was denied.

All contentions and arguments contained in Respondents' Motion to Dismiss were reviewed, were considered, and were rejected as having no legal merit. Given the "heavy burden" for reconsideration, *Basic Research*, 2006 FTC LEXIS 7, at *5-6, an order's mere silence on a contention cannot reasonably be equated with a "manifest failure" to consider facts or precedent. *Conference Interpreters*, 1996 FTC LEXIS 126, at *1; *Champion Spark Plug Co.*, 1981 FTC LEXIS 119, at *1. Moreover, Respondents have failed to assert any facts or precedent which, even if not expressly considered, would now change the ruling, and have failed to demonstrate that reconsideration is necessary to remedy "clear error" or to prevent "manifest injustice." *Karr*, 768 F. Supp. at 1093; *Rambus*, 2003 FTC LEXIS 49, at *21–22.

Respondents have failed to meet the burden for reconsideration of the Order and, accordingly, their Motion is denied. For purposes of clarification, Respondents' prior restraint, due process and separation of powers contentions, contained in their Motion to Dismiss and reasserted in their Motion for Reconsideration, are addressed below. However, to the extent that Respondents' Motion for Reconsideration recharacterizes and/or attempts to enhance their previous arguments or contentions, those arguments or contentions need not, and will not, be addressed.

B. Prior Restraint

Respondents asserted in their Motion to Dismiss that the administrative process constitutes a "prior restraint" on their First Amendment freedoms and that they are being deprived of a "prompt judicial review" of their constitutional claims, as follows:

> The FTC administrative process imposes an unconstitutional prior restraint in violation of the freedoms of speech and press, in that it fails to provide prompt judicial review of Respondents' First Amendment claims, virtually denying to Respondents any access to an Article III court review of their constitutional claims until after a lengthy and expensive administrative process that empowers the FTC to impose censorship settlements without evidence that such censorship powers are necessary to protect a government interest of the highest order. *See* Freedman v. Maryland, 380 U.S. 51 (1965) and Near v. Minnesota, 283 U.S. 687, 716 (1931).

Respondents' Motion to Dismiss, p. 21.

Respondents' apparent contention is that, to the extent the administrative process may result in a cease and desist order requiring Respondents' product claims to be supported by competent scientific evidence, the process allows "censorship," but does not allow for judicial review of Respondents' constitutional claims until after the proceedings are concluded.

This administrative process does not equate to a prior restraint on Respondents' First Amendment freedoms. As the Supreme Court stated in *Alexander v. United States*:

> The term prior restraint is used "to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." M. Nimmer, Nimmer on Freedom of Speech § 4.03, p. 4–14 (1984) (emphasis added). Temporary restraining orders and permanent injunctions - *i.e.,* court orders that actually forbid speech activities - are classic examples of prior restraints. See *id.,* § 4.03, at 4–16.

509 U.S. 544, 550 (1993) (emphasis in original).

In this case, there is no administrative or judicial order in place forbidding Respondents' speech or publications – commercial, religious, or otherwise. Thus, the requirement of "prompt judicial review" of constitutional issues arising in connection with prior restraints has no application here, and the cases upon which Respondents rely provide no legal support for their contention. *Waters v. Churchill*, 511 U.S. 661 (1994) (recognizing importance of procedural safeguards when government employee is allegedly discharged for engaging in constitutionally protected speech); *New York Times v. United States*, 403 U.S. 713 (1971) (holding that government was not entitled to injunction against publication of Pentagon Papers); *Freedman v. Maryland*, 380 U.S. 51 (1965) (holding that state statute prohibiting exhibition of any movie without obtaining advance approval of state board of censors was unconstitutional prior restraint on speech); *Near v. Minnesota*, 283 U.S. 697 (1931) (holding that state statute prohibiting publication of malicious or scandalous matters was unconstitutional prior restraint on speech); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (holding that blanket prohibition

against distribution of any handbills, leaflets, pamphlets, and similar materials without a permit violated right to freedom of the press).

In addition, it has previously been held that a FTC cease and desist order prohibiting representations about performance of products without substantiation is not an unconstitutional "prior restraint," but a reasonable sanction, imposed after a hearing establishes violations of the FTC Act. *Jay Norris, Inc. v. Fed. Trade Comm'n*, 598 F.2d 1244, 1252 (2d. Cir. 1979). *See also* Order: "[T]he 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." Order, at 8 (citations omitted).

The prior restraint doctrine, including its requirement of prompt judicial review of alleged constitutional violations, does not apply, and does not afford a legal basis for dismissal in this case. Thus, Respondents' prior restraint contention is without merit.

C. Due Process and Separation of Powers

Respondents argued in their Motion to Dismiss that the FTC administrative process lacks impartiality because of the issuance of a news release at the same time as the issuance of the Complaint. They assert that the FTC's conduct in issuing and posting the news release on the FTC's website under the docket listing of this case violates Respondents' due process rights in two ways. First, Respondents argue, by announcing that Daniel Chapter One was among 11 companies to which the FTC had issued warning letters charging the recipients with peddling bogus cancer cures, the news release was an improper effort by the FTC to establish guilt by association. Second, Respondents argue, the Commission – by issuing a news release that states that many of the products promoted by the 11 companies are "scams" – has prejudged its claim against Respondents and therefore cannot sit in impartial judgment of Respondents. Respondents further contend that by issuing the news release and making it a part of the docket in this case, the FTC has not kept separate its enforcement function from its adjudicative function and thereby has violated the constitutional principle of separation of powers.

Although a link to the press release appears under the docket listing for this case on the FTC's website, a press release is not considered by the Administrative Law Judge to be a filing in this matter. Moreover, any press releases, whether issued by the FTC or by Respondents, are not considered by the Administrative Law Judge unless offered and admitted into evidence at the trial in this matter.

Regarding Respondents' guilt by association argument, "guilt by association" has had relevance in the criminal context, *e.g.*, *United States v. Lane*, 474 U.S. 438, 463 (1986) (noting in conspiracy case that joinder rules protect against jury making improper inferences of guilt by association) and in legal challenges to statutes prohibiting or punishing membership in disfavored organizations, *see generally Healy v. James*, 408 U.S. 169, 185-186 (1972) (noting that the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization, and that "guilt by

association alone," without establishing that an individual's association poses the threat feared by the government, is an impermissible basis for such governmental action). The only case cited by Respondents for the proposition that the docket filing of a news release imposes upon Respondents guilt by association, *Concrete Pipe v. Construction Laborers*, 508 U.S. 602 (1993), provides no support for Respondents' proposition. In the context of these proceedings, guilt by association is not an independent or valid legal basis for a due process challenge. Therefore, Respondents' guilt by association contention is without merit.

Respondents' claim that the press release constitutes evidence that the FTC lacks impartiality is also without merit. A case squarely on point, *Fed. Trade Comm'n v. Cinderella Career and Finishing Schools, Inc.*, 404 F.2d 1308 (D.C. Cir. 1968), holds that the FTC's issuance of a press release along with a complaint *does not* deprive respondents of any due process right. *Id.* at 1315. In that case, the FTC issued a complaint against the appellees and promulgated a news release announcing and describing the issuance of the complaint. The appellees "contended that the Commission has a duty in a quasi-judicial proceeding to avoid prejudgment, or giving the appearance of prejudgment, and that the press release program, by violating this duty, constitutes a violation of their due process rights." *Id.* at 1315. The appellees further "contended that the Commission, although it must ultimately pass judgment upon the merits of its complaint against the appellees, does, by the issuance of press releases appearing to support and justify its action, prejudge – or give the appearance of prejudging – the complaint before the respondents have been afforded a hearing." *Id.* The Court of Appeals for the D.C. Circuit rejected these arguments, stating, "[w]hile we are unwilling to go as far as the Fifth Circuit in declaring 'the contention that the press release in some manner denied petitioner due process of law in that it prevented the Hearing Examiner and the Judicial Officer from acting fairly in the premises is frivolous,' we conclude that the appellees have not been deprived of any due process right by the Commission's press release in this case." *Id.* (citations omitted). Accordingly, Respondents' due process contention is without merit.

The *Cinderella* holding also extinguishes Respondents' argument that, by issuing the news release and placing it on the docket in this case, the FTC has not acted in such a way as to keep separate its enforcement function from its adjudicative function, thereby violating the constitutional principle of separation of powers. In *Cinderella*, the appellees also charged "that while it has been the 'uniform and long-established practice' of the Commission to issue news releases in its cases, the action . . . constitute[d] an alignment, or appearance of an alignment, of the Commission 'with the prosecution . . . .'" *Id.* at 1313-14. The court rejected this argument, holding:

> Congress has, as a general practice, vested administrative agencies with both the specified power to act in an accusatory capacity through the initiation of an action designed to enforce compliance with or prevent further violation of a statutory provision and with the responsibility of ultimately determining the merits of the charges so presented. In fact, this procedure is recognized by the Administrative Procedure Act, 5 U.S.C. §

> 500 (Supp. II, 1965-6), et seq. More specifically, while 5 U.S.C. § 554(d) (Supp. II, 1965-6) requires separation of the adjudicatory and prosecutorial functions in an agency, subpart (C) of subsection (d) excepts the "agency" or a "member or members of the body comprising the agency" from that requirement. The Federal Trade Commission's practice of reviewing the recommendations of subordinate investigative employees of the Commission and then making the decision to initiate a complaint is clearly within this exception to the Administrative Procedure [Act]. . . . It is well settled that a combination of investigative and judicial functions within an agency does not violate due process.

Id. at 1315 (citations omitted). Thus, Respondents' separation of powers contention is without merit.

The FTC's issuance of a press release that lists Daniel Chapter One along with other companies alleged to have engaged in deceptive advertising of bogus cancer cures does not violate Respondents' due process rights or constitute a violation of the separation of powers doctrine, and therefore does not constitute any legal basis for granting a motion to dismiss.

IV.

After full consideration of Respondents' Motion for Reconsideration, and Complaint Counsel's Opposition, and having fully considered all arguments and contentions therein and in the Motion to Dismiss, Respondents' Motion for Reconsideration is DENIED.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Dated: February 23, 2009