

ORIGINAL



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

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

RESPONDENTS' MOTION TO AMEND ANSWER & MEMORANDUM IN SUPPORT

I. Motion

COME NOW Respondents and move the Administrative Law Judge for an Order under 16 CFR §3.15 granting Respondents leave to amend their Answer to the FTC complaint. Specifically, Respondents seek leave to amend their Answer in two respects:

A. Amendment of Answer to the allegations of Complaint ¶¶3 and 5.

Respondents seek leave to amend their Answer to ¶¶ 3 and 5 of the Complaint as follows (with the amended language appearing in bold italics below within the existing Answer to each paragraph):

COMPLAINT ¶3

Respondents have advertised, promoted, offered for sale, sold, and distributed products to the public, including Bio*Shark, 7 Herb Formula, GDU, and BioMixx (collectively, the "DCO Products"). The DCO Products are "foods" or "drugs" within the meaning of Sections 12 and 15 of the FTC Act.

AMENDED ANSWER ¶3

Respondents answer the allegations in paragraph 3 of the Complaint as follows: admit that they distribute the named products but otherwise deny the allegations contained in paragraph 3 of the Complaint, ***including but not limited to a specific denial of the allegation that they offered for sale or sold products to the public***, and answer further that the products sold by Respondent Daniel Chapter One are dietary supplements within Section 201 (21 U.S.C. 321) of the 1938 Food Drug and Cosmetic Act as amended.

COMPLAINT ¶5

Since 2005, Respondents have engaged in deceptive acts or practices in connection with the advertising, promotion, offering for sale, sale, and distribution of the DCO Products which purport to prevent, treat, or cure cancer or tumors, and other serious medical illnesses. Respondents operate linked web pages on the website, www.danielchapterone.com, through which they advertise and sell the products at issue in this complaint.

AMENDED ANSWER ¶5

Respondents answer the allegations in paragraph 5 of the Complaint as follows: admit they operate a website that provides information on the named products in a religious and educational context, but otherwise deny the allegations contained in paragraph 5 of the Complaint, ***including but not limited to a specific denial of any allegation or inference that they offered for sale, sold or advertised products to the public***.

B. Amendment of Answer to the allegation of Complaint ¶14.

Respondents seek leave to amend their Answer to ¶14 of the Complaint, as follows (The new amended answers appears in italics below, and the original language is shown in footnote #1):

COMPLAINT: ¶14:

Through the means described in Paragraphs 6 through 13, including, but not limited to, the statements contained in the advertisements attached as Exhibits A through D, Respondents have represented, expressly or by implication, that:

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

AMENDED ANSWER: ¶14:

In answering FTC Complaint paragraph 14, Respondents state that the express language actually used by Respondents speaks for itself, notwithstanding the implications attributed to that language by the FTC. Respondents otherwise deny paragraph 14 and its inferences.¹

This Motion is based on the subjoined Memorandum and on the sworn statement of Respondents' counsel.

II. Memorandum

FTC Rule of Practice 3.15 (12 CFR §13.5) allows for the amendment of a pleading “whenever determination of a controversy on the merits will be facilitated thereby [and]

¹ Respondents' original answer to ¶ 14 of the FTC Complaint is, “14. Respondents answer the allegations in paragraph 14 of the Complaint as follows: while continuing to deny any allegations contained in paragraphs 6 through 13 that are denied in this Answer, Respondents admit making the representations contained in subparagraphs a through h of paragraph 14.

. . . to avoid prejudicing the public interest and the rights of the parties.” §13.5(a)(1).

Amendment of a pleading before the FTC is appropriate so that the pleadings conform to the evidence. See §13.5(a)(2).

A. The proposed Amendment of the Answers to ¶¶ 3 and 5 of the Complaint facilitate the determination of this controversy and prevent prejudice to Respondents.

This Administrative Law Judge (ALJ) recently denied Respondents’ Motion to Dismiss for Lack of Jurisdiction. In doing so, the ALJ inadvertently stated that Respondents “admit that they offer the Challenged Products for sale.” That statement is incorrect. Respondents intend to prove that their offering of the Challenged Products was on a donation basis as part of the ministry of Daniel Chapter One.

Although Respondents contend that their current Answer to ¶¶ 3 and 5 of the Complaint constitute a denial of the allegation regarding “sale,” the ALJ’s statement makes it clear that the requested amendment is necessary under the standards of §13.5(a)(1).

B. The proposed Amendment of the Answer to ¶14 conforms to the evidence.

The Respondents’ answer to ¶14, as is, does not conform to the evidence. For instance, in response to deposition questions about Respondents’ alleged representations about the Challenged Products as described by Complaint ¶14, Tricia Feijo testified as follows:

Q: [T]here are eight statements that are alleged to be statements that were made by Daniel Chapter One. And I want to go through these statements and ask you if in

fact these are statements that you recognize as statements that Daniel Chapter One made .

..

A. Well, I remember in working on interrogatories or after working on a sequence to those interrogatories, I recall doing just this, having our words on one side and this listing from the FTC on the other, and realizing that it was not exactly our words what the FTC represented.²

...

THE WITNESS: [In regard to paragraph 14 of the Complaint] Those are not my words. They're not statements we made. We do not make such definitive statements.³

Respondents' amended Answer to ¶14 correctly reflects Ms. Feijo's testimony and the evidence presented.

C. Leave to amend should be given for the benefit of the parties' rights.

The amendments to Respondents' Answers as described above are necessary to accurately state Respondents' position, and in order to conform the pleadings to the evidence. This includes the specific language that Respondents used for their representations about the Challenged Products. As a result, the amendments will facilitate the determination here because this controversy turns largely on the actual specific language on the one hand, and on the *alleged implications* that the FTC associates with that actual language on the other hand.

Respondents' rights weigh heavily in favor of granting leave for this amendment. Leave is to be given when justice so requires. See e.g. FRCP 16(a)(2).

² See Exhibit A to Sworn Statement of Counsel: Deposition Transcript of Tricia Feijo, p. 214:line 10 to p. 214: line 19-24.


D. No prejudice will result.

In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant . . . undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment etc.--the leave sought should, as the rules require, be 'freely given.' *Reiffin v. Microsoft*⁴, citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 1160 (1962)

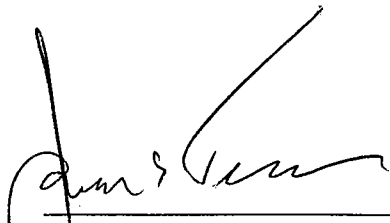
Respondents' amendment does not create the need for additional discovery, nor will it delay the proceedings. Further because the FTC has the evidence in hand from actual discovery, Complaint Counsel is not prejudiced. The party opposing amendment bears the burden of showing prejudice, and undue delay by itself is insufficient to justify denying a motion to amend unless accompanied by that showing of prejudice. *Reiffin*, at 1160.

For the foregoing reasons, Respondents ask that this Motion be granted.

Respectfully submitted February 10, 2009.



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³ Exhibit A to Sworn Statement of Counsel: Deposition Transcript of Tricia Feijo, p. 217: line 14-16.

⁴ 270 F. Supp. 2d 1132, 1159 (2003).

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6 **OFFICE OF ADMINISTRATIVE LAW JUDGES**

7 **In the Matter of**) **Docket No. 9329**
8 **DANIEL CHAPTER ONE,**)
9 **a corporation, and**)
10 **JAMES FEIJO,**) **PUBLIC DOCUMENT**
11 **individually, and as an officer of**)
12 **Daniel Chapter One**)
13 _____)
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17)

14 **STATEMENT OF COUNSEL FOR RESPONDENT**

15 This statement is being submitted in accordance with Additional Provision #5 of the
16 Court's Scheduling Order of October 28, 2008, and in support of Respondents' Motion to
17 Amend their Answer to the Complaint.

18
19 1. I certify that I have conferred with Complaint Counsel in a good faith effort to
20 resolve the issues raised by the attached Motion to Amend Answer and have been unable to
21 reach an agreement. The issue raised here was the subject of the questions raised by Carole A.
22 Paynter on January 14, 2009, and Counsel Michael McCormack exchanged email messages with
23 Counsel Ted Zang about the possibility of Complaint Counsel agreeing to the proposed
24 amendment on February 10, 2009.

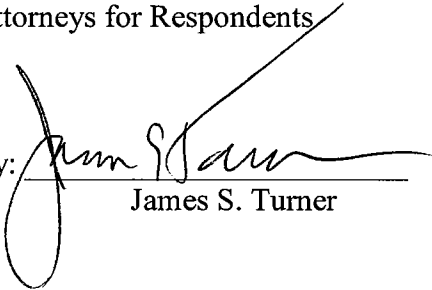
25
26 2. I further certify that attached to this Statement as Exhibit A are true and correct
27 copies of pages from the deposition transcript of Tricia Feijo, i.e. those deposition pages
28 referenced within Respondents' Motion to Amend. I was present at Ms. Feijo's deposition, and

1 have personal knowledge that the transcript pages attached here accurately reflect her sworn
2 testimony. Ms. Feijo is a speaking agent for Daniel Chapter One.

3
4 I swear under penalty of perjury that the foregoing statement is true and correct.

5 Dated this 10th day of February, 2009.

6 Swankin & Turner
7 Attorneys for Respondents

8
9 By: 
10 James S. Turner
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Exhibit

A

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. D09329

TITLE DANIEL CHAPTER ONE

**PLACE FEDERAL TRADE COMMISSION
ONE BOWLING GREEN, SUITE 318
NEW YORK, NY 10044**

DATE JANUARY 14, 2009

PAGES 1 THROUGH 222

TESTIMONY OF PATRICIA FEIJO

**FOR THE RECORD, INC.
10760 DEMARR ROAD
WHITE PLAINS, MD 20695
(301)870-8025**

FEDERAL TRADE COMMISSION

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<u>WITNESS:</u>	<u>EXAMINATION:</u>	<u>PAGE</u>
PATRICIA FEIJO	BY MS. PAYNTER	4
		218
	BY MR. J. TURNER	204

<u>EXHIBIT:</u>	<u>DESCRIPTION</u>	<u>FOR ID</u>
Number 13	DCO 0001-0155	97
Number 14	Bio*Shark labels	163
Number 15	7 Herb Formula labels	169
Number 16	GDU Caps labels	191
Number 17	BioMixx labels	195

1 MR. ZANG: Can you just state which those are?

2 MR. J. TURNER: Do you want the --

3 MS. PAYNTER: Just explain for the record where
4 you're looking.

5 BY MR. J. TURNER:

6 Q. Okay. We're looking at page 8. It's Roman
7 numeral I in the complaint, and it's the first -- I
8 think it's the first operative paragraph of the proposed
9 order.

10 So it's on page 8 and it's Roman numeral I
11 carried over from page 7, and there are eight statements
12 that are alleged to be statements that were made by
13 Daniel Chapter One. And I want to go through these
14 statements and ask you if in fact these are statements
15 that you recognize as statements that Daniel Chapter One
16 made.

17 So number 1 is: Bio*Shark inhibits tumor
18 growth.

19 A. Well, I remember in working on interrogatories
20 or after working on a sequence to those interrogatories,
21 I recall doing just this, having our words on one side
22 and this listing from the FTC on the other, and
23 realizing that it was not exactly our words what the FTC
24 represented.

25 Bio*Shark inhibits tumor growth. I could find

1 nowhere that we made that definitive statement. I
2 believe that was taken from "Pure skeletal tissue of
3 sharks which provides a protein that inhibits
4 angiogenesis - the formation of new blood vessels. This
5 can stop tumor growth."

6 Q. So you're saying that in your -- you believe
7 that those are -- those statements are different.

8 A. Correct, I do believe that they're different.

9 Q. And then it says that Bio*Shark -- the second
10 one is: Bio*Shark is effective in the treatment of
11 cancer.

12 A. I could not find that statement either.

13 Q. And what is your -- what is the statement that
14 you make about Bio*Shark in relation to cancer?

15 **(Pause in the proceedings.)**

16 A. I do not see anything about cancer. I don't
17 see the word "cancer" here. I'd have to refer to
18 the --

19 Q. How about the word "treatment"?

20 A. -- BioGuide perhaps.

21 I don't see the word "treatment" either.

22 Q. So -- but your -- say your view of the
23 relationship between Bio*Shark and cancer. What do you
24 mean? What are the -- what's the concept?

25 MS. PAYNTER: Can I -- I object to that.

1 I think she already testified to all of that. I
2 think -- you said there were statements that you wanted
3 to put on the record. I know I asked her already what
4 the purpose of that product is and we went over what
5 this -- what the language on the Web site states in
6 terms of treatment.

7 MR. J. TURNER: The statement is, the situation
8 we're addressing is that -- and we're going to ask about
9 the answer to 14.

10 The answer to 14 says that they made these
11 statements. The position is that they do not agree that
12 they made these statements, they do not acknowledge that
13 they made these statements, and the belief is that these
14 are misrepresentations and they were misunderstood when
15 we read them before.

16 MS. PAYNTER: When we read them before when?

17 MR. J. TURNER: When we answered the complaint.
18 That these statements --

19 MS. PAYNTER: Mr. Turner, the proper way to do
20 that is to try to amend your answer. However,
21 yesterday I recall you saying, when we asked Mr. Feijo
22 questions, that these are legal conclusions and he
23 couldn't answer. I don't know if -- if you remember
24 that.

25 So I don't --

1 MR. J. TURNER: Let me --

2 MS. PAYNTER: If you want to make that
3 correction, it's not the appropriate place to do it.

4 She's already testified as to what is on the
5 Web site. We went extensively over what is on these
6 representations here, what does it mean about cancer
7 treatment, and she's already done that.

8 If there's other things, then that's not what
9 you represented you wanted to do at this juncture.

10 MR. J. TURNER: Well, then what I'm going to do
11 then is I'm going to ask her whether she admits that
12 these statements are statements that Daniel Chapter One
13 made.

14 THE WITNESS: Those are not my words. They're
15 not statements we made. We do not make such definitive
16 statements.

17 MR. J. TURNER: Okay. So we will amend the
18 complaint on that point.

19 MS. PAYNTER: Thank you.

20 MS. LEHRFELD: The answer, amend the answer.

21 MR. J. TURNER: Amend the answer, right. Amend
22 the answer.

23 Okay. We have no further questions.

24 MS. PAYNTER: Okay. Thank you.

25 **(Pause in the proceedings.)**

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10 **individually, and as an officer of**)
11 **Daniel Chapter One**)
12)
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17 **[PROPOSED] ORDER**
18 **GRANTING RESPONDENTS' MOTION TO AMEND ANSWER**

19 On February 10, 2009, counsel for Respondents filed a motion to amend Respondents'
20 Answer *In the Matter of Daniel Chapter One*, Docket No. 9329. The Court being fully advised,

21 IT IS ORDERED that Respondents' Answer *In the Matter of Daniel Chapter One*,
22 Docket No. 9329, be, and is hereby amended as stated in Respondents' motion.

23 Dated this ___ day of _____, 2009.

24 _____
25 D. Michael Chappell
26 Administrative Law Judge
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8 **JAMES FEIJO,**)
9 **individually, and as an officer of**)
10 **Daniel Chapter One**)

11 **CERTIFICATE OF SERVICE**

12
13
14 I certify that on February 10, 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 Amend Answer and Memorandum in Support thereof
18 Sworn Statement of Counsel re Motion to Amend Answer (with exhibit)
19 [Proposed] Order Granting Respondents' Motion to Amend Answer

20 Service to:

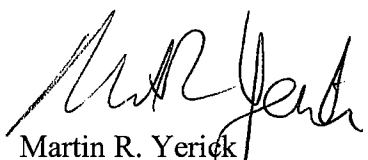
21 Donald S. Clark
22 Office of the Secretary
23 Federal Trade Commission
24 600 Pennsylvania Avenue, NW, Room H-135
25 Washington, DC 20580
26 Email: secretary@ftc.gov

27 Leonard L. Gordon, Esq. (lgordon@ftc.gov)
28 Theodore Zang, Jr., Esq. (tzang@ftc.gov)
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New York, NY 10004

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Courtesy Copies:

Hon. D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Avenue, NW, Room H-106
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