



**MEMORANDUM IN SUPPORT**

FTC Rule of Practice 3.15 (16 CFR § 3.15) allows for the amendment of a pleading “whenever determination of a controversy on the merits will be facilitated thereby [and] to avoid prejudicing the public interest and the rights of the parties.” *See* 16 CFR §13.5(a)(2).

**A. The Proposed Amendment Facilitates the Determination of This Controversy and Prevents Prejudice to Respondents.**

One of Respondent’s foremost claims in this proceeding is that the FTC standards governing deceptive and false advertising, as applied to Respondents, substantially burden Respondents’ free exercise of religion. *See Respondents’* Objection and Memorandum in Opposition to Complaint Counsel’s Motion to Compel Production of Documents, pp. 13-17. 42 U.S.C. Section 2000bb-1(a) provides that the “Government shall not substantially burden a person’s free exercise of religion even if the burden results from a rule of general applicability....” 42 U.S.C. Section 2000bb-1(c) further provides that “[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a ... defense in a judicial proceeding and obtain appropriate relief against a government.” *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424 (2006).

According to 42 U.S.C. Section 2000bb-2(1), the FTC is subject to the provisions of 42 U.S.C. Section 2000bb-1 in that the FTC is a “branch, department, agency, [or] instrumentality ... of the United States.” According to 42 U.S.C. Section 2000bb-1(c), Respondents — as a party defendant to this case and controversy, having alleged in their first affirmative defense a personal injury fairly traceable to the FTC’s unlawful conduct and for which they are likely to be redressed by the

requested relief — has standing under Article III of the United States Constitution. See Allen v. Wright, 468 U.S. 737, 751 (1984).

Allowing Respondents to invoke the protections of their free exercise of religion under the Religious Freedom Restoration Act (“RFRA”) conforms with Congress’s statement that one of its purposes is “to provide a claim or defense to persons whose religious exercise is substantially burdened by government.” 42 U.S.C. section 2000bb(b)(2).

**B. The Proposed Amendment Conforms to the Evidence.**

According to RFRA Section 2000bb-2(4), “the term ‘exercise of religion’ means religious exercise, as defined in section 2000cc-5.” Section 2000cc-5(7)(A) states that “‘religious exercise’ includes **any** exercise of religion, whether or not compelled by, or central to, a system of religious belief.” (Emphasis added). The discovery process in this case has uncovered substantial evidence that the FTC complaint and proposed orders would substantially burden Respondents’ “religious exercise.”

**C. Justice Requires Leave for Granting the Amendment.**

RFRA’s Section 2000bb(a) includes the findings that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise,” and that “governments should not substantially burden religious exercise without compelling justification.” Thus, Section 2000bb-(b) announces that the purpose of 2000bb-1 is: (1) “to restore the compelling interest test set forth in *Sherbert v. Verner* ... and *Wisconsin v. Yoder* and to guarantee its application **in all cases** where free exercise of religion is substantially burdened,” and (2) to provide a ... defense to persons whose religious exercise is substantially burdened by government.” Otherwise, the constitutional right of free exercise of religion would not be

“secured” as an “unalienable right,” as provided for by the First Amendment guarantee of free exercise of religion. *See* 42 U.S.C. Section 2000bb(a).

The FTC may claim that its rules governing false and deceptive advertising are “neutral,” but the application of those rules “burden [Respondents’] religious exercise as surely as laws intended to interfere with religious exercises.” Thus, it would be in the interest of justice for Respondents to invoke RFRA’s Section 2000bb-1(a) and (c) as a defense in this case.

**D. No Prejudice Will Result.**

Citing Foman v. Davis, 371 U.S. 178, 182 (1962), the United States District Court for the Northern District of California observed that “[i]n the absence of any apparent or declared reason — such as undue delay, bad faith or dilatory motive ... undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. — leave sought should, as the rules require, be ‘freely given.’” Reiffen v. Microsoft, 270 F. Supp. 2d 1132, 1159 (N.D. Cal., 2003).

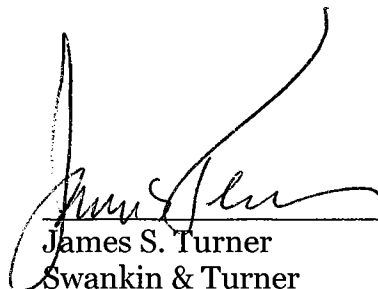
Respondents’ amendment does not create the need for any additional discovery, nor will it delay the proceedings. Thus, Complaint Counsel is not prejudiced. To the contrary, Complaint Counsel has been amply forewarned of the religious nature of Respondents’ ministry and of their claims of religious freedom based upon the free exercise guarantee of the First Amendment. *See, e.g.*, Respondents’ Motion to Dismiss and Supporting Memorandum of Points and Authorities, pp. 1-4, 17-21. As RFRA’s Section 2000bb(a) states, Section 2000bb-1 is simply and specifically designed to secure the full scope of that guarantee.

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

Respectfully submitted February 24, 2009.



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4 **IN THE UNITED STATES OF AMERICA**  
5 **BEFORE THE FEDERAL TRADE COMMISSION**  
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 \_\_\_\_\_ )

14 **SWORN STATEMENT OF COUNSEL FOR RESPONDENT**

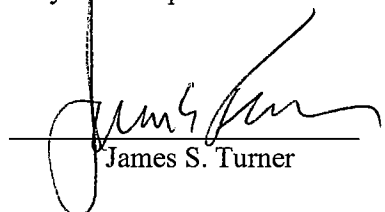
15 This statement is being submitted in accordance with Additional Provision #5 of the Court's  
16 Scheduling Order of October 28, 2008, and in support of Respondents' Second Motion to Amend their  
17 Answer to the Complaint.

18 I certify that I have conferred with Complaint Counsel Theodore Zang, Jr. in a good faith effort to  
19 resolve the issues raised by the attached Second Motion to Amend Answer and have been unable to reach  
20 an agreement. I conferred with Counsel Zang about the possibility of Complaint Counsel agreeing to the  
21 proposed amendment on February 24, 2009.  
22

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

24 Dated this 24th day of February, 2009.

25 Swankin & Turner  
26 Attorneys for Respondents

27  
28 By:   
James S. Turner

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17 **[PROPOSED] ORDER**  
18 **GRANTING RESPONDENTS' MOTION TO AMEND ANSWER**

19 On February 24, 2009, counsel for Respondents filed their Second Motion to Amend  
20 Respondents' Answer *In the Matter of Daniel Chapter One*, Docket No. 9329. The Court being  
21 fully advised,

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

24 Dated this \_\_\_ day of \_\_\_\_\_, 2009.

25 \_\_\_\_\_  
26 D. Michael Chappell  
27 Administrative Law Judge  
28



Bible's Old Testament, the text of which states that proper religious practice includes a natural diet. This principle is reflected throughout DCO's religious and educational communications, which are accessible to DCO followers and constituents via the DCO website and other media.

Part of DCO's religious ministry involves the supply of natural dietary supplements. It is these DCO supplements, and DCO's claims about them, that prompt the FTC's Complaint here. In light of the connection between DCO's ministry and its dietary supplements, this case is unlike any to have come before the FTC to date.

The FTC's Complaint against DCO contends that DCO has created an "overall net impression" that four specific supplements are offered to cure or treat cancer. The FTC Complaint charges that this activity is therefore false and misleading under 15 USC § 52, and unfair and deceptive under 15 USC §45.

DCO disputes the FTC charges as a matter of substance, and based on several Constitutional grounds. However, this Motion is not about the substantive controversy involved in the FTC's charges. There are no issues of material fact relevant to the legal issue raised in this Motion.

By this Motion, DCO will show that the FTC's charges must be dismissed due to the FTC's inability at this stage of the proceedings to meet its evidentiary burden of proof. There can be no factual dispute. Discovery is now closed, and the record reveals that the FTC has ignored or otherwise failed to produce the evidence required to prove essential elements of the statutory charges against DCO. Instead, the FTC has relied almost exclusively on presumptions. A

defendant/respondent is entitled to summary judgment when it can show the plaintiff/prosecution lacks the necessary evidence to sustain its burden at trial. Such is the case here.

## **II. Analysis of the DCO Mosaic**

In the present case, the FTC's Complaint is based on charges that DCO has created an "overall net impression" of cancer cures via its website.<sup>3</sup> The FTC does not contend that DCO has made express claims of cancer cures. FTC case law, guidelines and policy statements have stated clearly over the years that when allegations of deception are based on the "overall net impression," the entire framework and context of the representations must be considered, along with other important factors.

"It is necessary in these cases to consider the advertisement in its entirety, and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately." *FTC v. Sterling Drug*, 317 F. 2d. 669, 674 (2<sup>nd</sup> Cir. 1963).

To evaluate the DCO mosaic, it is important to know two things: first, what the FTC's Complaint omits about DCO claims; and second, what the FTC's Complaint misrepresents about DCO claims.

### **A. What the Complaint Omits**

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<sup>3</sup> See FTC Answers to DCO Interrogatories # 1 and 3 through 10, attached as Exhibit A to the McCormack Declaration.

The FTC Complaint is based on DCO representations that appear in the DCO website and other media. The DCO representations on which the FTC relies are contained in the Exhibits attached to the Complaint.<sup>4</sup> FTC investigators and legal staff discovered DCO by means of an “internet surf” (i.e., google search) that targeted DCO along with over a hundred other dietary supplement manufacturers.<sup>5</sup> The investigators who designed the surf, who targeted DCO and who researched DCO’s claims had no background in health care.<sup>6</sup> The FTC administrator who instigated this particular web surf testified that the decision to pursue the DCO Complaint was based on “common sense” and FTC policy.<sup>7</sup> The FTC’s only disclosed expert did not review this case until after the Complaint in this matter was filed.<sup>8</sup>

The FTC’s myopic pursuit of DCO resulted in at least two errors in the DCO Complaint. The first of these errors is an error of omission, i.e. what the FTC Complaint leaves out about DCO’s website. The second error is one of commission, i.e. what the FTC misrepresents about the DCO website and other materials.

In the first instance, the FTC has omitted several indisputable features from the mosaic that is DCO and its claims. The first omission is the name Daniel Chapter One itself, a book of the Old Testament. The following comes from the DCO website:

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<sup>4</sup> See FTC Answers to DCO Interrogatories 1 at Exhibit A to McCormack Declaration.

<sup>5</sup> Lynne Colbert Dep, at \_\_\_\_\_. Exhibit B to McCormack Declaration.

<sup>6</sup> Colbert Dep, at \_\_\_\_; Richard Cleland Dep, at \_\_\_\_\_, Exhibit C to McCormack Declaration.

<sup>7</sup> Cleland Dep at \_\_\_\_\_.

<sup>8</sup> See Miller Dep at \_\_\_\_\_, in which he testified that his source for review of DCO alleged claims was the Complaint itself. Exhibit D to McCormack Declaration.

Welcome to Daniel Chapter One Online!

Daniel Chapter One got its name from the Old Testament, book of Daniel, first chapter. In that account, Daniel and his men were being held in Babylonian captivity, and were expected to eat the king's food -so as to be fit and strong servants.

But Daniel asked permission to eat a vegetable diet and to drink only water, rather than partake of the rich meats and wine of the king. The king's men said no; surely Daniel would get sick, maybe die! So Daniel asked for a trial of 10 days. At the end of Chapter One, it is recorded that Daniel and men, after that trial, were strong in flesh, with bright eyes, and continued to grow in knowledge and wisdom.

So it was that the founders of Daniel Chapter One®, since trying their own "Daniel Chapter One" diet for 10 days and discovering that indeed they felt fantastic, decided to name the health food store they began, after that portion of the bible. The company, then and now, does not push a vegetarian diet for wellness, but simply a healthy diet of wholesome, natural foods - rather than the unwholesome, artificial food of the modern world. It's about eating with purpose, and partaking of the good food God has given us for health and healing. Good food for physical, mental, and emotional health includes herbs and nutrients.

The tiny health food supplement store Daniel Chapter One® grew and grew, from one to several locations. As the store grew, so the founders grew - in knowledge and wisdom, as in fact Daniel had experienced! The store quickly became more of a natural healing center. From their hands-on expertise, the couple began next to design the nutritional supplement product line now known world over as Daniel Chapter One.<sup>9</sup>

Every page of the DCO website contains the following statement:

The information on this website is intended to provide information, record, and testimony about God and His Creation. It is not intended to diagnose a disease. The information provided on this site is designed to support, not replace, the relationship that exists between a patient/site visitor and his/her health care provider. Caution: some herbs or supplements should not be mixed with certain medications.

The description of every product offered on the DCO website includes the following language:

*\*These statements have not been evaluated by the FDA. This product is not intended to diagnose, treat, cure or prevent disease. (Italics and “\*” supplied in original.)*<sup>10</sup>

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<sup>9</sup>[dc1pages.com/danielchapterone/index.php?option=com\\_content&task=view&id=16&Itemid=3](http://dc1pages.com/danielchapterone/index.php?option=com_content&task=view&id=16&Itemid=3)

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<sup>10</sup> See e.g.

[dc1store.com/component/page,shop.product\\_details/category\\_id,46/flypage,shop.garden\\_flypage/product\\_id,25?option,com\\_virtuemart/Itemid,44/](http://dc1store.com/component/page,shop.product_details/category_id,46/flypage,shop.garden_flypage/product_id,25?option,com_virtuemart/Itemid,44/)

From this more complete picture of the DCO mosaic, it cannot reasonably be disputed that the DCO ministry – including but not limited to its product offerings – is directed to a unique religious constituency. This indisputable fact bears on the burden of proof that the FTC is required to meet.

**B. What the Complaint Misrepresents**

The FTC Complaint also contains errors of commission, i.e. what the Complaint misrepresents. The Complaint identifies DCO representations about 4 DCO products: (1) Bioshark; (2) 7 Herb Formula; (3) GDU; and (4) BioMixx. At ¶18 of the Complaint, the FTC sets forth the representations attributed to DCO for each product.

The following chart juxtaposes what the FTC attributes to DCO with what DCO actually wrote on its website. This juxtaposition is important not only to a fair evaluation of DCO’s “structure/function” claims and the substantiation for those claims, but also to an understanding of the “overall net impression” that the FTC must now prove with substantial evidence consistent with the required standards of proof.

The FTC’s attribution to DCO	DCO’s actual claim
<p><u>About Bioshark:</u></p> <p><i>"Bioshark inhibits tumor growth"</i></p> <p><i>"Bioshark is effective in the treatment of cancer"</i></p>	<p><i>"Bioshark is pure skeletal tissue of sharks which provides a protein that inhibits angiogenesis -- the formation of new blood vessels. This can stop tumor growth and halt the progression of eye diseases . . ."</i></p>
<p><u>About 7 Herb Formula:</u></p> <p><i>"7 Herb Formula is effective in treating and curing cancer"</i></p>	<p><i>"purifies the blood, promotes cell repair, fights tumor formation, and fights pathogenic bacteria"</i></p>

<p><i>"7 Herb Formula inhibits tumor formation"</i></p>	
<p><u>About GDU:</u></p> <p><i>"GDU eliminates tumors"</i></p>	<p><i>"contains natural proteolytic enzymes (from pineapple source bromelain to help digest protein --even that of unwanted tumors and cysts. This formula also helps to relieve pain and heal inflammation. . .GDU is also used for. . .and as an adjunct to cancer therapy. GDU possesses a wide range of actions including anti-inflammatory and antispasmodic activity. . ."</i></p>
<p><u>About BioMixx:</u></p> <p><i>"BioMixx is effective in the treatment of cancer"</i></p> <p><i>"BioMixx heals the destructive effects of radiation and chemotherapy"</i></p>	<p><i>"boosts the immune system, cleanses the blood and feeds the endocrine system to allow for natural healing. It is used to assist the body in fighting cancer and in healing the destructive effects of radiation and chemotherapy treatments."</i></p>

Each of the statements that DCO actually made about its products is truthful and substantiated, as explained in more detail below. In contrast, the FTC has no qualified proof to the contrary that will support its charge of "overall net impression."

### **III. Basis and Standard for Summary Decision**

It bears emphasizing that this Motion for Summary Decision is based on the FTC's lack of competent, qualified evidence altogether, notwithstanding some potential factual issues that are not relevant to this Motion. To survive this Motion, the FTC must offer sufficient qualified evidence, not mere allegations. A "scintilla" of evidence, evidence that is "merely colorable", and evidence that "is

not significantly probative" will not defeat the motion. See e.g. *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986). It is also true, according to the elements of proof described below, that presumptions about the facts will not defeat this Motion.

This Brief shows that the FTC does not have the evidence to meet its burden in this case under the *preponderance of evidence* standard. Nevertheless, DCO contends that the standard of proof required of the FTC in this case is *clear, cogent and convincing* evidence in light of the Constitutional liberty and property interests involved in this case. See e.g. *Addington v. Texas*, 441 U.S. 418 (1970). This standard applies even in the summary judgment context, i.e. the FTC must produce clear, cogent & convincing evidence to defeat DCO's Motion. See *Anderson*.

*Addington* articulated the reasons for the *clear, cogent & convincing* standard in a case like this one. Though that case concerned the standard of proof in an involuntary civil commitment proceeding, the *Addington* Court's analysis properly fits the circumstances here. For instance, *Addington* states that the nature and importance of the Constitutional interest determines the proper standard of proof. In this case, the Constitutional interests include the First Amendment rights to free speech and religious freedom possessed by both DCO and its constituents.

*Addington* states that proper standard of proof flows from the relative importance attached to the ultimate decision, i.e., the more important the decision, the higher the burden of proof. *Id.* at 423. *Addington* established that there is a constitutional necessity for an intermediate standard of proof (i.e.,

"clear," "cogent," "unequivocal," and/or "convincing") in circumstances where the interest is greater than a mere money judgment but less than a generic criminal proceeding. *Id.* at 424. The intermediate *clear, cogent & convincing* standard is required in a variety of civil situations "to protect particularly important individual interests," namely Constitutional interests that are more important than the interest against erroneous imposition of a mere money judgment. *Id.*

*Addington* also noted that while the interest of the individual may dictate a higher standard of proof to avoid erroneous deprivation, important interests of the state are likewise vindicated by the higher burden because state interests would be compromised by a lower burden of proof, thus needlessly increasing the incidents of erroneous results. *Addington*, at 425.

Indeed, it is not just DCO's constitutional interests that are at stake. Also involved here is the interest of the public, constituents of DCO's ministry who exercise their right to access DCO's religious and educational messages, and the related wellness products and information. The public's interest is as much a part of this case as is DCO's interest.

In any event, now that discovery has closed, DCO contends that the FTC charges are wholly unsupported by the required evidence as a matter of law, even if this Court applies a *preponderance* standard.

#### **IV. The Law Requires the FTC to Produce Extrinsic Evidence**

There are a number of factors that bear on the FTC's burden of proof, and the elements of that proof required in a case like this one. First, in evaluating the FTC charges under 15 USC §§ 45 and 52, the Commission employs a "reasonable

basis” test for evaluating whether claims about Challenged Products are unfair, deceptive and/or misleading. See, e.g. *FTC v. Pharmatec*, 576 F. Supp. 294 (D.C.D.C. 1983); accord, FTC Policy Statement appended to *Thompson*<sup>11</sup>. This test requires the FTC to consider whether there is a “reasonable basis” for the claims, i.e. is there reliable and competent information to substantiate the efficacy claims made for the Products. *Thompson*, 791 F. 2d at 193-194.

The FTC must also address several other considerations in order to prove violations of §§45 and 52. For instance, where the charges against a respondent are based on the “overall net impression” rather than on any express claims, those charges must be proved by substantial evidence of consumer expectations in order for the FTC to prevail. *Thompson*, 791 F. 2d at 197. Accord, *Thompson* Policy Statement at p. 2.

Absent actual evidence of consumer expectations, according to the *Thompson* Policy Statement, the FTC’s substantial evidence must address the following 6 factors:

- The type of claim;
- The Products;
- The consequences of a false claim;
- The benefits of a truthful claim;
- The cost of developing substantiation for the claim; and
- The amount of substantiation experts in the field believe is reasonable.

See *Thompson* Policy Statement at p. 2.

The *Thompson* Policy Statement states clearly that these factors apply to charges of false/misleading advertising, deception and unfairness. “The Commission’s determination of what constitutes a reasonable basis depends, as it

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<sup>11</sup> *Thompson Medical*, 104 FTC 648 (1984), aff’d 791 F. 2d 189 (D.C. Cir 1986).

does in an unfairness analysis, on a number of factors relevant to the benefits and costs of substantiating a particular claim. These factors include [the list described above.]”

These factors are identical to the statutory requirements of 15 USC 6§45(n) applicable to claims of unfairness. In other words, the FTC must effectively meet the same standards of proof for false advertising and deception, as §45(n) requires for unfairness.

The *Thompson* Policy Statement goes on to say that “extrinsic evidence” is useful, including qualified expert testimony and consumer surveys. In fact, under 15 USC §45(n), extrinsic evidence is required. Presumptions and policy guidance alone will not suffice.

The Courts and the Commission have explained why extrinsic evidence about these factors is required in a case like this one. For instance, at the outset, evaluation of the 6 factors in an “overall net impression” case involves a “highly factual inquiry.”<sup>12</sup> One reason for that inquiry is because even the most orthodox commercial advertisers “are not required to substantiate claims that were not made.” *Thompson* Policy Statement at footnote #3. Only a “highly factual inquiry” can justify overall net impression claims.

**A. Extrinsic Evidence is Required to Prove Deception and Unfairness.**

As an adjunct to the required evidence that bears on the 6 factors of the *Thompson* Policy Statement, the FTC must also examine the allegedly deceptive practice from the perspective of a reasonable consumer. If the representation is

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<sup>12</sup> *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3<sup>rd</sup> Cir. 1976).

directed *primarily* to a particular group, the FTC is required to examine reasonableness from the perspective of that group.<sup>13</sup> See FTC Policy Statement appended to *Cliffdale Associates*<sup>14</sup> (hereinafter *Cliffdale* Statement). That is, the FTC must determine the effect of the challenged claims on a reasonable member of the target group, e.g. constituents of a religious ministry devoted to natural health and wellness.<sup>15</sup>

When such a specific group of recipients is involved, extrinsic evidence about that group’s reasonable perceptions is necessary. *Id.* See e.g. *Thompson*, 791 F. 2d at 197, where the Circuit Court made special note that “The issue of [consumer perception of the claims] was extensively addressed by expert testimony.” This is just one of the reasons why understanding the full mosaic of DCO as a religious ministry is so important, because it underscores the requirement for actual extrinsic evidence.

The FTC understands why it’s necessary to prove consumer perception with actual extrinsic evidence:

“[Consumer perception scores] may reflect basic consumer skepticism of promotional claims, however worded.”<sup>16</sup>

“Although some variations in consumer interpretation of qualified health claims is inevitable given what are almost certainly broad differences in [consumers’] background beliefs, the degree of variation observed in the research is nonetheless surprising . . .”<sup>17</sup>

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<sup>13</sup> Note that the representation need not be directed *exclusively* to a particular group.

<sup>14</sup> See FTC Statement on Deception, appended to *Cliffdale Associates*, 103 FTC 110, 174 (1984), hereinafter *Cliffdale* Statement.

<sup>15</sup> See *Cliffdale* Statement at footnotes 13 and 29.

<sup>16</sup> See p. *In the Matter of Assessing Consumer Perceptions of Health Claims*, FTC Staff Comments, p. 10. Complaint Counsel produced this document as indicative of FTC policy bearing on this matter under Bates document nos. FTC-DCO 870 to 894. See Appendix 1 attached hereto.

<sup>17</sup> *Id.*, at footnote 39.

These statements reveal an understanding that consumer perceptions vary greatly, and in surprising ways. Presumptions about consumer perception do not pass muster under the standards of the *Thompson and Cliffdale Policy Statements*, just as they do not pass muster under §45(n). The FTC must produce substantial evidence about consumer perception, and the 6 factors articulated by the *Thompson and Cliffdale Policy Statements*. This requirement is in accord with, as well as independent from §45(n).

**B. Qualified Expert Evidence is Required to Challenge Substantiation.**

Qualified expert testimony or other extrinsic evidence is required not just to satisfy the FTC's burden on the issue of consumer perception. Qualified expert testimony is also required to address the substantiation for "overall net impression" claims. This is especially true for cases involving natural dietary supplements, where science and law has prompted standards for dietary supplement claims that are dramatically different from the standards applied to drugs.

As a general matter, the FTC's Official Guidance to the Dietary Supplement Industry says that the amount and type of substantiation evidence required for dietary supplements is determined by what experts *in the relevant field* would consider to be adequate.<sup>18</sup> This is consistent with the qualifications required of an expert under the relevancy prong of the *Daubert* standard.<sup>19</sup>

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<sup>18</sup> *Dietary Supplements: An Advertising Guide for the Industry*, produced by Complaint Counsel as evidence of policy in this case. A copy is provided at Appendix 2, Bates no. FTC-DCO 1041 to 1070. See p. 1052, specifically.

<sup>19</sup> *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

In other words, without testimony from experts who are specifically qualified about dietary supplements (e.g. naturopaths and phyto-nutritionists), the FTC cannot meet its burden of proof about DCO's claims and the alleged lack of substantiation for those claims as a matter of law.

1. DCO's Structure/Function Claims are Not the Same as Health Claims for Drugs.

The FTC's need for expert testimony from the field of dietary supplements is drawn from the sharp distinction expressed by Congress between the regulation of dietary supplements claims on the one hand, and the regulation of drugs and drug claims on the other hand. Few, if any, FTC cases have addressed this distinction, as this case now must.

The Dietary Supplement Health and Education Act (DSHEA) authorizes dietary supplement manufacturers to make "structure/function" claims about their products:

[A] statement for a dietary supplement may be made if:

(A) the statement claims a benefit related to a classical nutrient deficiency disease and discloses the prevalence of such disease in the United States, **describes the role of a nutrient or dietary ingredient intended to affect the structure or function in humans**, characterizes the documented mechanism by which a nutrient or dietary ingredient acts to maintain such structure or function, or describes general well-being from consumption of a nutrient or dietary ingredient,

(B) the manufacturer of the dietary supplement has substantiation that such statement is truthful and not misleading, and

(C) the statement contains, prominently displayed and in boldface type, the following: "This statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease."

A statement under this subparagraph may not claim to diagnose, mitigate, treat, cure, or prevent a specific disease or class of diseases.

See 21 USC §343(r)(6). [Bold emphasis added.]

The meaning of this statute is well settled: a natural supplement provider is lawfully allowed to make structure-function claims describing how a particular nutrient or dietary supplement may affect a structure or function of the human body. See *Pearson v. Shalala*, 164 F. 3d 650 (1999); and *U.S. v. Lane Labs*, 324 F. Supp. 2d 547, 565 (2004). A fair reading of the actual DCO claims, as opposed to the inferences drawn by the FTC Complaint, shows that DCO claims are proper structure/function claims. Nowhere on the face of the actual DCO statements does DCO state that its products “diagnose, mitigate, treat, cure, or prevent a specific disease or class of diseases,” which are the claims prohibited by DSHEA. Each of the DCO statements on their face describe how the products and/or their constituent ingredients support the structure/function of the human body, as “adjuncts” to – not in lieu of - cancer treatment. The efficacy of these DCO claims is corroborated by DCO’s experts qualified in natural healing modalities, as discussed below.

It is well settled, and self-evident, that FTC law corresponds with DSHEA. Logic dictates that DSHEA influences FTC actions just as significantly as it does FDA actions. Lest there be any doubt as to the role DSHEA must play on FTC law, the FTC’s own words put the issue to rest:

“[S]tructure/function claims . . . refer to representations about a dietary supplement’s effect on the structure or function of the body for maintenance of good health . . . This [FDA] requirement is fully consistent with the FTC’s standard that advertising claims be truthful, not misleading and substantiated.”<sup>20</sup>

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<sup>20</sup> FTC Dietary Supplement Advertising Guide, footnotes 2 and 3; Bates page FTC-DCO 1068.

In light of DSHEA, it stands to reason that expertise on health claims for drugs is not the same field as expertise on structure/function claims for dietary supplements. Without expert testimony properly qualified for dietary supplements, the FTC does not meet its burden of proof.

To summarize this section, the FTC must address the 6 factors identified by the *Thompson* Policy Statement. It must do so with substantial evidence. These factors apply to FTC charges of deception, just as they apply to charges of unfairness. These factors mirror the requirements of 15 USC §45(n). As part of this inquiry, the FTC must also produce extrinsic evidence bearing on these factors especially when the charges are based on the “overall net impression,” as opposed to express claims. The required extrinsic evidence must address the perceptions of a reasonable person within the target audience to whom the Respondent’s activity is primarily directed. And the extrinsic evidence must include qualified expert testimony about dietary supplements, about the structure/function claims made for those dietary supplements, and about the substantiation that supports those claims.

The record of discovery taken in this case reveals that the FTC has not met any of these requirements.

#### **V. The FTC Lacks the Evidence to Sustain the Charges.**

The FTC has properly identified only three witnesses in this case. Two of those are FTC investigators who are identified as fact witnesses. The third witness is an expert witness qualified in the area of conventional cancer treatment and

research. As revealed by their testimony, as well as the testimony of the FTC administrator who conceived of the internet surf that resulted in this action, the FTC has failed to address the required elements of proof in almost every instance.

**A. The FTC did not consider the required elements of proof.**

1. FTC witness Michael Marino is an investigator whose role was limited to gathering evidence: he “recorded” the DCO website; he made an undercover website purchase of DCO products; he purchased recordings of two radio programs, and he did BBB, Lexis and Dunn & Bradstreet searches for DCO.<sup>21</sup> Mr. Marino had virtually no experience that he could recall investigating dietary supplement manufacturers before this DCO matter.<sup>22</sup> He played no role in the evaluation of DCO claims, and exercised no discretion about the investigation. That is, he did what he was told to do.<sup>23</sup>

Mr. Marino has no training in health matters, and no understanding of what a structure/function claim is.<sup>24</sup> He has no understanding of what is meant by “overall net impression.”<sup>25</sup> He investigated, but could not find any complaints about DCO products.<sup>26</sup> He has no knowledge about any consumer injury connected with DCO or its products.<sup>27</sup>

2. FTC witness Lynne Colbert was the supervising investigator for the internet surf involved here; her role includes supervision of FTC staff paralegals

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<sup>21</sup> See Deposition of Michael Marino, at p20:line 5-7; 34:1-5; 37:8-10 and 38:19-25. Exhibit E to the McCormack Declaration.

<sup>22</sup> Marino dep at 28:24-29:15.

<sup>23</sup> Id., at 30:17-31:17.

<sup>24</sup> Id. at 43:6-25.

<sup>25</sup> Id. at 53:20-54:1.

<sup>26</sup> Id., 49:16-25.

<sup>27</sup> Id., 52:11-20.

and legal technicians.<sup>28</sup> Ms. Colbert was the one primarily in charge of the internet surf involved in this case, including the development and direction of the internet search parameters, using google and other search engines.<sup>29</sup> She performed the preliminary evaluation of all claims discovered in the internet surf, and it was based on her discretion whether a particular target case moved on in the administrative process toward a Complaint.<sup>30</sup> She spent an average of 10 to 15 minutes evaluating the data from each dietary supplement provider's web site.<sup>31</sup>

She has paralegal training, but no background, training or qualifications in health care.<sup>32</sup> She has no training or education about consumer perceptions of health claims.<sup>33</sup> She has no training in regard to structure/function claims other than what she has read on her own.<sup>34</sup> She does not consider any religious speech that may exist in the context of alleged advertising claims.<sup>35</sup>

The investigators whom Ms. Colbert supervised received no instructions about how to evaluate implied claims, or how to evaluate consumer perceptions; the investigators used their own discretion in making those evaluations.<sup>36</sup> The FTC's Division of Advertising Practices has no health care experts on staff.<sup>37</sup>

Ms. Colbert generally uses an online data base accessible to FTC staff to search for information about dietary supplements; she cannot remember doing

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<sup>28</sup> See Colbert deposition at p. 7; lines 1-7. Exhibit B to McCormack Declaration.

<sup>29</sup> Id., at 8:1-15; 10:16-11:7

<sup>30</sup> Id., 23:14-18; 24:1-16.

<sup>31</sup> Id. 28:9-18

<sup>32</sup> Id., at 7:21-25; 44:18-25

<sup>33</sup> Id. at 24:15-25:5

<sup>34</sup> Id. at 34:1-24; 36:21-37-8

<sup>35</sup> Id. 60:2-22

<sup>36</sup> Id. at 14:5-16; 17:14-25

<sup>37</sup> Id. 44:18-25

so in regard to the DCO products.<sup>38</sup> She does not know if DCO was ever asked to provide substantiation for its claims.<sup>39</sup>

3. Richard Cleland is the Assistant Director for the Division of Advertising Practice at the FTC.<sup>40</sup> He testified for the FTC in this case as a designee on FTC policies and procedures. Mr. Cleland supervised the internet surf involved here, and he was the one who titled it “Operation False Cures.”<sup>41</sup> He participated in the exercise of prosecutorial discretion in this case.<sup>42</sup>

Mr. Cleland testified that it is within the FTC’s discretion to evaluate implied claims based on policy and case law; the Commission on its own determines the perspective of a reasonable consumer, and the target audience is presumed from the face of the ad alone.<sup>43</sup>

Mr. Cleland testified that he FTC conducted its “reasonable basis” analysis on the basis of presumptions about consumer perceptions and consumer harm; he testified that those presumptions are based on common sense and general FTC institutional knowledge.<sup>44</sup>

Mr. Cleland has no knowledge of economic or physical injury that resulted from DCO activity, and the FTC made no effort to evaluate the users of DCO products.<sup>45</sup> The FTC conducted no analysis under 15 USC §45(n) about whether there were benefits to users of the DCO products, nor did the FTC conduct any

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<sup>38</sup> Id. 42:2-43:6

<sup>39</sup> Id. 40:13-22

<sup>40</sup> Cleland Deposition, at p. 10, line 23 to page 11:line 2. Exhibit C to McCormack Declaration.

<sup>41</sup> Id. 11:9-19; 16:15-19.

<sup>42</sup> Id. 15:13-18.

<sup>43</sup> Id. 18:23-19:22; 20:5-13; 60:10-19; 60:21-61:4.

<sup>44</sup> Id. 68:21-69:21; ; 70:19-71:12.

<sup>45</sup> Id. 61:5-23; 67:17-68:7

analysis about the costs of substantiating dietary supplements.<sup>46</sup> He testified that the FTC used an expert in the field of cancer treatment to evaluate the DCO claims in this case.<sup>47</sup>

4. Dr. Denis Miller is the FTC's testifying expert. Dr. Miller's credentials as a cancer researcher for large pharmaceutical companies, and as a professional expert witness, are impressive. See Exhibit H to the McCormack Declaration. Dr. Miller conducted his analysis on the basis of the FTC's version of the implied claims, not on the basis of DCO's structure/function claims. See Exhibit H, p.4 and see e.g. Miller Deposition, p. 97:7-24, Exhibit D to McCormack Declaration. To be more specific, Dr. Miller only evaluated substantiation for whether DCO products "treat, cure and prevent cancer," and not the actual DCO claims themselves. Exhibit H, §IV at p. 7. See also, e.g. Miller Dep, 142:15-25.

Dr. Miller has no training or certification in nutrition. His credentials are in oncology and hematology.<sup>48</sup>

The sum of this testimony shows that the FTC has brought the charges against DCO based on presumptions, and erroneous presumptions at that. These presumptions include:

- A presumption that DCO was not authorized to make structure/function claims;
- A presumption that DCO's claims were directed to the general population, rather than a specific constituency related to its ministry;
- A presumption that the DCO constituency was deceived by DCO structure/function claims;

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<sup>46</sup> Id. 72:16-27; 85:20-86:3

<sup>47</sup> Id. 86:17-87:2

<sup>48</sup> Miller Dep, 14:18-25.

- A presumption that DCO products offered no benefits;
- A presumption that DCO had no substantiation for its structure/function claims;
- A presumption that the substantiation required for dietary supplements is equivalent to the substantiation required for prescription drugs.

Reliance on these presumptions does not meet the FTC's burden of proof required by the applicable statutes, guides and policy statements. Yet, the FTC has no other evidence to offer other than these presumptions. As a matter of law, the FTC's charges must be dismissed.

**B. DCO's substantiation is more than adequate to meet the required legal standards.**

Lest this Court be left with concern that the FTC's failings will allow a miscreant to walk free, DCO has substantiated its structure/function claims. And it has done so more than adequately. DCO supplied considerable substantiating documents to the FTC in discovery. Experts highly qualified in naturopathy and phyto-nutrition considered this substantiation, as well as additional confirming research, which allowed them to conclude that DCO's claims were proper and accurate structure/function claims.

By way of example, DCO expert witness Dr. Sally LaMont is a licensed naturopath and acupuncture practitioner. Her expertise includes the use of natural dietary supplements for healing and wellness. Dr. LaMont, who has testified before the California State Legislature in support of naturopathic

licensing and efficacy, has issued a written opinion in this case, stating that DCO's actual claims are accurate and substantiated by competent evidence.<sup>49</sup>

DCO expert witness Dr. Jim Duke is a world-renowned ethnobotanist who has written and lectured extensively on the medicinal qualities of plants and herbs. Dr. Duke co-authored the book *Herbs of the Bible: 2000 Years of Plant Medicine*.<sup>50</sup> Dr. Duke worked for 30 years at the USDA, where he established the USDA's ethnobotanical and phytochemical data base. Like Dr. LaMont, Dr. Duke is qualified about the qualities and effects on structure and function of natural products like those used in DCO products. Dr. Duke has also issued a written opinion in this case, stating that DCO's actual claims are accurate and substantiated by competent evidence.<sup>51</sup>

**VI. In the Absence of Actual Harm, the FTC must prove its case with Actual Evidence or otherwise Violate Due Process.**

There is a final point to be made about the FTC's flawed reliance on presumptions in a case involving dietary supplement structure/function claims. The principle of DSHEA is that dietary supplements are presumed safe unless and until they are proved harmful. The burden to prove harm is on the government. The FTC's approach in this case turns Congressional promulgation of DSHEA on its head by emasculating the dietary supplement providers' rights, and by ignoring the government's burden to prove harm.

Even without DSHEA, the FTC's near-exclusive reliance on presumptions in a case like this violates due process. It bears repeating: there are many factors

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<sup>49</sup> See LaMont Report, p. 40, attached to McCormack Declaration as Exhibit F.

<sup>50</sup> Duke & Telatnik, *Herbs of the Bible: 2000 Years of Plant Medicine* Interweave Press, 1999.

<sup>51</sup> See Duke Report, §IV at p. 3, and §VI at p. 13, attached to McCormack Declaration as Exhibit G.

that the FTC must consider in order to maintain charges of unfair, deceptive and misleading advertising. In circumstances like those presented here, those factors must be addressed with extrinsic evidence, including but not limited to consumer surveys, expert testimony about consumer perceptions and expert testimony qualified in the specific field of dietary supplements.

Without such extrinsic evidence, in the absence of actual harm and in the context of an “overall net impression” case, the ability of the FTC to meet nearly every element of proof by means of presumption effectively shifts the burden of proof to the Respondent DCO. This type of procedural approach absolves the government of the most basic obligation to put on a prima facie case with competent evidence. This is unconstitutional, as it violates due process in the most fundamental of ways.

In *Mathews v. Eldridge*<sup>52</sup>, the U.S. Supreme Court developed a three-part test to evaluate the minimum constitutional process due in a variety of procedural situations. In *Mathews* at p. 335, the Court considered whether a hearing prior to administrative termination of social security benefits was constitutionally required. The Court structured its consideration of procedural due process on three relevant factors: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used; and (3) the governmental interest in the added fiscal and administrative burden that additional process would entail.

DCO’s companion Motion amply addresses the constitutionally protected First Amendment and Religious interests and deprivations involved in this case.

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<sup>52</sup> 424 U.S. 319, 332 (1976)

For the purpose of this Motion, the third of the *Mathews* factors deserves an especially close look, i.e. the added fiscal and administrative burden that additional due process procedures would entail, i.e. the requirement to produce extrinsic evidence instead of presumptions. Mindful of the pages of FTC policy statements and guidelines that are devoted to First Amendment protections and the risk of deprivation, it is this third factor that especially drives the FTC to adopt “trial by presumption.”

Trial by presumption has been explicitly considered and explicitly rejected by the U.S. Supreme Court. Indeed, almost in anticipation of this 3<sup>rd</sup> element of the *Mathews* test, the U.S. Supreme Court decided *Stanley v. Illinois*<sup>53</sup> just a few years earlier than *Mathews*. The *Stanley* case concerned the due process requirements involved in parentage cases. The Court there addressed the specific question of whether the State could forego due process requirements in the interest of efficiency by adopting a presumption in lieu of meeting a burden of proof. Here, in a quote that seems to have anticipated not only *Mathews* but this case also, the *Stanley* court said this:

The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

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<sup>53</sup> 405 U.S. 645, 656-657 (1972).

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues . . . when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests . . . [Such a procedure] therefore cannot stand.

Allowing the FTC to try this case by presumption in the absence of actual harm, wherein the standard is a subjective “overall net impression,” improperly shifts the primary burden of proof to DCO in violation of DSHEA, *Matthews* and *Stanley*.

**A. Adjudication by presumption is the unauthorized use of *parens patriae* under the guise of police power.**

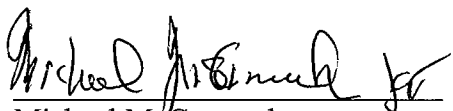
The FTC uses its police power to protect citizens from harm and the unreasonable risk of harm. A similar power is conferred on a government agency as *parens patriae* – government as parent – to determine what is good and healthy for citizens who are deemed unfit to care for themselves. See e.g. *Addington*.

When a government agency exploit its police power in the absence of harm, and in the absence of authentic, qualified and credible extrinsic evidence, that agency casts itself not as the arbiter of what is harmful, but as the arbiter of what is good and healthy. It casts itself as the *parens patriae* of healthcare for all citizens. Nothing could be more systemically damaging and offensive, much less unconstitutional, to the burgeoning and valuable healthy effects offered by dietary supplements to consumers, to say nothing of the actual users of DCO products who benefited from their faith in DCO when they were left with nowhere else to turn.

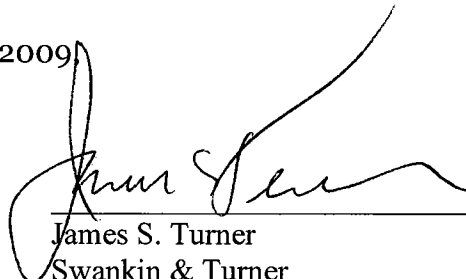
**CONCLUSION**

For the foregoing reasons, the Motion to Dismiss should be granted and the Complaint dismissed.

Respectfully submitted February 24, 2009



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

**In the Matter of** ) **Docket No.: 9329**  
**DANIEL CHAPTER ONE,** )  
**a corporation, and** )  
**JAMES FEJO,** ) **PUBLIC DOCUMENT**  
**individually, and as an officer of** )  
**Daniel Chapter One** )  
)  
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**Sworn Declaration of Michael McCormack in Support of Respondents' Motion for Summary Decision**

Michael McCormack swears under oath as follows:

1. I am one of the attorneys for Respondents in this matter. I have personal knowledge of the facts described below. I am competent to testify.

2. Attached hereto are the following documents, which are true and correct copies of documents produced in this matter through the course of discovery and expert disclosure:

Exhibit A: FTC Answers to DCO Interrogatories #1 through 10.

Exhibit B: Deposition excerpts from the deposition of Lynn Colbert, as referenced in Respondents' Motion.

Exhibit C: Deposition excerpts from the deposition of Richard Cleland, as referenced in Respondents' Motion.

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Exhibit D: Deposition excerpts from the deposition of Dr. Denis Miller, as referenced in Respondents' Motion.

Exhibit E: Deposition excerpts from the deposition of Mike Marino, as referenced in Respondents' Motion.

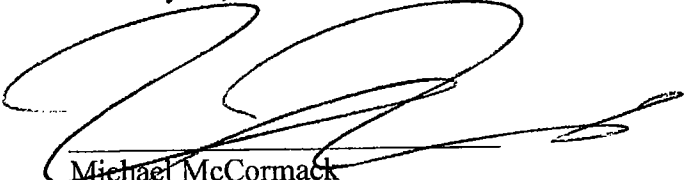
Exhibit F: Report of DCO expert Dr. Sally LaMont.

Exhibit G: Report of DCO expert Dr. James Duke.

Exhibit H: Report of FTC expert Dr. Denis Miller.

I certify under penalty of perjury that the foregoing is true and correct.

February 24, 2009.



Michael McCormack  
Co-counsel for Respondents  
26828 Maple Valley Hwy. #242  
Maple Valley, WA 98038  
425-785-9446

# **Exhibit**

# **A**

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

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

**COMPLAINT COUNSEL’S ANSWERS TO RESPONDENTS’ FIRST SET OF  
INTERROGATORIES**

Pursuant to this Court’s Scheduling Order dated October 28, 2008 and FTC Rule of Practice 3.35, Complaint Counsel submits the following Answers to Respondents’ First Set of Interrogatories, subject to and without waiving both the General Objections and the Specific Objections contained in Complaint Counsel’s Objections to Respondents’ First Set of Interrogatories, dated December 24, 2008. By providing information in response to Respondents’ Interrogatories, Complaint Counsel do not concede that such information is relevant, material, or admissible in evidence. Complaint Counsel’s responses to these Interrogatories are based on information now known to Complaint Counsel. The FTC has not yet completed its discovery of the facts in this lawsuit or prepared for trial and therefore reserves its rights to amend, modify, or supplement its responses if it learns of new information. Subject to and without waiving these objections, Complaint Counsel provide the following responses.

## INTERROGATORIES

1. For each of the representations that you attribute to Respondent in paragraph 14 a. through h. of your Complaint, state whether you believe the representation is “express” or “implied”, and identify the specific statement or statements that you allege Respondents disseminated which constitutes that representation.

### ANSWER:

Subject to Complaint Counsel’s previously stated objections, through the means described in Paragraphs 6 through 13 of the Complaint, including, but not limited to, the statements contained in the advertisements attached to the Complaint as Exhibits A through D, as well as the statements contained in Respondents’ documents produced to the FTC (under the heading “Web Pages from prior Daniel Chapter One Web Sites”), Respondents have created the overall net impressions caused by the challenged advertising, and thereby have made the representations alleged in paragraph 14 a. through h. of the Complaint. These statements include the following:

- “Bio\*Shark: Tumors & Cysts. . .Pure skeletal tissue of sharks which provides a protein that inhibits angiogenesis - the formation of new blood vessels. This can stop tumor growth.”
- “Bio\*Shark Shark Cartilage Stops tumor growth in its tracks.
- “INFO CENTER  
**Cancer News.**  
7 Herb Formula
  - purifies the blood
  - promotes cell repair
  - **fights tumor formation** [emphasis in original]
  - fights pathogenic bacteria...

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

7\*Herb Formula <sup>TM</sup> . . .

Bio\*Shark <sup>TM</sup> . . .

BioMixx <sup>TM</sup> . . .

GDU Caps <sup>TM</sup> . . .

[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!..."

- **"7 Herb Formula battles cancer.**

Tracey was given no hope!

The doctors had pretty much given up on Tracey. She had leukemia and tumors on the brain, behind the heart and on her liver. . .

This is Tracey's story in her own words as told in 1997: 'I had contracted leukemia and had three inoperable tumors. When I 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."

- "[GDU] Contains natural proteolytic enzymes (from pineapple source bromelain) to help digest protein - even that of unwanted tumors and cysts. This formula also helps to relieve pain and heal inflammation. . .and as an adjunct to cancer therapy."

- "GDU: With curcumin that research says may prevent cancer. . . .Daniel Chapter One - GDU caps contains proteolytic enzymes that metabolize protein and can aid the body in breaking down a tumor. The importance of oral enzymes in treating cancers has been the subject of scholarly papers and books for almost a century."

- "Bio\*Mixx boosts the immune system, cleanses the blood and feeds the endocrine system to allow for natural healing. It is used to assist the body in fighting cancer and in healing the destructive effects of radiation and chemotherapy treatments."

Complaint Counsel allege that Respondents' representations are both express and implied.

2. For each statement identified in your response to Interrogatory #1, identify the media source used by Respondents to disseminate the statements.

ANSWER:

Subject to Complaint Counsel's previously stated objections, to the best of Complaint Counsel's knowledge, the above statements appear or have appeared in a variety of media sources, including but not limited to, on Respondents' web sites, in Respondents' product literature and catalogs, and on Respondents' radio broadcasts.

3. Of the statements identified in Interrogatory #1, identify all statements that you contend are false.

ANSWER:

Subject to Complaint Counsel's previously stated objections, Complaint Counsel refer to Interrogatory Answer No. 1, which describes some of the statements made by Respondents that have contributed to the overall net impressions created by the challenged advertising. All of these statements are false because they are misleading in a material respect, as described more fully in response to Interrogatory No. 4.

4. State all facts upon which you based your contention that the statements identified in your response to Interrogatory #3 are false.

ANSWER:

Subject to Complaint Counsel's previously stated objection, the foregoing net impression claims are false, misleading, or lack substantiation for one or more of the following reasons as may be further delineated in expert reports produced in accordance with the applicable

Scheduling Order:

- a. There is no reliable study of the product that purports to test the claims;

- b. There is no reliable study of the ingredients as formulated in the product that supports the claims;
  - c. There is no known biologically feasible mechanism of action to support the claims;
  - d. The scientific literature does not provide reliable scientific evidence to support the claims; and
  - e. Anecdotal or testimonial evidence regarding the product's purported efficacy is not sufficient to substantiate the claims.
5. Of the statements identified in Interrogatory #1, identify all statements that you contend are deceptive.

ANSWER:

Subject to Complaint Counsel's previously stated objections, Complaint Counsel refer to Interrogatory Answer No.1, which describes some of the statements made by Respondents that have contributed to the overall net impressions created by the challenged advertising. All of these statements are deceptive, as described more fully in response to Interrogatory No. 6.

6. State all facts upon which you based your contention that the statements identified in your response to Interrogatory #5 are deceptive.

ANSWER:

Subject to Complaint Counsel's previously stated objection, the foregoing net impression claims are false, misleading, or lack substantiation for one or more of the following reasons as may be further delineated in expert reports produced in accordance with the applicable Scheduling Order:

- a. There is no reliable study of the product that purports to test the claims;

- b. There is no reliable study of the ingredients as formulated in the product that supports the claims;
  - c. There is no known biologically feasible mechanism of action to support the claims;
  - d. The scientific literature does not provide reliable scientific evidence to support the claims; and
  - e. Anecdotal or testimonial evidence regarding the product's purported efficacy is not sufficient to substantiate the claims.
7. Of the statements identified in Interrogatory #1, identify all statements that you contend are misleading.

ANSWER:

Subject to Complaint Counsel's previously stated objections, Complaint Counsel refer to Interrogatory Answer No. 1, which describes some of the statements made by Respondents that have contributed to the overall net impressions created by the challenged advertising. All of these statements are misleading, as described more fully in response to Interrogatory No. 8.

8. State all facts upon which you based your contention that the statements identified in your response to Interrogatory #7 are misleading.

ANSWER:

Subject to Complaint Counsel's previously stated objection, the foregoing net impression claims are false, misleading, or lack substantiation for one or more of the following reasons as may be further delineated in expert reports produced in accordance with the applicable Scheduling Order:

- a. There is no reliable study of the product that purports to test the claims;

- b. There is no reliable study of the ingredients as formulated in the product that supports the claims;
- c. There is no known biologically feasible mechanism of action to support the claims;
- d. The scientific literature does not provide reliable scientific evidence to support the claims; and
- e. Anecdotal or testimonial evidence regarding the product's purported efficacy is not sufficient to substantiate the claims.

9. Of the statements identified in Interrogatory #1, identify all statements that you contend are unfair.

ANSWER:

Subject to Complaint Counsel's previously stated objections, Complaint Counsel refer to Interrogatory Answer No. 1, which describes some of the statements made by Respondents that have contributed to the overall net impressions created by the challenged advertising. All of these statements are unfair, as described more fully in response to Interrogatory No. 10.

10. State all facts upon which you based your contention that the statements identified in your response to Interrogatory #9 are unfair.

ANSWER:

Subject to Complaint Counsel's previously stated objection, the foregoing net impression claims are false, misleading, or lack substantiation for one or more of the following reasons as may be further delineated in expert reports produced in accordance with the applicable

Scheduling Order:

- a. There is no reliable study of the product that purports to test the claims;

- b. There is no reliable study of the ingredients as formulated in the product that supports the claims;
  - c. There is no known biologically feasible mechanism of action to support the claims;
  - d. The scientific literature does not provide reliable scientific evidence to support the claims; and
  - e. Anecdotal or testimonial evidence regarding the product's purported efficacy is not sufficient to substantiate the claims.
11. For all statements identified in your response to Interrogatory #9, state the injuries that have been caused, or are likely to be caused, to consumers as a result of the alleged practices or acts of Respondents.

ANSWER:

Subject to Complaint Counsel's previously stated objections, although injuries have been caused, or are likely to be caused, to consumers as a result of the alleged practices or acts of Respondents, proving specific injury is not a necessary element of the proof in this litigation. Consumer injury is inherent when products are promoted for the cure, mitigation, treatment, or prevention of diseases or other health-related benefits through false, misleading, or deceptive representations. To that extent that such injury can be quantified in terms of economic harm consumers have suffered, Respondents possess information setting forth Respondents' total revenue from the sale of products with false, misleading, or deceptive representations.

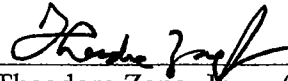
12. For all statements identified in your response to Interrogatory #9, identify the steps you have taken to determine whether or not the alleged injuries are reasonably avoidable by consumers.

consumers would not have less access to information about traditional use of natural remedies without information that comes from claims by supplement manufacturers about the traditional use of natural remedies, including dietary supplements.

ANSWER:

Subject to Complaint Counsel's previously stated objections, Complaint Counsel respond as follows: claims that are false, misleading, or lack substantiation do not provide any useful information to consumers, as set forth in the public policies expressed by Congress in Sections 5(a) and 12 of the FTC Act, the FTC Policy Statement on Deception, the FTC Policy Statement Regarding Advertising Substantiation, the FTC Food Policy Statement, the FTC Policy Statement on Unfairness, the FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, and in relevant case law.

Respectfully submitted,



---

Theodore Zang, Jr. (212) 607-2816

Carole A. Paynter (212) 607-2813

David W. Dulabon (212) 607-2814

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

Dated: January 5, 2009

# **Exhibit B**

**In the Matter of:**

Daniel Chapter One, et al.

*January 22, 2009*

*Lynne J. Colbert*

**Condensed Transcript with Word Index**



For The Record, Inc.

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1

1 FEDERAL TRADE COMMISSION  
 2 I N D E X  
 3  
 4 WITNESS: EXAMINATION: PAGE  
 5 LYNNE J. COLBERT BY MR. MCCORMACK 4  
 6  
 7  
 8 EXHIBIT: DESCRIPTION FOR ID  
 9 Number 4 FTC-DCO 1041-1070, Dietary 19  
 Supplements: An Advertising  
 Guide for Industry  
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2

1 UNITED STATES OF AMERICA  
 2 FEDERAL TRADE COMMISSION  
 3  
 4 In the Matter of: )  
 5 DANIEL CHAPTER ONE, a corporation, )  
 6 and ) Docket No. 9329  
 7 JAMES FEIJO, individually and as )  
 8 an officer of Daniel Chapter One )  
 9 -----)  
 10 Thursday, January 22, 2009  
 11  
 12 Room 318  
 13 Federal Trade Commission  
 14 One Bowling Green  
 15 New York, New York 10004  
 16  
 17 The above-entitled matter came on for  
 18 deposition, pursuant to notice, at 1:41 p.m.  
 19  
 20  
 21  
 22  
 23  
 24  
 25

3

1 APPEARANCES:  
 2  
 3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:  
 4 THEODORE ZANG JR., ESQ.  
 5 Federal Trade Commission  
 6 Northeast Region  
 7 One Bowling Green - Suite 318  
 8 New York, New York 10004  
 9 (212) 607-2816  
 10 tzang@ftc.gov  
 11  
 12 ON BEHALF OF THE RESPONDENTS:  
 13 MICHAEL McCORMACK, ESQ.  
 14 26828 Maple Valley Highway - #242  
 15 Maple Valley, Washington 98038  
 16 (425) 785-9446  
 17 -and-  
 18 JAMES S. TURNER, ESQ.  
 19 BETSY E. LEHRFELD, ESQ.  
 20 CHRISTOPHER B. TURNER, ESQ.  
 21 Swankin & Turner  
 22 1400 16th Street, N.W. - Suite 101  
 23 Washington, D.C. 20036  
 24 (202) 462-8800  
 25 jim@swankin-turner.com

4

1 P R O C E E D I N G S  
 2 - - - - -  
 3 Whereupon --  
 4 LYNNE J. COLBERT  
 5 a witness, called for examination, having been first  
 6 duly sworn, was examined and testified as follows:  
 7 EXAMINATION  
 8 BY MR. McCORMACK:  
 9 **Q. Good afternoon, Ms. Colbert.**  
 10 A. Yes.  
 11 **Q. My name is Michael McCormack again for the**  
 12 **record.**  
 13 **And also for the record, can you state your full**  
 14 **name and business address, please.**  
 15 A. Yes. Lynn, L-Y-N-N-E, middle initial J,  
 16 Colbert, C-O-L-B-E-R-T, 600 Pennsylvania Avenue,  
 17 Northwest, Mail Drop NJ-3212, Washington, D.C. 20580.  
 18 **Q. Ms. Colbert, have you ever had your deposition**  
 19 **taken before?**  
 20 A. Yes, I have.  
 21 **Q. How many times roughly?**  
 22 A. Roughly two or three times.  
 23 **Q. Okay. And do you recall the most recent time?**  
 24 A. No, I don't. It was approximately two years ago  
 25 I believe.

5

1 **Q. Okay. The other instances when you've had your**  
 2 **deposition taken, were they -- did you testify as an FTC**  
 3 **witness or employee of some sort as opposed to a**  
 4 **personal matter?**  
 5 A. As an FTC employee.  
 6 **Q. Do you remember the nature of the cases in which**  
 7 **you testified?**  
 8 A. One was a dietary supplement case.  
 9 And one was a device, but I was really a  
 10 peripheral player in that.  
 11 **Q. In the device case?**  
 12 A. Yes.  
 13 **Q. Okay. Generally let me just refresh your memory**  
 14 **perhaps to the extent it's helpful that our**  
 15 **court reporter is going to be transcribing everything we**  
 16 **say on the record for possible use in the hearing that**  
 17 **will occur as well as any appeals and other public**  
 18 **relations purposes perhaps.**  
 19 For that reason, I strive to try to make sure we  
 20 have as clear and clean a record as possible. And if  
 21 you will let me finish my question before answering and  
 22 I'll try to let you finish answering before I ask my  
 23 next question, that will probably be helpful.  
 24 Also, because nods and shakes of the head and  
 25 uh-huhs and huh-uhs don't transcribe very well, if at

7

1 A. I'm the supervisory investigator in the  
 2 Division of Advertising Practices.  
 3 **Q. And as the supervisory investigator in the**  
 4 **Division of Advertising Practices what are your job**  
 5 **responsibilities?**  
 6 A. I supervise the paralegals and investigative  
 7 staff and legal technician staff.  
 8 **Q. Is Michael Marino one of your reports or**  
 9 **subordinates?**  
 10 A. No, he is not.  
 11 **Q. Okay. How long have you been with the FTC?**  
 12 A. 21 years.  
 13 **Q. What other roles or job responsibilities other**  
 14 **than your current job responsibilities have you held**  
 15 **with the FTC, if any?**  
 16 A. As investigator.  
 17 **Q. Okay.**  
 18 A. That's -- that's all.  
 19 **Q. Okay. And what training did you have as an**  
 20 **investigator for the FTC, if any?**  
 21 A. Well, prior to my employment with the FTC, I  
 22 worked for two law firms. But prior to that, my  
 23 training -- I have a certificate in paralegal studies  
 24 from the Institute for Paralegal Studies in  
 25 Philadelphia, Pennsylvania. And prior to that, I have a

6

1 all, if I prompt you to say is that a yes or is that a  
 2 no, that's no disrespect intended. I just want to make  
 3 sure the record is clear.  
 4 Okay?  
 5 A. I understand.  
 6 **Q. Super.**  
 7 Also, if I ask any questions that you don't  
 8 understand -- and particularly as jet lag begins to seep  
 9 into me, I may be prone to that -- please let me know,  
 10 and I'll do my best to clarify.  
 11 Okay?  
 12 A. Okay.  
 13 **Q. Great.**  
 14 Ms. Colbert, you were recently identified as a  
 15 witness for the FTC in the Daniel Chapter One case. And  
 16 I'm familiar, for instance, with Mr. Marino's role, but  
 17 I have to confess I'm not familiar with your role at  
 18 all, so I'm going to do my best to ask generally what  
 19 your role is here and what your responsibilities are for  
 20 the FTC, and so forth, and try to understand more  
 21 specifically essentially what your testimony is going to  
 22 be at the hearing in this case.  
 23 So that's just a little bit of backstory.  
 24 With that in mind, can you tell me, what is your  
 25 title with the FTC?

8

1 BA degree from Mount Holyoke College.  
 2 **Q. Okay. When did you first become familiar with**  
 3 **Daniel Chapter One?**  
 4 A. I became familiar with it through the  
 5 2007 cancer Internet surf.  
 6 **Q. Is that also known as Operation False Cures?**  
 7 A. Yes, it is.  
 8 **Q. Okay. And were you -- strike that.**  
 9 **How were you involved in Operation False Cures**  
 10 **generally?**  
 11 A. I made sure that the database that we maintain  
 12 was operational for data entry of Web site claims that  
 13 we found. I sent -- I disseminated electronic mail to  
 14 our regional office participants regarding the surf,  
 15 announcing the surf, and providing instructions.  
 16 **Q. Correct me if I'm misstating what I think I just**  
 17 **heard.**  
 18 **But is it accurate to say that you're the person**  
 19 **that kind of constructed at least the technology aspects**  
 20 **of Operation False Cures?**  
 21 A. Well, in connection with the technology, if you  
 22 mean the database, I had assistance from our litigation  
 23 support division. The database was preexisting. We  
 24 used it as a prototype for all the surfs that we've  
 25 conducted over the years.

1 Q. Can you give me examples of other surfs that  
2 you've conducted over the years other than  
3 Operation False Cures?

4 A. In 2006 there was a surf for diabetes treatment  
5 and cure products.

6 MR. ZANG: Ms. Colbert, I'm sorry to interrupt,  
7 but before you go any further, I just want to caution  
8 you not to give testimony about surfs that have not been  
9 publicly identified, if any.

10 THE WITNESS: Okay.

11 MR. ZANG: Okay.

12 THE WITNESS: And prior to that, there had been  
13 some about ten -- eight to ten years ago.

14 There was one after the 9-11 catastrophe for  
15 biochemical and -- well, products related to terrorism.

16 Let's see.

17 And prior to that, in the late '90s, there was  
18 one that was conducted for serious disease claims such  
19 as HIV/AIDS, arthritis, cancer, and the like.

20 BY MR. McCORMACK:

21 Q. Okay. Is my understanding correct that in each  
22 of these surf situations, surf projects or operations  
23 that what the FTC was looking for were claims of some  
24 sort, health claims of some sort that were deemed false,  
25 misleading, unfair?

1 A. Yes. In addition to efficacy claims because --  
2 well, in connection with the 9-11, the terrorist  
3 products, it could have been apparatus or apparel, so  
4 performance claims, too.

5 Q. Okay. In terms of the diabetes claim, for  
6 instance, that was essentially directed, though, to  
7 health claims --

8 A. Yes.

9 Q. -- related to diabetes.

10 A. Yes.

11 Q. Okay. Moving forward to closer to the present  
12 time anyway, Operation False Cures was a surf  
13 exclusively directed to cancer claims; am I right about  
14 that?

15 A. Yes.

16 Q. Okay. And if you can, explain to me how the  
17 parameters of that surf were set up and how it was  
18 conducted.

19 A. The parameters included terminology, certain  
20 terminology that might be prevalent in claims of that  
21 sort. We were looking for express and implied claims  
22 for treatment and cure of cancer.

23 Q. Okay. Can I parse that out just a little bit.

24 You said terminology. I'm a -- as much as I've  
25 been around it, I'm a tech novice, so bear with me. I

1 think of a surf as putting a word or a series of words  
2 in the Google search bar and hitting "go" and seeing  
3 what comes up.

4 Are the surf parameters kind of like that on a  
5 more sophisticated basis?

6 A. Yes. That's pretty much rudiment, fundamentally  
7 how it's done.

8 I mean, we use other -- a number of other search  
9 engines so that our results are varied.

10 Q. Okay.

11 A. But there are certain terms or phrases or  
12 vocabulary that was suggested or recommended to surfers  
13 to employ.

14 Q. And now, when you say "surfers," you're talking  
15 about investigators and paralegals?

16 A. Yes.

17 Q. Do you recall what the search terms were that  
18 were used for Operation False Cures?

19 A. Melanoma, carcinoma, tumor, and then phrases  
20 such as miracle cure, scientific breakthrough.

21 Q. Were any protocols for creating the database  
22 written up to guide the surfers?

23 A. I'm sorry. Would you repeat that, please.

24 Q. Sure.

25 Were any protocol -- well, let me rephrase it

1 entirely.

2 Was there any list of terminology printed up for  
3 FTC surfers to use for Operation False Cures?

4 A. Yes, there was.

5 Q. Do you know if those lists still exist?

6 A. Yes. It does.

7 Q. Is Operation False Cures still going on to this  
8 day?

9 MR. ZANG: Let me just -- I want to interrupt  
10 for one minute. And Mr. McCormack, I just want to state  
11 a general objection. I'm going to allow Ms. Colbert to  
12 answer that question, but I do want to state for the  
13 record that any testimony going to investigations,  
14 either Daniel Chapter One or other ones, I do want to  
15 preserve our right to claim the investigatory and  
16 governmental deliberative privileges.

17 And Ms. Colbert, I'm going to allow you to  
18 testify generally about the mechanics, and so forth.  
19 If it sounds like you're getting too much into  
20 information that may involve discussions that you've  
21 had or advice you've been given with FTC attorneys, I  
22 may need to instruct you not to go further or answer.

23 THE WITNESS: Okay.

24 BY MR. McCORMACK:

25 Q. And so far it hasn't been my intention to ask

13

1 you those questions. I'm just looking for the mechanics  
 2 right now, so thank you.  
 3 So the terminology -- there's a terminology list  
 4 that exists for the surfers to use for  
 5 **Operation False Cures; right?**  
 6 A. Yes. The list contains some vocabulary, some  
 7 phrases, just recommended, just suggested. It wasn't  
 8 anything that had to be used.  
 9 **Q. Okay. Did the sufferers have discretion to go**  
 10 **beyond that list, to your knowledge?**  
 11 A. Yes.  
 12 **Q. And so what was -- if you know, what was the**  
 13 **general direction or instruction given to the surfers**  
 14 **for purposes of conducting their searches?**  
 15 A. Looking for express or implied claims for  
 16 treatment and/or cure of cancer.  
 17 **Q. Was the word "treatment" included in the**  
 18 **terminology list, do you know? Do you remember?**  
 19 A. I don't remember.  
 20 **Q. Okay. How about the word "cure"?**  
 21 **And not remembering is fine as you might**  
 22 **remember.**  
 23 A. I don't remember, but probably.  
 24 **Q. Okay. And the surfers could certainly use their**  
 25 **discretion in using those words for their search I**

15

1 A. I did.  
 2 **Q. Okay. Do you know, is that instruction sheet a**  
 3 **document that you'll be testifying about when the**  
 4 **Daniel Chapter One case goes to hearing?**  
 5 A. I don't know.  
 6 **Q. Now, in terms of -- I want to stick with this**  
 7 **notion of implied claims.**  
 8 **Strike that.**  
 9 **Let me go back to the instruction sheet.**  
 10 **Did you prepare the instruction sheet on your**  
 11 **own or was that in collaboration with a team?**  
 12 A. I used instructions that had been used in the  
 13 past. I incorporated specifics for cancer, such as the  
 14 terminology, the disease terminology or the -- but the  
 15 phraseology "scientific breakthrough" or "miracle cure,"  
 16 those are really general, general phrases.  
 17 **Q. Who came up with the -- that didn't sound very**  
 18 **good.**  
 19 **How was Operation False Cures specifically**  
 20 **developed and launched? Were you part of a team that**  
 21 **made that decision?**  
 22 A. No.  
 23 **Q. Do you know who was?**  
 24 A. Not really. No.  
 25 **Q. Okay. All right.**

14

1 **presume.**  
 2 A. Yes.  
 3 **Q. Okay. You used the phrase "express or implied**  
 4 **claims."**  
 5 **How, for purposes of preparing the database, are**  
 6 **implied claims determined or evaluated?**  
 7 MR. ZANG: Objection to the extent that that's  
 8 calling for some sort of legal conclusion, but if you're  
 9 asking for the witness' understanding, her own  
 10 understanding, that's fine.  
 11 MR. McCORMACK: I'm certainly asking for her  
 12 testimony and only her testimony.  
 13 THE WITNESS: Okay. Implied claims are  
 14 understood to be not literal but suggestive.  
 15 For example, the URL might imply something to  
 16 the surfer or the consumer.  
 17 BY MR. McCORMACK:  
 18 **Q. Okay. Any other guidelines that you're familiar**  
 19 **with to evaluate whether a claim is implied as opposed**  
 20 **to express?**  
 21 A. Well, I just don't remember verbatim what was in  
 22 the instruction sheet that the surfers would have been  
 23 reading.  
 24 **Q. To your knowledge, who prepared the instruction**  
 25 **sheet?**

16

1 **To whom do you report?**  
 2 A. To Richard Cleland.  
 3 **Q. And was it Mr. Cleland who gave you sort of the**  
 4 **directive to prepare this database for**  
 5 **Operation False Cures?**  
 6 A. Well, when I became aware that there was going  
 7 to be a surf, I just -- I knew from past experience that  
 8 we were going to need a database, so I called the  
 9 litigation support individual who helps with databases,  
 10 helps construct databases, and got it set up and  
 11 accessible.  
 12 **Q. Okay. So to be more specific, I guess what I'm**  
 13 **interested in, did at some point, before you prepared**  
 14 **the database or to help guide you in preparing the**  
 15 **database, did you receive instructions about your role**  
 16 **in Operation False Cures, written instructions?**  
 17 A. Written instructions about my -- what my role  
 18 would be?  
 19 **Q. Correct.**  
 20 A. No.  
 21 **Q. Okay.**  
 22 A. No.  
 23 **Q. Okay. Did you receive verbal instructions?**  
 24 A. No.  
 25 **Q. Okay. So you knew the surf was starting and**

17

1 you knew what your role was based on past experience  
 2 and --  
 3 A. Just from past experience, yes.  
 4 **Q. Got it. Okay. All right.**  
 5 Now I'll go back to the notion of implied  
 6 claims.  
 7 Are there any specific instructions given to  
 8 surfers to guide them in determining what an implied  
 9 claim entails?  
 10 A. There is a brief explanation in the instruction  
 11 sheet.  
 12 **Q. I couldn't do it if I were in your shoes, but**  
 13 **I'm going to ask you anyway.**  
 14 Do you remember any of those instructions from  
 15 the instruction sheet or the definition of what an  
 16 implied claim is from that instruction sheet?  
 17 A. No. Not from the instruction sheet, no.  
 18 **Q. Do the surfers make any evaluation of what they**  
 19 **think consumers would interpret from the alleged claims**  
 20 **that they're searching?**  
 21 A. No.  
 22 **Q. Okay. What did they use to guide them? Their**  
 23 **own sense of things?**  
 24 A. I presume, yes, that's what they use to guide  
 25 them. Some of the surfers are experienced investigators

19

1 were selected, so I don't know how they were selected.  
 2 And I know some of them have been with the FTC  
 3 for a while. It's possible that some of them had not  
 4 been employed here that long and might not be as learned  
 5 with surfing and identifying claims.  
 6 **Q. Okay. To your knowledge, with respect to**  
 7 **surfers who either you picked or with whom you may have**  
 8 **worked, was there any policy information given to those**  
 9 **surfers about what constitutes an implied claim?**  
 10 A. I -- in my office in advertising practices in  
 11 the Washington office, I gave information to the surfers  
 12 in that office. What happened in the regional offices I  
 13 don't know.  
 14 **Q. Understood.**  
 15 Do you remember what information you gave to the  
 16 surfers in your office?  
 17 A. There's a booklet. It's for industry.  
 18 Advertising for industry, a dietary supplement  
 19 advertising for industry, but it's on our Web site.  
 20 MR. McCORMACK: Right.  
 21 Excuse me just a second. Off the record.  
 22 (Discussion off the record.)  
 23 (DCO Deposition Exhibit Number 4,  
 24 FTC-DCO 1041-1070, Dietary Supplements: An Advertising  
 25 Guide for Industry, was marked for identification.)

18

1 also.  
 2 MR. ZANG: Mr. McCormack, I've been giving you  
 3 a lot of leeway on this line of questioning. I just  
 4 want to point out that Ms. Colbert is not necessarily  
 5 aware and no foundation has been established of, you  
 6 know, what the investigators working on the surf, for  
 7 example, actually did. I mean -- or you haven't  
 8 established that.  
 9 And to the extent you're asking about their  
 10 thought processes rather than hers, I would just point  
 11 out that there's no foundation, so I'm giving you  
 12 leeway --  
 13 MR. McCORMACK: Your objection is noted. Right?  
 14 We're objecting to form. Those are preserved.  
 15 Object to form. You can strike them later.  
 16 We're doing fine. Thank you.  
 17 BY MR. McCORMACK:  
 18 **Q. So are the surfers -- and let's stick with the**  
 19 **surfers who were involved in Operation False Cures.**  
 20 To your knowledge, are the surfers trained with  
 21 respect, for instance, to -- trained in consumer  
 22 awareness about implied claims, for instance?  
 23 A. Well, the surf was conducted among our regional  
 24 offices, and I initially sent the invitation/instruction  
 25 sheet to the office director, and from there surfers

20

1 BY MR. McCORMACK:  
 2 **Q. Ms. Colbert, I'm handing you what's been marked**  
 3 **DCO Exhibit Number 4, which I understand to be the**  
 4 **dietary supplement guide provided to us by complaint**  
 5 **counsel.**  
 6 If you'd just take a moment to look through that  
 7 and see if that's in fact the document to which you just  
 8 referred.  
 9 A. Yes, it is.  
 10 **Q. Okay. So what we see there in Exhibit Number 4**  
 11 **is a piece of information that you supplied to your**  
 12 **surfers in your regional office for use in**  
 13 **Operation False Cures.**  
 14 A. That's correct.  
 15 **Q. Okay. Anything else that you provided to your**  
 16 **surfers?**  
 17 A. No. Only if they had questions to feel free to  
 18 come to me, any confusion or questions.  
 19 **Q. Now, let's -- I want to stick for the time being**  
 20 **to how Operation False Cures unfolded within your**  
 21 **experience, mindful that -- well, actually let me make**  
 22 **sure of this.**  
 23 When did you first become aware of  
 24 Daniel Chapter One?  
 25 A. It would have been early July of 2007 because

1 the surf lasted from June 25th through the 27th, and I  
2 would not have received the printouts from anyone for a  
3 couple days, so it would have had to have been the end  
4 of June, early July.

5 **Q. Now, are we talking 2007?**

6 A. Yes.

7 **Q. Did the surf that uncovered Daniel Chapter One,  
8 if you will, originate out of your office, do you know?**

9 A. I don't know. I only know that it was an FTC  
10 staffer who found it.

11 **Q. Do you know which FTC staffer it was?**

12 A. No, I don't.

13 **Q. Okay. Do you know out of what office that FTC  
14 staffer worked?**

15 A. No, I don't.

16 **Q. Okay. So to the best of your recollection,  
17 share with me how it unfolded that you became familiar  
18 with Daniel Chapter One.**

19 A. After the surf ended, surfers sent -- well, from  
20 the regional offices they sent via Federal Express  
21 printouts from the Web sites that they found and felt  
22 were pertinent.

23 From the surfers within advertising practices  
24 office, they would have handed them to me.

25 **Q. Okay. So you were the central clearinghouse for**

1 **Was any consideration given at -- strike that.  
2 Help me with the time frame or sequencing.  
3 The surf occurred roughly June 25 to June 27,  
4 2007, and within roughly the next 30 days is when the  
5 data came in by Federal Express and otherwise from the  
6 offices?**

7 A. Yes.

8 **Q. Okay. Were you and your staff pretty much on  
9 top of that data and going through it immediately or was  
10 there some period of time before you got to it? Do you  
11 remember?**

12 A. I don't remember.

13 **Q. Okay. All right.**

14 **At the time that you were going through the  
15 initial data -- strike that -- initially going through  
16 the data, you're kind of the first threshold evaluator I  
17 gather; is that fair to say?**

18 A. That's fair to say.

19 **Q. Okay. Was any consideration given to, for  
20 instance, whether the company or organization was a  
21 nonprofit?**

22 A. No.

23 **Q. Okay. Was any consideration given to whether  
24 the organization was a religious organization?**

25 A. No.

1 **all the results of the surfs from all the regional  
2 offices.**

3 A. Yes.

4 **Q. Okay. Do you recall how many you got? And by  
5 "how many" I mean how many different dietary supplement  
6 companies you got.**

7 A. Well, there were well over a hundred.

8 **Q. Okay. And if you would, walk me through the  
9 mechanics, without telling me about conversations you  
10 had with counsel, walk me through the mechanics of what  
11 you did with that data.**

12 A. Okay. Well, we had to discard any duplicates,  
13 which there were several of.

14 **Q. Okay.**

15 A. We also were not interested in Web sites selling  
16 books.

17 **Q. Okay.**

18 A. So that's how we sifted out a lot of Web sites.

19 **Q. Okay. Were there any other filters or  
20 parameters that prompted you to use some discretion or  
21 decision-making authority about which ones moved forward  
22 and which ones you tossed?**

23 A. Well, the degree of egregiousness of the  
24 claims.

25 **Q. Okay. I'll come back to that in just a second.**

1 **Q. Back to the degree of egregiousness.**

2 **Can you explain to me what the parameters were  
3 for evaluating egregiousness?**

4 A. Well, if the statements were -- made blatant  
5 claims of curing, reversing, stopping, any -- if the  
6 consumer could take away any understanding of the  
7 disease being deterred in any way.

8 **Q. And I presume that during this process you're  
9 exercising your discretion in making that evaluation  
10 about the degree of egregiousness. Is that right?**

11 A. Based on what I just said, yes.

12 **Q. Correct.**

13 A. Yes.

14 **Q. Was that you exclusively or were you part of a  
15 team doing that?**

16 A. Preliminarily it was just me.

17 **Q. Okay. In the course of your work in exercising  
18 that discretion, have you been empowered or instructed  
19 or educated in consumer surveys or any other FTC  
20 information about what consumers are or are not aware of  
21 in regard to health claims for supplements or how they  
22 interpret health claims for supplements?**

23 MR. ZANG: Objection. Compound question.

24 BY MR. McCORMACK:

25 **Q. Do you understand that?**

1 A. Yes.  
 2 Just from 21 years of experience.  
 3 **Q. So nothing specific or formal, just your work at**  
 4 **the FTC for a long period of time.**  
 5 A. Yes.  
 6 **Q. Okay. So you talked about initially you were**  
 7 **the one exercising your discretion. It sounds like**  
 8 **there was a second phase to that process.**  
 9 **Did I understand that right?**  
 10 A. That's correct.  
 11 **Q. Okay. Can you describe the second -- just**  
 12 **mechanically what the second phase was without getting**  
 13 **into conversations with counsel that may have occurred.**  
 14 A. Okay. After I had identified the Web sites that  
 15 I thought should be sent advisory letters, I passed  
 16 those on to Richard Cleland.  
 17 **Q. Do you recall that this was the -- that during**  
 18 **this phase was when you identified Daniel Chapter One?**  
 19 A. Yes.  
 20 **Q. Okay. Again, mindful that I couldn't do it if I**  
 21 **were in your shoes, but do you recall specifically about**  
 22 **the material you received about Daniel Chapter One that**  
 23 **prompted you to put them in the -- I'll call it the**  
 24 **egregious pile?**  
 25 A. No, I don't. Not specifically, no.

1 **Do you recall any of the other fields?**  
 2 A. Yes, I do.  
 3 **Q. And what were they?**  
 4 A. The company name.  
 5 The product.  
 6 Product ingredients.  
 7 The URL, the Web site URL.  
 8 The company contact information, address, phone  
 9 and fax.  
 10 Whether it was a domestic or foreign  
 11 enterprise.  
 12 And the source of the surf material.  
 13 **Q. When you say "source," again are you -- you mean**  
 14 **Web site as opposed to brochures or --**  
 15 A. Well, FTC, where the surfer was.  
 16 **Q. Okay. Got you, got you, got you. Okay.**  
 17 **In the course of your work in evaluating the**  
 18 **degree of egregiousness, as you've described it, did**  
 19 **you keep any notations, either by hand or**  
 20 **electronically, about the results and the process of**  
 21 **your evaluation?**  
 22 A. No.  
 23 **Q. Can you estimate how much time you spent**  
 24 **evaluating each of the supplement providers in terms of**  
 25 **determining, yeah, they make the egregious pile, no,**

1 **Q. One thing I should have asked you at the**  
 2 **beginning, and I apologize for not remembering to do so,**  
 3 **is: What, if anything, did you do to prepare for your**  
 4 **deposition today?**  
 5 **Did you review any documents, for instance?**  
 6 A. Not really, no.  
 7 **Q. Okay. Sometimes that's the safe way to go.**  
 8 **Okay. So if you can remember specific to**  
 9 **Daniel Chapter One -- let me stick with**  
 10 **Daniel Chapter One.**  
 11 **Do you remember specifically the kind of data**  
 12 **you received about them that you first evaluated?**  
 13 A. The kind of data? We had -- well, we have  
 14 several fields that we were entering data into.  
 15 **Q. Okay.**  
 16 A. And there's one field for claims.  
 17 **Q. Okay.**  
 18 A. And those were taken from the materials that  
 19 were submitted.  
 20 **Q. On the Web?**  
 21 A. Yes.  
 22 **Q. Was there any other media that was researched**  
 23 **besides what was on the Web, to your knowledge?**  
 24 A. No, there wasn't, not to my knowledge.  
 25 **Q. You talked about claims being one field.**

1 **they don't make the egregious pile?**  
 2 MR. ZANG: Objection. Lack of foundation with  
 3 respect to supplementary or dietary supplementary  
 4 manufacturers.  
 5 BY MR. McCORMACK:  
 6 **Q. Do you understand the question?**  
 7 A. Could you repeat it, please.  
 8 **Q. Sure.**  
 9 **Can you estimate on average how much time you**  
 10 **spent evaluating each supplement manufacturer?**  
 11 MR. ZANG: The same objection, lack of  
 12 foundation.  
 13 THE WITNESS: The printouts that I received?  
 14 BY MR. McCORMACK:  
 15 **Q. Yes, ma'am.**  
 16 A. I would say at least 10 to 15 minutes.  
 17 **Q. Per manufacturer.**  
 18 A. Yes.  
 19 **Q. Okay. Do you recall on average how much data**  
 20 **in terms of number of pages you received per**  
 21 **manufacturer?**  
 22 A. It varied.  
 23 **Q. Okay. From one page to a hundred in some cases**  
 24 **maybe?**  
 25 A. Maybe not as many as a hundred, but from, you

1 know, two or three pages to maybe --  
 2 **Q. A lot.**  
 3 A. -- forty or fifty. Yes.  
 4 MR. ZANG: Mr. McCormack, again I've been  
 5 giving leeway, but I don't think a foundation has been  
 6 established that all these companies are manufacturers.  
 7 Maybe they are, but I don't believe --  
 8 MR. McCORMACK: Objection noted, counsel.  
 9 Thank you. Yeah, again, I think the witness and I are  
 10 doing just fine.  
 11 BY MR. McCORMACK:  
 12 **Q. Do you recall how many pages of data you**  
 13 **received about Daniel Chapter One?**  
 14 A. No, sir, I don't.  
 15 **Q. So again to get back to the mechanics of the**  
 16 **process -- I'm not looking for conversations, yet**  
 17 **anyway -- you passed the data on to Mr. Cleland.**  
 18 A. Yes.  
 19 **Q. Okay. What was the next step in**  
 20 **Operation False Cures, to your knowledge, from there?**  
 21 A. Mr. Cleland would review what I submitted to him  
 22 and make a judgment call as to whether the Web site  
 23 would receive an advisory letter or not.  
 24 **Q. Okay. To your knowledge, what is Mr. Cleland's**  
 25 **job title?**

1 **Q. Okay. Once the advisory letters were sent out,**  
 2 **insofar as your role was concerned or has been**  
 3 **concerned, what happened next?**  
 4 A. I believe we alerted the Web site operator to  
 5 get back to us about what they were going to do in  
 6 connection with our letter within ten days I believe it  
 7 was.  
 8 So after approximately I'd say fifteen -- we  
 9 gave a grace period of maybe five days -- we went  
 10 back -- or I went back to review the Web site to observe  
 11 whether there had been any changes made, any revisions,  
 12 any modifications.  
 13 **Q. Do you recall doing so in the Daniel Chapter One**  
 14 **instance specifically?**  
 15 A. Specifically, no.  
 16 **Q. Okay.**  
 17 A. There were so many. I don't specifically  
 18 remember.  
 19 **Q. And are we still talking targets, I'll call**  
 20 **them, numbering close to a hundred as best you can**  
 21 **recall?**  
 22 A. Yes. Yes.  
 23 **Q. Okay. To the best of your recollection, of**  
 24 **that hundred roughly, at this point in the process, how**  
 25 **many of them had complied to your satisfaction by**

1 A. He's the associate director in the Division of  
 2 Advertising Practices.  
 3 **Q. If you know, is that an administrative role or a**  
 4 **legal counsel role?**  
 5 A. It's a managerial role and legal counsel.  
 6 **Q. Did Mr. Cleland communicate to you the results**  
 7 **of his decisions?**  
 8 A. Yes, he did.  
 9 **Q. In what form?**  
 10 A. Written form.  
 11 **Q. Okay. Did you do anything with that**  
 12 **information?**  
 13 A. Yes. The pages on which he approved -- the  
 14 pages which he approved are the Web sites, the URLs,  
 15 that received advisory letters.  
 16 **Q. And were you the one that engineered the**  
 17 **advisory letters after he gave the information back to**  
 18 **you?**  
 19 A. I supervised the dissemination of them. One of  
 20 our paralegals actually manually, you know, sent them  
 21 out.  
 22 **Q. Who crafted the language of the advisory**  
 23 **letters?**  
 24 A. I really am not sure about the collaboration of  
 25 the letter, the final form of the letter.

1 changing their Web site, for instance? Can you  
 2 estimate?  
 3 A. I don't remember.  
 4 **Q. Okay. Okay.**  
 5 **At this point in the process, though, it's still**  
 6 **essentially your project; am I right?**  
 7 **I mean, you're the -- are you the primary person**  
 8 **kind of managing the sequence of steps and the**  
 9 **communication with the target?**  
 10 A. Yes.  
 11 **Q. Okay. All right.**  
 12 **So walk me through, to the best of your**  
 13 **recollection, what happened with Daniel Chapter One, but**  
 14 **I'm mindful you may not remember specifically, in which**  
 15 **case let me know and just tell me what would have**  
 16 **happened generally.**  
 17 **Once you sent the advisory letter, requested**  
 18 **feedback, requested changes to the Web site, what**  
 19 **happened next with Daniel Chapter One, if you recall?**  
 20 A. I don't specifically recall if  
 21 Daniel Chapter One communicated with us directly. I  
 22 don't recall providing any additional guidance or  
 23 information.  
 24 But generally speaking, if the Web site had  
 25 e-mailed back to ask for additional information or

1 additional guidance, I would have -- there would have  
2 been an e-mail exchange back and forth.

3 **Q. When you say "additional information or  
4 additional guidance," can you be more explicit?**

5 A. For example, it might have to do with whether  
6 the Web site linked to another site that made claims or  
7 whether there was historical use language at the  
8 Web site or whether there were animal studies being  
9 passed off as, you know, effective for humans, that type  
10 of thing to clarify, for clarification.

11 **Q. The advisory letters that were sent out, were  
12 they specific in their direction about what needed to be  
13 done with respect to Web site language or was it generic  
14 direction, you need to change your language and let us  
15 know how it's changed?**

16 A. It was a generic letter.

17 **Q. So the idea -- correct me if I'm wrong -- was we  
18 have problems with your Web site, you need to change the  
19 language and we'll take another look at it kind of  
20 thing?**

21 A. Yes. Correct.

22 **Q. All right. And you don't recall specifically  
23 with respect to Daniel Chapter One what took place in  
24 terms of that kind of exchange?**

25 A. No, I don't.

1 **Q. All right. To the best of your recollection, at  
2 the point in the process that we're talking about now,  
3 did you or anyone that you were working with on  
4 Operation False Cures investigate what  
5 "Daniel Chapter One" referred to, the title of this  
6 particular company?**

7 A. No. Not that I know of. I did not. I don't  
8 know if anyone else did, but I don't think so.

9 **Q. Do you know as you sit here today?**

10 MR. ZANG: Objection. Relevance.

11 BY MR. McCORMACK:

12 **Q. Do you know as you sit here today?**

13 MR. ZANG: Go ahead.

14 THE WITNESS: Is it a bible chapter?

15 BY MR. McCORMACK:

16 **Q. Well, I'm asking you if you know. I'll be happy  
17 to tell you, but --**

18 A. I think it's a bible chapter. That may have  
19 illuminated in my head before today, but I never  
20 researched it.

21 **Q. Okay. So you don't know what bible -- assuming  
22 it is a bible chapter, you don't know what it refers  
23 to.**

24 A. No, I don't.

25 **Q. Okay. All right.**

1 **All right. So we have -- we're walking through  
2 this process, and this is very helpful. I appreciate  
3 it. As far as I'm concerned, you're doing fine.**

4 **You've sent out the advisory letter to  
5 Daniel Chapter One and others. There is or perhaps not  
6 an exchange of dialogue about the Web site language.**

7 **To the extent you can recall with  
8 Daniel Chapter One, what happened next?**

9 A. Well, I really can't specifically recall  
10 Daniel Chapter One, but generally speaking?

11 **Q. Yes, ma'am.**

12 A. I would go back to review the Web site.

13 If no changes had been made, I would put that  
14 URL on a list of noncompliant Web sites.

15 If changes had been made and they were  
16 acceptable, we would acknowledge the changes and thank  
17 the Web site operator for cooperating.

18 **Q. In terms of Operation False Cures, do you have a  
19 recollection of how many sites made changes that were  
20 acceptable?**

21 A. I really don't recall.

22 **Q. A percentage perhaps?**

23 **And I'm just looking for the best of your  
24 recollection.**

25 A. I am guessing maybe approximately twenty.

1 **Q. Of the roughly 100?**

2 A. Yes.

3 **Q. Okay. So the other eighty or so were  
4 noncompliant?**

5 A. Yes.

6 **Q. Is there a -- I think you testified to this, but  
7 let me ask it specifically.**

8 **Is there a list of those sites that did comply?**

9 A. There's no list, no.

10 **Q. Okay. Is there any way -- is there any database  
11 with which one could evaluate the kind of changes that  
12 passed muster?**

13 A. No.

14 **Q. Okay. Who made the decision, in those twenty  
15 cases that passed muster, who made that decision that  
16 those sites -- the changes passed?**

17 A. I did.

18 **Q. And with anyone else or was that exclusively in  
19 your hands?**

20 A. It was in my hands.

21 **Q. Okay. Other than the considerable experience  
22 that you've had at the FTC, have you had any specific  
23 training about what a structure/function claim is?**

24 A. No other additional training, no.

25 **Q. Have you had training at the FTC about what a**

1 **structure/function claim is?**  
 2 A. Yes.  
 3 **Q. Can you describe the training for me.**  
 4 A. Well, it wasn't classroom training. It's mostly  
 5 reading on my own.  
 6 **Q. Okay.**  
 7 A. And just in discussions, general discussions  
 8 over the years.  
 9 **Q. Has there been any -- was there any specific**  
 10 **source of information or education on what is a**  
 11 **structure/function claim that you relied on?**  
 12 A. Well, this, this document --  
 13 **Q. Are you talking about Exhibit 4?**  
 14 A. -- Exhibit 4 --  
 15 **Q. Okay.**  
 16 A. -- and other like FDA pieces of literature I've  
 17 read. I can't specifically identify them at this time.  
 18 **Q. Okay. So continuing with the mechanics of what**  
 19 **unfolded, for those who did pass muster after the**  
 20 **changes or who were noncompliant, what happened next?**  
 21 A. Well, may I add something?  
 22 **Q. Absolutely.**  
 23 A. That one of the changes -- a Web site would have  
 24 been considered compliant because some of them just  
 25 totally changed their marketing, their product, their

1 **Q. -- letter phase.**  
 2 A. Correct.  
 3 **Q. Okay.**  
 4 **It sounds like we're getting to that point in**  
 5 **the process, though, mechanically.**  
 6 **So you've identified -- you identified in the**  
 7 **context of Operation False Cures those sites that**  
 8 **remained noncompliant.**  
 9 **What happened next?**  
 10 A. I'm sorry. Could you --  
 11 **Q. Sure thing.**  
 12 A. -- repeat that, please.  
 13 **Q. Sure.**  
 14 **Once you identified those sites that were**  
 15 **noncompliant, what happened next with respect to those**  
 16 **sites and their operators?**  
 17 A. I let Richard Cleland know which sites were  
 18 noncompliant.  
 19 **Q. In writing or e-mail?**  
 20 A. In most likely -- I'm trying to remember.  
 21 Probably -- most likely in writing. I can't really  
 22 recall how, how it was transmitted, but most likely in  
 23 writing.  
 24 **Q. Okay. Do you recall, to the extent it was in**  
 25 **writing, was it just a list or did you prepare comments**

1 format, totally -- they were totally different from what  
 2 they started out as, so that was one, one of the -- the  
 3 premise of their being considered compliant.  
 4 **Q. Okay. Did any of them to your recollection shut**  
 5 **down altogether?**  
 6 A. Yes.  
 7 **Q. Do you remember how many of those?**  
 8 A. No, I don't.  
 9 **Q. Within the 100?**  
 10 A. I don't remember.  
 11 **Q. Okay. Okay.**  
 12 **Actually before we take the next step in the**  
 13 **mechanical process, in the course of your work sending**  
 14 **out advisory letters, and so forth, did you and the FTC**  
 15 **in these advisory letters ever ask for substantiating**  
 16 **information?**  
 17 MR. ZANG: Objection to the extent that's  
 18 calling for a legal conclusion.  
 19 You may go ahead.  
 20 THE WITNESS: Okay.  
 21 Substantiation is typically requested after --  
 22 no, we did not.  
 23 BY MR. McCORMACK:  
 24 **Q. Okay. Not at least in the advisory --**  
 25 A. Correct.

1 **about each site?**  
 2 A. Well, I had a printout of each screen of the  
 3 database and I would write -- I wrote on the page.  
 4 **Q. On the printout of the page itself.**  
 5 A. Yes. The database page, yes.  
 6 **Q. And what did you write?**  
 7 A. Compliant or noncompliant.  
 8 **Q. Nothing more, though?**  
 9 A. No.  
 10 **Q. Okay. All right. What was the next step after**  
 11 **that, if you know?**  
 12 A. I really don't know.  
 13 **Q. Okay. At what point in the process, if you**  
 14 **know, was the request for substantiation sent out?**  
 15 A. I don't know.  
 16 **Q. Okay. Do you know that that did occur, you just**  
 17 **don't know when?**  
 18 A. I would assume that it was requested after the  
 19 further law enforcement action, after further law  
 20 enforcement action was deemed necessary.  
 21 **Q. But you weren't involved in that process.**  
 22 A. No, I was not.  
 23 **Q. In terms of your role, what, if anything,**  
 24 **happened next with those sites that were deemed**  
 25 **noncompliant? Again, your role.**

1 A. Nothing. It was out of my hands after that.  
 2 **Q. So that exhausted your part in**  
 3 **Operation False Cures then I gather.**  
 4 A. Yes. Yes.  
 5 **Q. Okay. Since that time that you turned over**  
 6 **the -- I'll call it the noncompliant list to**  
 7 **Mr. Cleland, since that time and receiving notice that**  
 8 **you were going to have to come up here and talk to me,**  
 9 **did you track the results or the progress of what was**  
 10 **happening on the Daniel Chapter One matter at all?**  
 11 A. No. Not at all.  
 12 **Q. How about any of the other cases, noncompliant**  
 13 **sites, out of Operation False Cures?**  
 14 A. No.  
 15 **Q. While I'm reviewing my notes, would you review**  
 16 **Exhibits DCO 1, 2 and 3, which are discovery requests**  
 17 **made by Daniel Chapter One to the FTC. Essentially what**  
 18 **I'm going to ask you to do, ma'am, is just tell me if**  
 19 **you've ever seen these before.**  
 20 **But take a moment to review those. I'm going to**  
 21 **review my notes.**  
 22 **(Pause in the proceedings.)**  
 23 **Have you reviewed those documents?**  
 24 A. Yes, I have.  
 25 **Q. Have you ever seen them before?**

1 advisory letter, I would have consulted with the  
 2 databases.  
 3 **Q. Okay. Do you recall specifically whether you**  
 4 **consulted either or both of those databases with respect**  
 5 **to Daniel Chapter One products?**  
 6 A. I don't recall specifically, no.  
 7 **Q. Do you know who maintains either of those**  
 8 **databases?**  
 9 A. No, I don't.  
 10 **Q. Do you know -- okay.**  
 11 **Do you know -- a slightly different question --**  
 12 **who loads the data into them or the source, the sources**  
 13 **for the data?**  
 14 A. No, I don't.  
 15 **Q. Okay. Is research into those databases standard**  
 16 **operating procedure in surfs like this one?**  
 17 A. It is for me.  
 18 **Q. Okay. In the context of Operation False Cures,**  
 19 **do you recall finding substantiating data for any of**  
 20 **the products or ingredients for the manufacturers**  
 21 **targeted?**  
 22 MR. ZANG: Objection to the extent it's calling  
 23 for a legal conclusion.  
 24 Go ahead and answer if you can.  
 25 THE WITNESS: If I did find any supporting

1 A. No, I have not.  
 2 **Q. Okay. During the course of your work on**  
 3 **Operation False Cures, whether for Daniel Chapter One or**  
 4 **any of the target companies, did you or your surfers**  
 5 **make any efforts to determine the truth or falsity of**  
 6 **the claims made?**  
 7 A. I consulted some databases that we use in ad  
 8 practices, herbal supplement databases, to find out  
 9 what -- if there were any studies or any reports of  
 10 efficacy and for any safety issues.  
 11 **Q. Okay. So the FTC has a database of --**  
 12 A. It's a subscription.  
 13 **Q. Okay. It's a subscription to what?**  
 14 A. Natural Standard and a thing called  
 15 Natural Databases -- I'm not a hundred percent sure of  
 16 the second one.  
 17 **Q. Okay.**  
 18 A. Or Natural Medicine Databases. I'm not a  
 19 hundred percent sure.  
 20 **Q. Okay. In the context of Operation False Cures,**  
 21 **can you tell me at what point or different points in the**  
 22 **process you would have done that exercise of getting**  
 23 **into those two databases?**  
 24 A. After responses from the Web sites, if I did get  
 25 responses from the Web sites that questioned our

1 data, it wasn't a hundred percent proof that something  
 2 was effective. There might have been preliminary  
 3 findings that suggested that something might be  
 4 effective, but I don't recall finding anything for any  
 5 of the products we found, you know, to really support  
 6 efficacy.  
 7 BY MR. McCORMACK:  
 8 **Q. Did you pass on any of that data that you found**  
 9 **to Mr. Cleland along with the Web sites on a**  
 10 **manufacturer-per-manufacturer basis or not? Do you**  
 11 **remember?**  
 12 A. Well, I don't believe I consulted the database  
 13 for every single Web site, but for what I did consult,  
 14 yes, I did attach information. Or if Mr. Cleland had a  
 15 question about a specific ingredient or compound, I  
 16 would have consulted the database and provided him with  
 17 the results.  
 18 **Q. Does the FTC, specifically the Division of**  
 19 **Advertising Practices, have any healthcare providers on**  
 20 **staff?**  
 21 MR. ZANG: Lack of foundation.  
 22 THE WITNESS: No.  
 23 BY MR. McCORMACK:  
 24 **Q. Do you have any healthcare training?**  
 25 A. No.

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1 **Q. Okay. I'm going to go back to reviewing my**  
 2 **notes. Bear with me here just a minute. That's a sign**  
 3 **that I'm drawing to a close, that I can't think of any**  
 4 **more questions.**  
 5 MR. J. TURNER: We have some, too.  
 6 MR. McCORMACK: I figured you would.  
 7 (Pause in the proceedings.)  
 8 BY MR. McCORMACK:  
 9 **Q. Ms. Colbert, do you have any specific**  
 10 **recollection of speaking directly with anyone from**  
 11 **Daniel Chapter One itself?**  
 12 A. No. I never spoke with anyone from  
 13 Daniel Chapter One.  
 14 **Q. Okay. Do you recall speaking with anyone who**  
 15 **used Daniel Chapter One products?**  
 16 A. No.  
 17 **Q. In the course of your Operation False Cures**  
 18 **work, did you speak with consumers of any of the**  
 19 **products at issue?**  
 20 A. No.  
 21 **Q. Did you conduct any purchases of**  
 22 **Daniel Chapter One products?**  
 23 A. No.  
 24 MR. McCORMACK: What I'm going to suggest is we  
 25 take just a five-minute break. You can run down the

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1 MR. ZANG: I'll take it under advisement.  
 2 Appropriate privileges.  
 3 MR. McCORMACK: I wouldn't expect you to do  
 4 otherwise. That's fine. And that was more for my  
 5 mental note than anything else.  
 6 BY MR. McCORMACK:  
 7 **Q. I have just a half a dozen to a dozen more**  
 8 **questions and then I think we'll be done.**  
 9 **First of all, in the course of your work on**  
 10 **Operation False Cures specifically, did you do any**  
 11 **consulting with the FDA, anyone from the FDA?**  
 12 A. Yes.  
 13 **Q. And describe for me when, where, how, who,**  
 14 **what.**  
 15 MR. ZANG: And just let me say I'm going to let  
 16 Ms. Colbert answer, but I do want to state the  
 17 governmental investigative and deliberative process  
 18 privileges as well as joint law enforcement privilege.  
 19 I just want to put that on the record to preserve our  
 20 privileges, but you may go ahead and answer.  
 21 THE WITNESS: We spoke with FDA staff off and on  
 22 during the -- in the duration of the surf. I can't  
 23 pinpoint any specific dates.  
 24 BY MR. McCORMACK:  
 25 **Q. What was the subject matter of those**

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1 hall, I can confer with my co-counsel, capture  
 2 lingering questions, and then we'll travel the last mile  
 3 home.  
 4 THE WITNESS: Okay.  
 5 MR. McCORMACK: All right.  
 6 Thank you. You've been very patient.  
 7 (Recess)  
 8 BY MR. McCORMACK:  
 9 **Q. Back on the record.**  
 10 A. I'd like to amend a previous answer.  
 11 When you had asked if I had reviewed any  
 12 documents in preparation for the deposition, I did look  
 13 at like a little summary page that I had where I had  
 14 counted up how many Web sites we had sent e-mails to and  
 15 how many replied.  
 16 **Q. Okay. This is a summary page that you had**  
 17 **prepared?**  
 18 A. Yes. Just for my own reference.  
 19 **Q. And when did you review that?**  
 20 A. It would have been late last week. Maybe  
 21 Friday.  
 22 **Q. And that was in preparation for today?**  
 23 A. Yes. Just as a recollection.  
 24 MR. McCORMACK: I'll try to remember to make a  
 25 request for that, and then we can decide --

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1 **consultations?**  
 2 A. The nature of the surf, at what stages we were  
 3 in the surf, when we were going to send out advisory  
 4 letters.  
 5 **Q. Okay. Was the purpose of that consultation**  
 6 **with the FDA to advise them about the status of the**  
 7 **surf or was it to receive feedback and input from the**  
 8 **FDA?**  
 9 A. More just to let them know the status of the  
 10 surf.  
 11 **Q. Do you recall -- and specifically yourself, do**  
 12 **you recall getting any guidance from the FDA personnel**  
 13 **that you were in contact with during**  
 14 **Operation False Cures?**  
 15 MR. ZANG: Again, same objections.  
 16 THE WITNESS: Can I ask to confer?  
 17 MR. ZANG: Yes.  
 18 (Witness and counsel confer.)  
 19 THE WITNESS: The FDA was another surf partner,  
 20 so we were in touch with them about the topics that I  
 21 just mentioned.  
 22 BY MR. McCORMACK:  
 23 **Q. Sure. Let me try to be more specific.**  
 24 **Did you ever seek guidance from the FDA in**  
 25 **making the evaluations about the claims that came up in**

1 **Operation False Cures?**  
 2 A. No.  
 3 **Q. Okay. Ms. Colbert, you've used the phrase**  
 4 **"surf partner."**  
 5 **What is a surf partner?**  
 6 A. A participant.  
 7 **Q. Okay.**  
 8 A. As in our FTC regional offices were surf  
 9 partners with our Washington office.  
 10 **Q. So did the FDA, if you know, craft its own**  
 11 **search parameters or did they sort of adopt yours, if**  
 12 **you know?**  
 13 A. I don't know.  
 14 **Q. Okay.**  
 15 A. I don't know if they crafted their own. But  
 16 they did contribute to the list of terms that I  
 17 mentioned earlier.  
 18 **Q. The search terms?**  
 19 A. Yes.  
 20 **Q. What else did the FDA do, to your knowledge, in**  
 21 **the context of Operation False Cures?**  
 22 **They conducted their own surfs?**  
 23 A. Yes, they conducted their own surfs.  
 24 **Q. They contributed to the terminology used for the**  
 25 **surfs it sounds like.**

1 A. We would have eliminated any duplicates.  
 2 **Q. Was the Canadian entity you just described a**  
 3 **surf partner as well?**  
 4 A. Yes.  
 5 **Q. And that was set up before the surf started I**  
 6 **presume.**  
 7 A. Yes.  
 8 **Q. Okay. All right. Were there any other surf**  
 9 **partners?**  
 10 A. No.  
 11 **Q. Thanks for bearing with us. This goes with the**  
 12 **territory. Thank you.**  
 13 **Are you aware of any press releases that the FTC**  
 14 **issued about Operation False Cures and the results of**  
 15 **the operation?**  
 16 A. I believe there was a press release issued. I  
 17 don't recall the content of it specifically.  
 18 **Q. Did you have any role in preparing that press**  
 19 **release?**  
 20 A. No. Not that I know of.  
 21 **Q. Okay. Okay. Do you know who did?**  
 22 A. Not specifically, but our press office, our  
 23 public affairs office, most likely would have put it  
 24 together.  
 25 **Q. And who -- if you know, who would have directed**

1 A. Yes.  
 2 **Q. Okay. Do you know, did they supply you with**  
 3 **some sites that they deemed -- or that came up for**  
 4 **them?**  
 5 A. Yes.  
 6 **Q. Do you remember how many the FDA supplied to**  
 7 **you?**  
 8 A. No, I don't.  
 9 **Q. Do you recall if Daniel Chapter One was one of**  
 10 **the sites that FDA supplied to you?**  
 11 A. Daniel Chapter One was on the FDA list.  
 12 **Q. Okay. Do you know if Daniel Chapter One came up**  
 13 **on any other surfer's list other than the FDA list?**  
 14 A. Yes.  
 15 **Q. How many?**  
 16 A. One.  
 17 **Q. Just one other?**  
 18 A. Yes.  
 19 **Q. Do you remember who it was?**  
 20 A. The Competition Bureau of Canada.  
 21 **Q. Okay. Any other FTC surfers that identified**  
 22 **Daniel Chapter One, to your recollection?**  
 23 A. Do you mean did Daniel Chapter One come in as  
 24 duplicate -- I don't remember.  
 25 **Q. Okay.**

1 **them to do so?**  
 2 A. Our Division of Consumer and Business  
 3 Education.  
 4 **Q. And is there an individual in particular with**  
 5 **whom you're familiar that would give that direction?**  
 6 A. Carolyn Shanoff.  
 7 **Q. Can you spell her last name if you know it?**  
 8 A. S-H-A-N, as in Nancy, O-F-F.  
 9 And another staffer is Carol Kando, K-A-N-D-O,  
 10 Pineda, P-I-N-E-D-A.  
 11 **Q. A few more specifics just to flush out the**  
 12 **mechanics of Operation False Cures a little bit**  
 13 **further.**  
 14 **I think you've said that in the process of the**  
 15 **surfers pulling data off the Web, either the surfers or**  
 16 **yourself made a column where claims were identified?**  
 17 **Did I understand that right?**  
 18 A. There's a field.  
 19 **Q. Okay. A field, a field for claims.**  
 20 **Who filled those fields in?**  
 21 A. Our interns and myself and a paralegal.  
 22 **Q. So with respect to the claims that were**  
 23 **identified for Daniel Chapter One in that field, do you**  
 24 **recall specifically who did it?**  
 25 A. No, I don't.

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1 **Q. Okay. And when you say interns, yourself and**  
 2 **the paralegals, did you all participate or one of those**  
 3 **three groups would have done so but hard to discern**  
 4 **whom, who specifically?**  
 5 A. We all worked on the project at different times  
 6 during the day or during the week. I really couldn't  
 7 say who filled in the Daniel Chapter One claims field.  
 8 **Q. Okay. To the best of your recollection, was the**  
 9 **instruction to paraphrase the claim or write it**  
 10 **word-for-word verbatim? How did that unfold?**  
 11 MR. ZANG: Objection. Lack of foundation.  
 12 THE WITNESS: To take it from the printout that  
 13 we received.  
 14 BY MR. McCORMACK:  
 15 **Q. Okay. And was it to be taken verbatim from the**  
 16 **printout you received?**  
 17 A. Yes.  
 18 **Q. Okay. You indicated that there were about a**  
 19 **hundred, give or take, sites identified from**  
 20 **Operation False Cures and that I think you said about**  
 21 **twenty were deemed compliant?**  
 22 A. Yes.  
 23 **Q. And then I also asked you how many of the sites**  
 24 **shut down, just outright shut down. I think you said**  
 25 **some of them did, but you weren't sure how many.**

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1 **me -- made changes but whose sites still did not pass**  
 2 **muster?**  
 3 A. I would have communicated with them to say that  
 4 we'd noted the changes that had been made, but there  
 5 were still -- we still had problems with some other  
 6 portion that had not been attended to.  
 7 **Q. And was another -- to the extent you can**  
 8 **remember, did the site owner or operator make another**  
 9 **effort to make the changes in those cases?**  
 10 A. Yes.  
 11 **Q. Were they resolved, generally speaking?**  
 12 A. Some were; some were not.  
 13 **Q. Okay. And again, ultimately those that were**  
 14 **fell into the twenty or so that were compliant and**  
 15 **those that weren't -- never -- were noncompliant**  
 16 **obviously.**  
 17 A. Correct.  
 18 **Q. Do you know how many, of the sites that were**  
 19 **ultimately deemed noncompliant, how many went to**  
 20 **complaint, where a complaint was actually issued?**  
 21 A. No, I don't.  
 22 **Q. Okay. All right.**  
 23 **And I may have asked you this, and if I did,**  
 24 **forgive me, but how many noncompliant sites went to**  
 25 **Mr. Cleland?**

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1 A. That's right.  
 2 **Q. Okay. Did you include those sites that shut**  
 3 **down within the group that was compliant?**  
 4 A. Yes.  
 5 **Q. Okay. So in other words, of those twenty, some**  
 6 **shut down, some changed sufficiently to pass muster.**  
 7 A. That's correct.  
 8 **Q. Okay. Of those twenty, do you recall how many**  
 9 **just outright shut down and how many actually made**  
 10 **changes?**  
 11 A. No, I don't recall.  
 12 **Q. Is that on the list that you reviewed the other**  
 13 **day?**  
 14 A. It may be. I don't remember specifically each  
 15 itemized entry. It may be.  
 16 **Q. Okay. Okay.**  
 17 **Did any -- to the best of your recollection, did**  
 18 **any sites make changes or adjustments but did not pass**  
 19 **muster?**  
 20 A. Yes.  
 21 **Q. Again, do you recall how many?**  
 22 A. I don't recall how many.  
 23 **Q. To the extent that you remember either**  
 24 **specifically or generally, would there have been an**  
 25 **interim step with those folks who made sites -- excuse**

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1 A. I don't recall.  
 2 **Q. However many there were outside the twenty that**  
 3 **were either shut down or compliant I presume.**  
 4 A. Correct.  
 5 **Q. Okay. All right. And I think I asked you if**  
 6 **you know who Michael Marino is.**  
 7 A. Yes, you did.  
 8 **Q. Okay. And did you work with him in**  
 9 **Operation False Cures?**  
 10 A. No, I did not.  
 11 **Q. Do you know if he was one of the surfers through**  
 12 **the course of your work on the database?**  
 13 A. No, I don't know.  
 14 **Q. And have you ever talked with him?**  
 15 A. I have not talked with him in connection with  
 16 this matter. I've talked with him in the past.  
 17 **Q. But not on this --**  
 18 A. But not on this matter.  
 19 **Q. Okay. Okay. Also I think I asked you this, but**  
 20 **let me make sure.**  
 21 **Was the word "cancer" one of the target triggers**  
 22 **for the database search?**  
 23 A. I think so. I'm not a hundred percent sure, but  
 24 I would think it was.  
 25 **Q. In the course of filling out the fields that**

1 you've described, was there any column or field for  
 2 consumer complaints?  
 3 A. No.  
 4 **Q. Were consumer complaints any part of your**  
 5 **database search?**  
 6 A. I did not -- I don't recall searching for  
 7 consumer complaints in connection with any products.  
 8 **Q. Or Operation False Cures generally?**  
 9 A. Correct.  
 10 **Q. Okay. Okay.**  
 11 **And do you know where the title**  
 12 **Operation False Cures came from?**  
 13 A. No, I don't.  
 14 **Q. Okay. All right.**  
 15 **And in the course of your work specifically, was**  
 16 **part of your job responsibility to help site operators**  
 17 **get into compliance?**  
 18 A. Yes.  
 19 **Q. Did you ever give site operators specific**  
 20 **recommendations or advice about what changes to make?**  
 21 A. No. I never gave them any language or anything  
 22 really specific. We don't preapprove the advertising or  
 23 the claims, so I just made recommendations in the  
 24 context of FTC advertising law.  
 25 **Q. Okay. So did you convey FTC advertising law to**

1 instance, there were portions of the Web site, whether  
 2 Daniel Chapter One or otherwise, where a portion of the  
 3 Web site would not be deemed advertising but imparting,  
 4 let's say, educational information?  
 5 MR. ZANG: Objection to the extent that calls  
 6 for a legal conclusion.  
 7 But you may answer if you can.  
 8 THE WITNESS: There may have been, yes. I  
 9 vaguely recollect some essence of that, yes.  
 10 BY MR. McCORMACK:  
 11 **Q. Do you still consider that within the scope of**  
 12 **advertising, though, in terms of the discretion you were**  
 13 **applying in your role?**  
 14 A. Yes. That could be implied, implied claims  
 15 embedded in that.  
 16 **Q. So in some instances educational information is**  
 17 **part of an implied claim in your opinion.**  
 18 A. Possibly, yes.  
 19 MR. ZANG: Objection. This witness -- let me  
 20 just state the objection. This witness is not  
 21 qualified --  
 22 MR. McCORMACK: Your objection to form is noted.  
 23 I think that's within the rule. You're certainly  
 24 welcome to do that. Anything more explanatory I think  
 25 is out of bounds.

1 the Web site operator and kind of leave it to them to  
 2 figure out what worked within those parameters or not?  
 3 A. Well, in the advisory letter we provided links  
 4 to publications. A lot of times it didn't appear that  
 5 those publications were read, but I tried to break it  
 6 down and take out some sections that were relevant and  
 7 applicable to what the Web site operator needed to do.  
 8 **Q. Okay. In response to any of those advisory**  
 9 **letters, did you ever get phone calls, asking for**  
 10 **guidance, for instance?**  
 11 A. They asked for phone numbers, but there were so  
 12 many Web sites that we just could not talk to  
 13 everybody.  
 14 **Q. Okay. Okay.**  
 15 **Okay. Were Web sites considered -- the**  
 16 **Web sites overall considered advertising for purposes**  
 17 **of Operation False Cures or only specific parts of it?**  
 18 MR. ZANG: Objection to the extent that calls  
 19 for a legal conclusion.  
 20 You may answer.  
 21 THE WITNESS: Is the Web site considered  
 22 advertising?  
 23 Yes.  
 24 BY MR. McCORMACK:  
 25 **Q. Okay. Were there ever instances where, for**

1 BY MR. McCORMACK:  
 2 **Q. And lastly, how about religious information?**  
 3 **Would that be part of advertising as well?**  
 4 MR. ZANG: Same objection.  
 5 THE WITNESS: I'm sorry. Could you clarify what  
 6 you mean by "religious information."  
 7 BY MR. McCORMACK:  
 8 **Q. Daniel Chapter One, the bible verse, for**  
 9 **instance.**  
 10 A. The URL?  
 11 **Q. Any information about the chapter itself, the**  
 12 **bible verse.**  
 13 MR. ZANG: Objection. Lack of foundation.  
 14 BY MR. McCORMACK:  
 15 **Q. Just as an example.**  
 16 A. Well, it could imply to the consumer that it has  
 17 religious connections.  
 18 **Q. Is that part of your evaluation process?**  
 19 A. Whether something is religious or has religious  
 20 connotations?  
 21 **Q. Correct.**  
 22 A. Absolutely not.  
 23 MR. McCORMACK: Okay.  
 24 Thank you.  
 25 THE WITNESS: You're welcome.

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1 MR. McCORMACK: I'm finished. You really have  
 2 been very patient. I appreciate it.  
 3 THE WITNESS: No problem.  
 4 (Whereupon, the foregoing deposition was  
 5 concluded at 3:15 p.m.)  
 6  
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1 CERTIFICATION OF REPORTER  
 2  
 3 DOCKET/FILE NUMBER: 9329  
 4 CASE TITLE: Daniel Chapter One and James Feijo  
 5 HEARING DATE: January 22, 2009  
 6  
 7 I HEREBY CERTIFY that the transcript contained  
 8 herein is a full and accurate transcript of the notes  
 9 taken by me at the hearing on the above cause before the  
 10 FEDERAL TRADE COMMISSION to the best of my knowledge and  
 11 belief.  
 12  
 13 DATED: JANUARY 22, 2009  
 14  
 15  
 16 JOSETT F. WHALEN, RMR  
 17  
 18  
 19 CERTIFICATION OF PROOFREADER  
 20  
 21 I HEREBY CERTIFY that I proofread the transcript  
 22 for accuracy in spelling, hyphenation, punctuation and  
 23 format.  
 24  
 25 DIANE QUADE

63

1 CERTIFICATE OF DEPONENT  
 2 I hereby certify that I have read and examined  
 3 the foregoing transcript, and the same is a true and  
 4 accurate record of the testimony given by me.  
 5 Any additions or corrections that I feel are  
 6 necessary, I will attach on a separate sheet of paper to  
 7 the original transcript.  
 8  
 9 LYNNE J. COLBERT  
 10  
 11 I hereby certify that the individual  
 12 representing himself/herself to be the above-named  
 13 individual, appeared before me this  
 14 day of , 2009, and  
 15 executed the above certificate in my presence.  
 16  
 17  
 18 NOTARY PUBLIC IN AND FOR  
 19  
 20 MY COMMISSION EXPIRES:  
 21  
 22  
 23  
 24  
 25

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1 WITNESS: LYNNE J. COLBERT  
 2 DATE: January 22, 2009  
 3 CASE: In the Matter of Daniel Chapter One and  
 4 James Feijo  
 5 Please note any errors and the corrections thereof on  
 6 this errata sheet. The rules require a reason for any  
 7 change or correction. It may be general, such as "to  
 8 correct stenographic error" or "to clarify the record"  
 9 or "to conform with the facts."  
 10 PAGE LINE CORRECTION REASON FOR CHANGE  
 11  
 12  
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# **Exhibit**

# **C**

**In the Matter of:**

Daniel Chapter One, et al.

*January 22, 2009*  
*Richard L. Cleland*

**Condensed Transcript with Word Index**



For The Record, Inc.  
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1				2			
1	FEDERAL TRADE COMMISSION			1	EXHIBIT:	DESCRIPTION	FOR ID
2	I N D E X			2	Number 10	FTC-DCO 0818-0869,	76
3				3		Consumer Perceptions of	
4	WITNESS:	EXAMINATION:	PAGE	4		Qualified Health Claims	
5	RICHARD L. CLELAND	BY MR. McCORMACK	6	5	Number 11	FTC-DCO 0870-0894	78
6				6	Number 12	FTC-DCO 0895-0943	81
7				7			
8	EXHIBIT:	DESCRIPTION	FOR ID	8			
9	Number 4 (re-marked)	FTC-DCO 1041-1070,	82	9			
10		Dietary Supplements: An		10			
11		Advertising Guide for		11			
12	Number 5	Industry		12			
13		Notice of Deposition	8	13			
14		Pursuant to 16 CFR		14			
15		3.33(c)		15			
16	Number 6	FTC-DOC 0743-0746, FTC	54	16			
17		Sweep Stops Peddlers of		17			
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		Unfairness					

3				4			
1	UNITED STATES OF AMERICA			1	APPEARANCES:		
2	FEDERAL TRADE COMMISSION			2			
3				3	ON BEHALF OF THE FEDERAL TRADE COMMISSION:		
4	In the Matter of:	)		4	LEONARD GORDON, ESQ.		
5	DANIEL CHAPTER ONE, a corporation, )			5	DAVID W. DULABON, ESQ.		
6	and ) Docket No. 9329			6	THEODORE ZANG JR., ESQ.		
7	JAMES FEIJO, individually and as )			7	CAROLE A. PAYNTER, ESQ.		
8	an officer of Daniel Chapter One )			8	Federal Trade Commission		
9	-----)			9	Northeast Region		
10	Thursday, January 22, 2009			10	One Bowling Green - Suite 318		
11				11	New York, New York 10004		
12	Room 318			12	(212) 607-2816		
13	Federal Trade Commission			13	lgordon@ftc.gov.		
14	One Bowling Green			14			
15	New York, New York 10004			15	ON BEHALF OF THE RESPONDENTS:		
16				16	MICHAEL McCORMACK, ESQ.		
17	The above-entitled matter came on for			17	26828 Maple Valley Highway - #242		
18	deposition, pursuant to notice, at 3:40 p.m.			18	Maple Valley, Washington 98038		
19				19	(425) 785-9446		
20				20			
21				21			
22				22			
23				23			
24				24			
25				25			

5

1 APPEARANCES: (continued)

2

3 ON BEHALF OF THE RESPONDENTS:

4 JAMES S. TURNER, ESQ.

5 BETSY E. LEHRFELD, ESQ.

6 CHRISTOPHER B. TURNER, ESQ.

7 Swankin & Turner

8 1400 16th Street, N.W. - Suite 101

9 Washington, D.C. 20036

10 (202) 462-8800

11 jim@swankin-turner.com

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1 unclear, let me know. I'll do my best to rephrase it.

2 Okay?

3 A. Yes.

4 Q. Super.

5 In preparation for your deposition today, have

6 you reviewed any documents?

7 A. Yes.

8 Q. Can you tell me what documents you reviewed?

9 A. Yes.

10 I reviewed the commission's policy statements on

11 unfairness, ad substantiation, and deception.

12 I reviewed a number of FTC cases.

13 I reviewed the complaint.

14 I reviewed the notice of deposition.

15 And that's the documents that I can recall.

16 There may have been some additional ones.

17 Q. Okay. Do you recall specifically what cases you

18 reviewed?

19 A. Oh. Among others, Pfizer, Thompson Medical,

20 Kraft.

21 Those would be the primary cases.

22 Q. Did you review any cases involving dietary

23 supplement manufacturers?

24 A. Actually that jogs my memory of some other stuff

25 that I did review.

6

1 PROCEEDINGS

2 - - - - -

3 Whereupon --

4 RICHARD L. CLELAND

5 a witness, called for examination, having been first

6 duly sworn, was examined and testified as follows:

7 EXAMINATION

8 BY MR. McCORMACK:

9 Q. Mr. Cleland, for the record, my name is

10 Michael McCormack, one of the attorneys for

11 Daniel Chapter One, the respondent in the case that

12 brings us here today.

13 For the record, could you state your full name

14 and your business address, please.

15 A. Richard L. Cleland, 601 New Jersey, Northwest,

16 Washington, D.C.

17 Q. Mr. Cleland, I can presume the answer to this

18 question, but I'm going to ask it anyway.

19 Have you ever had your deposition taken before?

20 A. Yes.

21 Q. How many times?

22 A. Not a lot. Maybe three or four times.

23 Q. Okay. I'll dispense with most of the

24 formalities other than to suggest, as you already know,

25 if there's any question you don't understand, that is

8

1 The district court decision in the

2 National Urological case. That involved some

3 weight-loss products.

4 So the answer to your question is yes.

5 Q. Other than the urological case that you just

6 identified, any others that involved dietary supplements

7 or purported dietary supplements?

8 And obviously if you don't remember, that's

9 fine.

10 A. Yeah. I'm not -- I don't recall.

11 Q. Okay. Before us here on the table, Mr. Cleland,

12 are four documents that have been marked Exhibits DCO 1,

13 2, 3 and 4.

14 While I'm having our court reporter mark

15 Exhibit 5, if you'd take a look at those four exhibits

16 and tell me if any of them are documents you reviewed in

17 preparation for today's dep.

18 (Pause in the proceedings.)

19 (DCO Deposition Exhibit Number 5, Notice of

20 Deposition Pursuant to 16 CFR 3.33(c), was marked for

21 identification.)

22 THE WITNESS: The only document that I looked at

23 of Deposition Exhibits 1, 2, 3 and 4 would have been

24 Deposition Exhibit Number 3, which is labeled

25 Complaint Counsel's Answers to Respondents' First Set of

9

1 Interrogatories. And my primary reason for -- and I did  
 2 not review the whole thing but only those questions that  
 3 related to issues that were raised in the notice of  
 4 deposition.  
 5 BY MR. McCORMACK:  
 6 **Q. Prior to reviewing Exhibit Number 3 in**  
 7 **preparation for your deposition, had you seen this**  
 8 **document, the interrogatory answers?**  
 9 A. I may have seen a draft of that document.  
 10 **Q. Okay. Do you recall participating in the**  
 11 **preparation of the answers prior to reviewing the**  
 12 **document in preparation for this deposition?**  
 13 A. Yes. I had input into some of the answers.  
 14 **Q. Okay. Okay. And -- okay.**  
 15 **And forgive me, but I didn't catch your answer**  
 16 **if you did.**  
 17 **Did you review document Exhibit Number 4?**  
 18 A. I did not review Deposition Exhibit Number 4.  
 19 **Q. Okay. Let me show you now what's been marked**  
 20 **Deposition Exhibit Number 5, DCO Number 5, a copy of the**  
 21 **notice of deposition that brings you here today. I**  
 22 **think you said you reviewed that. Correct?**  
 23 A. Yes.  
 24 **Q. And it's my understanding that you are prepared**  
 25 **to give testimony in response to the five areas of**

11

1 A. I am assistant director for the Division of  
 2 Advertising Practices.  
 3 **Q. And can you give me sort of a Reader's Digest**  
 4 **version of what the job responsibilities are for that**  
 5 **position?**  
 6 A. It's primarily a supervisory position. I  
 7 supervise and manage other attorneys and their  
 8 casework.  
 9 **Q. Do you also supervise investigators and**  
 10 **paralegals?**  
 11 A. Well, I would be supervising anybody that was  
 12 involved in one of my -- one of the cases that I was  
 13 responsible for, and that would include, depending on  
 14 the case, investigators or paralegals.  
 15 **Q. Okay. And when you say -- when you say "cases,"**  
 16 **are you talking about specific respondents or are you**  
 17 **also including operations like Operation False Cures,**  
 18 **for instance?**  
 19 A. It would be both.  
 20 **Q. Okay. All right.**  
 21 **How long have you been the assistant director of**  
 22 **advertising policy?**  
 23 MR. GORDON: Advertising practices.  
 24 MR. McCORMACK: Practices. Thank you.  
 25 THE WITNESS: You know, I don't know exactly

10

1 **inquiry identified in that deposition notice?**  
 2 A. Yes.  
 3 **Q. Is there any area identified in 1 through 5 that**  
 4 **you are not prepared to give testimony about?**  
 5 A. Not that I'm aware of at this time.  
 6 **Q. Okay. We'll find out, won't we.**  
 7 **With respect to Exhibit Number 5, Mr. Cleland,**  
 8 **can you tell me, to the extent that you know, how you**  
 9 **were selected to give testimony as opposed to somebody**  
 10 **else.**  
 11 MR. GORDON: Let me object to the form of that,  
 12 but go ahead, if you know.  
 13 THE WITNESS: I volunteered.  
 14 BY MR. McCORMACK:  
 15 **Q. Okay. And was the call yours to make**  
 16 **essentially?**  
 17 MR. GORDON: Objection to form.  
 18 Go ahead.  
 19 THE WITNESS: Actually had lead counsel  
 20 objected to it, I think I would have considered an  
 21 option.  
 22 BY MR. McCORMACK:  
 23 **Q. Okay. Tell me if you would just generally what**  
 24 **is your -- well, first, what is your job title with the**  
 25 **FTC?**

12

1 the answer to that question. It seems like a long  
 2 time.  
 3 Probably about roughly eight years.  
 4 BY MR. McCORMACK:  
 5 **Q. And how long have you been with the FTC**  
 6 **overall?**  
 7 A. Since 1991.  
 8 **Q. And prior to your current role, what was your**  
 9 **role?**  
 10 A. Well, I had bounced back and forth. I was  
 11 the -- starting -- let me start from 1991 and move  
 12 forward. It makes more sense going that direction.  
 13 **Q. Okay. That's fine.**  
 14 A. From 1991 until about 1994 I was a senior  
 15 attorney in the Division of Advertising Practices doing  
 16 litigation.  
 17 Then I spent a year and a half to two years,  
 18 approximately, in the Bureau of Consumer Protection  
 19 office where I was the coordinator for the regional  
 20 offices.  
 21 Then I spent two years as the assistant director  
 22 in the Division of Service Industry Practices, where my  
 23 function actually was pretty much the same as it is now,  
 24 supervising attorneys in cases and operations.  
 25 **Q. Could I interrupt you.**

13

1 **What does "service industry" mean?**  
 2 A. Well, it was half of the -- half of the division  
 3 essentially dealt with things like investment frauds,  
 4 art frauds, things like that, and the other half of the  
 5 division dealt with medical services, various types of  
 6 medical services.  
 7 **Q. As opposed to products or devices?**  
 8 A. Right.  
 9 **Q. Okay. Okay.**  
 10 A. And then that division was dissolved, and I went  
 11 back to the Division of Advertising Practices where I  
 12 was a senior attorney for three or four years and then  
 13 became the assistant attorney -- assistant director for  
 14 the Division of Advertising Practices.  
 15 **Q. In that role, just to explore the scope of**  
 16 **potential testimony under the dep notice and also**  
 17 **taking care, as I will try to do, to stay away from**  
 18 **privileged information, can you describe for me the**  
 19 **extent to which your role, your current job**  
 20 **description, is managerial and administrative versus**  
 21 **legal prosecutorial.**  
 22 MR. GORDON: Objection.  
 23 Go ahead.  
 24 THE WITNESS: Yeah, I don't know that I can  
 25 really answer that question because I don't think that

15

1 prosecutorial discretion of which, in the case of  
 2 Operation False Cures, which supplement manufacturers  
 3 are going to have complaints filed and prosecuted or  
 4 not?  
 5 MR. GORDON: Objection to form.  
 6 THE WITNESS: So I want to make sure. Without  
 7 conceding that we're talking about supplement  
 8 manufacturers, the -- I do get -- I do get involved on  
 9 in terms of recommending cases for further action. I  
 10 make recommendations with regard to closing cases, the  
 11 whole gambit of recommendations.  
 12 BY MR. McCORMACK:  
 13 **Q. Okay. With respect to Operation False Cures,**  
 14 **did you participate in the prosecutorial discretion**  
 15 **that led to a determination of complaints being filed**  
 16 **or not?**  
 17 MR. GORDON: Objection to form.  
 18 THE WITNESS: Yes.  
 19 BY MR. McCORMACK:  
 20 **Q. Okay. Was the, if you will, the final authority**  
 21 **yours as to who was -- who had complaints filed and who**  
 22 **didn't?**  
 23 A. No.  
 24 MR. GORDON: Objection.  
 25 THE WITNESS: I'm sorry.

14

1 the job responsibilities divide up that neatly.  
 2 I make various decisions on what cases or what  
 3 the staff recommendation is going to be. I participate  
 4 in the selection of cases. I participate in and lead  
 5 others in, you know, management of cases. I've even led  
 6 a case where it was necessary. It was a big enough  
 7 case.  
 8 So I don't think that -- it doesn't break down  
 9 squarely in -- at least at my level, it doesn't break  
 10 down squarely into only supervise, only -- because I  
 11 do -- the truth is, I do a great deal of all those  
 12 functions.  
 13 BY MR. McCORMACK:  
 14 **Q. Okay. Do those functions include setting**  
 15 **policy for operations like Operation False Cures, for**  
 16 **instance?**  
 17 A. I don't mean to be evasive, but I need a better  
 18 definition of what you mean by "policies."  
 19 **Q. Establishing the mechanics of how the**  
 20 **investigation or operation will unfold, for instance.**  
 21 A. I do get involved in that.  
 22 **Q. And I'll get more specific with my questions.**  
 23 A. Yeah. Yeah.  
 24 **Q. I understand.**  
 25 **Do you also participate in what I'll call the**

16

1 MR. GORDON: Go ahead. Sorry.  
 2 BY MR. McCORMACK:  
 3 **Q. Was that made by a team?**  
 4 MR. GORDON: Objection.  
 5 THE WITNESS: No. That was made by the  
 6 commission.  
 7 BY MR. McCORMACK:  
 8 **Q. Okay.**  
 9 **Okay. We, as you may know, just finished taking**  
 10 **the deposition of Ms. Colbert, and to help me understand**  
 11 **a little bit more about how the policies are**  
 12 **implemented, and so forth, let me ask you if I could a**  
 13 **few questions about her description of the**  
 14 **Operation False Cures mechanism.**  
 15 **First, do you know who came up with the title**  
 16 **"Operation False Cures"?**  
 17 A. Yes.  
 18 **Q. Who did?**  
 19 A. I did.  
 20 **Q. Okay. And do you know who developed the search**  
 21 **parameters for the database surf that Ms. Colbert and**  
 22 **her team conducted?**  
 23 MR. GORDON: Objection to form.  
 24 You mean Internet surf?  
 25 MR. McCORMACK: Yes.

1 THE WITNESS: Well, initially I -- my  
 2 recollection is -- and I'm not sure this is in the scope  
 3 of the notice, but to the extent my recollection is that  
 4 Lynne developed the initial list of search terms and  
 5 that other people, including myself, may have reviewed  
 6 those and had suggestions as to either some that might  
 7 not work or some that would be better or -- although I  
 8 don't have a -- I don't have any recollection of doing  
 9 any editing in that process, but she would have showed  
 10 them to me.  
 11 BY MR. McCORMACK:  
 12 **Q. And by "Lynne" you mean Ms. Colbert?**  
 13 A. I mean Ms. Colbert.  
 14 **Q. Okay. Okay. In terms of exercising the**  
 15 **policies, the FTC policies related to false advertising**  
 16 **claims, unfair deceptive claims, and the**  
 17 **Operation False Cures project, after, as I understand**  
 18 **it, Ms. Colbert submitted to you the list of**  
 19 **noncompliant Web sites, in terms of the mechanics, what**  
 20 **occurred next?**  
 21 MR. GORDON: Objection to form.  
 22 If you know.  
 23 THE WITNESS: Again, my recollection is that I  
 24 asked another attorney in my office to review that  
 25 material and make a recommendation to me. And I got

1 back a -- those recommendations. Then I reviewed the  
 2 Web sites and came up with a list of Web sites that I  
 3 thought were plausible law enforcement targets.  
 4 BY MR. McCORMACK:  
 5 **Q. Okay. Were there specific criteria that you**  
 6 **utilized from a policy standpoint to make that, I'll**  
 7 **call it, target evaluation?**  
 8 MR. GORDON: Objection to form.  
 9 Go ahead.  
 10 THE WITNESS: In general what we were looking  
 11 for were what we considered to be express or nearly  
 12 express claims that -- based on what we understood were  
 13 unlikely to be substantiated or likely to be false.  
 14 BY MR. McCORMACK:  
 15 **Q. Okay. In terms of what -- the phrase you used,**  
 16 **"nearly express claims," Ms. Colbert I'll represent to**  
 17 **you used the word "implied."**  
 18 **One of the challenges we find in this case is**  
 19 **trying to interpret and understand the FTC policies and**  
 20 **guidelines as well as regulations if they exist that**  
 21 **define what an implied claim is.**  
 22 A. Uh-huh.  
 23 **Q. Can you tell me what the criteria is for**  
 24 **evaluating what you called the nearly express claims.**  
 25 MR. GORDON: Objection to form.

1 Go ahead.  
 2 THE WITNESS: Okay.  
 3 I mean, I -- what I can do is refer you to the  
 4 case law. And in particular I would refer you to cases  
 5 like Thompson Medical and Kraft. Those cases discuss  
 6 the different forms, different types of claims in the  
 7 context of the commission's evaluation of what messages  
 8 are conveyed in an ad.  
 9 In those cases, the commission talks about the  
 10 claims range from claims that are express, which in  
 11 which, you know, the meaning of the claim is apparent on  
 12 its face, to cases or claims that are nearly express,  
 13 meaning, you know, it's obvious from its face, to  
 14 implied claims to claims that, you know, all the way on  
 15 the far end that ultimately that a reasonable consumer  
 16 might not take or at least the commission couldn't  
 17 conclude with confidence that a reasonable consumer  
 18 would take from an ad. And as to those claims, the  
 19 commission suggested in those decisions that extrinsic  
 20 evidence might be necessary.  
 21 So we're really talking about a range of clarity  
 22 of a particular claim.  
 23 BY MR. McCORMACK:  
 24 **Q. So it's a range of clarity.**  
 25 A. Uh-huh.

1 **Q. So no set definition of what an implied claim or**  
 2 **nearly express claim is.**  
 3 MR. GORDON: Objection to form.  
 4 BY MR. McCORMACK:  
 5 **Q. It's a matter of discretion, is it not?**  
 6 MR. GORDON: Objection to form.  
 7 THE WITNESS: Well, it is a -- you know, the --  
 8 with the exception of an express claim. An express  
 9 claim is it is what it says.  
 10 BY MR. McCORMACK:  
 11 **Q. Right.**  
 12 A. That essentially all claims that are not express  
 13 claims are subject to some interpretation.  
 14 **Q. Okay. From a policy standpoint, Mr. Cleland,**  
 15 **once a case is assigned for prosecution, what role do**  
 16 **you continue to play, if any, in, say, monitoring the**  
 17 **case through its litigation process?**  
 18 MR. GORDON: Objection to form.  
 19 THE WITNESS: If it is a case that is being  
 20 handled by the Division of Advertising Practices and it  
 21 was one of my cases, I will continue to manage the  
 22 litigation, not as lead attorney but as the ultimate  
 23 decision maker in matters of -- involving the case.  
 24 BY MR. McCORMACK:  
 25 **Q. Sure.**

21

1 **Is Daniel Chapter One one of your cases, as you**  
 2 **just used that phrase?**  
 3 A. No, it is not.  
 4 **Q. Okay. To what extent in your role are you**  
 5 **involved in crafting what I call the requested**  
 6 **remediation that appears in the complaint?**  
 7 MR. GORDON: Is that in a general matter?  
 8 MR. McCORMACK: Let's talk specific to  
 9 Daniel Chapter One.  
 10 Thanks for that clarification.  
 11 BY MR. McCORMACK:  
 12 **Q. Do you know what I mean by "requested**  
 13 **remediation"?**  
 14 A. I think you're talking about the notice order,  
 15 what I would --  
 16 **Q. The proposed order?**  
 17 A. As proposed.  
 18 **Q. The proposed order.**  
 19 A. We would call it the notice order.  
 20 **Q. That's what I'll call it then.**  
 21 A. I --  
 22 MR. GORDON: And what's the question at this  
 23 point?  
 24 MR. McCORMACK: What's his role in crafting  
 25 that, the language of that notice order.

23

1 MR. GORDON: Objection to form.  
 2 Go ahead.  
 3 THE WITNESS: Yes.  
 4 BY MR. McCORMACK:  
 5 **Q. Okay. And was that proposed letter -- I call it**  
 6 **attachment A to the complaint -- was that proposed**  
 7 **letter the same in every complaint that was filed based**  
 8 **on Operation False Cures?**  
 9 MR. GORDON: Objection to the form.  
 10 Go ahead.  
 11 THE WITNESS: It should have been substantially  
 12 the same in all cases.  
 13 BY MR. McCORMACK:  
 14 **Q. Okay.**  
 15 A. Whether or not, because some of these cases  
 16 were settlements, there may have been some minor  
 17 variations based on the negotiations in a particular  
 18 case.  
 19 **Q. Okay. So in terms of the model pleadings and**  
 20 **the notice order that was part of the model pleadings,**  
 21 **in every complaint filed under Operation False Cures was**  
 22 **there a requirement that the respondent send to**  
 23 **consumers a letter that included references to**  
 24 **conventional cancer treatments?**  
 25 MR. GORDON: Objection to the form.

22

1 THE WITNESS: I think it would be fair to say  
 2 that because there were multiple cases involved in  
 3 Operation False Cures, we used what we would refer to as  
 4 model pleadings for the cases so that the cases would  
 5 end up with essentially the same type of relief to the  
 6 extent that we could, given the different forums that  
 7 were involved in some of the cases.  
 8 In terms of developing the model pleadings which  
 9 ultimately became I think the basis for the notice order  
 10 in this case, I was active in drafting those model  
 11 pleadings.  
 12 BY MR. McCORMACK:  
 13 **Q. Okay.**  
 14 A. And to the extent that I think it -- I can't say  
 15 that I had the final word on those pleadings because  
 16 that would have been a matter for ultimately for the  
 17 Bureau of Consumer Protection staff and the  
 18 commissioners that voted out the complaint.  
 19 **Q. In the model pleading process that you just**  
 20 **described for Operation False Cures then, do I**  
 21 **understand your testimony correctly that you had at**  
 22 **least a role in crafting the proposed letter that**  
 23 **respondents would have to send in the event --**  
 24 A. Yes.  
 25 **Q. -- the ALJ ruled against them?**

24

1 THE WITNESS: I think that the answer to that  
 2 question is yes. The one case that I'm not a hundred  
 3 percent sure is the case that involved a company called  
 4 Bioque or a product called Bioque. And I'm not a  
 5 hundred percent sure whether that order contained that  
 6 provision, my recollection that it is, that it did, but  
 7 I'm not a hundred percent certain on that.  
 8 BY MR. McCORMACK:  
 9 **Q. Do you remember who the manufacturer or**  
 10 **respondent was for that particular product?**  
 11 **Did you call it Biocure?**  
 12 A. Bioque.  
 13 **Q. Bioque.**  
 14 A. No, I don't, but it would have been one of the  
 15 cases that would have been referred to in the press  
 16 release announcing the filing of Daniel Chapter One.  
 17 **Q. Okay. So it was part of Operation False Cures.**  
 18 A. Yes.  
 19 **Q. Okay. All right. And just to close this loop,**  
 20 **that particular matter did go to an order, an order was**  
 21 **entered?**  
 22 A. Yeah. There was a consent.  
 23 **Q. Okay. That was my next question. Thank you.**  
 24 **In terms of policy and crafting that notice**  
 25 **order, Mr. Cleland, does the FTC give any of**

1 being violated, and it appears to the commission that  
 2 the proceeding is in the public interest. The complaint  
 3 is not a finding or ruling that the defendant or  
 4 respondent has actually violated the law. The  
 5 stipulated final order is for settlement purposes only  
 6 and does not constitute an admission by the defendants  
 7 of a law violation. A stipulated final order requires  
 8 approval by the court and has the force of law when  
 9 signed by the judge."  
 10 **Q. Okay. So there's a disclaimer in there.**  
 11 **Is that what you just read?**  
 12 MR. GORDON: Objection to the form and beyond  
 13 the notice.  
 14 THE WITNESS: I wouldn't call it a disclaimer.  
 15 I think it's a pretty clear statement that the  
 16 commission has not made a determination that the law has  
 17 been violated.  
 18 MR. McCORMACK: Okay.  
 19 Mark the next one, please.  
 20 (DCO Deposition Exhibit Number 7,  
 21 FTC-DCO 0747-0766, Self-Regulation and Consumer  
 22 Protection: A Complement to Federal Law Enforcement, was  
 23 marked for identification.)  
 24 BY MR. McCORMACK:  
 25 **Q. This is Exhibit 7, Mr. Cleland. I'd ask you to**

1 practices?  
 2 MR. GORDON: Objection to the form. I think  
 3 it's beyond the scope of the notice.  
 4 Do you want to hear the question again or...  
 5 THE WITNESS: I think that this statement fairly  
 6 reflects the commission's policy on deception.  
 7 BY MR. McCORMACK:  
 8 **Q. That's what I wanted to know. Thank you.**  
 9 **Could I direct your attention to the second to**  
 10 **last paragraph on the first page, Bates-stamped 0787,**  
 11 **please.**  
 12 MR. GORDON: The second to last page?  
 13 MR. McCORMACK: The second to last paragraph of  
 14 the first page.  
 15 MR. GORDON: Sorry.  
 16 BY MR. McCORMACK:  
 17 **Q. It begins with the italicized word "second"?**  
 18 A. Yes, I see it.  
 19 **Q. I'm going to go ahead and read it into the**  
 20 **record for my own benefit.**  
 21 **"We," I presume meaning the FTC, "examine the**  
 22 **practice from the perspective of a consumer acting**  
 23 **reasonably in the circumstances. If the representation**  
 24 **or practice affects or is directed primarily to a**  
 25 **particular group, the commission examines reasonableness**

1 **identify that, please.**  
 2 A. I don't know what this is.  
 3 **Q. Okay. I'll represent to you that it was**  
 4 **produced by complaint counsel in response to certain**  
 5 **requests for production.**  
 6 A. Okay.  
 7 **Q. Have you ever seen it before?**  
 8 A. No.  
 9 MR. McCORMACK: Okay.  
 10 (DCO Deposition Exhibit Number 8,  
 11 FTC-DCO 0787-0799, FTC Policy Statement on Deception,  
 12 was marked for identification.)  
 13 BY MR. McCORMACK:  
 14 **Q. If you would, take a look at Exhibit 8, please.**  
 15 **I'd like to know if you can identify this document.**  
 16 **(Pause in the proceedings.)**  
 17 A. This document appears to be the deception  
 18 policy -- what's referred to as the deception policy  
 19 statement.  
 20 **Q. Is this one of the documents that you reviewed**  
 21 **in preparation for your deposition today?**  
 22 A. Yes, it is.  
 23 **Q. Okay. Generally speaking, is Exhibit 8 a fair**  
 24 **representation of the commission's policy and**  
 25 **guidelines with respect to unfair or deceptive**

1 **from the perspective of that group."**  
 2 **Do you see that?**  
 3 A. Yes.  
 4 **Q. Does that continue to be an accurate statement**  
 5 **of FTC policy and procedure?**  
 6 MR. GORDON: Objection to the form and beyond  
 7 the scope of the notice.  
 8 THE WITNESS: I believe so. Yes.  
 9 BY MR. McCORMACK:  
 10 **Q. Can you tell me what effort, if you know, the**  
 11 **FTC made in the DCO case to determine the perspective of**  
 12 **a consumer acting reasonably in the circumstances.**  
 13 MR. GORDON: Objection to the form.  
 14 THE WITNESS: Basically what that refers to is  
 15 ad interpretation of whether or not the commission is  
 16 analyzing -- is -- it analyzes the ad to determine what  
 17 claims are conveyed to a reasonable consumer in the  
 18 target audience for that ad. That's what that refers  
 19 to.  
 20 BY MR. McCORMACK:  
 21 **Q. And how is the target audience identified?**  
 22 A. The target audience can be identified from the  
 23 face of the advertisement.  
 24 If you're advertising a product such as shark  
 25 cartilage for the cure of cancer, then the presumption

1 there is that the target audience are people who have --  
 2 either have cancer or perceive that they have cancer for  
 3 that ad, so it is -- you know, it is self-evident in  
 4 that case.  
 5 **Q. Okay. In the DCO case, were any cancer patients**  
 6 **interviewed, investigated, researched to identify the**  
 7 **target audience and their impressions about the DCO**  
 8 **statements?**  
 9 MR. GORDON: Objection to the form and beyond  
 10 the scope of the notice I believe.  
 11 THE WITNESS: The answer is no.  
 12 BY MR. McCORMACK:  
 13 **Q. Okay. Were any efforts made to investigate or**  
 14 **interview any users of DCO products in this case?**  
 15 MR. GORDON: Objection. Beyond the scope of the  
 16 notice.  
 17 THE WITNESS: No. Not by my office.  
 18 BY MR. McCORMACK:  
 19 **Q. Okay. Do you know if that was done by any other**  
 20 **office?**  
 21 MR. GORDON: Same objection.  
 22 THE WITNESS: I don't know whether that was done  
 23 by any other office.  
 24 BY MR. McCORMACK:  
 25 **Q. Okay. Mr. Cleland, did you confer at all with**

1 MR. McCORMACK: Thank you. I appreciate it.  
 2 (DCO Deposition Exhibit Number 7,  
 3 FTC-DCO 0747-0766, Self-Regulation and Consumer  
 4 Protection: A Complement to Federal Law Enforcement, was  
 5 re-marked for identification.)  
 6 BY MR. McCORMACK:  
 7 **Q. Mr. Cleland, can you identify Exhibit 9,**  
 8 **please.**  
 9 A. Yes.  
 10 **Q. Please do so.**  
 11 A. It appears to be a copy of the -- what is  
 12 referred to as the commission's policy statement on  
 13 unfairness.  
 14 **Q. Is this one of the documents you reviewed in**  
 15 **preparation for your deposition today?**  
 16 A. Yes, it is.  
 17 **Q. If I could direct your attention to the second**  
 18 **full paragraph on the first page identified with the**  
 19 **Bates number 804.**  
 20 **And the third full sentence I'll quote: "We**  
 21 **recognize that the concept of consumer unfairness is one**  
 22 **whose precise meaning is not immediately obvious and**  
 23 **also recognize that this uncertainty has been honestly**  
 24 **troublesome for some businesses and some members of the**  
 25 **legal profession."**

1 **any representatives from the FDA with respect to DCO?**  
 2 A. What do you mean by "confer"?  
 3 **Q. Did you talk with them, communicate with them in**  
 4 **any way?**  
 5 A. There were communications between the FTC and  
 6 the FDA involving Daniel Chapter One.  
 7 **Q. Did you participate in those communications?**  
 8 MR. GORDON: This is again beyond the scope of  
 9 the notice.  
 10 THE WITNESS: Yes.  
 11 BY MR. McCORMACK:  
 12 **Q. Do you remember who at the FDA you talked with?**  
 13 MR. GORDON: Same objection.  
 14 THE WITNESS: Most likely it was Gary Coody.  
 15 It could have also been a person by the name of  
 16 Lisa Romano.  
 17 (DCO Deposition Exhibit Number 9,  
 18 FTC-DCO 0804-0810, FTC Policy Statement on Unfairness,  
 19 was marked for identification.)  
 20 MR. GORDON: Counselor, before we go any  
 21 further, on Exhibit 7 you've given us a copy that's got  
 22 I'm assuming your handwriting on it.  
 23 MR. McCORMACK: Oh.  
 24 MR. GORDON: Because I'm a nice guy, I'm going  
 25 to give you a chance to fix your exhibit.

1 **Do you see that statement?**  
 2 A. Yes.  
 3 **Q. Okay. Do you agree with it or disagree with it**  
 4 **today?**  
 5 MR. GORDON: Objection as to form. It's beyond  
 6 the scope of the notice.  
 7 (Witness and counsel confer.)  
 8 THE WITNESS: I agree that that might have been  
 9 an accurate statement on December 17, 1980. I don't  
 10 think that it's an accurate statement today.  
 11 BY MR. McCORMACK:  
 12 **Q. And -- fair enough.**  
 13 **What has occurred to bring -- strike that.**  
 14 **Would you say that it's certain today?**  
 15 A. Would I say -- I think that --  
 16 MR. GORDON: Objection as to vagueness and also  
 17 outside the scope.  
 18 THE WITNESS: I think that in part, because of  
 19 this document, that the commission's exercise of its  
 20 unfairness jurisdiction is -- it is fairly clear what  
 21 comes within -- it is clear what comes within the  
 22 context of unfairness, that there has been an effort to  
 23 refine the definition of it that -- and to address other  
 24 issues that were, quote, troublesome to the bar at the  
 25 time.

1 BY MR. McCORMACK:  
 2 **Q. Have regulations about dietary supplements been**  
 3 **promulgated to bring about any of the certainty that**  
 4 **you're talking about?**  
 5 MR. GORDON: Objection. Way beyond the scope of  
 6 the notice.  
 7 THE WITNESS: The -- well, there have been no  
 8 regulations promulgated by the FDA that deal  
 9 specifically with the subject of dietary supplements.  
 10 BY MR. McCORMACK:  
 11 **Q. You said FDA. Did you mean to say FDA?**  
 12 A. By the FTC.  
 13 **Q. Okay.**  
 14 A. And by "regulation" I mean trade rule  
 15 regulations.  
 16 **Q. Right. Right.**  
 17 **Have there been requests, petitions to make**  
 18 **rules along those lines?**  
 19 A. Yes.  
 20 MR. GORDON: Objection. Beyond the scope.  
 21 BY MR. McCORMACK:  
 22 **Q. Okay. The second page of that Exhibit 9,**  
 23 **Mr. Cleland, if you could turn to that, and I'd like you**  
 24 **to direct your attention to the --**  
 25 A. Although I need to qualify that in the context

1 I'm mindful that the document is 28 years old,  
 2 so I'm curious to see if the policy has changed.  
 3 THE WITNESS: Well, I think that the -- I have  
 4 no reason to dispute that unjustified consumer injury is  
 5 the primary focus of the FTC Act.  
 6 BY MR. McCORMACK:  
 7 **Q. You have no reason to dispute that.**  
 8 A. Right.  
 9 **Q. Okay.**  
 10 A. As for whether or not it's the most important  
 11 of the three criterias in S&H, that was obviously the  
 12 opinion of the authors of the letter of the  
 13 commissioners at the time. Whether that continues to  
 14 be the position of the current commissioners I do not  
 15 know.  
 16 **Q. So let's talk about injury in the DCO case.**  
 17 **Are you aware of any physical injury that has**  
 18 **occurred to any consumer or user of the DCO products?**  
 19 A. I am not. I have no knowledge to that effect.  
 20 **Q. Okay. Do you know if any user of DCO products**  
 21 **has complained about them?**  
 22 MR. GORDON: Objection to the form.  
 23 THE WITNESS: Not to my knowledge.  
 24 BY MR. McCORMACK:  
 25 **Q. Okay. Do you know if anyone has been -- is**

1 of this conversation.  
 2 **Q. Sure.**  
 3 A. Because it's outside of the scope of this, I'm  
 4 going to have to say that there have been -- I'm  
 5 familiar with requests that have -- petitions that have  
 6 been filed with the FTC regarding rulemaking that would  
 7 deal with some issues involving dietary supplements.  
 8 Whether or not that deals specifically with the  
 9 commission's unfairness jurisdiction, I'm not prepared  
 10 to testify on that right now.  
 11 **Q. Okay. Thank you.**  
 12 **So I'm directing your attention to page 2 of**  
 13 **Exhibit 9 and the first full paragraph which appears**  
 14 **below the italicized heading "Consumer Injury."**  
 15 A. Yes.  
 16 **Q. The first sentence reads: "Unjustified consumer**  
 17 **injury is the primary focus of the FTC Act and the most**  
 18 **important of the three S&H criteria."**  
 19 **Agree or disagree with that from a policy**  
 20 **standpoint?**  
 21 MR. GORDON: Objection to the form. A, it's  
 22 beyond the -- and B, it's beyond the scope.  
 23 Also are you asking whether he agrees or is he  
 24 agreeing that that's the FTC policy?  
 25 MR. McCORMACK: The latter.

1 **claiming an economic injury in fact from their use of**  
 2 **DCO products?**  
 3 MR. GORDON: Objection to the form.  
 4 THE WITNESS: Again, I'm not aware of -- given  
 5 that I just said I wasn't aware of any complaints being  
 6 filed, it would follow that I'm not aware that anyone is  
 7 claiming economic injury.  
 8 BY MR. McCORMACK:  
 9 **Q. Well, there may be some investigation done**  
 10 **outside the complaint process, which is why I was**  
 11 **asking.**  
 12 **But none that you know of.**  
 13 A. As to specific consumers, no.  
 14 **Q. Okay. All right.**  
 15 **So the injury component involved in the DCO case**  
 16 **is -- what would we call it -- theoretical?**  
 17 MR. GORDON: Objection.  
 18 THE WITNESS: No. I would not call it  
 19 theoretical.  
 20 BY MR. McCORMACK:  
 21 **Q. Based on presumption of harm?**  
 22 A. It is --  
 23 MR. GORDON: Objection.  
 24 THE WITNESS: It is based on the premise that  
 25 consumers are injured when they are misled and that

1 they are misled in this instance because they would  
2 make the -- take the implied claim or make the  
3 assumption that there was a reasonable basis for the  
4 claim. And had they known that there was no reasonable  
5 basis for the claim -- that's the allegation -- they may  
6 or likely would have made a different decision  
7 concerning the product. Therefore, in the view of the  
8 FTC, there is consumer injury.

9 BY MR. McCORMACK:

10 **Q. Okay. How does the FTC make that assumption or**  
11 **arrive at that assumption?**

12 MR. GORDON: Objection to form. I think that's  
13 beyond the scope.

14 But go ahead.

15 THE WITNESS: Well, I believe that that  
16 deduction, that inference, is made based upon both  
17 common sense viewing how consumers actually operate in  
18 the marketplace as well as the commission's  
19 institutional knowledge, having been involved in  
20 consumer and consumer behavior for almost a hundred  
21 years.

22 BY MR. McCORMACK:

23 **Q. Okay. So common sense and institutional**  
24 **knowledge.**

25 A. Well, and the observation, as I said, that

1 consumers -- that consumers would likely act differently  
2 if they knew that there was no basis, no reasonable  
3 basis for DCO's claims.

4 **Q. And how -- if there's been no communication with**  
5 **users of DCO products, how does the FTC know how those**  
6 **folks would operate differently?**

7 MR. GORDON: Objection to the form.

8 THE WITNESS: I think that's a reasonable  
9 inference based on the facts.

10 BY MR. McCORMACK:

11 **Q. And that's an inference that the FTC is making**  
12 **unilaterally.**

13 MR. GORDON: Objection to the form.

14 THE WITNESS: I don't understand the question.

15 BY MR. McCORMACK:

16 **Q. Are you presuming, Mr. Cleland, in that case**  
17 **that the statements made by DCO in this case are false?**

18 MR. GORDON: Objection to the form.

19 THE WITNESS: I am presuming that there is no  
20 reasonable basis to support the representations that  
21 have been made in the complaint --

22 BY MR. McCORMACK:

23 **Q. Okay.**

24 A. -- and that consumers either would have a belief  
25 that such reasonable basis would exist or take the

1 implied claim from those representations that such a  
2 reasonable basis existed.

3 Since they don't have the knowledge that no  
4 reasonable basis existed, the likelihood that they  
5 would -- the commission's rationale is that a consumer  
6 would likely make a different decision if they knew -- a  
7 different economic decision if they knew that the DCO or  
8 the advertiser had no reasonable basis to make the  
9 claim.

10 **Q. On the basis of what information does the FTC**  
11 **make that inference?**

12 A. I've already answered that question.

13 **Q. And has the -- and in the DCO case, has the FTC**  
14 **determined that there was no reasonable basis for the**  
15 **statements that DCO made?**

16 MR. GORDON: Objection to the form.

17 THE WITNESS: The determination that the  
18 commission has made is that there is reason to believe  
19 that there is no reasonable basis for the claims, for  
20 the representations that are set forth in the  
21 complaint.

22 BY MR. McCORMACK:

23 **Q. If you would, direct your attention to the next**  
24 **page, Bates-stamped 806, specifically the first sentence**  
25 **of the first full paragraph, which reads: "Second, the**

1 **injury must not be outweighed by any offsetting consumer**  
2 **or competitive benefits that the sales practice also**  
3 **produces."**

4 **Do you see that?**

5 A. Where is that?

6 MR. GORDON: This paragraph (indicating).

7 THE WITNESS: The one that starts "Second, the  
8 injury must not" --

9 BY MR. McCORMACK:

10 **Q. Yes, sir.**

11 A. Okay. I see that.

12 **Q. That is essentially a 1980 iteration of the**  
13 **standard of proof that now appears in 15 U.S.C. 45**  
14 **subpart (n), is it not?**

15 A. That would be correct.

16 **Q. Can you tell me in the DCO case if any efforts**  
17 **were made to evaluate whether there was offsetting**  
18 **consumer benefits to the users of DCO products.**

19 A. If, as we allege, the claims are  
20 unsubstantiated, then there is no offsetting benefit  
21 either to competitors or to consumers from those  
22 claims.

23 **Q. I'm directing your attention to Exhibit 3, the**  
24 **interrogatories and answers to interrogatories in this**  
25 **case, and specifically, Mr. Cleland, I'd like to direct**

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1 know -- you have looked at the unfairness statement.  
 2 You have looked at the deception statement. You haven't  
 3 looked at the substantiation statement yet.  
 4 **Q. We may get to it yet.**  
 5 A. Okay.  
 6 **Q. Assuming it was produced by complaint counsel in**  
 7 **response for documents pertaining to FTC policy, though,**  
 8 **you would agree with me that at least some portion of it**  
 9 **has some weight in reflecting FTC policy.**  
 10 MR. GORDON: Objection to the form and that it's  
 11 beyond the scope.  
 12 THE WITNESS: And I can't agree with you without  
 13 reading the document.  
 14 BY MR. McCORMACK:  
 15 **Q. Okay. You have no reason without reading the**  
 16 **document to dispute that, though.**  
 17 MR. GORDON: Same objections.  
 18 THE WITNESS: I have no reason either to dispute  
 19 or agree with you on that statement.  
 20 (DCO Deposition Exhibit Number 12,  
 21 FTC-DCO 0895-0943, was marked for identification.)  
 22 BY MR. McCORMACK:  
 23 **Q. I'm handing you what's been marked Exhibit**  
 24 **Number 12.**  
 25 **Can you identify that?**

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1 **error -- and I'm sorry, Mr. Cleland. You said you did**  
 2 **not review this document in preparation for your**  
 3 **deposition?**  
 4 A. That's correct.  
 5 **Q. Are you familiar with it, though, all the same?**  
 6 A. Yes.  
 7 **Q. Can you identify it, please?**  
 8 A. Yes. It appears to be a copy of a document -- I  
 9 can't read the title of it.  
 10 **Q. It is hard, isn't it?**  
 11 A. On this copy.  
 12 **Q. I'm not sure that's a whole lot**  
 13 **better (indicating).**  
 14 A. Dietary Supplements: An Advertising Guide for  
 15 Industry.  
 16 **Q. Okay. Does this document qualify as reflective**  
 17 **of FTC policy?**  
 18 MR. GORDON: Objection. Beyond the scope.  
 19 THE WITNESS: This document is -- I would  
 20 describe it as FTC staff's interpretations of FTC case  
 21 law and precedence that was provided to industry as for  
 22 guidance.  
 23 BY MR. McCORMACK:  
 24 **Q. Is that something different than reflecting FTC**  
 25 **policy?**

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1 **(Pause in the proceedings.)**  
 2 A. No.  
 3 **Q. Okay.**  
 4 A. I mean, I've not seen this document before. I  
 5 can read the title of the document.  
 6 **Q. Sure. Yeah.**  
 7 **And in particular I want to know if it was one**  
 8 **of the documents you reviewed in preparation for your**  
 9 **deposition.**  
 10 A. No.  
 11 **Q. I showed you before Exhibit Number 4. I direct**  
 12 **your attention to it again.**  
 13 **And I think you said that this was not one of**  
 14 **the documents that you reviewed in preparation for your**  
 15 **deposition. Is that right?**  
 16 A. That's correct.  
 17 MR. McCORMACK: Okay. And excuse me just a  
 18 second.  
 19 You know what? Forgive me. I did it again. I  
 20 had my copy marked by mistake, so let's correct that.  
 21 (DCO Deposition Exhibit Number 4,  
 22 FTC-DCO 1041-1070, Dietary Supplements: An Advertising  
 23 Guide for Industry, was re-marked for identification.)  
 24 BY MR. McCORMACK:  
 25 **Q. All right. Now that we've corrected that**

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1 A. Well, you know, to the extent -- has this  
 2 document been approved as the -- as official FTC policy,  
 3 no, it hasn't.  
 4 **Q. Okay. Let me direct your attention to Bates --**  
 5 **within this particular exhibit to Bates number 1050,**  
 6 **please.**  
 7 A. 1050.  
 8 Yes.  
 9 **Q. Okay. And directing your attention to the**  
 10 **heading labeled "B. Substantiating Claims" and**  
 11 **specifically the -- what I call the five block bullet**  
 12 **points that start on the bottom of Bates number 1050 and**  
 13 **continue onto the top of Bates number 1051.**  
 14 A. Yes.  
 15 **Q. Review those, please.**  
 16 A. Do what with them?  
 17 **Q. Review those, please.**  
 18 A. Yes.  
 19 **Q. Both pages.**  
 20 **(Pause in the proceedings.)**  
 21 A. Yes.  
 22 **Q. Okay. Do those five bullet points -- regardless**  
 23 **of whether you hold that this document reflects FTC**  
 24 **policy or not, do those five bullet points accurately**  
 25 **state FTC policy for substantiation?**

21 (Pages 81 to 84)

1 MR. GORDON: Objection. Beyond the scope.  
 2 THE WITNESS: I would -- I would have to say  
 3 that they, at least as to my understanding of Pfizer and  
 4 Thompson Medical, they -- and subsequent cases, they  
 5 accurately reflect the FTC's policy.  
 6 BY MR. McCORMACK:  
 7 **Q. Okay. Directing your attention to the first**  
 8 **block bullet I call it on Bates page 1051 and the**  
 9 **bolded heading that reads "The Benefits of a Truthful**  
 10 **Claim and the Cost/Feasibility of Developing**  
 11 **Substantiation for the Claim," can you tell me what, if**  
 12 **anything, has been done in the DCO case to determine**  
 13 **the cost/feasibility of developing substantiation for**  
 14 **the statements made --**  
 15 MR. GORDON: Objection.  
 16 BY MR. McCORMACK:  
 17 **Q. -- or attributed to DCO.**  
 18 MR. GORDON: Beyond the scope of the notice.  
 19 (Pause in the proceedings.)  
 20 THE WITNESS: Yeah, I don't think that there was  
 21 a specific evaluation done in this particular case as to  
 22 the development -- the cost of development of the -- of  
 23 the substantiation. I think it's more of a general  
 24 reference to in general what are the -- can a product be  
 25 tested, how much does it cost to test this kind of

1 claim. And quite frankly, it is only one of five  
 2 factors, and not all -- all those factors have to be  
 3 present.  
 4 BY MR. McCORMACK:  
 5 **Q. To your knowledge, has that analysis been done**  
 6 **in any case involving health claims made by a purported**  
 7 **dietary supplement manufacturer?**  
 8 MR. GORDON: Objection. Beyond the scope.  
 9 THE WITNESS: And I don't know the answer to  
 10 that.  
 11 BY MR. McCORMACK:  
 12 **Q. Okay. Look at the last block bullet point there**  
 13 **on that same page if you would, please, Mr. Cleland,**  
 14 **which reads "The Amount of Substantiation that Experts**  
 15 **in the Field Believe Is Reasonable."**  
 16 A. I see that.  
 17 **Q. Okay. Can you tell me with respect to the DCO**  
 18 **case specifically, if you know, what is meant or**  
 19 **intended by "experts in the field" -- strike that.**  
 20 **What field are we talking about there with**  
 21 **respect to Daniel Chapter One?**  
 22 MR. GORDON: Objection. Beyond the scope.  
 23 THE WITNESS: Well, we're talking about experts  
 24 in the fields of -- that would be in the field of the  
 25 representations that were made here. They would be

1 experts in -- they could be experts in the field of  
 2 cancer treatment.  
 3 BY MR. McCORMACK:  
 4 **Q. How about experts in the field of natural**  
 5 **healing remedies? Would they qualify?**  
 6 MR. GORDON: Objection to the form and also  
 7 beyond the scope.  
 8 THE WITNESS: That would depend on their  
 9 credentials and what they were testifying to.  
 10 BY MR. McCORMACK:  
 11 **Q. Okay. But it's plausible that they would**  
 12 **qualify for substantiation under that bullet point.**  
 13 MR. GORDON: Objection to the form and beyond  
 14 the scope.  
 15 THE WITNESS: Again, it depends on what they're  
 16 testifying to.  
 17 I mean, you know, that's a question of  
 18 qualifying an expert.  
 19 BY MR. McCORMACK:  
 20 **Q. Okay.**  
 21 A. And we would look -- when we're looking at  
 22 experts to -- and I think this particular element is not  
 23 necessarily meant to be -- you know, we have -- well,  
 24 let me put it differently.  
 25 In terms of consulting experts, our normal

1 procedure is to consult experts not only in the disease  
 2 that we're talking about -- and we are talking about a  
 3 disease here -- but, you know, experts that would also  
 4 have some knowledge of what needs -- what would have to  
 5 be -- from a scientific standpoint, what kind of  
 6 substantiation would you need for experts in that field  
 7 of the disease to be -- you know, to be generally  
 8 accepted as, you know, in terms of its reasonableness.  
 9 We have consulted with disease experts. We have  
 10 consulted with -- and I'm speaking generally -- with  
 11 experts in alternative medicine. We have consulted with  
 12 experts in natural products. We have consulted with  
 13 experts in homeopathic products.  
 14 So we're not exclusive in our consultations.  
 15 BY MR. McCORMACK:  
 16 **Q. Are you talking about in the DCO case or in**  
 17 **general?**  
 18 A. No, I'm not talking about the DCO case.  
 19 **Q. Okay. What if the claims or statements, as is**  
 20 **alleged in the DCO case, are not made for scientific**  
 21 **purposes but for religious purposes?**  
 22 MR. GORDON: Objection to the form.  
 23 BY MR. McCORMACK:  
 24 **Q. Does it make a difference?**  
 25 MR. GORDON: Beyond the scope.

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1 THE WITNESS: If those statements are made to  
 2 promote the sale of a product, it doesn't make a  
 3 difference.  
 4 BY MR. McCORMACK:  
 5 **Q. And if they -- if the products are offered to**  
 6 **substantiate the Daniel Chapter One passage from the**  
 7 **bible, does that make a difference?**  
 8 MR. GORDON: Same objection.  
 9 THE WITNESS: If the products are being  
 10 marketed, advertised to the public for purposes  
 11 represented in those advertisements, that's what the FTC  
 12 looks at.  
 13 BY MR. McCORMACK:  
 14 **Q. And if -- is there a difference between an**  
 15 **advertisement and an offering?**  
 16 A. The advertisement in this case is any -- it's  
 17 any document that promotes the product or attempts to  
 18 induce the consumers to purchase the product.  
 19 MR. McCORMACK: Okay. Let's take five.  
 20 MR. GORDON: Okay.  
 21 MR. McCORMACK: I'll review my notes, confer  
 22 with counsel. We're twenty minutes from needing to get  
 23 you out of here anyway.  
 24 THE WITNESS: Okay.  
 25 (Recess)

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1 a placebo or a treatment group.  
 2 **Q. Can you think of any products, generic products**  
 3 **themselves that fall under that category?**  
 4 MR. GORDON: Same objection.  
 5 THE WITNESS: Can I think of any.  
 6 Where it usually plays out is that there will  
 7 be substantiation perhaps for a claim as opposed --  
 8 you know, one representation as opposed to  
 9 representations about a whole product or something to  
 10 that nature.  
 11 And I'm trying to think of specific examples,  
 12 and I'm sure that if I were given adequate notice, I  
 13 could come up with some, but sitting here I'm not sure.  
 14 BY MR. McCORMACK:  
 15 **Q. And how about the same question, any cases that**  
 16 **you're familiar with that the FTC has dealt with where**  
 17 **health claims were made by homeopathics that were found**  
 18 **to be substantiated?**  
 19 MR. GORDON: Same objection.  
 20 THE WITNESS: I don't recall any of those cases  
 21 where -- and again -- no. No need to go beyond that. I  
 22 have no recollection of that event.  
 23 MR. McCORMACK: Okay. Great.  
 24 Thank you. I have no further questions.  
 25 THE WITNESS: Okay.

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1 BY MR. McCORMACK:  
 2 **Q. Mr. Cleland, to your knowledge, has the FTC**  
 3 **ever dealt with a case in which health claims for a**  
 4 **purported dietary supplement were adequately**  
 5 **substantiated?**  
 6 MR. GORDON: Objection. Beyond the scope.  
 7 THE WITNESS: Yes.  
 8 BY MR. McCORMACK:  
 9 **Q. Can you think of how many instances?**  
 10 MR. GORDON: Same objection.  
 11 THE WITNESS: No. I wouldn't have a clue.  
 12 BY MR. McCORMACK:  
 13 **Q. Okay. Fair enough.**  
 14 A. I mean, I could -- because the FTC is a big  
 15 organization, number one --  
 16 **Q. Sure.**  
 17 A. -- so...  
 18 **Q. Do you recall what the sources of the**  
 19 **substantiation for those cases was?**  
 20 MR. GORDON: Same objection.  
 21 BY MR. McCORMACK:  
 22 **Q. Or what the sources were?**  
 23 A. In most of the -- in -- in most of those  
 24 instances they would have been clinical studies with  
 25 humans, with control groups randomly assigned to either

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1 MR. GORDON: Why don't we take --  
 2 MR. McCORMACK: Yep.  
 3 (Pause in the proceedings.)  
 4 MR. GORDON: We don't have any questions.  
 5 That's fine.  
 6 THE WITNESS: Thank you.  
 7 MR. McCORMACK: Thank you. I appreciate it.  
 8 (Whereupon, the foregoing deposition was  
 9 concluded at 6:09 p.m.)  
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1 CERTIFICATION OF REPORTER  
 2  
 3 DOCKET/FILE NUMBER: 9329  
 4 CASE TITLE: Daniel Chapter One and James Feijo  
 5 HEARING DATE: January 22, 2009  
 6  
 7 I HEREBY CERTIFY that the transcript contained  
 8 herein is a full and accurate transcript of the notes  
 9 taken by me at the hearing on the above cause before the  
 10 FEDERAL TRADE COMMISSION to the best of my knowledge and  
 11 belief.

12 DATED: JANUARY 23, 2009

13 JOSETT F. WHALEN, RMR

14  
 15  
 16  
 17  
 18  
 19 CERTIFICATION OF PROOFREADER  
 20  
 21 I HEREBY CERTIFY that I proofread the transcript  
 22 for accuracy in spelling, hyphenation, punctuation and  
 23 format.

24 DIANE QUADE  
25

1 CERTIFICATE OF DEPONENT  
 2 I hereby certify that I have read and examined  
 3 the foregoing transcript, and the same is a true and  
 4 accurate record of the testimony given by me.  
 5 Any additions or corrections that I feel are  
 6 necessary, I will attach on a separate sheet of paper to  
 7 the original transcript.

8 RICHARD L. CLELAND

9 I hereby certify that the individual  
 10 representing himself/herself to be the above-named  
 11 individual, appeared before me this  
 12 day of , 2009, and  
 13 executed the above certificate in my presence.

14 NOTARY PUBLIC IN AND FOR

15 MY COMMISSION EXPIRES:  
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1 WITNESS: RICHARD L. CLELAND  
 2 DATE: January 22, 2009  
 3 CASE: In the Matter of Daniel Chapter One and  
 4 James Feijo  
 5 Please note any errors and the corrections thereof on  
 6 this errata sheet. The rules require a reason for any  
 7 change or correction. It may be general, such as "to  
 8 correct stenographic error" or "to clarify the record"  
 9 or "to conform with the facts."  
 10 PAGE LINE CORRECTION REASON FOR CHANGE  
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# **Exhibit D**

**In the Matter of:**

Daniel Chapter One, et al.

*February 6, 2009*

*Denis R. Miller*

**Condensed Transcript with Word Index**



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**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 FEBRUARY 6, 2009**

**PAGES 1 THROUGH 194**

**TESTIMONY OF DENIS R. MILLER**

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

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I N D E X

WITNESS:	EXAMINATION	PAGE
DR. DENIS R. MILLER	MR. J. TURNER	4

E X H I B I T S

NUMBER	DESCRIPTION	PAGE
DCO 1	Labels for each of the four products.	135

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UNITED STATES DISTRICT COURT  
FEDERAL TRADE COMMISSION

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

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Friday, February 6, 2009

Federal Trade Commission  
One Bowling Green  
New York, New York

The above-entitled matter came on for  
deposition, pursuant to Agreement, at 9:30 a.m.

Pages 1 - 194  
Reported by: Linda A. Schilt

1 APPEARANCES:

2

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8

9

10 ON BEHALF OF THE DEFENDANTS:

11 JAMES S. TURNER, ESQ.

12 CHRISTOPHER TURNER, ESQ.

13 BETSY E. LEHRFELD, ESQ.

14 SWANKIN & TURNER

15 1499 16th Street, N.W.

16 Washington, D.C. 20036

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1 DR. DENIS R. MILLER, having first been  
2 duly sworn by a Notary Public of the State of New York,  
3 was examined and testified as follows:

4 EXAMINATION BY

5 MR. S. TURNER:

6 Q. Good morning.

7 A. Good morning.

8 Q. Dr. Miller, could you state your name, address  
9 and professional title for the record.

10 A. Yes. Denis R. Miller, D-E-N-I-S. My address  
11 is 36 East Lake Road, Tuxedo Park, New York 10987.

12 My official title?

13 Q. Yes, whatever your professional title is.

14 A. I'm a therapeutic area leader for oncology  
15 hematology at Parexel, P-A-R-E-X-E-L, all capital  
16 letters, International.

17 Q. Thank you. Dr. Miller, you met Betsy Lehrfeld  
18 who is here, Chris Turner, and I'm Jim Turner, and we  
19 are representing the respondent in this case, Daniel  
20 Chapter One.

21 A. Yes.

22 MR. J. TURNER: What we're planning to do today  
23 is go over your expert witness report and talk about  
24 that and I want to do three things: One is to talk  
25 about how the report was prepared, that's the first

1 Do you have a background in nutrition?

2 A. Am I a nutritionist, no. Do I know about  
3 nutrition as it relates to cancer patients, yes.

4 Q. Can you describe your knowledge about nutrition  
5 as it relates to cancer patients?

6 A. Well, I'm very aware of the importance of  
7 nutrition in cancer patients. I'm very well aware of  
8 the adverse effects of malnutrition. I'm aware of how  
9 important it is for cancer patients who are undergoing  
10 therapy to make sure that they're well hydrated and not  
11 malnourished and, if they are, to treat those  
12 deficiencies so they can tolerate their treatment  
13 better and have a better quality of life.

14 I am constantly engaged in working with  
15 nutritionists and metabolic colleagues to help support  
16 cancer patients that I treated in a comprehensive and  
17 full way.

18 Q. Do you have any training in nutrition?

19 A. No.

20 Q. Do you have any certifications in nutrition?

21 A. No.

22 Q. I noted in your credentials that you were  
23 involved in oncology/hematology. Is that your area of  
24 expertise?

25 A. I'm board certified in oncology and hematology.

1 there may be other warnings, other side effects and  
2 they usually list them all.

3 Q. Okay. I want to now go to the part of the  
4 report "Detailed Discussion of Findings" and begin with  
5 Bio\*Shark.

6 A. Yes.

7 Q. You began that by saying, "The key questions  
8 relating to Bio\*Shark are: Does Bio\*Shark inhibit  
9 tumor growth? Is Bio\*Shark effective in the treatment  
10 of cancer?"

11 A. Yes.

12 Q. Who formulated those questions?

13 A. Well, I formulated the questions in response to  
14 the scope of work on page four where I said I had been  
15 asked by the FTC to determine whether there is  
16 competent and reliable scientific evidence to support  
17 or substantiate the following claims, and the first  
18 one, does Bio\*Shark inhibit tumor growth, and the  
19 second, Bio\*Shark is effective in the treatment of  
20 cancer, and I turned it a -- I asked the question and  
21 addressed those questions with the available  
22 peer-reviewed literature that addressed whether or not  
23 Bio\*Shark inhibits tumor growth and whether or not it's  
24 effective in the treatment of cancer.

25 Q. You state that a number of reported

1 effect of curcumin."

2 I don't know one by Rao, "Chemoprevention of  
3 colon carcinogenesis by dietary curcumin." So all of  
4 these papers that I've cited, talk about dietary  
5 curcumin. Some of them they may have mentioned where  
6 they came from, what the historical background was, but  
7 that is where that statement came from. All of these  
8 published papers and peer-reviewed literature use the  
9 term curcumin, not tumeric.

10 Q. You make the statement concerning lacking  
11 double blind placebo controlled randomized clinical  
12 trials of curcumin. Could you summarize your -- the  
13 significance of that section in which you talk about  
14 the lack of those studies?

15 A. Before I got to that sentence I described what  
16 are the reported studies and what some of the results  
17 were of those studies, particularly some of the studies  
18 in patients who are at high risk of developing colon  
19 cancer, but the ultimate step to demonstrate in a  
20 competent and reliable way that curcumin actually does  
21 these things would be to do a double blind placebo  
22 controlled randomized clinical trial. That's how we do  
23 things to show that it really is effective.

24 Q. Effective?

25 A. In preventing cancer or treating colon cancer.

## 1 CERTIFICATION OF REPORTER

2

3 CASE TITLE: FTC vs. DANIEL CHAPTER ONE4 DATE: FEBRUARY 6, 2009

5

6 I, HEREBY CERTIFY that the transcript contained  
7 herein is a full and accurate transcript of the notes  
8 taken by me in the above cause before the FEDERAL TRADE  
9 COMMISSION to the best of my knowledge and belief.

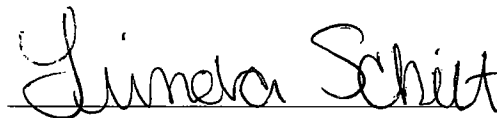
10

11

Dated: 2-9-09

12

13



14

LINDA A. SCHILT

15

16

## CERTIFICATION OF PROOFREADER

17

18

19

20

I HEREBY CERTIFY that I proofread the  
transcript for accuracy in spelling, hyphenation,  
punctuation and format.

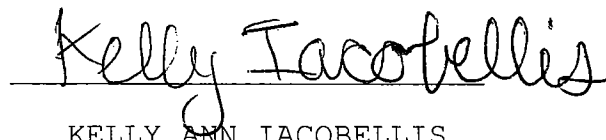
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24

25



KELLY ANN IACOBELLIS

# **Exhibit**

# **E**

**In the Matter of:**

Daniel Chapter One, et al.

*January 22, 2009*  
*Michael W. Marino*

**Condensed Transcript with Word Index**



For The Record, Inc.  
(301) 870-8025 - [www.ftrinc.net](http://www.ftrinc.net) - (800) 921-5555

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1 **Q. Okay.**  
 2 A. I don't recall seeing Exhibit 3, although that  
 3 doesn't mean that I didn't see it at one time or  
 4 another.  
 5 **Q. Do you recall the circumstances in which you've**  
 6 **seen Exhibits 1 and 2 before?**  
 7 A. Give me one second. I just want to look at some  
 8 of the --  
 9 **Q. Take your time.**  
 10 A. -- pages here.  
 11 (Pause in the proceedings.)  
 12 I don't recall the specific instances. They  
 13 just look familiar to me.  
 14 **Q. Do you recall whether you were asked to help in**  
 15 **preparation of answers to the questions that appear in**  
 16 **those exhibits?**  
 17 A. I don't recall if I was asked to help  
 18 specifically for these legal documents.  
 19 MR. McCORMACK: Okay. Great.  
 20 I have no further questions. Thank you for your  
 21 time. You passed your first deposition with flying  
 22 colors as far as I'm concerned. We appreciate it.  
 23 MR. ZANG: Off the record.  
 24 (Whereupon, the foregoing deposition was  
 25 concluded at 10:54 a.m.)

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1 CERTIFICATE OF DEPONENT  
 2 I hereby certify that I have read and examined  
 3 the foregoing transcript, and the same is a true and  
 4 accurate record of the testimony given by me.  
 5 Any additions or corrections that I feel are  
 6 necessary, I will attach on a separate sheet of paper to  
 7 the original transcript.  
 8  
 9 MICHAEL W. MARINO  
 10  
 11 I hereby certify that the individual  
 12 representing himself/herself to be the above-named  
 13 individual, appeared before me this  
 14 day of \_\_\_\_\_, 2009, and  
 15 executed the above certificate in my presence.  
 16  
 17  
 18 NOTARY PUBLIC IN AND FOR  
 19  
 20 MY COMMISSION EXPIRES:  
 21  
 22  
 23  
 24  
 25

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1 CERTIFICATION OF REPORTER  
 2  
 3 DOCKET/FILE NUMBER: 9329  
 4 CASE TITLE: Daniel Chapter One and James Feijo  
 5 HEARING DATE: January 22, 2009  
 6  
 7 I HEREBY CERTIFY that the transcript contained  
 8 herein is a full and accurate transcript of the notes  
 9 taken by me at the hearing on the above cause before the  
 10 FEDERAL TRADE COMMISSION to the best of my knowledge and  
 11 belief.  
 12  
 13 DATED: JANUARY 22, 2009  
 14  
 15  
 16 JOSETT F. WHALEN, RMR  
 17  
 18  
 19 CERTIFICATION OF PROOFREADER  
 20  
 21 I HEREBY CERTIFY that I proofread the transcript  
 22 for accuracy in spelling, hyphenation, punctuation and  
 23 format.  
 24  
 25 DIANE QUADE

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1 WITNESS: MICHAEL W. MARINO  
 2 DATE: January 22, 2009  
 3 CASE: In the Matter of Daniel Chapter One and  
 4 James Feijo  
 5 Please note any errors and the corrections thereof on  
 6 this errata sheet. The rules require a reason for any  
 7 change or correction. It may be general, such as "to  
 8 correct stenographic error" or "to clarify the record"  
 9 or "to conform with the facts."  
 10 PAGE LINE CORRECTION REASON FOR CHANGE  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

1 **notes about that conversation, written notes?**  
 2 A. I don't recall if I kept written notes.  
 3 **Q. If you did, I presume they would be in your**  
 4 **file.**  
 5 A. Yes.  
 6 **Q. Okay. Did you make any kind of e-mail report**  
 7 **about that conversation to anyone that you recall?**  
 8 A. Yes.  
 9 **Q. Okay. I presume a copy of that would also be**  
 10 **within your file.**  
 11 A. Yes.  
 12 **Q. I should ask, do you keep written copies of your**  
 13 **e-mails on particular cases?**  
 14 A. It depends.  
 15 **Q. Okay. On what?**  
 16 A. In the initial stage of the investigation I may  
 17 or may not, depending on its importance, whether or not  
 18 I think I'll need it in the future. Later on, if  
 19 there's a litigation hold, then I'll keep those  
 20 documents.  
 21 **Q. Do you keep electronic copies of your e-mails in**  
 22 **any case?**  
 23 A. The same rule applies.  
 24 **Q. In this case did you -- have you kept copies of**  
 25 **everything you produced?**

1 **reason that things like that are done undercover or**  
 2 **not?**  
 3 A. I don't know if there's a policy reason.  
 4 **Q. How about a strategic reason that you're aware**  
 5 **of?**  
 6 A. There may be a reason that we don't want the  
 7 company that we're looking at to know that we're looking  
 8 at them.  
 9 They may, for example, shut down the Web site.  
 10 They may, for example, change something on their  
 11 Web site.  
 12 They may not send us the products --  
 13 **Q. Okay.**  
 14 A. -- if they knew that we were with the FTC.  
 15 **Q. Do you know who Ms. Colbert is, C-O-L-B-E-R-T?**  
 16 A. Yes.  
 17 **Q. Who is she?**  
 18 A. She's an investigator with the FTC.  
 19 **Q. Does she work -- where does she work?**  
 20 A. She works in headquarters.  
 21 **Q. Which is where?**  
 22 A. Washington, D.C.  
 23 **Q. Do you know what -- strike that.**  
 24 **Did she play a role in the investigation of DCO,**  
 25 **to your knowledge?**

1 **Let me rephrase it actually.**  
 2 **Have you destroyed or deleted anything in the**  
 3 **Daniel Chapter One case?**  
 4 A. During the course -- the course of the entire  
 5 investigation?  
 6 **Q. Correct.**  
 7 A. I'm sure I might have thrown out some things.  
 8 Yes.  
 9 **Q. Do you know what?**  
 10 A. I can't remember specific items.  
 11 **Q. Do you generally recall what you tossed out or**  
 12 **deleted?**  
 13 A. No. Not -- no.  
 14 **Q. Anything exculpatory, for instance?**  
 15 A. No, no. Absolutely not.  
 16 **Q. Okay.**  
 17 A. No. The only reason I would throw something out  
 18 is if I felt I didn't need it anymore, you know, for my  
 19 own knowledge.  
 20 **Q. Can you tell me why the purchases you made of**  
 21 **DCO products was done undercover as opposed to**  
 22 **aboveboard?**  
 23 A. I was merely told to make an undercover  
 24 purchase. I don't know why that decision was made.  
 25 **Q. Do you know generally if there's a policy**

1 A. I have a general recollection that she did.  
 2 **Q. And what's your general recollection about the**  
 3 **role she played?**  
 4 A. I don't know specifically. I just remember the  
 5 name.  
 6 **Q. Have you had any conversations with her about**  
 7 **DCO?**  
 8 A. Not that I could recall.  
 9 **Q. And lastly --**  
 10 A. And if I could just go back.  
 11 **Q. Yep.**  
 12 A. Just to clarify my one answer, I think she's an  
 13 investigator. She may be an attorney, but I think she's  
 14 an investigator.  
 15 **Q. Okay. And if you would, Mr. Marino, take a look**  
 16 **at what I'll hand you that has been marked Exhibits 1, 2**  
 17 **and 3, marked specifically DCO 1, DCO 2 and DCO 3. Just**  
 18 **peruse those and tell me if you've ever seen those**  
 19 **documents before.**  
 20 **(Pause in the proceedings.)**  
 21 A. Okay. I briefly looked at these.  
 22 **Q. And have you seen these documents before?**  
 23 A. I may have seen these two before (indicating).  
 24 **Q. And you're referring to Exhibits 1 and 2 only?**  
 25 A. That's correct.

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1 "consumer injury."  
 2 THE WITNESS: Could you rephrase that or --  
 3 could you rephrase that.  
 4 BY MR. McCORMACK:  
 5 **Q. What is it about the question you didn't**  
 6 **understand?**  
 7 A. I don't understand the question.  
 8 **Q. Is there any particular part you don't**  
 9 **understand?**  
 10 A. Yeah. Could you just ask it again then or  
 11 just --  
 12 **Q. Sure.**  
 13 **Is investigation of consumer injury within the**  
 14 **scope of your job responsibilities?**  
 15 A. Generally, no.  
 16 MR. ZANG: And again I just want to note the  
 17 objection, even though you answered very quickly, to the  
 18 extent that that's calling for a legal conclusion.  
 19 BY MR. McCORMACK:  
 20 **Q. In the course of your job responsibilities,**  
 21 **Mr. Marino, do you ever evaluate the phrase "net overall**  
 22 **impression of health claims"?**  
 23 A. No.  
 24 **Q. Do you have an understanding of what that phrase**  
 25 **means?**

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1 now that I'm thinking about it, I vaguely remember there  
 2 were cancer claims associated with those investigations,  
 3 but again I think it was like five years ago or  
 4 something like that.  
 5 **Q. And to clarify, were those dietary supplement**  
 6 **cases, if you remember, or were they something else?**  
 7 MR. ZANG: Objection.  
 8 I don't think we've ever established the meaning  
 9 of "dietary supplement," so if you want to lay a  
 10 foundation or ask Mr. Marino if he has an understanding  
 11 of "dietary supplement" --  
 12 BY MR. McCORMACK:  
 13 **Q. Do you understand what I mean by "dietary**  
 14 **supplement"?**  
 15 A. I have an understanding of it.  
 16 **Q. Okay. Then I'll re-ask the question.**  
 17 **Were those dietary supplement cases, the other**  
 18 **ones that you're referring to?**  
 19 A. I think they were.  
 20 **Q. Okay.**  
 21 A. But again it was five or six years ago, so I  
 22 don't remember specifically.  
 23 **Q. I understand.**  
 24 **It's a yes-or-no question. Do you know if**  
 25 **conventional cancer treatments, claims about**

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1 A. No.  
 2 **Q. Have you ever investigated what you understand**  
 3 **to be conventional cancer treatments or products?**  
 4 A. I have a general recollection. Yes.  
 5 MR. ZANG: Again, I would just caution you not  
 6 to go into the specifics of any company that has not  
 7 publicly been identified.  
 8 BY MR. McCORMACK:  
 9 **Q. Yes. At this point I don't want to -- no**  
 10 **names.**  
 11 **Do you recall how many instances you've**  
 12 **investigated?**  
 13 A. Just one or two.  
 14 **Q. I'm sorry. One or two?**  
 15 A. One or two.  
 16 **Q. Did either of those go to a phase of a public**  
 17 **complaint being filed? If you know.**  
 18 A. I don't know.  
 19 **Q. All right. Do you recall specifically, again**  
 20 **without naming names, the product or treatment that was**  
 21 **at issue in either of those?**  
 22 A. No.  
 23 **Q. Can you give me a time frame?**  
 24 A. Again, these were the similar products we were  
 25 talking about earlier. I vaguely remember there were --

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1 **conventional cancer treatments have ever been evaluated**  
 2 **by the FTC?**  
 3 A. I don't know.  
 4 **Q. Through the course of your investigation on**  
 5 **Daniel Chapter One specifically, did you interview or**  
 6 **research -- strike that. It's compound.**  
 7 **In the course of your investigation of**  
 8 **Daniel Chapter One, did you interview anyone with cancer**  
 9 **who used dietary supplements?**  
 10 A. No.  
 11 **Q. And in the course of your investigation of**  
 12 **Daniel Chapter One did you do any research, separate**  
 13 **from interviewing people, did you do any research about**  
 14 **conventional cancer treatments, their safety and**  
 15 **efficacy?**  
 16 A. Not that I can remember, no.  
 17 MR. McCORMACK: I want to take a two-minute  
 18 break, make sure that I've exhausted my questions, and  
 19 then we'll wrap.  
 20 (Recess)  
 21 BY MR. McCORMACK:  
 22 **Q. We are back on the record following our break.**  
 23 **Just a few follow-up questions, Mr. Marino, and**  
 24 **then we'll let you go, with thanks.**  
 25 **When you spoke with Ms. Oppie, did you keep**

1 companies were targeted in Operation False Cures?  
 2 A. Oh, I don't know.  
 3 **Q. Independent of what you received from DCO**  
 4 **Web site or with the products, did you do any**  
 5 **investigation about the products themselves from other**  
 6 **sources?**  
 7 A. You mean the efficacy -- what is it --  
 8 efficacy?  
 9 **Q. Efficacy?**  
 10 A. No.  
 11 **Q. Apart from the efficacy, did you do any**  
 12 **research about just the elements of the products?**  
 13 A. You mean the ingredients?  
 14 **Q. Yes.**  
 15 A. No.  
 16 **Q. Okay. Did you do any research or investigation**  
 17 **about complaints that any user of DCO products had ever**  
 18 **made?**  
 19 A. Yes.  
 20 **Q. Okay. Tell me what steps you took in that**  
 21 **regard.**  
 22 A. I mentioned before that I went to the BBB's  
 23 Web site to see if they had any complaints.  
 24 **Q. What did you find?**  
 25 A. I could not find any complaints.

1 A. Yes. I conducted a Consumer Sentinel search.  
 2 **Q. A Consumer Sentinel?**  
 3 A. A Consumer Sentinel search.  
 4 **Q. Tell me generally what Consumer Sentinel is.**  
 5 A. Consumer Sentinel is a database that the FTC  
 6 maintains to keep a record of consumer complaints.  
 7 **Q. And what did the result of your**  
 8 **Consumer Sentinel search turn up about DCO?**  
 9 A. There was only one complaint that was listed,  
 10 and that complaint was entered by Lynlea Givens Oppie.  
 11 **Q. And the complaint was what you'd already**  
 12 **described from your conversation?**  
 13 A. Very similar.  
 14 **Q. So in other words, to the best of your**  
 15 **recollection, Ms. Oppie's complaint as revealed by the**  
 16 **Consumer Sentinel search was not about the product but**  
 17 **was about her father's testimonial.**  
 18 A. I don't remember the specifics of it, but it was  
 19 substantially similar to what she told me over the  
 20 phone.  
 21 **Q. Okay. Was a written record kept of your**  
 22 **Consumer Sentinel search?**  
 23 A. Not a written record by me. I did not make hand  
 24 notes. However, I did print up a summary of the  
 25 complaint. Yes.

1 **Q. Other than the BBB's Web site --**  
 2 A. Well, let me back up.  
 3 **Q. Yep.**  
 4 A. I'm sorry.  
 5 **Q. That's okay.**  
 6 A. But the reason I couldn't find any complaints  
 7 was because the BBB -- the search was inconclusive. The  
 8 BBB didn't have a listing for Daniel Chapter One at the  
 9 time that I could find, so therefore I couldn't identify  
 10 any complaints for Daniel Chapter One.  
 11 **Q. Is there a reason --**  
 12 **(Pause in the proceedings.)**  
 13 **Do you have an understanding about why the BBB**  
 14 **wouldn't have a listing for Daniel Chapter One?**  
 15 A. No.  
 16 **Q. Do you know if the BBB only opens a file if they**  
 17 **receive a complaint?**  
 18 A. I don't know.  
 19 **Q. Would it be your understanding that the reason**  
 20 **there was no listing with the BBB of DCO is that they**  
 21 **had not received a complaint?**  
 22 A. I don't know why it's not listed.  
 23 **Q. Okay. Any other sources besides the BBB that**  
 24 **you investigated or researched to determine complaints**  
 25 **about DCO?**

1 MR. McCORMACK: For the record, I'll follow up  
 2 with you separately. I think we requested that, but I  
 3 think the response we got is that there is nothing  
 4 available on that.  
 5 MR. ZANG: I think the request, if it's the one  
 6 I'm recalling, was regarding consumer complaints against  
 7 DCO, and Ms. Givens, if that's her name, was not a  
 8 direct consumer herself.  
 9 MR. McCORMACK: Could be. We'll double-check.  
 10 BY MR. McCORMACK:  
 11 **Q. Mr. Marino, are you aware of any specific**  
 12 **injuries that DCO or its products have caused to**  
 13 **consumers?**  
 14 A. I wouldn't know that.  
 15 **Q. You would not know that?**  
 16 A. I would not know that.  
 17 **Q. That was not within the scope of your**  
 18 **investigation then; is that right?**  
 19 A. That's correct. That was -- yes, that's  
 20 correct.  
 21 **Q. Okay. Apart from the DCO case specifically, is**  
 22 **the investigation of specific consumer injury ever**  
 23 **within the scope of your job responsibilities?**  
 24 MR. ZANG: I just want to object in terms of  
 25 lack of foundation with respect to the term

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1 list.  
 2 A. Yes.  
 3 **Q. Did you ever contact any of the people that were**  
 4 **on that list?**  
 5 A. I never contacted anyone from that list as a  
 6 result of reviewing that list.  
 7 **Q. How about -- did you contact anyone on that list**  
 8 **for some other reason or prompted by some other**  
 9 **direction?**  
 10 A. I never contacted anyone on that list.  
 11 **Q. Okay. All right.**  
 12 **With respect to DCO, have you contacted anyone,**  
 13 **whether on the list of testimonials, anyone who's**  
 14 **purchased a product or who is a follower of DCO's**  
 15 **ministry, for any purpose related to this case in your**  
 16 **investigation?**  
 17 A. Could you repeat that.  
 18 **Q. Sure.**  
 19 **Have you contacted anyone who is a DCO follower,**  
 20 **who's used their products --**  
 21 MR. ZANG: Objection.  
 22 BY MR. McCORMACK:  
 23 **Q. -- related to the investigation?**  
 24 MR. ZANG: Objection with respect to the  
 25 terminology of "follower." Lack of foundation there.

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1 **your contact with Ms. Oppie was?**  
 2 A. Yes.  
 3 **Q. What's that understanding?**  
 4 A. I was to interview her and see what her story  
 5 was.  
 6 **Q. And did you do so?**  
 7 A. Yes.  
 8 **Q. What's her story?**  
 9 A. Her story was that she was doing some research  
 10 on her father, she was on the Internet, she came across  
 11 Daniel Chapter One's Web site, she saw that her  
 12 father's -- her father's name appeared along with a  
 13 testimonial purportedly by him in which he endorsed  
 14 Daniel Chapter One's products, and she was upset about  
 15 that because he had been dead for several years.  
 16 **Q. Anything else that she imparted to you?**  
 17 A. She said that she was very upset, she contacted  
 18 the company.  
 19 **Q. Is that it as far as you can recall?**  
 20 A. Those are the general points that come to mind  
 21 now.  
 22 **Q. To your knowledge and recollection, did she**  
 23 **contradict anything in the testimonial itself?**  
 24 A. I never read the testimonial word for word, so I  
 25 couldn't say.

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1 BY MR. McCORMACK:  
 2 **Q. Do you understand what I mean?**  
 3 A. I understand what you mean.  
 4 And based on what you asked me so far, the  
 5 answer is no, I haven't contacted anyone, based on what  
 6 you just asked me.  
 7 **Q. Okay. Have you contacted any third party**  
 8 **related to the DCO investigation?**  
 9 A. Yes.  
 10 **Q. Who?**  
 11 A. I was asked by an attorney to contact  
 12 Lynlea Givens --  
 13 **Q. Oppie?**  
 14 A. Oppie, that's it.  
 15 **Q. O-P-P-I-E?**  
 16 A. I'm not sure of the spelling, but that's the  
 17 name.  
 18 **Q. I think that's what it is.**  
 19 **And did you succeed?**  
 20 A. Yes.  
 21 **Q. And when did you do that?**  
 22 **When did you contact her?**  
 23 A. It was in October or November of the previous  
 24 year, 2008.  
 25 **Q. Do you have an understanding what the purpose of**

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1 **Q. But did she share anything that indicated she**  
 2 **disputed what was in the testimonial?**  
 3 A. Not that I recall at this point.  
 4 **Q. Okay. Did she give you any indication that you**  
 5 **recall that she felt the testimonial was inauthentic?**  
 6 A. I don't remember.  
 7 **Q. Okay. Mr. Marino, I've got a few more**  
 8 **questions and I also want to be sensitive to our time**  
 9 **schedule, so I'm going to perhaps bounce around a bit.**  
 10 **Bear with me.**  
 11 **You used the word I think in specific reference**  
 12 **to your purchase of DCO products as an undercover**  
 13 **purchase.**  
 14 **What did you mean by "undercover"?**  
 15 A. I used an undercover name and some other  
 16 undercover information.  
 17 **Q. Do you recall the name you used?**  
 18 MR. ZANG: Objection. That would be  
 19 investigatory privilege.  
 20 MR. McCORMACK: Okay. I won't press that one  
 21 right now, but I understand.  
 22 BY MR. McCORMACK:  
 23 **Q. Do you know the identity of any of the -- strike**  
 24 **that.**  
 25 **Do you know if other dietary supplement**

1 **Q. Sure. Go ahead.**  
 2 A. We -- I'm just thinking how I could frame this.  
 3 I'm not quite sure I understand.  
 4 If your question is have we ever gone out and at  
 5 the outset investigated nonprofits -- is that what  
 6 you're asking, or are you asking me have you ever in the  
 7 course investigated companies that turned out to be  
 8 nonprofits or...  
 9 **Q. Well, first of all I'm asking for what you've**  
 10 **done.**  
 11 A. Okay.  
 12 **Q. And let's parse it out in the ways you've just**  
 13 **described.**  
 14 **So first, have you ever investigated companies**  
 15 **who you knew going into the investigation were**  
 16 **nonprofits?**  
 17 A. Not that I could recall.  
 18 **Q. And the part two of that question I guess would**  
 19 **be: Have you ever investigated companies that through**  
 20 **the course of your investigation you learned were**  
 21 **nonprofits?**  
 22 A. Yes.  
 23 **Q. Okay. Do you recall if those investigations of**  
 24 **nonprofits related to claims that were made by those**  
 25 **nonprofits?**

1 communicated verbally or by e-mail.  
 2 A. Correct.  
 3 **Q. Okay. And is that something that you would keep**  
 4 **notes on in your file?**  
 5 A. Not necessarily.  
 6 **Q. Through the course of your work for the FTC,**  
 7 **Mr. Marino, have you had any training about what**  
 8 **constitutes a health claim?**  
 9 MR. ZANG: Objection. Lack of foundation.  
 10 MR. McCORMACK: Objection noted.  
 11 THE WITNESS: If you're talking about formal  
 12 training like classroom training, the answer is no.  
 13 BY MR. McCORMACK:  
 14 **Q. Okay. How about informal training?**  
 15 A. Professional reading on my own. Yes.  
 16 **Q. Okay. Do you understand what is meant by the**  
 17 **phrase "structure/function claim" in the context of**  
 18 **health claims, for instance?**  
 19 A. No.  
 20 **Q. Through the course of your investigation of DCO,**  
 21 **did you ever feel that you needed to have an**  
 22 **understanding of what health claims are?**  
 23 A. No.  
 24 **Q. How about structure/function claims?**  
 25 A. No.

1 A. I don't remember.  
 2 **Q. Okay. What do you remember about the**  
 3 **investigation of those nonprofits? What was the reason**  
 4 **for the investigation?**  
 5 MR. ZANG: And here just let me pause and direct  
 6 you, Mr. Marino, not to disclose the names of any  
 7 companies that you might have investigated in the past  
 8 unrelated to Daniel Chapter One that have not been  
 9 publicly disclosed.  
 10 MR. McCORMACK: Agreed. I'm not looking for  
 11 names.  
 12 THE WITNESS: I don't remember.  
 13 BY MR. McCORMACK:  
 14 **Q. Okay. All right.**  
 15 **In the course of issuing reports to your**  
 16 **supervisors -- I'm talking generally now -- are there**  
 17 **times when you include in your reports recommendations**  
 18 **or conclusions?**  
 19 A. Generally speaking?  
 20 **Q. Yes.**  
 21 A. Yes, sometimes I do.  
 22 **Q. Okay. In the Daniel Chapter One matter did you**  
 23 **do so?**  
 24 A. I don't recall specific instances. No.  
 25 **Q. If you did so, I presume they would have been**

1 **Q. Okay. At any time during your investigation of**  
 2 **Daniel Chapter One did you focus specifically on media**  
 3 **other than the Web site?**  
 4 A. What do you mean, "focus"?  
 5 **Q. Did you gather information about**  
 6 **Daniel Chapter One from media other than the Web site?**  
 7 A. Not that I recall at this point.  
 8 **Q. Okay. Okay. Did you gather information in the**  
 9 **course of your investigation of Daniel Chapter One on**  
 10 **testimonials?**  
 11 A. Yes, I did.  
 12 **Q. Describe that process for me, please.**  
 13 A. Going back to the Web site preservation, we  
 14 captured some testimonials in that Web site  
 15 preservation.  
 16 **Q. So there wasn't, I gather from your answer --**  
 17 **and correct me if my impression is wrong -- there wasn't**  
 18 **a specific direction to focus on testimonials; it was**  
 19 **just part of the general Web site capture?**  
 20 A. Not necessarily. I was just giving that one  
 21 instance.  
 22 At a later point, I was asked to make a list of  
 23 individuals who appeared on Daniel Chapter One's  
 24 Web site as providing testimonials.  
 25 **Q. Okay. Did you -- and I presume you created that**

1 Q. Who's "we"?

2 A. The team collectively.

3 Q. The attorneys you've mentioned and yourself.

4 A. And myself, right.

5 Q. Okay. All right. Can you frame for me the time

6 when you made the purchases of the products relative to

7 downloading the Web site? Days? Weeks? Months?

8 A. Well, I purchased the products on January 3,

9 2008. I purchased the radio shows July -- I guess July

10 of 2008.

11 Q. Actually your memory is pretty good, so

12 thank you. I'm impressed.

13 Okay. At any time during the course of your

14 investigation did you talk with anyone, by phone or in

15 person or even by e-mail I suppose, with anyone who you

16 knew or understood to be affiliated with

17 Daniel Chapter One?

18 A. Not that I recall, no.

19 Q. How about with Accent Radio?

20 A. Yes, I did.

21 Q. Share that with me, please, the circumstances.

22 A. I had to contact Accent Radio Network because

23 we -- at the time we didn't receive the CDs that we

24 ordered.

25 Q. You received different CDs?

1 A. No. We didn't receive any.

2 Q. Oh, okay. All right.

3 A. So I spoke to the person and said, We haven't

4 received the CDs. They -- I forget what they said. I

5 waited another period of time. I called them again and

6 said, Hey, we still haven't received the CDs. They

7 said, Oh, it was an oversight, we're sending them now,

8 and then received the CDs.

9 Q. Do you happen to recall who you spoke with by

10 any chance?

11 A. No, I don't.

12 Q. Okay. So we've identified the download and

13 capture of the Web site. We've identified an undercover

14 purchase of four products. Right?

15 A. Right.

16 Q. And we've identified the purchase of two

17 specific radio programs; right?

18 A. Correct.

19 Q. Any other tasks that you undertook in your

20 investigation of DCO?

21 A. Yes.

22 I conducted a BBB search.

23 I did a Whois search.

24 I did a Lexis search.

25 I did a D&B search.

1 Did I say that already?

2 Q. I think you did, but that's okay.

3 A. Oh, I'm sorry.

4 And that's all I could remember offhand right

5 now.

6 Q. Do you recall what, if anything, was revealed by

7 the Lexis search?

8 A. I conducted a search for the company. It

9 revealed the company's -- the usual information that a

10 Lexis search would reveal: the company's addresses,

11 the company's telephone numbers, you know, telephone

12 numbers that are associated with the company, addresses

13 that are associated with the company, corporate

14 officers who are associated with the company, that sort

15 of information.

16 Q. Okay. Did you do any investigation into the

17 organizational status of Daniel Chapter One as a

18 nonprofit organization, for instance?

19 A. I was asked to obtain copies from the

20 Washington Secretary of State for their articles of

21 incorporation.

22 Q. And did you do so?

23 A. Yes, I did.

24 Q. And how did you do that?

25 A. I wrote a letter to Washington Secretary of

1 State requesting the articles of incorporation.

2 Q. Did you do any investigation into the status of

3 DCO as a religious organization?

4 A. Not specifically as a religious organization,

5 no.

6 Q. In the course of your work over the last ten

7 years with the FTC, have you investigated other

8 nonprofit organizations for any reason?

9 MR. ZANG: Objection. Foundation.

10 BY MR. McCORMACK:

11 Q. You can go ahead and answer.

12 A. That threw me off a little bit.

13 Q. That's okay.

14 A. Could you repeat the question.

15 Q. Sure.

16 Over the course of your investigatory work for

17 the FTC over the last ten years, to the extent you can

18 recall, have you investigated other nonprofit

19 organizations?

20 MR. ZANG: And again, same objection.

21 MR. McCORMACK: Noted.

22 THE WITNESS: No.

23 BY MR. McCORMACK:

24 Q. Okay. I presume that you haven't --

25 A. Let me qualify that if I could.

1 A. Correct.  
 2 **Q. Okay. All right.**  
 3 **In the course of learning about that reference,**  
 4 **did you deem that significant to your investigation or**  
 5 **not?**  
 6 A. It had no impact whatsoever.  
 7 **Q. On your investigation.**  
 8 A. Correct.  
 9 **Q. Okay. All right.**  
 10 **We've talked about task one I think in its**  
 11 **entirety.**  
 12 **Can you tell me -- if I'm wrong about that, let**  
 13 **me know -- what was the next task you undertook in the**  
 14 **investigation of DCO?**  
 15 A. I don't recall the exact chronology. There were  
 16 several tasks I had to do, but I can't give you a  
 17 chronological order for each of those tasks.  
 18 **Q. Okay. Why don't you describe to the best of**  
 19 **your recollection what the next task was, and if it's**  
 20 **out of order, I'll forgive you.**  
 21 A. Again, I can't -- I can't tell you every task --  
 22 well, maybe I didn't make this clear. I don't remember  
 23 every task also.  
 24 I mean, I would have to look at my investigative  
 25 file.

1 **Q. And it was just four products?**  
 2 A. Just four products.  
 3 **Q. And I'm sorry. I think I interrupted you.**  
 4 **But you followed through with the purchase**  
 5 **online?**  
 6 A. I think I was done with my answer.  
 7 **Q. And I may have missed it.**  
 8 **Did you follow through with the purchase**  
 9 **online?**  
 10 A. Oh, I'm sorry. Yes. Yes.  
 11 **Q. And actually took delivery of the products?**  
 12 A. Yes, I did.  
 13 **Q. Okay. Next task or major task that you can**  
 14 **recall.**  
 15 A. The next major task I can recall is purchasing  
 16 two radio shows -- or recordings of two radio shows that  
 17 were broadcast by Daniel Chapter One or their  
 18 principals.  
 19 **Q. And you purchased those how?**  
 20 A. I went online to Accent Radio Network -- I'm  
 21 sorry. Let me back up.  
 22 I went online to Daniel Chapter One's Web site  
 23 that had a link to Accent Radio Network's Web site and  
 24 then made a purchase from Accent Radio Network's  
 25 Web site.

1 The next major task I did, if that's acceptable  
 2 to you --  
 3 **Q. Start there?**  
 4 A. Okay -- was an undercover purchase for  
 5 Daniel Chapter One products.  
 6 **Q. And is that the -- remember I described that DVD**  
 7 **earlier?**  
 8 A. Correct.  
 9 **Q. Is that DVD of that undercover purchase?**  
 10 A. That's correct.  
 11 **Q. Did you make more than one purchase?**  
 12 A. I made one -- there was one purchase for four  
 13 products.  
 14 **Q. Describe for me what you did there, please, as**  
 15 **best you can recall.**  
 16 A. Okay. I went to Daniel Chapter One's Web site  
 17 and I chose four products that were identified for me  
 18 and I purchased those products.  
 19 **Q. When you say that were identified for you, by**  
 20 **your supervisors I presume.**  
 21 A. By one of the attorneys in charge of the  
 22 matter.  
 23 **Q. It wasn't the Web site that identified them for**  
 24 **you.**  
 25 A. No. Absolutely not.

1 **Q. Of the?**  
 2 A. Two recordings.  
 3 **Q. Downloaded radio shows?**  
 4 A. I'm not saying downloaded. Of the two radio  
 5 shows. When I made the purchase, they sent me CDs of  
 6 the shows.  
 7 **Q. Okay. How did you pick the two shows that you**  
 8 **purchased?**  
 9 A. I was told to pick those two shows.  
 10 **Q. I see. Okay.**  
 11 **Do you have any understanding why those two**  
 12 **particular shows were selected --**  
 13 A. No.  
 14 **Q. -- your understanding?**  
 15 A. No.  
 16 **Q. Okay. Did you investigate what, if any,**  
 17 **relationship existed at the time between DCO and**  
 18 **Accent Radio Network?**  
 19 A. Not specifically.  
 20 **Q. Okay. How about unspecifically?**  
 21 A. There was a point in the investigation when we  
 22 identified Accent Radio Network and then -- then I think  
 23 collectively we tried to determine whether there was a  
 24 connection between them. That's the extent of what I  
 25 remember.

29

1 A. No.  
 2 **Q. Okay.**  
 3 A. Not specific products.  
 4 **Q. I'm sorry?**  
 5 A. Not specific products or specific companies I  
 6 don't recall.  
 7 **Q. Okay. It certainly would have been some type of**  
 8 **claim, though, I presume.**  
 9 A. Yes.  
 10 **Q. And were they health claims, if you remember or**  
 11 **know?**  
 12 A. They were dietary supplement claims.  
 13 **Q. Okay. Okay. Do you remember the specific**  
 14 **claims that were at issue in those cases?**  
 15 A. No.  
 16 **Q. When you receive instructions to investigate**  
 17 **any of these small handful of dietary supplement**  
 18 **companies, are you looking for the specific claims or**  
 19 **are you just kind of following general protocols of**  
 20 **downloading information, gathering information,**  
 21 **printing information?**  
 22 A. I'm not sure if I understand the question.  
 23 If you're asking me -- if you're asking me if  
 24 someone will come up to me and say, Hey, investigate  
 25 this matter and follow a certain set formula and do

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1 A. I don't decide what's an important claim and  
 2 what's not an important claim.  
 3 **Q. Okay. And how about outside of the claims**  
 4 **per se? Do you use your discretion in deciding what's**  
 5 **important information and what's not important**  
 6 **information?**  
 7 A. You'll have to be more specific than that.  
 8 **Q. The name Daniel Chapter One, for instance.**  
 9 A. Would I think that's an -- are you asking me if  
 10 I would think that's an important what?  
 11 **Q. For instance, do you exercise or did you in this**  
 12 **case exercise discretion in deciding that the name**  
 13 **Daniel Chapter One was relevant to the investigation or**  
 14 **not?**  
 15 A. As a target or as a possible target?  
 16 **Q. As a concept.**  
 17 A. No.  
 18 **Q. Do you know what Daniel Chapter One means or**  
 19 **refers to?**  
 20 A. I think it's a biblical reference.  
 21 **Q. Are you familiar with the biblical reference by**  
 22 **any chance?**  
 23 A. That particular one?  
 24 **Q. Yes.**  
 25 A. Not very familiar, no, just in a very broad

30

1 that -- is that what you're asking me?  
 2 **Q. Yes.**  
 3 A. For this type of case?  
 4 **Q. Right.**  
 5 A. Or for Daniel Chapter One in particular?  
 6 **Q. Let's talk first about this type of case.**  
 7 A. Okay.  
 8 No, that's not what happens.  
 9 **Q. Okay. And was it any different for**  
 10 **Daniel Chapter One?**  
 11 A. No.  
 12 **Q. How does it happen?**  
 13 A. Generally an attorney will approach me and an  
 14 attorney will tell me, Mr. Marino, could you do this,  
 15 for example, preserve a Web site, and then I'll preserve  
 16 the Web site.  
 17 **Q. Okay. So it's not within your job**  
 18 **responsibilities -- through the course of your job**  
 19 **responsibilities, you're not exercising discretion about**  
 20 **what's important within the Web site versus what's not**  
 21 **important in the Web site, for instance.**  
 22 A. Are you talking about Daniel Chapter One in  
 23 particular?  
 24 **Q. Let's talk about Daniel Chapter One in**  
 25 **particular.**

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1 sense.  
 2 **Q. Tell me what your broad sense is.**  
 3 MR. ZANG: Mr. McCormack, here I'm going to  
 4 object on the grounds of relevance.  
 5 But go ahead. You can answer.  
 6 MR. McCORMACK: Objection noted.  
 7 BY MR. McCORMACK:  
 8 **Q. You can go ahead and answer.**  
 9 A. I understand that -- oh, boy.  
 10 **Q. And I don't want you to guess. If you don't**  
 11 **know, that's fine. I'm just curious.**  
 12 A. Yeah. I understand it's a biblical reference  
 13 having to do with nature or God being able to help  
 14 people maybe cure themselves or help themselves or  
 15 something like that. That's the extent of my  
 16 understanding.  
 17 **Q. Sure.**  
 18 **Where did you gain that understanding?**  
 19 A. Through general conversation. I don't recall  
 20 the exact source.  
 21 **Q. Do you recall if you gained that understanding**  
 22 **from the DCO Web site at all?**  
 23 A. No. Absolutely not.  
 24 **Q. Okay. So you're certain that you didn't gain**  
 25 **that understanding from the Web site.**

1 A. Okay. Hypothetically what I wait for is a  
 2 prompt from the computer saying it's finished.  
 3 **Q. Okay. So again, you're relying on the computer**  
 4 **to tell you that it's downloaded all the relevant**  
 5 **information.**  
 6 A. Correct.  
 7 **Q. Now let's talk about Daniel Chapter One**  
 8 **specifically.**  
 9 **Did you do any manual exercise in reviewing the**  
 10 **Daniel Chapter One Web site?**  
 11 A. I don't understand the question.  
 12 Are you talking about while it's saving the  
 13 information?  
 14 **Q. Or even afterwards.**  
 15 **I guess what I'm interested in knowing is,**  
 16 **during the course of this task one, if you downloaded,**  
 17 **captured every single page from the Daniel Chapter One**  
 18 **Web site with information about Daniel Chapter One and**  
 19 **what it does.**  
 20 A. Okay. As I alluded to earlier, not every  
 21 program that's designed to capture Web sites would  
 22 capture every single thing.  
 23 For example, Teleport Pro in some instances  
 24 can't capture pop-ups, can't capture streaming videos,  
 25 so for example, those are things that program won't be

1 would just keep going.  
 2 **Q. So at some point you made that decision and**  
 3 **saved the disk and handed it to Mr. Waldman.**  
 4 A. Yes. At some -- well, let me go back.  
 5 At that point when I realized that it was just  
 6 going on and on, I stopped the Web site preservation,  
 7 the Teleport Pro. I preserved it to the computer. I  
 8 preserved it to a CD. I gave it to Mr. Waldman. I  
 9 explained to Mr. Waldman what happened. I suggested  
 10 that he review it to make sure it had all the  
 11 information that he wanted preserved.  
 12 **Q. Okay. Did you take notes during your**  
 13 **performance of the task one you just described?**  
 14 A. I don't recall. I'd have to check.  
 15 **Q. Okay. Prior to being assigned this**  
 16 **investigation of Daniel Chapter One, do you recall**  
 17 **having investigated any dietary supplement manufacturer**  
 18 **before?**  
 19 A. Yes.  
 20 **Q. Can you tell me how many times?**  
 21 A. I think about two times before.  
 22 **Q. Can you give me a general time frame, window of**  
 23 **time, when those investigations took place?**  
 24 A. I would say approximately four to five years  
 25 ago.

1 able to capture.  
 2 **Q. Okay.**  
 3 A. So in general, that's a factor to be considered  
 4 when dealing with Teleport Pro, if I answered your  
 5 question correctly.  
 6 **Q. Okay. So anything that was a still shot of**  
 7 **text or graphic from the Daniel Chapter One Web site**  
 8 **you believe was captured during the course of this task**  
 9 **one?**  
 10 A. Not necessarily.  
 11 **Q. Can you explain?**  
 12 A. Yes. Teleport Pro is designed to capture all of  
 13 the files in a particular -- or at a particular Web site  
 14 or in a particular Web site.  
 15 In Daniel Chapter One's Web site case -- and  
 16 this tends to happen in a lot of Web sites that have a  
 17 lot of catalogs or large catalogs -- the program tends  
 18 to run on and on and on.  
 19 Additionally, Teleport Pro is also designed to  
 20 seek out other Web sites that are linked to the Web site  
 21 you're trying to preserve, so it will also start  
 22 preserving those Web sites as well, so it could tend to  
 23 run on and on.  
 24 So at some point with Daniel Chapter One I had  
 25 to make a decision to stop the program; otherwise, it

1 **Q. Okay.**  
 2 A. But let me qualify that --  
 3 **Q. Sure.**  
 4 A. -- in saying give or take a year or so.  
 5 **Q. Sure. That's fair.**  
 6 **Do you know if those investigations were part of**  
 7 **Operation False Cures?**  
 8 A. Oh, I have no idea.  
 9 **Q. Okay.**  
 10 A. I don't think so.  
 11 **Q. Okay. Were the investigations similar in the**  
 12 **sense that you were investigating companies that were**  
 13 **making claims that the FTC was adverse to?**  
 14 A. I'm sorry. Could you say that again.  
 15 **Q. Yes. I'll try.**  
 16 **Were you, in those previous cases -- I think you**  
 17 **said one or two or maybe two or three --**  
 18 A. Right.  
 19 **Q. -- when you investigated dietary supplement**  
 20 **companies, were those investigations prompted by alleged**  
 21 **claims that those manufacturers had made contrary to FTC**  
 22 **policies and guidelines?**  
 23 A. I don't know.  
 24 **Q. Okay. Do you recall what you were**  
 25 **investigating?**

