

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.)	

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

The United States of America, through undersigned counsel, hereby replies in support of its Motion for Preliminary Injunction [doc. #16]. Daniel Chapter One and James Feijo (“Defendants”) have violated, and continue to violate the Modified Final Order (“Order”) entered by the Federal Trade Commission (“FTC” or “Commission”) by promoting cures for cancer and other tumors without competent and reliable scientific evidence substantiating their claims and ignoring provisions in the Order that require that a corrective notice be sent to past purchasers. In their response to the Motion for Preliminary Injunction, Defendants ask that this matter be stayed,¹ claim that an order requiring them to send the corrective notice would require

¹ Defendants’ arguments related to staying this case are addressed in the government’s Response in Opposition to Defendants’ Motion to Stay the Proceedings.

them to make incriminating statements, and raise both the First Amendment and the Religious Freedom Restoration Act (“RFRA”) as a defense to the Order. As discussed below, these arguments have no merit, and Plaintiff’s Motion for Preliminary Injunction should be granted.

The Statements in the Corrective Notice are Attributed to the Federal Trade Commission

In their response to the Motion for Preliminary Injunction, Defendants assert that an order forcing them to mail the corrective notice would require them to make incriminating statements against their will. This argument is frivolous, and ignores the language of the letter. The corrective notice does not admit guilt. The letter specifically attributes all of the statements within it to the Federal Trade Commission, and merely informs the public about the proceedings before the Federal Trade Commission and the public findings that were made. As the statements within the letter are attributed to the Federal Trade Commission, they do not trespass upon any issues related to the Fifth Amendment.

Additionally, Defendants have been ordered - numerous times - by both the Federal Trade Commission and the Court of Appeals for the District of Columbia - to send this notice. Compliance with a court order would never be admitted in any criminal proceeding as evidence of guilt, and Defendants’ arguments otherwise are merely another attempt to postpone compliance with the Order. These arguments should be rejected.

The First Amendment and RFRA Cannot be Raised as Defenses in an Enforcement Proceeding

The only other basis Defendants assert for the denial of the injunctive relief Plaintiff seeks is to again claim that their actions are protected under the First Amendment and the Religious Freedom Restoration Act (“RFRA”). Defendants’ First Amendment and RFRA claims

were raised in the Court of Appeals, and were rejected by that court. Whether the Order was improper due to the First Amendment or RFRA were issues that were properly raised before the Court of Appeals. La Voz Radio de la Comunidad v. FCC, 223 F.3d 313, 318-319 (6th Cir. 2000) (RFRA defense is properly raised on direct appeal of agency decision, and not as the basis for an action seeking an injunctive order prohibiting the government from seeking civil or criminal sanctions) (citing Luz v. FCC, 88 F.Supp. 2d 372, 376 (E.D. Pa. 1999)). The First Amendment and RFRA cannot be used as defenses to this enforcement action, and by asserting these defenses, Defendants are attempting “an impermissible ‘end-run around the statutory scheme.’” Id.

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 occurred before the United States Court of Appeals for the District of Columbia Circuit was based upon an administrative review procedure that Congress 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, Envntl. Prot.

Agency, 882 F.2d 1294, 1299 (8th Cir. 1989); Kreschollek v. Southern Stevedoring Co., 78 F.3d 868, 870-71 (3d Cir. 1996). Defendants have failed to cite to a single court that has permitted the First Amendment or RFRA to be used as defenses to an enforcement proceeding for the violation of a final agency order. Because these defenses are not properly raised in an enforcement proceeding, there is no impact on the government's likelihood of success on the merits or the balance of the equities, and the injunctive relief Plaintiff seeks should be issued.

CONCLUSION

As discussed in the Response in Opposition to Defendants' Motion to Stay the Proceedings, Defendants' arguments that this action be stayed have no merit. As a result, the Court should hold the scheduled hearing on Plaintiff's Motion for Preliminary Injunction. Defendants' arguments related to the First Amendment and RFRA were properly raised before the Court of Appeals, and should not be considered in this action. As detailed in the Motion for Preliminary Injunction, 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 requests that its Motion for Preliminary Injunction be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 1, 2011, I caused a true and correct copy of the above-entitled **REPLY IN SUPPORT OF UNITED STATES' MOTION FOR PRELIMINARY INJUNCTION**, to be served via the Court's Electronic Case Filing System to counsel for the defendants as follows:

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