

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



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

**ORDER SETTING HEARING ON JURISDICTION
AND REVISING SCHEDULING ORDER**

I.

On February 24, 2009, Respondents submitted a Motion to Dismiss For Lack of Jurisdiction and Violation of Respondents' Constitutional Rights and Memorandum in Support ("Respondents' Motion to Dismiss"). Complaint Counsel submitted its Memorandum in Opposition to the Motion on March 6, 2009 ("Opposition to Motion to Dismiss").

On February 24, 2009, Respondents submitted a Motion for Summary Decision and Memorandum in Support ("Respondents' Motion for Summary Decision"). Complaint Counsel submitted its Opposition on March 10, 2009.

On February 24, 2009, Complaint Counsel submitted a Motion for Summary Decision and Memorandum in Support ("Complaint Counsel's Motion for Summary Decision"). Respondents submitted their Opposition on March 10, 2009.

As described below, these three motions and the oppositions thereto raise the issue of whether the FTC Act confers jurisdiction in this matter. Accordingly, as set forth below, an evidentiary hearing on jurisdiction will be held and the Scheduling Order is hereby revised.

II.

A. Respondents' Motion to Dismiss

Respondents previously submitted a Motion to Dismiss and Supporting Memorandum on January 13, 2009 ("January 13, 2009 Motion"). Among other contentions, Respondents argued that the FTC has no jurisdiction to bring the action because Daniel Chapter One ("DCO") is organized as a non-profit religious corporation, and there are no allegations in the Complaint that the corporation is operated for DCO's own profit or that of its members. By Order dated

February 2, 2009, Respondents' January 13, 2009 Motion was denied. ("February 2, 2009 Order").

The February 2, 2009 Order stated that "[a] challenge to subject matter jurisdiction can be based on the sufficiency of the allegations of the Complaint, or the sufficiency of the evidence to support those allegations." February 2, 2009 Order at 4. The February 2, 2009 Order explained:

"A 'facial attack' on the complaint requires the court merely to look and see if plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion. A 'factual attack,' however, challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered."

February 2, 2009 Order at 4 (citing *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980) (internal citations omitted). The February 2, 2009 Order held that because Respondents had not attached to their January 13, 2009 Motion any documents, affidavits, or other exhibits, Respondents' challenges would be deemed a facial attack only and the motion was evaluated on the sufficiency of the allegations of the Complaint. Order at 4.

In the February 24, 2009 Motion to Dismiss, however, Respondents purport to make a factual attack on jurisdiction, and reference matters outside the Complaint. Respondents make a number of factual assertions relating to jurisdiction including: "DCO is a nonprofit religious corporation. It is not operated for the profit of itself, nor the profit of any "member"; and "[a]ll receipts of funds are considered donations to a religious organization and are expended in accordance with DCO's religious purposes and to support its charitable and educational activities." Respondents' Motion to Dismiss, pp. 2-5. In support of their assertions, Respondents cite to the Certificate of Incorporation issued by Washington State, DCO's Articles of Incorporation filed with Washington state, deposition testimony, and Responses to Interrogatories.

Complaint Counsel contends in its Opposition to the Motion to Dismiss, "this Court denied Respondents' [January 13, 2009] Motion, ruling that the FTC has jurisdiction over DCO." Opposition to Motion to Dismiss, p. 2. This is a misstatement of the February 2, 2009 Order. The February 2, 2009 Order held only: "Even assuming that DCO is organized as a non-profit, the Complaint sufficiently alleges a basis for subject matter jurisdiction, as explained below." February 2, 2009 Order at 4. The February 2, 2009 Order further held: "It is not necessary for the Complaint also to allege that DCO is 'operated for its own profit or that of its members,' in order to survive a motion to dismiss." Order at 5. Thus, evaluating a facial attack on the Complaint, the February 2, 2009 Order held that the allegations of the Complaint, construed most favorably to Complaint Counsel, were sufficient to survive a motion to dismiss.

Complaint Counsel's Opposition further contends that Respondents' Motion to Dismiss provides only self-serving assertions regarding their financial condition, operations, and non-profit status. Complaint Counsel argues that, despite the February 11, 2009 Order Granting

Complaint Counsel's Motion to Compel discovery of these same matters, Respondents continue to provide non-responsive, incomplete, and evasive answers. As examples, Complaint Counsel points to the following:

- Interrogatory No. 10: For each bank account or trust identified in Response to Interrogatory Number 9 above, identify the date in which the account was opened or the trust was created, the financial institution where the bank account or trust is located, and the current balance of the bank account or trust.
- Response: Records not accessible to Respondent at this time, but oral information of what is known was provided at James Feijo's deposition. Respondents' Response to Complaint Counsel's Second Set of Interrogatories.
- In James Feijo's deposition, when asked how much money was in one of his ministry bank accounts, he answered: "I have no idea right now" and said that he could not even venture a guess. James Feijo Dep. at 76-77.
- Interrogatory No. 13: For each of the Challenged Products from 2003 to the present, describe the "cost of producing and making available that product," as described by Respondents in their response to Interrogatory Number 19 in Complaint Counsel's First Set of Interrogatories.
- Response: This is not available information. Respondents have no records, and the total cost includes everything from product manufacture to overhead, including ministry overhead, which includes radio network operational costs. Respondents' Response to Complaint Counsel's Second Set of Interrogatories.
- Document Request No. 7: All documents relating to the individual Respondent's "expenses as Overseer" and the "donations" he receives and has received from Daniel Chapter One to "defray his expenses," as described by Respondents in response to Interrogatory Number 3 in Complaint Counsel's First Set of Interrogatories.
- Response: Respondents do not have such documents. Respondents' Response to Complaint Counsel's Second Request for Production of Documentary Materials and Tangible Things.
- Document Request No. 10: All documents relating to any donations made to the Corporate Respondent or on behalf of the Corporate Respondent, including, but not limited to, donations made to the Individual Respondent.
- Response: No such documents exist. Respondents' Response to Complaint Counsel's Second Request for Production of Documentary Materials and Tangible Things.

Complaint Counsel urges that the Court is permitted by the Part III Rules, Section 3.38, to draw adverse inferences concerning whether Respondent DCO in fact operates as a nonprofit, because of Respondents' failure to comply with their discovery obligations with respect to this issue. Under the Commission's Rules of Practice, Rule 3.38 provides, in relevant part:

(b) If a party or an officer or agent of a party fails to comply with a subpoena or with an order including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, . . . the Administrative Law Judge . . . for the purpose of permitting resolution of relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

(1) Infer that the admission, testimony, documents or other evidence would have been adverse to the party;

(2) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, or agent, or the documents or other evidence;

(c) Any such action may be taken by written or oral order issued in the course of the proceeding or by inclusion in an initial decision of the Administrative Law Judge . . . It shall be the duty of parties to seek and Administrative Law Judges to grant such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for withheld testimony, documents, or other evidence. If in the Administrative Law Judge's opinion such relief would not be sufficient, . . . he shall certify to the Commission a request that court enforcement of the subpoena or order be sought.

16 C.F.R. § 3.38.

Complaint Counsel urges that an adverse inference should be drawn that the information sought, but not provided, in discovery would have defeated Respondents' non-profit argument. Complaint Counsel argues that, "to the extent that there is any dispute as to [Respondents' for-profit status], because Respondents have repeatedly failed to comply with Complaint Counsel's requests for documents and information, and this Court's Order to compel responses, the Court is entitled to make adverse inferences against Respondents and presume their for-profit status." Complaint Counsel Opposition to Motion to Dismiss, pp. 6-7.

B. Respondents' Motion for Summary Decision

In their Motion for Summary Decision, Respondents do not directly address the issue of jurisdiction, but instead "incorporate[] herein the details of its ministry and history as a religious

organization as described in its companion Motion to Dismiss on Constitutional grounds.” Respondents’ Motion for Summary Decision, p. 1, n.1.

C. Complaint Counsel’s Motion for Summary Decision

In its Motion for Summary Decision, Complaint Counsel asserts that the FTC Act confers jurisdiction because, regardless of the form of DCO, in fact, Respondents are engaged in for-profit activities. In support of this assertion, Complaint Counsel contends that: Respondents charge consumers three to ten times what it costs them to purchase the DCO Products from manufacturers; Respondents run an affiliate sales program and advise those who want to join this program of the sales and profits they too can make; Respondents place a “TM” next to their products; and that the profits generated by the sale of DCO products allow DCO to own two houses used by the Feijos, to own two Cadillacs used by the Feijos, and to pay all the Feijos’ living expenses. Complaint Counsel’s Motion for Summary Decision, pp. 11-12. Complaint Counsel supports these allegations by citing to Respondents’ Answer, as well as attached deposition testimony, pages from Respondents’ Website dc1store.com, and Respondents’ Responses to Interrogatories.

In their Memorandum in Opposition to Complaint Counsel’s Motion for Summary Decision (“Respondents’ Opposition”), Respondents appear to continue their challenge to jurisdiction by making a number of additional assertions, including:

- The cars purchased by DCO and used by the Respondent James Feijo and Tricia Feijo cost a total of \$56,000, Respondents’ Opposition at 6;
- DCO’s newsletters and handbooks are provided for free or small donations, *Id.*;
- DCO maintains a non profit charitable program that allows any user of DCO products to obtain the products for free, Respondents’ Opposition at 7;
- DCO receives and makes donations, *Id.*;
- DCO products cost the same or less than similar dietary supplements in the for profit dietary supplement market, Respondents’ Opposition at 9;
- If individuals are unable to pay, they can pay less or not at all, *Id.*;
- James Feijo establishes a recommended donation amount for the DCO products but does not “price” to the market as a for profit business, and leaves the “recommended donations” in place long after the market prices on similar products sold by for profit businesses have been raised by their sellers, *Id.*; and
- DCO is not organized or run to make and does not make a profit. *Id.*

In support of these assertions, Respondents cite to Complaint Counsel’s Statement of Material Facts as to Which There is No Genuine Issue, Attached to Respondents’ Opposition as Exhibit 1,

without specific reference to any particular statement of fact. In addition, Respondents do not cite to any specific evidence in support of the above assertions.

III.

A. Hearing on Jurisdiction

A challenge to jurisdiction questions the court's very power to hear the case. *Mortensen v. First Federal Savings and Loan Association*, 549 F.2d 884, 891 (3rd Cir. 1977). Where jurisdiction is challenged on the facts, as opposed to the face of the complaint, the proper procedure is for the court to determine the existence of jurisdiction, prior to any adjudication on the merits. *Menchaca*, 613 F.2d at 511; *Berardinelli v. Castle & Cooke Inc.*, 587 F.2d 37, 38-39 (9th Cir. 1978). *Cf. In Re Basic Research*, Docket No. 9318, 2006 FTC LEXIS 1, at *2 (January 5, 2006) (adopting federal rule, but noting exception that when facts related to jurisdiction are so intertwined with the merits, jurisdiction and the merits can be tried as part of the same proceeding). Such a "factual attack" may occur at any stage of the proceedings, and the proponent of jurisdiction bears the burden of proof that jurisdiction does in fact exist. *Mortensen*, 549 F.2d at 891-92. The existence of disputed facts does not preclude the court from evaluating for itself whether jurisdiction exists. Rather, the court has the duty to resolve any such disputes. *Id. See also Williamson v. Tucker*, 645 F.2d 404, 412-413 (5th Cir. 1981) (stating that court may hear conflicting written and oral evidence and decide for itself the factual issues which determine jurisdiction); *accord In Re Basic Research*, Docket No. 9318, 2006 FTC LEXIS 1, at *2 (January 5, 2006); *In Re Crosse & Blackwell Co.*, Docket No. 6463, 54 F.T.C. 1569, 1958 FTC LEXIS 79, *4 (May 8, 1958) (holding brief hearing on facts regarding jurisdiction only, prior to decision on merits). Dismissal may not be granted until the party asserting jurisdiction is permitted an opportunity to demonstrate that jurisdiction exists. *In Re Jose F. Calimlim, M.D.*, Docket No. 9199, 1987 FTC LEXIS 73, *2-3 (May 14, 1987).

The FTC Act gives the Commission authority over "persons, partnerships, or corporations," 15 U.S.C. § 45(a)(2), and defines "corporation" to include "any company . . . or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44. In order to properly, with due consideration, resolve the issue, a hearing will be held for the limited purpose of determining whether DCO is a corporation within the meaning of 15 U.S.C. § 44 and applicable case law. The parties are required to present evidence, including relevant documents and testimony from a witness or witnesses capable of providing information on this limited issue. To the extent the parties are able to stipulate to any non-disputed issues, such stipulations are encouraged. The parties should also be prepared to present a brief opening statement and, at the end of the hearing, succinct oral argument which shall apply legal precedent to the facts presented.

After this hearing and a recess, a ruling on jurisdiction will be issued. The case will then either proceed immediately thereafter or be dismissed for lack of jurisdiction.

B. Revised Scheduling Order

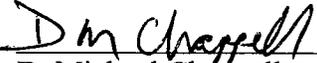
The Scheduling Order issued in this case on October 28, 2008, and amended to extend the discovery deadline by two days on January 21, 2009, is hereby revised. All remaining deadlines shall remain in effect, except as follows:

- April 21, 2009 - Hearing on jurisdiction to begin at 10:00 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.
- April 22, 2009 - Issuance of decision on jurisdiction at 11:00 a.m. (or later if necessary) in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.
- April 22, 2009 - **If jurisdiction is found to exist:** Final prehearing conference to begin at 2:00 p.m. (or later if necessary) in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity and any designated deposition testimony. Counsel may present any objections to the final proposed witness lists and exhibits, including the designated testimony to be presented by deposition. Trial exhibits will be admitted or excluded to the extent practicable.

- April 23, 2009 - Hearing to begin at 10:00 a.m. (or later if necessary) in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Dated: March 20, 2009