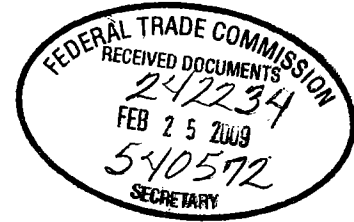


ORIGINAL

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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 MOTION FOR SUMMARY DECISION

Pursuant to Section 3.24 of the Commission's Rules of Practice, Complaint Counsel move for summary decision in this matter. Based on the pleadings and other evidence in the case, as described in Complaint Counsel's Statement of Material Facts as to Which There is No Genuine Dispute, Complaint Counsel are entitled to summary decision as to violations of Sections 5(a) and 12 of the Federal Trade Commission Act. The arguments supporting Complaint Counsel's motion are set forth in the accompanying Memorandum in Support of Complaint Counsel's Motion for Summary Decision.

Respectfully submitted,

Leonard L. Gordon (212) 607-2801
Theodore Zang, Jr. (212) 607-2816
Carole A. Paynter (212) 607-2813
David W. Dulabon (212) 607-2814
Elizabeth K. Nach (202) 326-2611

Federal Trade Commission
Alexander Hamilton U.S. Custom House
One Bowling Green, Suite 318
New York, NY 10004

Dated: February 24, 2009

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of)
)
DANIEL CHAPTER ONE,)
a corporation,)
)
JAMES FEIJO,)
individually, and as an officer of)
Daniel Chapter One.)
_____)

Docket No. 9329

PUBLIC DOCUMENT

MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S
MOTION FOR SUMMARY DECISION

Leonard L. Gordon (212) 607-2801
Theodore Zang, Jr. (212) 607-2816
Carole A. Paynter (212) 607-2813
David W. Dulabon (212) 607-2814
Elizabeth K. Nach (202) 326-2611
Counsel Supporting the Complaint

Federal Trade Commission
Alexander Hamilton U.S. Custom House
One Bowling Green, Suite 318
New York, NY 10004

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

A. DCO and the Feijos Have Long Sold Various Products to Consumers 2

B. The Feijos are Responsible for the Development and Price of the DCO Products 3

1. The Feijos Developed the DCO Products and Their Labels 3

2. Respondents Sell Products to Consumers 3

3. The DCO Products 4

a. Bio*Shark 4

b. 7 Herb Formula. 5

c. GDU. 5

d. BioMixx. 5

C. Respondents Disseminate Claims That the DCO Products “Fight Cancer,” “Stop Tumor Growth,” and are a “Cancer Solution” For All Types of Cancer 6

1. Claims That the DCO Products Are For All Types of Cancer 7

2. Claims That the DCO Products Will Fight Cancer 7

3. Claims that the DCO Products Will Fight and Stop Tumors 8

III. SUMMARY DECISION SHOULD BE GRANTED WHEN, LIKE HERE, THERE IS NO GENUINE ISSUE FOR TRIAL 9

IV. RESPONDENTS DISTRIBUTE THEIR PRODUCTS IN COMMERCE 10

A. The FTC Has Jurisdiction Over Even Ostensibly Nonprofit Entities

	Engaging in For-Profit Activities	10
B.	Respondents Are Engaged in Commerce	12
V.	RESPONDENTS' DECEPTIVE ADVERTISING VIOLATES SECTIONS 5 AND 12 OF THE FTC ACT	13
A.	Respondents Represented in Their Advertisements that Their Products Prevent, Treat, and/or Cure Cancer	14
1.	The Appropriate Legal Standard is the Overall Net Impression Created by the Advertisement	14
2.	Respondents Claimed that the DCO Products Could Prevent, Treat, and/or Cure Cancer	16
a.	Respondents' Advertising Represented that Bio*Shark Inhibits Tumor Growth and Is Effective in Treating Cancer.	16
b.	Respondents Represented that 7 Herb Formula is Effective in the Treatment or Cure of Cancer and Inhibits Tumor Formation	18
c.	Respondents Represented that GDU Eliminates Tumors and is Effective in the Treatment of Cancer	19
d.	Respondents Represented that BioMixx is Effective in the Treatment of Cancer and Heals the Destructive Effects of Radiation and Chemotherapy	20
B.	Respondents' Representations That the DCO Products Prevent, Treat, or Cure Cancer are Misleading	21
1.	Unsubstantiated Claims Are Misleading	21
2.	Respondents Did Not Possess a Reasonable Basis for Their Advertising Representations that the DCO Products Prevent, Treat and/or Cure Cancer	24
a.	Respondents Never Conducted Any Tests or Studies on the DCO Products.	24

b.	Dr. Miller, an Expert Oncologist, Confirms that No Competent and Reliable Scientific Evidence Exists with Regard to the DCO Products	25
i.	Respondents' Claims that Bio*Shark Inhibits Tumor Growth and Effectively Treats Cancer Are Unsubstantiated ...	26
ii.	Respondents' Claims that 7 Herb Formula Inhibits Tumor Formation and Effectively Treats or Cures Cancer Are Unsubstantiated	26
iii.	Respondents' Claims that GDU Eliminates Tumors and Effectively Treats Cancer Are Unsubstantiated	27
iv.	Respondents' Claims that BioMixx Effectively Treats Cancer and Heals the Destructive Effects of Radiation Chemotherapy Are Unsubstantiated ..	28
c.	Respondents' Purported Experts Reinforce Dr. Miller's Conclusion that No Competent and Reliable Scientific Evidence Exists to Support Respondents' Claims ...	28
C.	Respondents' Advertising Representations that the DCO Products Prevent, Treat, or Cure Cancer Are Material	32
VI.	COMPLAINT COUNSEL IS ENTITLED TO THE PROPOSED ORDER AGAINST RESPONDENTS	33
A.	James Feijo is Individually Liable and thus An Order is Appropriate Against Him.	33
B.	The Proposed Order is Appropriate for Respondents' Violations	33
VII.	CONCLUSION	34

TABLE OF AUTHORITIES

FEDERAL CASES

<i>ABS Tech Sciences, Inc.</i> , 126 F.T.C. 229 (1998)	21
<i>In re America Life Nutrition, Inc.</i> , 113 F.T.C. 906 (1990)	32
<i>American Home Products Corp. v. FTC</i> , 695 F.2d 681 (3d Cir. 192)	13
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	10
<i>Automotive Breakthrough Sciences</i> , 1996 FTC LEXIS 252 at 43	14
<i>In re Body Systems Tech., Inc.</i> , 128 F.T.C. 299 (1999)	32
<i>Brake Guard Products, Inc.</i> , 125 F.T.C. 138 (1998)	22
<i>Cal. Dental Association v. FTC</i> , 526 U.S. 756 (1999)	11
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	9,12
<i>Cliffdale Associates Inc.</i> , 103 F.T.C. 110	12
<i>Community Blood Bank v. FTC</i> , 405 F.2d 1011 (8 th Cir. 1969)	10
<i>Country Tweeds, Inc. v. FTC</i> , 326 F.2d 144 (2 nd Cir. 1964)	15
<i>FTC v. Ameridebt, Inc.</i> , 343 F.Supp.2d 451 (D.MD. 2004)	10
<i>FTC v. Amy Travel Serv., Inc.</i> , 875 F.2d 564 (7 th Cir. 1989)	32
<i>FTC v. Bronson Partners</i> , 564 F.Supp.2d 119 (D.Conn. 2008)	9,14,31
<i>FTC v. Cal. Pac. Research, Inc.</i> , 1991 U.S. Dist. LEXIS 12967 (D.Nev. Aug. 27, 1991)	23
<i>FTC v. Colgate-Palmolive Co.</i> , 380 U.S. 374 (1965)	14,34
<i>FTC v. Direct Marketing Concepts, Inc.</i> , 569 F.Supp.2d 285 (D.Mass. 2008)	13,23
<i>FTC v. National Commission on Egg Nutrition</i> , 517 F.2d 485 (7 th Cir. 1975)	11
<i>FTC v. National Urological Group, Inc.</i> , No. 1:04-CV-3294-CAP, 2008 U.S. Dist. LEXIS 44145 (N.D.Ga. June 4, 2008)	9,22

<i>FTC v. Natural Solution, Inc., No. CV 06-6112-JFW</i> , 2007 U.S. Dist. LEXIS 60783 (C.D. Cal. Aug. 7, 2007)	9,22
<i>FTC v. Pantron I Corp.</i> , 33 F.3d 1088 (9 th Cir. 1994)	21
<i>FTC v. QT, Inc.</i> , 448 F.Supp.2d 908 (N.D. Ill. 2006) <i>aff'd</i> 512 F.3d 858	22,30
<i>FTC v. QT, Inc.</i> , 512 F.3d 858 (7 th Cir. 2008)	23
<i>FTC v. Sabal</i> , 32 F.Supp.2d 1004 (N.D. Ill. 1998)	21,23
<i>FTC v. Simeon Management Corp.</i> , 570 F.2d 1137 (9 th Cir. 1978)	23
<i>FTC v. SlimAmerica, Inc.</i> , 77 F.Supp.2d 1263 (S.D. Fla. 1999)	23
<i>FTC v. Travel King, Inc.</i> , 86 F.T.C. 715 (1975)	14
<i>FTC v. U.S. Sales Corp.</i> , 785 F.Supp. 737 (N.D. Ill. 1992)	22
<i>FTC v. Westberry Enter., Inc.</i> , 2008 F.T.C. LEXIS 99 (2008)	32
<i>FTC v. World Travel Vacation Brokers, Inc.</i> , 861 F.2d 1020 (7 th Cir. 1988)	21
<i>In re ForMor Inc.</i> , 132 F.T.C. 7 (2001)	33
<i>Ford Motor Co.</i> , 87 F.T.C. 756 (1976)	15
<i>Ford Motor Co. v. FTC</i> , 120 F.2d 175 (6 th Cir. 1941)	12
<i>In re Forrest</i> , 132 F.T.C. 229 (2001)	33
<i>Green v. Dalton</i> , 164 F.3d 671 (D.C. Cir. 1999)	9
<i>In re Hearst Corp.</i> , 80 F.T.C. 1011 (1972)	9
<i>Honeywell, Inc.</i> , 126 F.T.C. 202 (1998)	21
<i>Jacob Siegel v. FTC</i> , 327 U.S. 608 (1946)	14
<i>Koch v. FTC</i> , 206 F.2d 311 (6 th Cir. 1953)	23
<i>Kraft, Inc.</i> , 114 F.T.C. 40 (1991)	14,15,31
<i>Kraft, Inc. v. FTC</i> , 970 F.2d 311 (7 th Cir. 1992)	13,14,32

<i>In re Kroger Co.</i> , 98 F.T.C. 639 (1981)	9,15
<i>Matsushita Electric Industrial Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	10
<i>Novartis</i> , 127 F.T.C. 580 (1996)	16
<i>In re Nutrivida, Inc.</i> , 126 F.T.C. 339 (1998)	33
<i>P.F. Collier & Son Corp. v. FTC</i> , 427 F.2d 261 (6 th Cir 1970)	12
<i>Porter & Dietsch, Inc. v. FTC</i> , 605 F.2d 294 (7 th Cir. 1979)	14
<i>Standard Education, Inc. v. FTC</i> , 475 F.2d 401 (D.C. Cir. 1973)	33
<i>Stouffer Foods Corp.</i> , 118 F.T.C. 746 (1994)	14,16
<i>Telebrands Corp.</i> , 140 F.T.C. 278 (2005), <i>aff'd</i> , 457 F.3d 354 (4 th Cir. 2006)	13,34
<i>In re Thompson Medical Co.</i> , 104 F.T.C. 648 (1984), <i>aff'd</i> , 791 F.2d 189 (D.C. Cir. 1986), <i>cert. denied</i> , 479 U.S. 1086	13,15,16
<i>Windward Marketing</i> , 1997 U.S. Dist. LEXIS 17114 (Sept. 30, 1997)	33

DOCKETED CASES

<i>FTC v. Febre</i> , No. 94 C3625 (N.D. Ill. July 2, 1996)	15
<i>In re Native Essence Herb Co.</i> , No. 9328 (FTC Jan 29, 2009)	33

FEDERAL STATUTES

15 U.S.C. § 44	10
15 U.S.C. §45(a)	10,12
15 U.S.C. § 52(a)	12
15 U.S.C. § 55	12
15 U.S.C. § 55(a), (b)	12
16 C.F.R. § 3.24(a)	9,10
Federal Rule of Civil Procedure 56	9

OTHER

FTC Policy Statement on Deception, 103 F.T.C. 174 (1984) 12,13,31

In re Jenks, 2008 F.T.C. LEXIS 94 (FTC Sept 18, 2008) 33

In re Miller, 2000 F.T.C. LEXIS 70 (FTC May 16, 2000) 33

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

<hr/>		
In the Matter of)	
)	
DANIEL CHAPTER ONE,)	
a corporation,)	
)	Docket No. 9329
JAMES FEIJO,)	
individually, and as an officer of)	PUBLIC DOCUMENT
Daniel Chapter One.)	
<hr/>)	

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL’S
MOTION FOR SUMMARY DECISION**

I. INTRODUCTION

The uncontroverted evidence demonstrates that Respondents Daniel Chapter One (“DCO”) and James Feijo violated Sections 5(a) and 12 of the Federal Trade Commission Act (the “FTC Act”) when marketing their Bio*Shark, 7 Herb Formula, GDU, and BioMixx products (collectively, the “DCO Products”). Respondents represented in their advertisements and promotional materials that the DCO Products were effective in preventing, treating, or curing cancer or tumors without competent and reliable scientific evidence to support such claims. Respondents preyed upon desperate, sick consumers “suffer[ing] from any type of cancer.” Respondents touted the DCO Products as “Cancer solutions” that would “stop tumor growth,” “fight[] tumor formation,” and otherwise “battle[] cancer.” At the time they made these serious health claims, Respondents lacked a reasonable basis for their representations, making them unsubstantiated and misleading.

Complaint Counsel have presented overwhelming uncontroverted evidence that Respondents made the alleged claims and lacked adequate substantiation. No genuine issues of material fact remain and summary decision is appropriate.

II. STATEMENT OF FACTS¹

A. DCO and the Feijos Have Long Sold Various Products to Consumers.

In 1986, James Feijo and his wife Patricia started DCO as a health food store. CCSF ¶¶ 4 and 6. Then, in 2002, James Feijo organized DCO as a corporation sole under Washington state laws. CCSF ¶ 1. DCO currently offers consumers 150 to 200 products. CCSF ¶ 7. James Feijo serves as DCO's Overseer, trustee for all DCO assets, and custodian of DCO's financial records. CCSF ¶¶ 2, 9, and 13-14. Patricia Feijo is DCO's Secretary. CCSF ¶ 3. Neither James nor Patricia Feijo is a doctor or research scientist. CCSF 114.

Respondents' principal office and place of business is located in Portsmouth, Rhode Island, where the Feijos live. CCSF ¶ 5. DCO's two Rhode Island buildings contain an Order Center and a warehouse for the products that DCO offers to the public. CCSF ¶ 17. James Feijo established another Washington corporation sole -- Messiah Y'Shua Shalom -- which he uses to own the Rhode Island property. CCSF ¶¶ 19-20. DCO also owns a three-bedroom property in Deerfield Beach, Florida, where the Feijos stay, as well as two Cadillacs which the Feijos use. CCSF ¶¶ 22-24. DCO pays for all the Feijos' expenses. CCSF ¶¶ 15, 23, and 25.

¹ Pursuant to Rule of Practice § 3.24(a), Complaint Counsel have submitted the accompanying Statement of Material Facts As To Which There Is No Genuine Issue ("CCSF") as a separate document. Complaint Counsel reserves the right to supplement the CCSF and the exhibits to this Motion. Respondents refused to respond to discovery requests, which resulted in the Court granting Motions to Compel. Respondents did not respond to the outstanding discovery requests until after the close of business on February 23, 2009, the day before Motions for Summary Decision were due.

B. The Feijos are Responsible for the Development and Price of the DCO Products.

1. The Feijos Developed the DCO Products and Their Labels.

James Feijo developed, created, and produced the DCO Products. CCSF ¶ 8. He established the DCO Products' price. CCSF ¶ 37. He and Patricia Feijo have been solely responsible for creating, drafting, and approving the DCO Products' directions and recommended usages. CCSF ¶ 95. They also developed the suggested dosages. CCSF ¶¶ 95, 98, 100, and 102. The identity and amount of each ingredient is contained on the product labels. CCSF ¶ 96. DCO contracts with Universal Nutrition to manufacture approximately 35-40 products, including Bio*Shark, GDU, and BioMixx. CCSF ¶ 82.

2. Respondents Sell Products to Consumers.

Over a thousand consumers have purchased DCO's products. CCSF ¶ 46. DCO has generated approximately \$2 million in annual sales for 2006, 2007, and 2008. CCSF ¶ 47. DCO offers consumers coupons for their next online store order. CCSF ¶ 60. Respondents run promotions from time to time to "give [consumers] more of an opportunity to . . . get things at a lower rate." CCSF ¶ 61. For example, consumers can buy multiple bottles and get a bottle free. CCSF ¶ 62. DCO charges shipping and handling fees of \$20.95. CCSF ¶ 59. Doctors and stores that carry DCO's product line purchase the products at a lesser price. CCSF ¶ 64. DCO sells its products in a number of stores nationally, including stores in Georgia and Pennsylvania. CCSF ¶ 63.

The DCO Products are expensive. An FTC investigator, Michael Marino, purchased one bottle of each of the four DCO Products, which together cost \$175.75. CCSF ¶¶ 52 and 58. With his purchase, he received a product catalog, a blank purchase order form, and an invoice

form. CCSF ¶ 55. At least one consumer pleaded for prices to be lowered: “There should be discounts for customers who have referred lots of people and for those customers who consume lots of product monthly.” CCSF ¶ 73. To counter such complaints, on their Web site, Respondents post “testimonials” to convince consumers to pay their high prices: “[i]t wasn’t cheap but it was the best money I ever spent”; “I then proceeded to reduce my 7 Herb Formula to a maintenance dosage. Tricia & Jim Feijo did not agree with my decision. They felt I should stay on the maximum dosage to be safe, but I was having financial problems, and could not afford the cost.” CCSF ¶¶ 71-72.

3. The DCO Products.

a. Bio*Shark

Bio*Shark contains, among other ingredients, Shark Cartilage. CCSF ¶ 76. Each Bio*Shark label directs users to take 2-3 capsules three times a day or as directed by a physician or by a “BioMolecular Nutrition health care professional.” CCSF ¶ 97. Respondents invented the term BioMolecular Nutrition to describe “the spiritual and physical” aspects of their products. CCSF ¶¶ 26-27. Respondents offer one bottle of Bio*Shark for \$30.95 (100 capsules) and \$65.95 (300 capsules), but only pay Universal Nutrition, their manufacturer, \$3.15 per unit for the 100-capsule and \$8.75 per unit for the 300-capsule bottle of Bio*Shark. CCSF ¶¶ 77-78. Thus, their acquisition cost for the 100-capsule bottle is approximately 10 percent of what Respondents charge consumers. During 2008, Respondents paid Universal Nutrition approximately \$1,437 to manufacture 479 100-capsules bottles of Bio*Shark and approximately \$6,256 to manufacture 782 300-capsule bottles of Bio*Shark. CCSF ¶ 79.

b. 7 Herb Formula

7 Herb Formula, a liquid tea concentrate, contains, among other ingredients, distilled water, Cat's Claw, Burdock Root, Siberian Ginseng, Sheep Sorrel, Slippery Elm, Watercress, and Turkey Rhubarb Root. CCSF ¶ 84. Respondents' label directs users to take 1-2 ounces of 7 Herb Formula with 2-4 ounces of hot or cold filtered or distilled water. CCSF ¶ 99. The label further directs users to take 7 Herb Formula twice daily or as directed by a BioMolecular Nutrition health care professional. CCSF ¶ 99.

Respondents offer one 32-ounce bottle of 7 Herb Formula for \$70.95. CCSF ¶ 85. Their acquisition cost for 7 Herb Formula is approximately 30 percent of the price they charge to consumers. CCSF ¶ 45.

c. GDU

GDU contains, among other ingredients, Bromelain, Turmeric, Quercetin, Feverfew, and Boron. CCSF ¶ 87. Respondents' label directs users to take 3-6 capsules 2 to 4 times per day or as directed by a physician or by a BioMolecular Nutrition health care professional. CCSF ¶ 101.

Respondents offer GDU for \$29.95 (120 capsules) and \$45.95 (300 capsules) but only pay Universal Nutrition \$3.28 for the 120-capsule bottle and \$7.07 for the 300-capsule bottle of GDU. CCSF ¶¶ 88-89. Thus, their acquisition cost for the 120-capsule bottle is slightly over 10 percent of what they charge consumers. During 2008, Respondents paid Universal Nutrition approximately \$5,127 to manufacture 1,709 of the 120-capsule bottles and approximately \$52,661 to manufacture 7,523 of the 300-capsule bottles of GDU. CCSF ¶ 90.

d. BioMixx

BioMixx contains, among other ingredients, Goldenseal, Echinacea, and Ginseng. CCSF ¶ 91. Respondents' label for BioMixx directs users to take five scoops daily. CCSF ¶ 103.

Respondents offer BioMixx for \$22.95 (1 lb. powder) and \$40.95 (3 lb. powder), but only pay Universal Nutrition \$11.50 for the 3-pound bottle of BioMixx, CCSF ¶¶ 92-93, approximately 35% of what they charge consumers. During 2008, Respondents paid Universal Nutrition approximately \$8,778 to manufacture 798 3-pound bottles of BioMixx. CCSF ¶ 94.

C. Respondents Disseminate Claims That the DCO Products “Fight Cancer,” “Stop Tumor Growth,” and Are a “Cancer Solution” For All Types of Cancer.

Respondents’ Web sites www.danielchapterone.com, dc1pages.com, www.7herbformula.com, www.gdu2000.com, and dcstore.com provide information on the DCO Products. CCSF ¶ 141-42. Consumers can locate the Web site www.danielchapterone.com by entering the term “cancer” in a Google search. CCSF ¶ 144. Respondents also disseminate information about the DCO Products through written materials, including the BioGuide, the Cancer Newsletter, and the radio program “Daniel Chapter One Health Watch.” CCSF ¶ 142. The Feijos are responsible for the information disseminated about the DCO Products. CCSF ¶ 143. James and Patricia Feijo also co-host DCO’s radio program for two hours a day, Monday through Friday. CCSF ¶ 146. They have counseled cancer patients who have called into the radio program about taking the DCO Products. CCSF ¶ 147. Respondents purposefully use the DCO radio program and the DCO Web sites to reach out to consumers. CCSF ¶ 148.

On their Web sites, radio program, and in their other publications, Respondents make numerous claims about how their products are a “Cancer Solution,” a “Cancer Treatment,” or can be used for “all types of cancer” to “fight cancer,” “stop tumor growth,” “fight tumor formation,” “battle cancer,” and “digest . . . unwanted tumors.” CCSF ¶¶ 104-06, 124-25, 132.

1. Claims That the DCO Products Are For All Types of Cancer.

Respondents recommend taking the DCO Products “**If you suffer from any type of cancer,**” CCSF ¶¶ 120, 124, 133, and 138 (emphasis added) and, in their *The Most Simple Guide to the Most Difficult Diseases: The Doctors’ How-To Quick Reference Guide*, recommend the DCO Products for “**All types of Cancer:**” CCSF ¶ 106. Respondents reinforce this claim by listing at least ten different types of cancer with consumer “testimonials.” CCSF ¶ 107.

2. Claims That the DCO Products Will Fight Cancer.

The DCO Products all appear in Respondents’ Cancer Newsletter, *How to Fight Cancer is Your Choice!!!*. CCSF ¶ 111. Respondents describe the DCO Products as a “Cancer solution” and specifically advise consumers to take the DCO Products to “fight” or “battle” cancer:

If you suffer from any type of cancer, Daniel Chapter One suggests taking this products [sic], to fight it: [emphasis added]

7*Herb Formula™ . . .

Bio*Shark™ . . .

BioMixx™ . . .

GDU Caps™ . . .

[depiction of bottles of BioMixx, 7 Herb Formula, Bio*Shark, and GDU]

Daniel Chapter One’s Cancer solutions

To Buy the products click here

How to fight cancer is your choice! . . . [emphasis added]

CCSF ¶ 124.

Respondents use testimonials to convince consumers that the DCO Products will help them “fight” and “battle” cancer and end up in remission, claiming that one consumer had “three inoperable tumors,” and that, when she “decided not to do chemotherapy or radiation, my father sent me Bio*Mixx and 7 Herb Formula. Each day as I took it and got it into my system more and more, the better I felt. Then I added Garlic Pur, Siberian Ginseng and BioShark.’” “I am now in complete remission. . .” CCSF ¶ 108 (*italics added*). Similarly, another testimonial

claimed that 7 Herb Formula “did such a good job fighting cancer,” “I plan to stay on that forever!” CCSF ¶ 127.

On their radio program, DCO Healthwatch, Respondents tout the DCO Products. By example, on one show Patricia Feijo urged consumers:

“[W]hile the FTC does not want us saying that anything natural can be used to treat cancer and that nothing certainly can cure cancer, we know that the truth is different than what they want us to say. **The truth is God has given us herbs in His creation and nutrients that can heal cancer, even cure cancer.**” CCSF ¶ 118. (emphasis added)

3. **Claims that the DCO Products will Fight and Stop Tumors.**

Respondents also specifically claim that the DCO Products will “battle tumors,” “stop tumor growth,” “fight tumor formation,” and “digest . . . unwanted tumors.” CCSF ¶¶ 122, 124, 128, and 132. On danielchapterone.com and dc1pages.com, Respondents advise consumers that: “With Jim Feijo’s addition to the [7 Herb] formula, **we now have the most effective and potent formula available in the battle against tumors.**” (emphasis added) CCSF ¶ 128. In their product catalog and on their Web site, Respondents claim that the 7 Herb Formula will “fight pathogenic bacteria and tumor formation.” CCSF ¶¶ 124 and 126. Similarly, in their product catalog, Respondents claim that GDU “[c]ontains natural proteolytic enzymes (from pineapple source bromelain) to help digest protein, *even that of unwanted tumors* and cysts. Helps to relieve pain, inflammation, and as *an adjunct to cancer therapy.*” (emphasis added). CCSF ¶¶ 132 and 134. They likewise claimed that their “**Bio*Shark Shark Cartilage** Stops tumor growth in its tracks,” (emphasis in original), a claim repeated in their product catalog. CCSF ¶¶ 121-22. Respondents also used a testimonial in their product catalog to claim that BioMixx, 7 Herb Formula, and Bio*Shark worked on “three inoperable tumors” so well that one “just

above the brain stem . . . has completely disappeared,” one on the liver “is shrinking,” and one behind the heart “has shrunk over 50%.” CCSF ¶ 108.

III. SUMMARY DECISION SHOULD BE GRANTED WHEN, LIKE HERE, THERE IS NO GENUINE ISSUE FOR TRIAL.

Commission Rule 3.24(a)(2) provides that summary decision “shall be rendered . . . if the pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law.” 16 C.F.R. § 3.24(a)(2). Rule 3.24(a)(2) is applied consistent with case law interpreting the summary judgment standard set out in Federal Rule of Civil Procedure 56. *In re Kroger Co.*, 98 F.T.C. 639, 726 (1981); *In re Hearst Corp.*, 80 F.T.C. 1011, 1014 (1972).

Whether an advertising practice complies with the laws or regulations the FTC enforces is a question of law that the Court can resolve on summary decision. *FTC v. Bronson Partners*, 564 F. Supp. 2d 119 (D. Conn. 2008) (ruling on summary judgment that defendants violated the FTC Act by making deceptive claims to consumers in advertisements for a purported weight-loss product); *FTC v. Nat’l Urological Group, Inc.*, No.1:04-CV-3294, 2008 U.S. Dist. LEXIS 44145 (N.D.Ga. June 4, 2008) (ruling on summary judgment that defendants violated the FTC Act by making deceptive claims to consumers in advertisements for dietary supplements); *FTC v. Natural Solution, Inc.*, No. 06-6112, 2007 U.S. Dist. LEXIS 60783 (C.D.Cal. Aug. 7, 2007) (ruling on summary judgment that defendants violated the FTC Act by making deceptive claims to consumers in advertisements for a dietary supplement purported to prevent and treat cancer).

The party moving for summary judgment bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact. *Green v. Dalton*, 164 F.3d

671, 675 (D.C. Cir. 1999) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once the moving party has properly supported its motion for summary judgment, the nonmoving party must “do more than simply show there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmoving party may not rest on mere allegations or denials of its pleading but must “come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 587 (quoting Fed. R. Civ. P. 56(e)). See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); 16 C.F.R. § 3.24(a)(3). “Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Matsushita* 475 U.S. at 587 (citation omitted). Thus, the “mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.” *Liberty Lobby*, 477 U.S. at 247-48.

There is no genuine issue as to any material fact relating to: (1) whether Respondents made the representations challenged in the Complaint and (2) whether these representations were unsubstantiated and misleading in a material respect. Thus, Complaint Counsel is entitled to summary decision as a matter of law.

IV. RESPONDENTS DISTRIBUTE THEIR PRODUCTS IN COMMERCE

A. The FTC Has Jurisdiction Over Even Ostensibly Nonprofit Entities Engaging in For-Profit Activities.

Under Section 5 of the FTC Act, the FTC is “empowered and directed” to prevent unfair or deceptive practices in commerce by “persons, partnerships, or corporations.” 15 U.S.C. § 45(a)(2). “Corporations” are defined in Section 4 of the FTC Act as “any company . . . which is organized to carry on business for its own profit or that of its members.” 15 U.S.C. § 44.

“Courts have consistently recognized that the [FTC] Act applies to ‘corporations’ organized for profit regardless of the form of their charter or statutory source.” *FTC v. Ameridebt, Inc.*, 343 F. Supp. 2d 451, 460 (D. Md. 2004) (citing *Community Blood Bank v. FTC*, 405 F.2d 1011, 1018-20 (8th Cir. 1969)). See also *FTC v. Nat’l Comm’n on Egg Nutrition*, 517 F.2d 485, 488 (7th Cir. 1975) (affirming jurisdiction over trade group organized for the profit of its members). Furthermore, courts have long held that non-profit corporations are not exempt from the reach of the FTC Act. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 769 (1999); *Nat’l Comm’n on Egg Nutrition*, 517 F.2d at 489; *Community Blood Bank*, 405 F.2d at 1017; *Ameridebt, Inc.*, 343 F. Supp. 2d at 451.

As the Court noted in *California Dental Association*, “the logic and purpose of the FTC Act comports” with the notion that the FTC can sometimes have jurisdiction over ostensibly non-profit entities, which often “have the same capacity and derivatively, at least, the same incentives as for-profit organizations to engage in unfair methods of competition or unfair and deceptive acts” and may even have “certain advantages” because “[they] would enjoy the screen of superficial disinterest while devoting itself to serving the interests” of its for-profit affiliates. 526 U.S. at 769.

Here, Respondents are engaged in for-profit activities. Respondents charge consumers three to ten times what it costs them to purchase the DCO Products from manufacturers. See pp. 5-6, *supra*. They charged FTC Investigator Marino \$175.75 for the four DCO Products. CCSF ¶¶ 52 and 58. Moreover, Respondents even run an affiliate sales program, and advise those who want to join this program of the sales and profits they too can make. CCSF ¶ 70. On their Web site, Respondents also place a “™” next to their products, indicating that their products are trademarked, so as to protect DCO from having its brand (and profits) diluted.

Moreover, the profits generated by the sale of DCO products allow DCO to own two houses used by the Feijos, to own two Cadillacs used by Feijos, and to pay all the Feijos living expenses. CCSF ¶¶ 5,15, and 22-25.

B. Respondents Are Engaged in Commerce.

Respondents admit that they distribute the DCO Products in commerce, CCSF ¶ 30, an admission borne out by their activities. Nationwide advertising, marketing, or sales activity constitutes “commerce” under the FTC Act. *See, e.g., P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 272 (6th Cir. 1970); *see, e.g., Ford Motor Co. v. FTC*, 120 F.2d 175, 183 (6th Cir. 1941) (noting that commerce also includes the actions, communications, and other acts or practices that are incident to those activities). Respondents engage in nationwide advertising, marketing, *and* sales activity.

First, Respondents advertise their products on their Web sites and on their Radio Show. CCSF ¶¶ 104-05, 117-18, 122, 128-31, and 136. Next, DCO has a toll-free telephone number and a call center for consumers to purchase the DCO Products. CCSF ¶ 31. DCO’s toll-free number is advertised on DCO’s Web site, “BioGuide,” radio program, and on the front page of DCO’s BioMolecular Nutrition Product Catalog, where Respondents inform consumers to “Call Toll FREE 1-800-504-5511 or shop online at www.danielchapterone.com.” CCSF ¶¶ 31-33, and 36. DCO’s Order Center is open Monday through Friday from 9:00 a.m. to 8:00 p.m., and receives payments through credit card and COD. CCSF ¶¶ 40-41. DCO also accepts consumers’ orders on the Internet. CCSF ¶ 42. DCO’s Web site invites consumers to shop at DCO’s “On-Line Store” and to “Buy Now.” CCSF ¶¶ 43-44. In addition, a number of stores nationally sell DCO’s products. CCSF ¶ 63. Over one thousand consumers have purchased

DCO's products. CCSF ¶ 46. DCO has generated \$2 million in annual gross sales for each of the last several years. CCSF ¶ 47.

Thus, regardless of how Respondents may attempt to hide their conduct from scrutiny, the uncontroverted facts firmly establish DCO's distinctly for-profit nature, and as engaging in commerce, placing Respondents squarely within the jurisdiction of the FTC Act.

V. RESPONDENTS' DECEPTIVE ADVERTISING VIOLATES SECTIONS 5 AND 12 OF THE FTC ACT.

The undisputed evidence shows that Respondents engaged in unfair or deceptive acts or practices prohibited by Sections 5 and 12 of the FTC Act. Section 5(a) provides that "unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful." 15 U.S.C. § 45(a)(1). Section 12 prohibits the dissemination of "any false advertisement" in order to induce the purchase of "food, drugs, devices, or cosmetics." 15 U.S.C. § 52(a)(2).²

An advertisement is deceptive under the FTC Act if it is likely to mislead consumers, acting reasonably under the circumstances, in a material respect. *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (citing Sections 5 and 12); *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 297 (D.Mass 2000); *Telebrands Corp.*, 140 F.T.C. 278, 290 (2005), *aff'd*, 457 F.3d 354 (4th Cir. 2006); *In re Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *Cliffdale Assocs. Inc.*, 103 F.T.C. 110, 164-66 (1984); *FTC Policy Statement on Deception*, 103 F.T.C. 174 (1984) (appended to *Cliffdale Assocs.*).

² For the purposes of Section 12, the DCO Products are "food" or "drugs." 15 U.S.C. § 55(a), (b), (c) (defining "food" as, among other things, "articles used for food or drink for man," and defining "drug" as, among other things, "articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man"). Section 12 defines "false advertisement" as "an advertisement, other than labeling, which is misleading in a material respect." 15 U.S.C. § 55.

In implementing the “likely to mislead” standard, “the [FTC] examines the overall net impression of an ad[vertisement] and engages in a three-part inquiry: (1) what claims are conveyed in the advertisement; (2) are those claims false or misleading; and (3) are those claims material to prospective consumers.” *Kraft*, 970 F.2d at 314.

A. Respondents Represented in Their Advertisements that Their Products Prevent, Treat, and/or Cure Cancer.

1. The Appropriate Legal Standard Is the Overall Net Impression Created by the Advertisement.

The FTC may use its own reasoned analysis to determine what claims an advertisement conveys. *See Kraft*, 970 F.2d at 318 (“[i]n determining what claims are conveyed by a challenged advertisement, the [FTC] relies on . . . its own viewing of the ad”); *see also FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). In determining whether an advertisement conveys a claim, the Commission looks to the overall, net impression created by the advertisement, through the interaction of different elements in the advertisement, rather than focusing on the individual elements in isolation. *Stouffer Foods Corp.*, 118 F.T.C. 746, 799 (1994); *Kraft*, 114 F.T.C. 40 at 122 (1991); *American Home Prods. Corp. v. FTC*, 695 F.2d 681, 688 (3d Cir. 1982); *FTC Policy Statement on Deception*, 103 F.T.C. 174, 179 (1984) (appended to *Cliffdale Assocs.*) (emphasizing importance of considering “the entire mosaic, rather than each tile separately”). Features of an advertisement such as a product name, visual images, and the use of testimonials may imply claims. *Jacob Siegel v. FTC*, 327 U.S. 608, 609 (1946); *Kraft*, 114 F.T.C. at 322; *Thompson Medical*, 104 F.T.C. at 793 and 811-12; *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 301, 303 (7th Cir. 1979). To determine how “reasonable consumers” interpret a claim, the Commission considers the target market for the advertisement. When the target market consists of “desperate consumers with terminal illnesses,” the FTC has shown

particular care in evaluating deceptive acts or practices. *FTC v. Travel King, Inc.*, 86 F.T.C. 715 (1975).

Advertising claims may be express or implied. *Kraft*, 970 F.2d at 318. Express claims directly state the representation at issue, while implied claims make representations without direct statements. *Id.* at 318 and 319 n.4; *Thompson Medical*, 104 F.T.C. at 788-89. The courts and the FTC have recognized consistently that implied claims fall along a continuum, from those which are so conspicuous as to be virtually synonymous with express claims, to those which are barely discernible. *See, e.g., Kraft*, 970 F.2d at 319; *FTC v. Febre*, No. 94 C 3625, 1996 WL 396117, at *4 (N.D. Ill. July 2, 1996) (magistrate judge recommendation), adopted by 1996 WL 556957 (N.D. Ill. Sept. 25, 1996), *aff'd*, 128 F.3d 530 (7th Cir. 1997); *see also Bronson Partners*, 564 F. Supp. at 127-28 (an advertisement's statements were "so clear, repetitive, and unambiguous that they constitute[d] the functional equivalent of express claims").

This Court has the authority to grant summary decision as to the conveyed meaning of advertisements and promotional materials based on a facial analysis of these advertisements or promotional materials. *Automotive Breakthrough Sciences, Inc.*, Docket Nos. 9275-77, 1996 FTC LEXIS 252, at *44, (Partial Summary Decision May 22, 1996) (citing *Kroger Co.*, 98 F.T.C. at 726, 729 n.11; *Ford Motor Co.*, 87 F.T.C. 756, 794-97 (1976)). No genuine issue of material fact is created simply by Respondents disputing that the advertisements make the alleged claims. *See Kroger*, 98 F.T.C. 729 n.11; *Kraft, Inc.*, 114 F.T.C. at 120 n.8; *Automotive Breakthrough Sciences*, 1996 FTC LEXIS 252 at *43. Commission law recognizes that advertisements may be susceptible to more than one reasonable interpretation. *Kraft*, 114 F.T.C. at 120 n.8. "Statements susceptible of both a misleading and a truthful interpretation will be

construed against the advertiser.” *Bronson Partners*, 564 F. Supp. 2d 119, 127 n.6 (D. Conn. 2008) (quoting *Country Tweeds, Inc. v. FTC*, 326 F.2d 144, 148 (2d Cir. 1964)).

If the facial analysis demonstrates that the claims were conveyed in the advertisements and promotional materials, the Court need not consider extrinsic evidence even if such evidence is offered. *Novartis*, 127 F.T.C. 580, 680 (1996); *Stouffer*, 118 F.T.C. at 798; *Kraft, Inc.*, 114 F.T.C. at 121; *Thompson Medical*, 104 F.T.C. at 789.

2. Respondents Claimed that the DCO Products Could Prevent, Treat, and/or Cure Cancer.

The Complaint alleges that Respondents represented in their advertising and promotional materials that the DCO Products were effective in preventing, treating, and/or curing cancer. As the Court noted in its February 2, 2009 Order Denying Respondents’ Motion to Dismiss Complaint, Respondents admit in their Answer that they made such claims. Order Den. Resp’ts’ Mot. to Dismiss, at 2; Answer ¶ 14.

In addition to Respondents’ admissions, a facial analysis of the challenged DCO Products’ advertisements and promotional materials establishes that the alleged representations are a reasonable interpretation. Respondents’ advertisements and promotional materials for the DCO Products, which include, but are not limited to, Exhibits A-D of the Complaint, convey bold promises of cancer prevention, treatment, and cure that, if not express, are so strongly implied as to be virtually express.

a. Respondents’ Advertising Represented that Bio*Shark Inhibits Tumor Growth and Is Effective in Treating Cancer.

Respondents’ Web page for Bio*Shark contains both express and strongly implied representations that create the net impression that Bio*Shark inhibits tumor growth, as alleged in ¶14 a of the Complaint. Complaint Counsel’s Summary Decision Exhibit (hereinafter referred to

