



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

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 MEMORANDUM IN OPPOSITION
TO RESPONDENTS' MOTION TO AMEND ANSWER**

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

I. INTRODUCTION

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.¹ 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. Now, after not complying with their discovery obligations, Respondents seek leave to amend their Answer three weeks after the close of fact discovery.

¹ Respondents first suggested that they were contemplating amending their Answer at the deposition of Patricia Feijo on January 14, 2009, yet they still waited almost a month to actually do so.

Here, Respondents are not attempting to correct a mere scrivener's error with their Amended Answer. Rather, they are attempting to change substantively their approach to this case. Respondents' dilatory Motion prejudices Complaint Counsel and, therefore, should be denied.

II. ARGUMENT

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 discovery. *Crest Hill Land Dev., LLC v. City of Joliet*, 396 F.3d 801, 804 (7th Cir. 2005) (citation omitted).

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).

Further, a motion for leave to amend an answer should be denied when the party seeking leave to amend does not comply with their 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).

A. Respondents' attempt to include a specific denial regarding the sale of the products should not be allowed.

Paragraphs 3 and 5 of the Complaint state the following:

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 or 15 of the FTC Act.
5. Since 2005, Respondents have engaged in deceptive acts or practices in connection with the advertising, promotion, offering for 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.

On October 14, 2008, Respondents provided the following Answer to the allegations listed above.

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, 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. (emphasis added).
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.

Respondents' Answer at ¶¶ 3, 5. In their present Motion, Respondents essentially are attempting to include a specific denial to the allegation that they "offered for sale or sold products to the public." Respondents' proposed amendments to Paragraphs 3 and 5 of their Answer should be denied for the following reasons.

First, Complaint Counsel offered Respondents the opportunity to state the position they now assert in Paragraphs 3 and 5 during fact discovery, yet Respondents refused to cooperate.

For example, Complaint Counsel's Request for Admission Number 10 states, "Respondents have offered for sale, and received payment for, the Challenged Products to consumers in numerous states of the United States." *Complaint Counsel's Request for Admission Number 10*.

Respondents, however, refused to answer this Request for Admission. Rather, they asserted the following objection:

Objection. Request violates the Respondents' freedoms of speech, press association and religion in that the request is based upon the administrative complaint's erroneous and unconstitutional assumptions that: (a) commercial speech, *vel non*, is not protected by the First Amendment and (b) that Daniel Chapter One's communications in relationship to its products may be isolated from Daniel Chapter One's overall teaching and informational activities. *See generally* Respondents' Objections II. A., B. And C to Complaint Counsel's Motion to Compel Production of Document #'s 22 and 23.

Respondents' Responses and Objections to Complaint Counsel's Request for Admissions at 2.

Complaint Counsel moved to compel answers to this – and other – discovery requests, and the Court granted Complaint Counsel's Motion to Compel. As of the date of the filing of this Opposition, however, Respondents still have not provided an answer to this discovery request and the other outstanding discovery requests.

In their Motion to Amend the Answer, Respondents state that they "intend to prove that their offering of the Challenged Products was on a donation basis as part of the ministry of Daniel Chapter One." *Respondents' Mot. to Amend Answer* at 4. Complaint Counsel provided Respondents the opportunity to explain this position during fact discovery, yet Respondents failed to provide any information. Specifically, Interrogatory Number 14 to Complaint Counsel's Second Set of Interrogatories states the following:

Specify the basis for the statement that, with regard to Respondents' sale of its products from 2003 to the present, "[r]eceipts of Daniel Chapter One are considered donations to a religious organization," and set forth

any statements from any local, state, or federal taxing authority with regard to this statement and DCO's products.

Complaint Counsel's Second Set of Interrogatories, Number 14. Furthermore, in Complaint Counsel's Second Set of Document Requests, Complaint Counsel requested that Respondents produce all relevant documents relating to any donations, the amount "expended [by Respondent Daniel Chapter One] in accordance with its purposes and to support charitable and educational activities," and to "[r]eceipts of Daniel Chapter One [that] are considered donations to a religious organization." *Complaint Counsel's Second Set of Document Requests, Numbers 10-12.* Once again, Respondents objected to these discovery requests on First Amendment grounds and failed to produce any answers or documents. Complaint Counsel moved to compel, and the Court granted Complaint Counsel's Motion to Compel. As of the date of the filing of this Opposition, however, Respondents still have not provided any answers or documents responsive to these discovery requests.

Finally, the information Complaint Counsel was able to acquire during discovery directly contradicts the proposed amendments to paragraphs 3 and 5 that Respondents are now submitting after the close of discovery. Specifically, during the deposition of James Feijo, Mr. Feijo acknowledged that the term used on the Daniel Chapter One Web site is price, not donation:

Q: All right. So on the Daniel Chapter One checkout page there's an indication of price, isn't there. And I direct your attention to the middle of the page where it says "price" and then it has four different prices?

A: Right. And we can't change that term. Our capabilities is [sic] not – I don't have the means to fund somebody to change those.

J. Feijo Dep. Tr. at 150:5-13. (The deposition excerpts cited herein are attached hereto as Exhibit 1.)

In addition, Mr. Feijo testified as follows:

Q: But if somebody didn't tune in to your radio show and just saw this Web page, they would just see "price"; right?

A: Sure. That's right.

Q: And they wouldn't know that that was a suggested contribution as you've testified?

A: Right.

J. Feijo Dep. Tr. (Exh. 1) at 151: 15-21.

Additionally, all the documents produced during the scope of discovery indicate that Respondents offer their products for sale at a significant mark-up. *See, e.g., J. Feijo Dep. Tr.* (Exh. 1) at 232: 3-8.

Because Respondents offered no excuse for their delay in filing their Motion to Amend the Answer, because Respondents produced no documents and provided no interrogatory answers relating to this issue during fact discovery, and because the information Complaint Counsel obtained during fact discovery directly contradicts the position Respondents are taking in paragraphs 3 and 5 of their Amended Answer, Respondents' Motion for Leave to Amend the Answer should be denied.

B. Respondents' attempt to amend their answer to Paragraph 14 of the Complaint should be denied.

Paragraph 14 of the FTC's Complaint states the following:

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 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;
- h. BioMixx heals the destructive effects of radiation and chemotherapy.

Complaint at ¶ 14. On October 14, 2008, Respondents answer Paragraph 14 of the *Complaint* as follows:

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.***

Answer at ¶ 14 (emphasis added). Now, almost four months after providing their initial Answer and almost three weeks after the close of fact discovery, Respondents want to amend their Answer to Paragraph 14 to the following:

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.

Respondents Mot. to Amend Answer at 3. Once again, Respondents are substantively changing their position after the close of discovery. Respondents had more than enough time to clarify their position regarding this matter. Allowing Respondents to alter their position regarding their representations will prejudice *Complaint Counsel*.

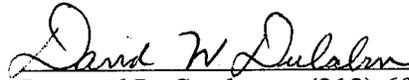
Additionally, Mr. Feijo admitted in his deposition testimony that the answer to Paragraph 14 provided by Respondents was “correct when written.” *J. Feijo Dep. Tr.* at 98-99.

Respondents offered no explanation for what has changed.

III. CONCLUSION

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

Respectfully submitted,



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Federal Trade Commission
Alexander Hamilton U.S. Custom House
One Bowling Green, Suite 318
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Dated: February 20, 2009

EXHIBIT 1

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

Tuesday, January 13, 2009

Room 318
Federal Trade Commission
One Bowling Green
New York, New York 10004

The above-entitled matter came on for
deposition, pursuant to notice, at 11:02 a.m.

For The Record, Inc.

1 APPEARANCES:

2

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For The Record, Inc.

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1 PROCEEDINGS

2 - - - - -

3 Whereupon --

4 JAMES FEIJO

5 a witness, called for examination, having been first
6 duly sworn, was examined and testified as follows:

7 EXAMINATION

8 BY MR. ZANG:

9 Q. Mr. Feijo, first of all, please help me
10 pronounce your name.

11 A. "Feijo."

12 Q. "Feijo." I'll try my best, and if I make a
13 mistake --

14 A. No problem. It doesn't matter. That's fine.

15 Q. Okay. Let me just tell you a few of the
16 procedural issues about this hearing so that it can run
17 smoothly.18 First of all, you can note that to your right we
19 have a court reporter, and she's going to be taking down
20 your testimony today. And one of the important things
21 to keep in mind is that she's unable to record gestures
22 such as if you're shaking your head or something like
23 that, so please articulate all of your answers so that
24 she can record them.

25 Do you understand that?

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1 fancy people to go in and change the programs around,
2 which is really pretty complicated from what I
3 understand. And this is what we have to try to make our
4 ministry work.

5 Q. All right. So on the Daniel Chapter One
6 checkout page there's an indication of price, isn't
7 there?

8 And I direct your attention to the middle of
9 that page where it says "price" and then it has four
10 different prices?

11 A. Right. And we can't change that term. Our
12 capabilities is not -- I don't have the means to fund
13 somebody to change those.

14 Q. So you could change it, but it's a question of
15 funds; is that correct?

16 A. Yeah. A lot of funds. It's not cheap.

17 Q. Okay.

18 A. I would love to change that.

19 Q. Okay. And --

20 A. I think we've been trying to change it, though,
21 since you all brought this to our attention, you know.
22 I think -- we don't have -- we have people who work hard
23 at trying to accomplish things, and they try to learn
24 the things. I mean, they do the best -- you know, we're
25 trying to get there.

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1 But that has always been things that I've asked
2 to -- can we change these things on our material, and
3 they said it would be expensive and they didn't know how
4 to do it. That's been since day one.

5 Q. But then how is an individual supposed to know
6 that what appears as a price here in fact is a suggested
7 contribution?

8 A. Basically everyone that listens to our
9 program -- and we don't -- those are probably the only
10 people that go to our -- it's kind of been like a
11 community type of thing that people go there because
12 they know us and they -- or someone goes there because
13 they are told, somebody told them about us secondhand,
14 you know, so --

15 Q. But if somebody didn't tune in to your radio
16 show and just saw this Web page, they would just see
17 "price"; right?

18 A. Sure. That's right.

19 Q. And they wouldn't know that that was a suggested
20 contribution as you've testified?

21 A. Right.

22 Q. All right.

23 A. Yep.

24 Q. And do you mention on each of your radio
25 broadcasts that what people pay for your products is a

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1 relationship to things that the world offers that can
2 cause cancer, that's pretty good.

3 Q. The 7 Herb Formula, how much does it cost for
4 you to obtain that from the distributor?

5 A. By the time it's all produced and everything and
6 all that stuff? Probably 30 percent of that.

7 Q. 30 percent of what you need to charge?

8 A. Well, what we ask for an offering.

9 Q. Okay.

10 A. That's not counting radio. That's not counting
11 everything under the sun, you know. It's not counting
12 knowledge. It's not counting ability to -- what's a
13 person's life that's been saved? You know, whatever,
14 you know.

15 Q. Okay.

16 A. And the other thing is they also -- when they
17 buy multiple, they get -- they can get a bottle free,
18 you know, an extra bottle if they want, so -- and plus
19 we use it for other people that can't, those who have,
20 and kind of like what Obama is trying to do.

21 Q. Okay. Some Web sites that I want to ask you
22 about. The first one is dconepages.com.

23 What is that?

24 A. I don't know. That's one of those crazy -- one
25 of those crazy things when you switch from one -- what

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 20, 2009, I have filed and served the attached **COMPLAINT COUNSEL'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO AMEND ANSWER** and **[Proposed] ORDER DENYING RESPONDENTS' 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:

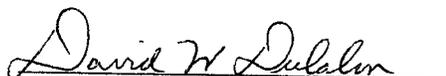
The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave., N.W., Room H-528
Washington, DC 20580

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

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