

ORIGINAL

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION



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In the Matter of )  
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)

DANIEL CHAPTER ONE, )  
a corporation, )  
)

JAMES FELJO, )  
individually, and as an officer of )  
Daniel Chapter One. )  
\_\_\_\_\_ )

Docket No. 9329

PUBLIC DOCUMENT

COMPLAINT COUNSEL'S  
PRE-TRIAL BRIEF

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**COMPLAINT COUNSEL’S  
PRE-TRIAL BRIEF**

**I. INTRODUCTION**

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

At trial, Complaint Counsel will present overwhelming evidence that Respondents made

the alleged claims and lacked adequate substantiation for these representations.

## **II. STATEMENT OF FACTS<sup>1</sup>**

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

In 1986, James Feijo and his wife Patricia started DCO as a health food store. CCPF ¶¶ 4 and 6. Then, in 2002, James Feijo organized DCO as a corporation sole under Washington state laws. CCPF ¶ 1. DCO currently offers consumers 150 to 200 products. CCPF ¶ 7. James Feijo serves as DCO's Overseer, trustee for all DCO assets, and custodian of DCO's financial records. CCPF ¶¶ 2, 9, and 13-14. Patricia Feijo is DCO's Secretary. CCPF ¶ 3. Neither James nor Patricia Feijo is a doctor or research scientist. CCPF ¶¶ 114 and 116.

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

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<sup>1</sup> Pursuant to the Court's Scheduling Order, Complaint Counsel have submitted the accompanying Proposed Findings of Fact ("CCPF") as a separate document.

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

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

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

**2. Respondents Sell Products to Consumers.**

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

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

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

### **3. The DCO Products.**

#### **a. Bio\*Shark**

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

**b. 7 Herb Formula**

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

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

**c. GDU**

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

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

**d. BioMixx**

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



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

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

Respondents’ Web sites [www.danielchapterone.com](http://www.danielchapterone.com), [dc1pages.com](http://dc1pages.com), [www.7herbformula.com](http://www.7herbformula.com), [www.gdu2000.com](http://www.gdu2000.com), and [dc1store.com](http://dc1store.com) provide information on the DCO Products. CCPF ¶¶ 141-42. Consumers can locate the Web site [www.danielchapterone.com](http://www.danielchapterone.com) by entering the term “cancer” in a Google search. CCPF ¶ 144. Respondents also disseminate information about the DCO Products through written materials, including the BioGuide, the Cancer Newsletter, and the radio program “Daniel Chapter One Health Watch.” CCPF ¶ 142. The Feijos are responsible for the information disseminated about the DCO Products. CCPF ¶ 143. James and Patricia Feijo also co-host DCO’s radio program for two hours a day, Monday through Friday. CCPF ¶ 146. They have counseled cancer patients who have called into the radio program about taking the DCO Products. CCPF ¶ 147. Respondents purposefully use the DCO radio program and the DCO Web sites to reach out to consumers. CCPF ¶ 148.

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

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

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

## 2. Claims That the DCO Products Will Fight Cancer.

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

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

7\*Herb Formula™ . . .

Bio\*Shark™ . . .

BioMixx™ . . .

GDU Caps™ . . .

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

**Daniel Chapter One’s Cancer solutions**

To Buy the products click here

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

CCPF ¶ 124.

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

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

On their radio program, “Daniel Chapter One Health Watch,” Respondents tout the DCO Products. By example, on one show Patricia Feijo urged consumers:

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

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

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

behind the heart “has shrunk over 50%.” CCPF ¶ 108.

### III. RESPONDENTS DISTRIBUTE THEIR PRODUCTS IN COMMERCE

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

Respondents advertise their products on their Web sites and on their radio show. CCPF ¶¶ 104-05, 117-18, 122, 128-31, and 136. DCO has a toll-free telephone number and a call center for consumers to purchase the DCO Products. CCPF ¶ 31. DCO’s toll-free number is advertised on DCO’s Web site, “BioGuide,” radio program, and on the front page of DCO’s BioMolecular Nutrition Product Catalog, where Respondents inform consumers to “Call Toll FREE 1-800-504-5511 or shop online at [www.danielchapterone.com](http://www.danielchapterone.com).” CCPF ¶¶ 31-33, and 36. DCO’s Order Center is open Monday through Friday from 9:00 a.m. to 8:00 p.m., and receives payments through credit card and COD. CCPF ¶¶ 40-41. DCO also accepts consumers’ orders on the Internet. CCPF ¶ 42. DCO’s Web site invites consumers to shop at DCO’s “On-Line Store” and to “Buy Now.” CCPF ¶¶ 43-44. In addition, a number of stores nationally sell DCO’s products. CCPF ¶ 63. Over one thousand consumers have purchased DCO’s products. CCPF ¶ 46. DCO has generated \$2 million in annual gross sales for each of the last several years. CCPF ¶ 47.

#### **IV. RESPONDENTS' DECEPTIVE ADVERTISING VIOLATES SECTIONS 5 AND 12 OF THE FTC ACT.**

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

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

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

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

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

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

The FTC may use its own reasoned analysis to determine what claims an advertisement conveys. *See Kraft*, 970 F.2d at 318 (“[i]n determining what claims are conveyed by a challenged advertisement, the [FTC] relies on . . . its own viewing of the ad”); *see also FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). In determining whether an advertisement conveys a claim, the Commission looks to the overall, net impression created by the advertisement, through the interaction of different elements in the advertisement, rather than focusing on the individual elements in isolation. *Stouffer Foods Corp.*, 118 F.T.C. 746, 799 (1994); *Kraft*, 114 F.T.C. 40 at 122 (1991); *American Home Prods. Corp. v. FTC*, 695 F.2d 681, 688 (3d Cir. 1982); *FTC Policy Statement on Deception*, 103 F.T.C. 174, 179 (1984) (appended to *Cliffdale Assocs.*) (emphasizing importance of considering “the entire mosaic, rather than each tile separately”). Features of an advertisement such as a product name, visual images, and the use of testimonials may imply claims. *Jacob Siegel v. FTC*, 327 U.S. 608, 609 (1946); *Kraft*, 114 F.T.C. at 322; *Thompson Medical*, 104 F.T.C. at 793 and 811-12; *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 301, 303 (7th Cir. 1979). To determine how “reasonable consumers” interpret a claim, the Commission considers the target market for the advertisement. When the target market consists of “desperate consumers with terminal illnesses,” the FTC has shown particular care in evaluating deceptive acts or practices. *FTC v. Travel King, Inc.*, 86 F.T.C. 715 (1975).

Advertising claims may be express or implied. *Kraft*, 970 F.2d at 318. Express claims directly state the representation at issue, while implied claims make representations without direct statements. *Id.* at 318 and 319 n.4; *Thompson Medical*, 104 F.T.C. at 788-89. The courts

and the FTC have recognized consistently that implied claims fall along a continuum, from those which are so conspicuous as to be virtually synonymous with express claims, to those which are barely discernible. *See, e.g., Kraft*, 970 F.2d at 319; *FTC v. Febre*, No. 94 C 3625, 1996 WL 396117, at \*4 (N.D. Ill. July 2, 1996) (magistrate judge recommendation), adopted by 1996 WL 556957 (N.D. Ill. Sept. 25, 1996), *aff'd*, 128 F.3d 530 (7th Cir. 1997); *see also Bronson Partners*, 564 F. Supp. at 127-28 (an advertisement's statements were "so clear, repetitive, and unambiguous that they constitute[d] the functional equivalent of express claims"). Moreover, Commission law recognizes that advertisements may be susceptible to more than one reasonable interpretation. *Kraft*, 114 F.T.C. at 120 n.8. "Statements susceptible of both a misleading and a truthful interpretation will be construed against the advertiser." *Bronson Partners*, 564 F. Supp. 2d 119, 127 n.6 (D. Conn. 2008) (quoting *Country Tweeds, Inc. v. FTC*, 326 F.2d 144, 148 (2d Cir. 1964)).

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

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

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

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

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

Respondents' Web page for Bio\*Shark contains both express and strongly implied representations that create the net impression that Bio\*Shark inhibits tumor growth, as alleged in ¶14 a of the Complaint. Complaint Counsel's Trial Exhibit (hereinafter referred to as CX \_\_\_ ) 12 at FTC-DCO 0011. In the Web page's center, in bold type, appears the headline "**Bio\*Shark: Tumors & Cysts.**" Respondents' decision to tie unequivocally its product with tumors and cysts carries the strong implication that Bio\*Shark is intended to be used on tumors. Immediately beneath this statement, the representation is stated virtually expressly: "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 . . .". *Id.* (emphasis added); CCPF ¶ 119. The claim is restated even more succinctly in an underlined link near the bottom of the Web page: "**Stop Tumor Growth & Cysts.**" CX 12 at FTC-DCO 0011; CCPF ¶ 119. Another link on the same page reinforces this claim, inviting consumers to "Read our clients [*sic*] testimonials on Bio Shark & Tumors." CX 12 at FTC-DCO 0011; CCPF ¶ 119. The link appears directly below the "BUY NOW" link through which consumers may purchase the product. CX 12 at FTC-DCO 0011; CCPF ¶¶ 44 and 119.



Respondents make numerous strongly implied representations that Bio\*Shark is effective in the treatment of cancer as alleged in ¶ 14b of the Complaint. Respondents' representations about stopping tumor growth also support the allegation that Bio\*Shark is effective in the treatment of cancer. Respondents tout Bio\*Shark a "Cancer solution." CCPF ¶ 104.

Respondents also state on their Web site:

**"If you suffer from any type of cancer, Daniel Chapter One suggests taking this products[sic], to fight it: . . . Bio\*Shark TM. . . How to fight cancer is your choice!"**  
CCPF ¶ 120 [emphasis added]

Respondents also used testimonials on their Web site and during the DCO Healthwatch radio program to make representations to consumers that Bio\*Shark cured cancer or resulted in a cancer patient's remission. For example, they represented that Bio\*Shark, in conjunction with 7 Herb Formula and GDU, cured someone's skin cancer so that "there was no trace of cancer," CCPF ¶ 130, very strongly implying, if not expressly stating, that Bio\*Shark is effective in treating cancer. Similarly, Respondents represented that Bio\*Shark, with BioMixx and 7 Herb Formula, cured three inoperable tumors, resulting in the patient's "complete remission." CCPF ¶ 125. Patricia Feijo also specifically advised a consumer who called the radio program, and whose father was diagnosed with colon cancer, that she should order Bio\*Shark and the other DCO Products for her father, and a copy of the DCO publication *How To Fight Cancer Is Your Choice*. CCPF ¶¶ 36, 147.

**b. Respondents Represented that 7 Herb Formula Is Effective in the Treatment or Cure of Cancer and Inhibits Tumor Formation.**

As alleged in ¶¶ 14 c and d of the Complaint, Respondents expressly claim or very strongly imply that 7 Herb Formula is effective in the treatment or cure of cancer and inhibits tumor formation. As with Bio\*Shark, Respondents claim on their Web site that 7 Herb Formula

is a “Cancer solution” and that **“If you suffer from any type of cancer, Daniel Chapter One suggests taking this products[sic], to fight it: . . . 7 Herb Formula. . . How to fight cancer is your choice!,”** CCPF ¶ 104 and 124 (emphasis added), thus strongly implying, if not explicitly stating, that 7 Herb Formula is effective in the treatment or cure of cancer.

Respondents also use testimonials on their Web site and in their radio program to convince consumers that 7 Herb Formula (and some combination of the other three DCO Products): (1) “battles cancer,” resulting in a patient’s “complete remission” despite “inoperable tumors”; (2) does “such a good job fighting cancer” that a patient “plan[s] to stay on [7 Herb Formula] forever” because it is a “good prophylaxis,” or (3) cured someone’s skin cancer so that “there was no trace of cancer,” thus strongly implying, if not expressly stating, that 7 Herb Formula effectively treats, cures, or prevents cancer. CX 12, 21, and 8; CCPF ¶¶ 125, 127, and 130.

On their Web sites, Respondents advise consumers that: “With Jim Feijo’s addition to the [7 Herb] formula, **we now have the most effective and potent formula available in the battle against tumors.**” CCPF ¶ 128 (emphasis added). In their product catalog and Web site, Respondents claim that the 7 Herb Formula will “fight . . . tumor formation,” CCPF ¶¶ 124 and 126, (under the heading “Cancer News”), thus strongly implying, if not explicitly stating, that 7 Herb Formula inhibits tumor formation (and thus prevents cancer or the recurrence of cancer).

Respondents also strongly imply, if not explicitly claim, that 7 Herb Formula (and other DCO Products) inhibit tumor formation when they use a testimonial in their product catalog to claim that BioMixx, 7 Herb Formula, and Bio\*Shark worked on “three inoperable tumors” so well that one “just above the brain stem . . . has completely disappeared,” one on the liver “is shrinking,” and one behind the heart “has shrunk over 50%.” CCPF ¶ 108.

**c. Respondents Represented that GDU Eliminates Tumors and Is Effective in the Treatment of Cancer.**

As alleged in ¶¶14 e and f of the Complaint, Respondents expressly claim or very strongly imply that GDU eliminates tumors and is effective in the treatment of cancer. Respondents' description of GDU on the DCO Web site leads with the statement “[GDU] [c]ontains natural proteolytic enzymes (from pineapple source bromelain) to help digest protein – even that of **unwanted tumors** and cysts.” CCPF ¶ 132 (emphasis added). This statement strongly implies that GDU's enzymes eliminate tumors by eroding their protein. In addition, the advertisement expressly states that “GDU is also used . . . as an adjunct to cancer therapy.” CCPF ¶ 132. The Web page also features a link to “[r]ead our clients[*sic*] testimonials,” which include stories about sufferers of prostate cancer and a breast mass. CX 14 at FTC-DCO 0029.

As with DCO's other Products, Respondents claim on their Web site that GDU is a “Cancer solution” and that “**If you suffer from any type of cancer, Daniel Chapter One suggests taking this products [*sic*], to fight it: . . . GDU. . . How to fight cancer is your choice!**,” CCPF ¶¶ 104, 133 (emphasis added), thus strongly implying, if not explicitly stating, that GDU effectively treats cancer.

**d. Respondents Represented that BioMixx Is Effective in the Treatment of Cancer and Heals the Destructive Effects of Radiation and Chemotherapy.**

As alleged in ¶14 g and h of the Complaint, Respondents expressly claim or very strongly imply that BioMixx effectively treats cancer and heals the destructive effects of radiation and chemotherapy. As with DCO's other Products, Respondents claim on their Web site that BioMixx is a “Cancer solution” and that “**If you suffer from any type of cancer, Daniel Chapter One suggests taking this products [*sic*], to fight it: . . . BioMixx. . . How to**

**fight cancer is your choice!,”** CCPF ¶¶ 104, 138 (emphasis added), thus strongly implying, if not explicitly stating, that BioMixx effectively treats cancer. DCO’s “Cancer Newsletter” contains both express claims and claims so strongly implied as to be virtually express. CCPF ¶¶ 111-12. The cover displays the following:

**how to  
fight  
cancer is  
your  
choice!!!**

CCPF ¶ 111; CX 15 at FTC-DCO 0031; CX 23 at FTC-DCO 0390. Inside, Respondents printed an anecdote about a man who, after taking a combination of DCO products including 7 Herb Formula, Bio\*Shark, and BioMixx, made a full recovery from bladder cancer and emphysema. CX 15 at FTC-DCO 0032. The newsletter also describes the BioMixx product, stating expressly that BioMixx **“is used to assist the body in fighting cancer and in healing the destructive effects of radiation and chemotherapy treatments.”** CCPF ¶ 140 (emphasis added); CX 15 at FTC-DCO 0032.

In Respondents’ *BioGuide*, they use a consumer testimonial which claimed that a cancer patient had three inoperable tumors and decided not to take radiation or chemotherapy but used BioMixx and other DCO Products, which resulted in “complete remission,” thus making an express, or strongly implied, claim that BioMixx effectively treats cancer:

**“When I decided not to do chemotherapy or radiation, my father sent me *BIOMIXX* 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, Siberian Ginseng, and Bio\*Shark. **I am now in complete remission. The cancer cell count has dropped, the doctors tell me.** I had a tumor just above the brain stem in my brain that has completely disappeared. The tumor**

on my liver is shrinking and the tumor behind my heart has shrunk over 50%. . .”  
CCPF ¶ 108 (emphasis in bold added) .

### 3. Respondents’ DSHEA Arguments

Respondents have argued that their representations, including those stated above, were “structure/function” claims rather than health claims. *See Respondents’ Mot. for Summ. Decision* at 15. Respondents also have attempted to minimize the impact of their cancer claims by asserting that their representations were accompanied by appropriate disclaimers under the Dietary Supplements Health and Education Act (DSHEA).

Respondents’ argument that their advertisements contain merely “structure/function” claims, and not health claims, simply ignores the advertisements themselves. As detailed above, Respondents’ advertisements and promotional material are replete with serious disease claims about the efficacy of the DCO Products in preventing, treating, or curing cancer. Claims such as “**Bio\*Shark Shark Cartilage** Stops tumor growth in its tracks,” “**7 Herb Formula battles cancer**,” “[i]f you suffer from any type of cancer, Daniel Chapter One suggests taking this products [sic], to fight it: . . . GDU Caps™,” and “**Bio\*Mixx . . . is used to assist the body in fighting cancer and in healing the destructive effects of radiation and chemotherapy treatments**” could not be any more express. CCPF ¶¶ 122, 125, 133, 137. If there is any doubt that Respondents are addressing serious diseases and health conditions in their advertising, one need only refer to Respondents’ publication entitled “The Most Simple Guide to the Most Difficult Diseases: The Doctors’ How-to Quick Reference Guide,” which recommends DCO products for 90 diseases, including cancer. CCPF ¶¶ 68, 106.

Had Respondents even made legitimate “structure/function” claims, the FDA’s

regulatory distinctions between “structure/function” claims and health claims under DSHEA do not apply to Section 5 of the FTC Act. As noted in the FTC staff’s guide, *Dietary Supplements: An Advertising Guide for Industry* (hereinafter referred to as the “*Dietary Supplements Guide*”), “advertising for any product – including dietary supplements – must be truthful, not misleading, and substantiated.” FTC, *Dietary Supplements: An Advertising Guide for Industry* at 1 (2001). The FTC staff warned “*all parties who participate directly or indirectly in the marketing of dietary supplements have an obligation to make sure that claims are presented truthfully and to check the adequacy of the support behind those claims.*” *Id.* at 2 (italics in original).

Respondents never adequately supported their cancer claims, as they were required to do.

DSHEA in no way altered the FTC’s approach to truth in advertising, and, in fact, as Respondents acknowledged in their Motion for Summary Decision, DSHEA is fully consistent with this approach. See 21 U.S.C. § 343(r)(6); *Respondents’ Mot. for Summ. Decision* at 15. FTC staff explained in the *Dietary Supplements Guide* that “a statement about a product’s effect on a normal ‘structure or function’ of the body may also convey to consumers an implied claim that the product is beneficial for the treatment of a disease. If elements of the ad imply that the product also provides a disease benefit, the advertiser must be able to substantiate the implied disease claim even if the ad contains no express reference to disease.” *Dietary Supplements Guide* at 4. Respondents cannot explain how their “Disease Guide,” “Cancer Newsletter,” and other cancer-related advertisements do not make disease claims. As detailed above, there are express references to disease, and the net impressions conveyed by both the express and implied claims – that the DCO Products can treat, prevent, or cure cancer or tumors – must be substantiated by competent and reliable scientific evidence. This year, the FDA even released guidance stating that it would adopt the FTC’s substantiation standard of “competent and reliable

scientific evidence”:

The FTC has typically applied a substantiation standard of “competent and reliable scientific evidence” to claims about the benefits and safety of dietary supplements and other health-related products. FDA intends to apply a standard for the substantiation of dietary supplement claims that is consistent with the FTC approach. FDA, *Guidance for Industry: Substantiation for Dietary Supplement Claims Made Under Section 403(r)(6) of the Federal Food, Drug, and Cosmetic Act* (December 2008), available at <http://www.cfsan.fda.gov/~dms/dsclmgu2.html>.

Respondents’ reliance on disclaimers also is unavailing. One only needs to review the attachments to the Complaint to see that Respondents’ advertisements do not even contain the DSHEA disclaimer that “This statement has not been evaluated by the FDA. This product is not intended to diagnose, treat, cure, or prevent disease,” a disclaimer that must be “prominently displayed and in boldface type.” See 21 U.S.C. § 343(r)(6). Instead, any disclaimers Respondents do make, where they do appear, are in fine-print. For example, at the bottom of their product pages on the DCO Web site, under the copyright line, Respondents simply state: “The information on this website is . . . not intended to diagnose a disease.” Such disclaimers are inadequate to cure Respondents’ deceptive claims, which are prominently featured on the Web site. It is well-established that advertisers cannot use fine print to contradict other statements in an advertisement or to clear up misimpressions the advertisement would otherwise leave. *Deception Policy Statement*, 103 F.T.C. at 180-81. To be effective, disclosures must be clear and conspicuous. See, e.g., *Thompson Med.*, 104 F.T.C. at 842-43 (1984). *U.S. v. Lane Labs* makes it clear that any such disclaimer also must be in boldface type and is permissible only if the claim is properly substantiated. *U.S. v. Lane Labs, Inc.*, 324 F. Supp. 2d 547, 564 (D.N.J. 2004) (stating that “[t]hese types of claims are permissible under DSHEA **only if the**

