

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)	Civil No. <u>1:10CV01362 EGS</u>
)	
Plaintiff,)	
)	
v.)	
)	
DANIEL CHAPTER ONE,)	
)	
and)	
)	
JAMES FEIJO,)	
)	
Defendants.)	

**MEMORANDUM IN SUPPORT OF UNITED STATES’
MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to Rule 65 of the Federal Rules of Civil Procedure and Local Rule 65.1, the United States seeks a preliminary injunction enjoining Daniel Chapter One and James Feijo (“Defendants”) from violating the Modified Final Order entered by the Federal Trade Commission (“FTC” or “Commission”) and affirmed by the United States Circuit Court for the District of Columbia Circuit. In violating the Modified Final Order, Defendants promote cures for cancer and other tumors without reliable scientific evidence substantiating their claims. They ignore provisions in the Modified Final Order that require that a corrective notice be sent to past purchasers. And they commit these violations notwithstanding the denial of their request for an order staying the effectiveness of these provisions. Injunctive relief is necessary to prevent continuing harm to individuals suffering from cancer and other tumors.

BACKGROUND

Defendant Daniel Chapter One is incorporated as a “corporation sole” under the laws of the State of Washington, with its principal place of business in Portsmouth, Rhode Island.

Defendant James Feijo is the sole member, overseer, and an officer of Daniel Chapter One. His principal office or place of business is the same as Daniel Chapter One.

Daniel Chapter One advertises and sells a variety of products, including dietary supplements. This Motion is principally concerned with four dietary supplements marketed by Defendants: BioShark, 7 Herb Formula, GDU, and BioMixx (collectively, “the Products”). BioShark is a capsule whose primary ingredient is shark cartilage. 7 Herb Formula is a liquid tea concentrate containing, among other things, rhubarb root, sheep sorrel, Siberian ginseng, and cat’s claw. GDU capsules contain, among other things, bromelain, turmeric, quercetin, feverfew, and boron. BioMixx is a powder that contains goldenseal, echinacea, and ginseng.

Defendants have made claims that the Products can treat, cure, or prevent cancer. The FTC believed the claims were unsubstantiated, and that Defendants possess no competent or reliable evidence to substantiate their claims that the covered products treat, cure, or prevent cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy. As a result, the FTC brought an administrative proceeding alleging that their marketing of the Products violated the FTC Act.

In the proceeding before the Commission¹, Defendants were charged with violating Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.² Following trial, an Administrative Law Judge concluded that Defendants violated the FTC Act by making unsubstantiated claims that the Products prevented, treated, or cured tumors or cancer.³ Defendants appealed this decision to the Commission. On December 24, 2009, the Commission upheld the decision and issued a Final Order to cease and desist certain practices. On January 25, 2010, the Commission issued a Modified Final Order (“Order”),⁴ which made non-substantive modifications to clarify required time periods in the Final Order. On February 1, 2010, the Order was served on Defendants. Pursuant to Section 5(g) of the FTC Act, 15 U.S.C. § 45(g), the Order became effective on April 2, 2010.

Among other things, the Order prohibits Defendants from representing that the Products, or any of their products, prevent, treat, or cure any type of tumor or cancer, without possessing and relying upon competent and reliable scientific evidence that substantiates the representation.

¹ Federal Trade Commission Docket No. 9329.

² Section 5(a) of the FTC Act prohibits engaging in “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce. . . .” 15 U.S.C. § 45(a)(1). Section 12 provides that “[t]he dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair a or deceptive act or practice in or affecting commerce within the meaning of [Section 5.]” 15 U.S.C. § 52(b).

³ Three elements must be established for the FTC to successfully prove a claim under Section 5(a), “(1) there was a representation; (2) the representation was likely to mislead customers acting reasonably under the circumstances, and (3) the representation was material.” FTC. v. Tashman, 318 F.3d 1273, 1277 (11th Cir. 2003) (citing FTC. v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1029 (7th Cir. 1988)).

⁴ The Modified Final Order is attached as Exhibit A.

The Order also requires Defendants to send a letter to past purchasers of the Products informing them of the Commission's conclusion that Defendants' advertising claims were deceptive because they lacked substantiation.

Defendants appealed the Order to the United States Court of Appeals for the District of Columbia Circuit. Defendants refused to comply with the terms of the Order while their appeal was pending, and they filed a motion with the FTC asking that the Order be stayed pending the outcome of their appeal. That motion was denied.⁵ Defendants then filed an emergency motion with the D.C. Circuit Court, asking that the Circuit Court stay the Order pending review. The Circuit Court denied this emergency motion.⁶ Daniel Chapter One v. FTC, No. 10-1064 (D.C. Cir. April 1, 2010). As a result of Defendants' violations of the Order, the pending action was filed. While the appeal was pending, the United States sought to prevent Defendants' continued violation of the Order, and filed a motion for a preliminary injunction. (See Doc. # 2 and 3). This Court denied that motion, and stayed this action. (See Doc. # 11).

The Federal Trade Commission then sought an Order of Enforcement Pendente Lite from the Court of Appeals, to enforce the Order while the appellate proceedings were ongoing. The Court of Appeals granted this request in a *per curiam* order on November 22, 2010, stating that "Daniel Chapter One is hereby enjoined to obey forthwith the modified final order of the Federal

⁵ The Commission stated that this relief was not warranted because, "[a]ll factors for granting a stay weigh against granting the motion. Respondents have shown neither a likelihood of success on the merits on appeal, nor that they will suffer irreparable harm absent the requested relief. Moreover, given that other parties will be harmed if the stay is granted, it is not in the public interest to grant Respondents' motion." The Commission Order denying Defendants' Motion is attached as Exhibit B.

⁶ The D.C. Circuit Court's Order denying Defendants' Emergency Motion to Stay is attached as Exhibit C.

Trade Commission issued January 25, 2010[.]”⁷ Defendants then filed a motion asking the Court of Appeals to stay the enforcement of the section of the Order requiring them to send the letter to their customers. The Court of Appeals rejected this request on December 7, 2010.⁸ Subsequently, the Court of Appeals denied Defendants’ appeal.⁹ Defendants request for a rehearing en banc was denied, and the Court of Appeals issued the Mandate on February 28, 2011.¹⁰

The Federal Trade Commission’s Order became effective on April 2, 2010, however, Defendants refused to comply with the terms of the Order. Defendants continued to violate the Order while the litigation detailed above proceeded, despite numerous orders from both the Commission and the Court of Appeals stating that the Order was not stayed, and that Defendants must comply with the Order while the appellate proceedings were ongoing. In the pending motion, we seek a preliminary injunction to stop these violations. The injunctive relief sought would require Defendants to stop forbidden marketing and to send the required notice. Civil penalties accrue for violations of FTC orders, see 15 U.S.C. § 45(l), but are not at issue in this motion for a preliminary injunction.

⁷ The D.C. Circuit Court’s Order is attached as Exhibit D.

⁸ The D.C. Circuit Court’s denial of the Motion for Partial Stay is attached as Exhibit E.

⁹ The D.C. Circuit Court’s Judgment and accompanying Memorandum is attached as Exhibit F.

¹⁰ The D.C. Circuit Court’s Mandate is attached as Exhibit G.

APPLICABLE STANDARD

The Federal Trade Commission Act provides for an injunction “[u]pon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest[.]” 15 U.S.C. § 53(b). “Congress intended this standard to depart from what it regarded as the then-traditional equity standard . . . [as] the traditional standard was not ‘appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measure the propriety and the need for injunctive relief.’” FTC v. H.J. Heinz Co., 246 F.3d 708, 714 (D.C. Cir. 2001) (citing H.R.Rep. no. 93-624, at 31 (1971)). As a result, “the FTC need not show any irreparable harm[.]” FTC v. Whole Foods Market, Inc., 548 F.3d 1034-35 (D.C. Cir. 2008) (citing FTC v. Weyerhaeuser, 665 F.2d 1072, 1082-83 (D.C. Cir. 1981)). Additionally, when considering the impact of any equities favoring Defendants, this test dictates that “[w]hen the Commission demonstrates a likelihood of ultimate success, a countershowing of private equities alone would not suffice to justify denial of a preliminary injunction[.]” Weyerhaeuser, 665 F.2d at 1083.

Here, the United States has filed an action seeking relief from violations of an order the FTC issued to prevent and cure violations of the FTC Act. It is likely that the United States will ultimately succeed on the merits of this case, at least insofar as the United States seeks injunctive relief, and the balance of the equities support granting an injunction. As a result, issuing a preliminary injunction enjoining the Defendants from violating the Modified Final Order entered by the Federal Trade Commission is in the public interest, just as it is when the FTC seeks such

relief directly. However, an injunction would be appropriate even if the Court were to apply the traditional four-factor test when evaluating this Motion.¹¹

The Scope of the Court's Review is Limited

The FTC Act entrusts the administration of the Act to the Commission, as “a body of experts[.]” Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 54 (1948). Once a Commission order becomes final, the enforcement responsibility held by the courts “is to adjudicate questions concerning the order’s violation, not questions of fact which support that valid order.” Id. “[I]t is well settled that a defendant cannot attack a final cease and desist order in a subsequent enforcement proceeding.” United States v. H.M. Prince Textiles, Inc., 262 F.Supp. 383, 288 (S.D.N.Y. 1966) (citing Morton Salt Co., 334 U.S. at 54; Parke, Austin & Lipscomb, Inc. v. FTC, 142 F.2d 437, 442 (2d Cir. 1944); United States v. Vitasafe Corp., 212 F. Supp. 397, 398 (S.D.N.Y. 1962)).

The review of the Order that took place before the United States Court of Appeals for the District of Columbia Circuit was based upon an administrative review procedure that Congress

¹¹ The four factors traditionally applied to private litigants seeking injunctive relief are: (1) the likelihood of success on the merits; (2) the irreparable harm to the plaintiff if the injunction is not granted; (3) whether the equities, on balance, favor an injunction; and (4) the public interest. See Winter v. Natural Resources Defense Council, 129 S.Ct. 365, 374 (2008); Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006). While the moving party bears the burden on all four of these factors, it does not have to make an equally strong showing on each factor. In the D.C. Circuit, district courts “balance the strengths of the requesting party’s arguments in each of the four required areas.” Chaplaincy of Full Gospel Churches, 454 F.3d at 297. As a result, “a particularly strong showing in one area can compensate for weakness in another.” Brady Campaign to Prevent Gun Violence v. Salazar, 612 F. Supp. 2d 1, 11-12 (D.D.C. 2009).

established by statute. See 15 U.S.C. § 45. Where “there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies.” City of Rochester v. Bond, 603 F.2d 927, 931 (D.C. Cir. 1979); see also Defenders of Wildlife v. Adm’r, Env’tl. Prot. Agency, 882 F.2d 1294, 1299 (8th Cir. 1989); Kreschollek v. Southern Stevedoring Co., 78 F.3d 868, 870-71 (3d Cir. 1996).

Issues raised concerning the validity of the Order or any facts underlying the Order were properly raised in the appellate proceeding. Indeed, the responsibility for considering those issues was specifically delegated to the consideration of the circuit courts. As a result, this Court’s review when considering the government’s likelihood of success on the merits of the pending proceeding is limited to consideration of only the face of the order and the facts underlying the Order’s violation, and should not include a review of the administrative record.

ARGUMENT

Injunctive relief is warranted here, where the government is able to show that it is likely to prevail on the merits and the equities support an injunction. This Memorandum will address each factor separately. The United States does not have to demonstrate irreparable harm under this standard. Nonetheless, we can establish irreparable harm to consumers due to Defendants’ violations of the Order.

The United States Is Likely To Succeed On The Merits

Defendants have violated, and continue to violate, the Order in two ways. First, they refuse to send a letter to purchasers of the Products, that Part V.B of the Order required Defendants to send nearly ten months ago. Second, the Defendants continue to make representations in violation of Part II of the order, including by soliciting and using endorsements to make these prohibited claims.

Notice - Part V.B

Part V.B of the Order states:

B. Within forty-five (45) days after the final and effective date of this order, Respondents shall send by first class mail, postage prepaid, an exact copy of the notice . . . to all persons [who purchased the Products between January 1, 2005 and the date of the Order.]

The notice will inform consumers that the advertising claims made for the Products were found to be deceptive by the FTC because they were not substantiated by competent and reliable scientific evidence, and states that the FTC is requiring that this notice be sent.¹² Additionally, the notice directs customers to talk to their doctor or health care provider about using these products in conjunction with, or instead of, other cancer treatments.

The Order became effective on April 2, 2010, and as a result, this notice should have been sent to customers on or before May 17, 2010. When Defendants subsequently submitted a required compliance report to the FTC, the report did not list the notice as having been sent and

¹² The full text of the notice can be found on page 7 of Exhibit A.

the FTC inquired further.¹³ In a letter dated June 4, 2010, Defendants confirmed that they had not sent the notice.¹⁴ Even now, after their appeal was denied by the Court of Appeals, Defendants refuse to send the notice. Their website declares that, “[w]e will never sign the DECEPTIVE letter written by the FTC.”¹⁵

Defendants have suggested both to the FTC, and in proceedings before the District of Columbia Court of Appeals, that the FTC send the required notice. This suggestion fails on both legal and practical grounds. First, what Defendants suggest amounts to an implicit request for modification of the Order. This request has no basis in law. Even if this Court were the proper forum in which to seek a modification of the Order, considerable deference to the FTC’s choice of remedy would be warranted. See FTC v. Colgate-Palmolive, 380 U.S. 374, 392 (1965) (reasoning that because “the Commission has wide discretion in determining the type of order that is necessary . . . and [because] Congress has placed primary responsibility for fashioning orders upon the Commission. . . . courts should not ‘lightly modify’ the Commission’s orders.”) (internal citations omitted).

Second, practical considerations weigh in favor of enforcing the Order’s requirement that Defendants send the letter. Defendants have an obligation to correct their own deceptive advertising. Moreover, only Defendants can effectively convey this message to their customers,

¹³ This Compliance Report is attached as Exhibit H.

¹⁴ The fax from counsel for Defendants is attached as Exhibit I.

¹⁵ See <http://www.danielchapterone.com/dc1freedom/index.php>. A screen shot of this page can be seen at page 7 of Exhibit J.

particularly in light of Defendants' prior communications with those customers regarding the FTC proceedings.

After first suggesting to the FTC that the FTC send the required letter, Defendants sent a different 5-page letter to their customers.¹⁶ This letter warned their customers that they were “forced to **turn over your name and address . . .** [and] we want to warn you that **you may get a letter from BIG BROTHER.**” (emphasis in original). The letter goes on to say that the letter the FTC has required them to send contains statements that “are lies” and asks customers to show support by purchasing Defendants' products, offering recipients of the letter 10% off their next purchase. In this letter, Defendants ask customers to do three things, “1. **PRAY.** . . . 2. **PURCHASE.** . . . [and] 3. **PETITION.** Sign the **petition** against the FTC's unfair actions[.]” (emphasis in original). This letter is available on the Daniel Chapter One Freedom website.¹⁷ Additionally, Defendants have encouraged their supporters to burn copies of the letter, and have posted a video of one individual burning the letter on their website.¹⁸

Accordingly, were the FTC to send the notice as Defendants suggest, Defendants' misrepresentations of the Commission's proceedings in the course of its continued deceptive marketing of its products would severely undercut the effectiveness of that notice. In addition,

¹⁶ This letter is attached as Exhibit K.

¹⁷ See <http://www.danielchapterone.com/dc1freedom/component/content/article/40-write-something/662-so-it-is-written-so-let-it-be-done>. A screen shot of this page is attached as page 1 of Exhibit J. The link on the top right side of the page titled “Customer Letter” leads visitors to this letter.

¹⁸ See <http://www.dc1freedom.com/tim-burning-ftc-letter>. A screen shot of this page is attached as Exhibit L. The video itself is being filed with the Court on a CD, and is entitled Exhibit S - Burning Letter Video.

as a practical matter, the FTC is a government agency with limited resources. Taxpayers should not bear the costs of correcting the harm that Defendants have caused. Defendants' intractable refusal to send this required notice violates the order, and as a result, the United States will succeed on the merits on this claim.

Representations - Part II

Part II of the Order prohibits Defendants from making "any representation, in any manner, expressly or by implication, including through the use of product or program names or endorsements" that any product marketed by Defendants:

prevents, treats, or cures or assists in the prevention, treatment, or cure of any type of tumor or cancer, including but not limited to representations that:

1. BioShark inhibits tumor growth;
2. BioShark is effective in the treatment of cancer;
3. 7 Herb Formula is effective in the treatment of cancer;
4. 7 Herb Formula inhibits tumor formation;
5. GDU eliminates tumors;
6. GDU is effective in the treatment of cancer;
7. BioMixx is effective in the treatment of cancer; or
8. BioMixx heals the destructive effects of radiation or chemotherapy;

unless the representation is true, non-misleading, and at the time it is made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

As a result, these representations are prohibited, and they cannot be made either by Defendants themselves or through endorsements by others. The order states that the term "endorsement" is as defined in 16 C.F.R. § 255.0(b). This regulation specifically states that "an endorsement means any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views

expressed by that party are identical to those of the sponsoring advertiser.” 16 C.F.R. § 255.0(b).

Defendants have continued making the prohibited representations about their products, even after losing their appeal in front of the Court of Appeals. They make these prohibited representations on Defendants’ radio show and on various websites and online forums.

Radio Show

The prohibited representations are frequently made on the Daniel Chapter One Censored radio show. These representations are made both by the hosts of the show, and also by individuals calling into the show who make endorsements of Defendants’ products. For example, in the show that aired on February 14, 2011, Defendant James Feijo stated, “You know, our voice has been hindered by the evil of our government. We can’t even give true testimony, signed affidavits of people who’ve cured or healed of cancer.”¹⁹ On their show that aired on February 22, 2011, James Feijo stated,²⁰

We’ve had people that have had, sent us testimonies that were cured of cancers, we had testimonies of people who had brain tumors that were completely gone, . . . [with] nothing, nothing but God-given nutrients, created by God and developed by Daniel Chapter One. Brain tumors, kidneys, liver, leukemias, multiple myelomas, every kind of cancer you can imagine, and we had hundreds of documented testimonies, all stolen, stolen, yes stolen, we said stolen, they were taken by the federal government . . . on danielchapteronefreedom.com you will be able to see some of those testimonies.

¹⁹ A recording of this show is being filed with the Court on a CD, and is entitled Exhibit T - Radio Show 2.14.2011b. This statement is made at 14:10.

²⁰ A recording of this show is being filed with the Court on a CD, and is entitled Exhibit U - Radio Show 2.22.2011a. This statement is made at 17:45.

These statements by James Feijo violate the Order as they represent that Daniel Chapter One products are effective in the treatment of cancer.

Defendants encourage callers to call in with their questions and experiences with Defendants products. For example, on February 8, 2011, Defendants accepted a call from “Elmer” who called regarding treatment for renal cell carcinoma, saying that a friend had recommended that he take 7 Herb Formula, BioShark, GDU, and First Kings.²¹ Elmer asked if that was the correct treatment for metastatic renal cell carcinoma, and Daniel Chapter One host David Bertrand answered, “I believe you’ve got the products you need to get on the right track for healing, and a good place to get more information would be the healthfellowship.org. You can go there and research different topics, and ask questions there and many different people answer them.”²² Later, David Bertrand added that “I would be aggressive with the products that you have, very aggressive.”²³ The statements by Daniel Chapter One host David Bertrand violate the Order as they represent that these four Daniel Chapter One products will assist in the treatment or cure of metastatic renal cell carcinoma.

On February 22, 2011, Defendants accepted another call from “Elmer”²⁴ who stated that he had been using BioShark, GDU, 7 Herb Formula, and First Kings for the past eleven days, and that since using the products “what I found out is, I used to have pain in my abdomen when I

²¹ A recording of this show is being filed with the Court on a CD, and is entitled Exhibit V - Radio Show 2.8.2011. This call begins at 16:45, and the caller mentions these products at 21:10.

²² Exhibit V - Radio Show 2.8.2011 at 24:50.

²³ Exhibit V - Radio Show 2.8.2011 at 26:20.

²⁴ A recording of this show is being filed with the Court on a CD, and is entitled Exhibit U - Radio Show 2.22.2011a. This call begins at 29:40.

tried to go to the bathroom, I don't have that anymore. The hot spots I had on my bones, across my bones from the cancer, they hurt like crazy, I haven't had that pain.²⁵ Defendant James Feijo encouraged him to elaborate on his condition, and provide additional information about the products and dosage he used, stating that "we're not going to block the Lord's testimony."²⁶ The health claims made by this caller indicated that these four products were effective in the treatment of his cancer, and were endorsements of these products, in violation of the Order.

Defendants do not always answer health questions themselves, and frequently solicit endorsements from others. For example, on February 22, 2011, the radio show took a call from "Patricia,"²⁷ who stated that her doctor had found a mass on her breast, and she asked Defendants for help and advice. Daniel Chapter One host Tricia Feijo and Defendant James Feijo instructed her not to get a biopsy, and Tricia Feijo stated that "if it is cancer, it can stir up the cells and can get them to spread[.]"²⁸ Tricia Feijo told Patricia that she should take products "to treat it worst case scenario."²⁹ Defendants then asked someone to call in to help answer Patricia's questions, and accepted a call from "Greg," who said that in addition to the products she was already taking, for "cancer . . . one thing I would add is BioShark to that."³⁰ Tricia Feijo confirmed this suggestion, stating, "yeah, definitely." Greg then directed Patricia to go to a Yahoo Group page

²⁵ Exhibit U - Radio Show 2.22.2011a at 29:40.

²⁶ Exhibit U - Radio Show 2.22.2011a at 42:45.

²⁷ A recording of this show is being filed with the Court on a CD, and is entitled Exhibit W - Radio Show 2.22.2011b. This call begins at 17:15.

²⁸ Exhibit W - Radio Show 2.22.2011b at 8:30.

²⁹ Exhibit W - Radio Show 2.22.2011b at 8:30.

³⁰ Exhibit W - Radio Show 2.22.2011b at 22:25.

for a group named “danielchapterone” where she could “download the most simple guide” and stated that she could email him and he would send it to her. The health claims made by caller Greg are endorsements, and violate the Order, as do the confirming comments made by Tricia Feijo. This pattern, in which Defendants solicit endorsements to provide information about how Daniel Chapter One products can be used to treat and cure cancer, is frequently repeated on the show when consumers call in with cancer-related questions.

These are not isolated incidents. While Defendants do not make representations that violate Part II of the Modified Final Order on every show, these representations are frequently made, and, as demonstrated above, have been made even since the Court of Appeals issued its Judgment in December. These representations violate the Order, and as a result, the United States will succeed on the merits on this claim.

Online Forums

These prohibited representations are not only made on the radio show itself. As indicated in the excerpts above, Defendants guide their listeners to various online forums and websites for more information. These online forums and websites contain many prohibited representations. For example, after the Court of Appeals issued its Judgment, Defendants posted a message on their website that read, in part:

Daniel Chapter One is being tortured right now for its opinion-- its knowledge -- about healing that is different from conventional medicine. Overseer Jim Feijo has been threatened with bankrupting fines and incarceration for refusing to sign a government agency letter saying, in essence, the earth is flat. Literally, the letter denounces what Mr. Feijo knows to be true -- that Daniel Chapter One natural products are safe and effective in helping fight cancer and there is science supporting efficacy of their various ingredients -- and states what Mr Feijo and

countless others know to be FALSE: that conventional cancer treatment has been proven safe and effective.

(typographic errors in original).³¹ Additionally, the introduction to the Daniel Chapter One

Freedom website states that:

They ordered that we sign a letter they wrote, a deceptive letter saying that only conventional cancer treatment has been **proven safe and effective in humans**, and send it to thousands of people.

But Daniel Chapter One cannot bear false witness...

(emphasis in original).³² These statements violate the Order as they represent that Daniel

Chapter One products are safe and effective in treating cancer.

Prior to the initiation of this lawsuit last summer, Defendants would direct their listeners to join their online fellowship. As detailed on pages 19-21 of the Memorandum in Support of the Motion for Preliminary Injunction filed on August 25, 2010, the online fellowship contains violations of the Modified Final Order where individuals would ask questions about treating cancer, and posters would respond with information on Defendants' products. Notably, Defendants averred in their partial stay request to the Court of Appeals,³³ that, since receiving the Court of Appeals' enforcement order of November 22, 2010, they had "taken further steps in [their] efforts to comply with the FTC Order."³⁴ Although Defendants did not elaborate in their

³¹ See <http://www.danielchapterone.com/dc1freedom/component/content/article/40-write-something/662-so-it-is-written-so-let-it-be-done>. A screen shot of this page is attached as page 1 of Exhibit J.

³² See <http://www.danielchapterone.com/dc1freedom/index.php>. A screen shot of this page can be seen at page 7 of Exhibit J.

³³ Defendants' Motion for Partial Stay of the Enforcement Order Pendente Lite is attached as Exhibit M.

³⁴ See page 2, note 1 of Exhibit M.

motion, they stated on their web site and radio show that they had stopped the online fellowship and would no longer answer health questions on the radio.³⁵ However, at that time, and presently, it is still possible for registered members to access content on the online fellowship website and the archive included recordings of shows that aired prior to entry of the November 22, 2010 enforcement order as well as Defendants' Guide Book.³⁶

Instead of using their online forum to pass on information about their products, it now appears that Defendants guide their listeners to visit either healthfellowship.org or the "danielchapterone" Yahoo Group page. Defendants use these online resources as a way to link potential customers to their "Guide Book" and their "Cancer Newsletter," both of which contain information on the Products.³⁷ The danielchapterone Yahoo Groups page contains a copy of the Cancer Newsletter and the Guide Book, along with a link to where potential customers can view the Guide Book on Flickr.³⁸ The healthfellowship.org website contains posts from several individuals who have copies of this publication, and other similar guides, offering to send them

³⁵ See Exhibit N, which contains the FTC's Opposition to DCO's Motion for Partial Stay of Enforcement Order Pendente Lite. Specifically, note pages 16 and 17, which contain a declaration by William Burton submitted in support of the FTC's Opposition to DCO's Motion.

³⁶ See pages 16 and 17 of Exhibit M, and paragraph 16 of Burton Declaration.

³⁷ The Guide Book's full title is "the most simple guide to the most difficult diseases" and is subtitled "the doctors' how-to quick reference guide." The full title of the Cancer Newsletter is "How to fight cancer is your choice!!!" and is subtitled "Cancer Newsletter, Millennium Edition, 2002[.]"

³⁸ A screen shot of the Files posted on the Yahoo Groups page can be seen at pages 1 and 2 of Exhibit O. A screen shot of the Yahoo Groups page with the Flickr link can be seen at page 3 of Exhibit P. Screen shots of the Flickr pages themselves can be seen at pages 5-108 of Exhibit P.

to interested parties.³⁹ The Guide Book’s introduction states that it contains “protocols we used successfully,” and that “[m]any have testified that these basic protocols are effective, when adhered to as part of an overall health plan.”⁴⁰ The Guide Book includes a page titled “Cancer” and subtitled “All types of Cancer” which lists recommended doses of 7 Herb Formula, BioShark, BioMixx, and GDU Caps, all of which are designated as “the most essential products” for cancer.⁴¹ The Cancer Newsletter provides information on using many of Defendants’ products, including 7 Herb Formula, Bio Shark, Pre Post, BioShark, GDU, and BioMixx to treat and cure cancer.⁴²

In addition to linking visitors to these publications, both the Yahoo Groups page and the healthfellowship.org website contain posts from individuals seeking advice on how to treat various diseases, and responses with information on what Daniel Chapter One products should be used. For example, on healthfellowship.org a poster named “Evangelist” stated on September 28, 2010, that their mother has pancreatic cancer, and asked for advice on a product to help her. “David” responded:

For cancer we believe the Lord has provided the following products to help with healing:

7 Herb Formula 8 ounces 4 times a day for a few days, then reduce as you feel comfortable

Bio Shark 2-4 capsules 4 times daily, to start, I would recommend at least 4 for a few days

GDU 3-6 capsules 4 times daily ½ hour before meals and before bed

³⁹ A screen shot of this discussion can be seen at pages 7 and 8 of Exhibit Q.

⁴⁰ See page 10 of Exhibit P and page 28 of Exhibit O.

⁴¹ See page 25 of Exhibit P and page 45 of Exhibit O.

⁴² See pages 3 through 18 of Exhibit O.

Endo 24 or **1st Kings 17:6** 3 scoops in clean water at least twice daily, early morning and within 1 hour of sleep. More often during the day would be most helpful considering the weight loss problem

By clean water I meant water that has been filtered to remove the chlorine, fluoride and other harmful chemicals making it safe to drink.

here is a link to our water filter site: . . . <http://www.waterkleenfrs.com>

Keep in mind that we do not recommend the use of our products while using prescription drugs, chemo or radiation as they counteract each other. The chemo and radiation will not help your mother and instead will cause other cancers to develop, chemo and radiation are deadly to the body.

(emphasis and typographic errors in original).⁴³

The danielchapterone Yahoo Group page contains similar discussions. For example, on January 27, 2011, a poster asked several questions, including “I have a friend who just found out her mom has returned cancer as well. Any suggestions to get her away from the drugs the doctor will soon be putting her on?”⁴⁴ Other posters responded, directing her to look at the Guide Book, and a poster named “Greg Lesher” stated that “[w]hile the treatment listed on the PDF may be followed, more can be used with out any side effects due to the fact they are God given foods to wake up the immune system!”⁴⁵

All of the representations discussed in this section violate Part II of the Order. Defendants encourage potential customers to visit these websites, where individuals give endorsements of Defendants’ products and direct potential customers to Daniel Chapter One publications, including the Guide Book and Cancer Newsletter. Defendants’ failure to stop

⁴³ A screen shot of this discussion can be seen at pages 9 and 10 of Exhibit N.

⁴⁴ See pages 4-5 of Exhibit R.

⁴⁵ See pages 7-11 of Exhibit R.

making these prohibited representations violates the order, and as a result, the United States will succeed on the merits on this claim.

The Equities Support Granting Injunctive Relief

The very real, imminent, and substantial harms that cancer patients face as a result of Defendants' misleading claims outweigh any equities that Defendants may claim support their position. The equities do not favor allowing Defendants to continue their current behavior. Indeed, courts that have considered misleading advertising practices have determined that "[t]here is no hardship to [defendants] in requiring them merely to follow the law - to refrain from making misrepresentations to consumers they contact." FTC v. City West Advantage, Inc., 2008 WL 2844696, at *6 (D.Nev. July 22, 2008). Additionally, when considering the impact of any equities favoring Defendants, it is important to remember that "[w]hen the Commission demonstrates a likelihood of ultimate success, a countershoring of private equities alone would not suffice to justify denial of a preliminary injunction[.]" Weyerhaeuser, Co., 665 F.2d at 1083. Because of the likelihood that the United States will prevail, any arguments Defendants may raise are insufficient.

The FTC Act reflects Congress' intent to protect consumers from deceptive advertising and the public interest in protecting consumers from such advertising, particularly advertising that implicates health and safety concerns, is especially strong. See, e.g., Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 841 (9th Cir. 2002); Conopco, Inc. v. Campbell Soup Co., 95 F.3d 187, 194 (2d Cir. 1996); United States v. Dianovin Pharm. Inc., 475 F.2d 100, 103 (1st Cir. 1973). Defendants target their advertising messages to vulnerable cancer patients and their

families who continue to be at risk of relying on Defendants' false claims with potentially grave consequences for their health. Defendants encourage these individual to forego chemotherapy and radiation and use the Products instead. The individuals who listen to this show or use the websites and online forums, and purchase the Products as a result of the prohibited representations do not just suffer monetary harm, and their injuries are "beyond remediation." Chaplaincy of Full Gospel Churches, 454 F.3d at 298. Consumers have been harmed, and continue to be harmed by the deceptive marketing practices Defendants use. The equities weigh strongly in favor of protecting these vulnerable consumers from Defendants' representations.

It is in the Public Interest to Issue Injunctive Relief

There is great public interest in preventing the harm that results when consumers forego beneficial and effective therapy for untested therapies such as those Defendants promote. There is great public interest in preventing the harm that arises when consumers risk their health to potential side effects and harmful interactions between the Products and other therapies. Additionally, there is great public interest in preventing the harm that arises when those who have been previously deceived by Defendants' representations do not receive corrective information and continue to use the unproven Products Defendants market. "[T]he public has a particularly strong interest in an accurate description of health and medical products." Jarrow Formulas, Inc., 304 F.3d at 841 (considering whether the public interest can overcome the rule of laches in a suit under the Lanham Act) (citing Conopco, Inc., 95 F.3d at 194 ("We have consistently held that the public's interest is especially significant when health and safety concerns are implicated, as with the advertising of over the counter medications"))).

Additionally, the public interest is served where the FTC is able to enforce the FTC Act, where companies that are found to violate the FTC Act are restrained from continuing to commit these violations, and where orders from a government agency, such as the FTC, are enforced. In this action, the United States seeks compliance with the FTC's Order. The public interest is served when consumers are protected from being deceived by false representations related to untested therapies. The public interest in this case weighs strongly in favor of injunctive relief.

Consumers Will Suffer Irreparable Harm If An Injunction Is Not Granted

As detailed in the legal standard section, the United States does not have to show irreparable harm when seeking injunctive relief under the FTC Act. Whole Foods Market, Inc., 548 F.3d at 1034-35. Nonetheless, consumers will suffer irreparable harm if injunctive relief is not granted.

Defendants have no competent and reliable scientific evidence that substantiates their claims that the Products can prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy. Consumers have been irreparably injured, and will continue to suffer irreparable harm if Defendants do not send the notice or if Defendants continue to make prohibited representations about their products. Requiring Defendants to follow the Order and send notice that the advertising claims were found to be deceptive by the FTC will provide these customers with corrective information so they can be fully informed on whether they should continue to use the unproven Products Defendants market. Requiring Defendants to follow the Order and stop making the prohibited representations detailed in Part II of the Order will prevent new customers from being deceived.

Irreparable harm arises if consumers forego beneficial and effective therapy for untested therapies such as those Defendants promote. Irreparable harm arises when consumers risk their health to potential side effects and harmful interactions between the Products and other therapies. Irreparable harm arises when those who have been previously deceived by Defendants' representations do not receive corrective information and continue to use the unproven Products Defendants market.

This harm is not theoretical. These representations can be made and accessed at any time on these websites and online forums. Defendants make these representations on their radio show, which airs every Monday through Friday for two hours each day. This irreparable harm is ongoing, and imminent.

CONCLUSION

Here, it is likely that the United States will ultimately succeed on the merits, and the balance of the equities support granting an injunction. As a result, issuing a preliminary injunction enjoining the Defendants from violating the Modified Final Order entered by the Federal Trade Commission is in the public interest. The United States would be entitled to a preliminary injunction even if the Court were to apply the traditional four-factor test when evaluating this Motion.

For the reasons stated above, the United States requests that its Revised Motion for Preliminary Injunction be granted, and that a preliminary injunction be ordered, barring Defendants from violating the Order, including: (1) prohibiting Defendants from continuing to make representations in violation of Part II of the Order on their radio show, Defendants'

websites, Defendants' Facebook page, the danielchapterone Yahoo Group, the healthfellowship.org website, and any other website, online forum or group, (2) requiring Defendants to remove audio recordings of their radio show and any written representations that violate Part II of the Order, along with any links to the Guide Book from Defendants' websites, Defendants' Facebook page, the danielchapterone Yahoo Group, the healthfellowship.org website, and any other website, online forum or group, and (3) requiring Defendants to send the notice detailed in Part V.B of the Order.

Respectfully submitted,

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