

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.)	

**UNITED STATES’ SUPPLEMENTAL PLEADING IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

The United States of America, through undersigned counsel, hereby replies in support of the pending Motion for Preliminary Injunction [doc. # 16]. On May 9, 2011, the Court ordered the United States to address several questions related to an order issued by the Court of Appeals for the District of Columbia Circuit on November 22, 2010 (“Enforcement Order”). Specifically, the Court directed Plaintiff to file a supplemental pleading in support of the pending Motion for Preliminary Injunction explaining (1) why this Court should enter an order preliminarily enjoining defendants from violating the FTC’s Modified Final Order, in view of the Enforcement Order, and (2) why the Federal Trade Commission is not seeking the modification or enforcement of the Enforcement Order. The Enforcement Order was entered

“*pendente lite*,” and its duration is limited to the life of the appellate litigation. Accordingly, the United States is pursuing more lasting relief before this Court.

INTRODUCTION

At a hearing held on September 14, 2010, the Court denied Plaintiff’s Motion for Preliminary Injunction and directed Plaintiff to seek injunctive relief in the Court of Appeals. As a result, the Federal Trade Commission (“FTC” or “Commission”) filed an “Emergency Motion of the United States Federal Trade Commission for an Order of Enforcement *Pendente Lite*” with the Court of Appeals.¹ The FTC’s motion requested that James Feijo and Daniel Chapter One (“Defendants”) be required to comply, *pendente lite*, with the Modified Final Order issued by the Commission on January 25, 2010.

The FTC sought this relief pursuant to the FTC Act, which states that after a petition for review is filed, the Court of Appeals in which the appeal is pending:

. . . shall have the power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors *pendente lite*.

15 U.S.C. § 45(c) (emphasis added). On November 22, 2010, the Court of Appeals granted the Commission’s motion. The Order² issued by the Court of Appeals stated:

Upon consideration of the emergency motion of the Federal Trade Commission for an order of enforcement *pendente lite*, the opposition thereto, and the reply it is

¹ The Motion filed by the Federal Trade Commission is attached as Exhibit A.

² The Order entered by the Circuit Court for the District of Columbia Circuit is attached as Exhibit B.

ORDERED that the motion be granted. Daniel Chapter One is hereby enjoined to obey forthwith the modified final order of the Federal Trade Commission issued January 25, 2010, in Docket No. 9329, In the Matter of Daniel Chapter One and James Feijo.

ARGUMENT

The *pendente lite* language within both the FTC Act and the Order entered by the Circuit Court limits the reach of the Circuit Court's enforcement powers. *Pendente lite* refers to relief that is granted "pending determination of the merits." United States v. Kelly, 790 F.2d 130, 139 (D.C. Cir. 1986) (citing Baker v. Sard, 420 F.2d 1342, 1343 (D.C. Cir. 1969)). A *pendente lite* order does not provide a litigant with permanent relief. See, e.g., Cooper v. Isaacs, 448 F.2d 1202, 1203 (D.C. Cir. 1971) (seeking an appointment of a receiver *pendente lite* and permanently). As the Eighth Circuit noted:

The application for such an injunction does not involve a final determination on the merits; in fact, the purpose of an injunction *pendente lite* is not to determine any controverted right, but to prevent a threatened wrong or any further perpetration of an injury, or the doing of any act pending the final determination of the action whereby rights may be threatened or endangered, and to maintain things in the condition in which they are in at the time . . . until the issues can be determined after a full hearing.

Benson Hotel Corporation v. Woods, 168 F.2d 694, 696 (8th Cir. 1948). As a result, the Order that was entered by the Court of Appeals was valid only while the appeal of the Modified Final Order was pending before the Court of Appeals.

The Federal Trade Commission determined that Defendants continued to violate the Modified Final Order, despite the entry of the Enforcement Order by the Circuit Court on November 22, 2010. The Federal Trade Commission did consider moving for contempt of the Enforcement Order in the Court of Appeals, but on December 10, 2010, less than three weeks

after the Enforcement Order was entered, the Circuit Court issued its Judgment on the merits of the appellate proceedings.³ Issuance of the Judgment indicated that the jurisdiction of the Court of Appeals, and therefore the reach of the *pendente lite* Enforcement Order, was soon to come to an end. As a result, the FTC took measures to accelerate the resolution of the appellate proceedings so that the enforcement proceedings before this Court could resume. Indeed, on January 6, 2011, the FTC notified the Court of Appeals that “Daniel Chapter One and James Feijo . . . continue to flout the Commission’s Order” and moved for expedited issuance of the mandate so “that the district court proceedings could resume.”⁴

After the FTC filed its motion requesting the expedited issuance of the mandate, Defendants petitioned for rehearing *en banc*. Their petition was quickly denied, and the mandate was issued by the Court of Appeals on February 28, 2011.⁵ The issuance of the mandate ended the Court of Appeals’ jurisdiction over the matter. Johnson v. Bechtel Assocs. Professional Corp., 801 F.2d 412, 415 (D.C. Cir. 1986) (“Issuance of the mandate formally marks the end of appellate jurisdiction. Jurisdiction returns to the tribunal to which the mandate is directed, for such proceedings as may be appropriate[.]”). The Enforcement Order provided *pendente lite* relief, valid only “pending determination of the merits.” Kelly, 790 F.2d at 139 (citing Baker,

³ The Judgment entered by the Court of Appeals is attached as Exhibit C. The Circuit Court’s Judgment did not permanently enjoin the Defendants, and merely stated that it was “**ORDERED** and **ADJUDGED** that the petition of review of the Order be denied.”

⁴ See page 2 of the Federal Trade Commission’s Motion for Expedited Issuance of the Mandate, which is attached as Exhibit D.

⁵ Defendants could have sought a stay of the issuance of the mandate pending certiorari pursuant to Fed. R. App. P. 41(d), however, they did not do so.

420 F.2d at 1343). As the mandate has been issued, the Court of Appeals no longer possesses jurisdiction and the Enforcement Order pendente lite has expired.⁶

After the mandate was issued, the United States petitioned this Court to lift the stay and subsequently filed the pending Motion for Preliminary Injunction. The relief that is sought in the pending Motion for Preliminary Injunction is not duplicative as Defendants' are not currently subject to restraint by the Enforcement Order.

The FTC Act states the relief that may be sought for violations of Commission Orders. Specifically, it states that in an action for civil penalties, "the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission." 15 U.S.C. § 45(l). The Court has the authority under 15 U.S.C. § 45(l) to grant the injunctive relief sought in the pending Motion for Preliminary Injunction.

As detailed in the papers filed with the Court, Defendants continue to violate the Modified Final Order by promoting cures for cancer and other tumors without competent and reliable scientific evidence substantiating their claims. Defendants ignore provisions in the Modified Final Order that require that a corrective notice be sent to past purchasers. Injunctive relief is necessary to prevent continuing harm to individuals suffering from cancer and other

⁶ The FTC could petition the Court of Appeals to exercise its inherent authority to provide the "extraordinary" and rarely granted remedy of recall of the mandate. Calderon v. Thompson, 523 U.S. 538, 549-50 (1998). However, that course of action "is one of last resort" and is simply not warranted as jurisdiction over the full panoply of statutory remedies for the enforcement action lies in this Court. Id.; 15 U.S.C. § 45(l). This Court possesses the statutory authority to award both civil penalties and injunctive relief, and is the venue that is best-positioned to engage in any necessary fact-finding. 15 U.S.C. §45(l).

tumors. The United States respectfully requests that the Court set a hearing on the pending Motion for Preliminary Injunction as soon as the Court's calendar permits.

CONCLUSION

This Court is the appropriate venue and forum for determining the need for preliminary and permanent injunctive relief, as well as the other relief sought in the United States' Complaint.

Respectfully submitted this 16th day of May, 2011.

Of Counsel:

WILLARD TOM
General Counsel

JAMES A. KOHM
Associate Director for Enforcement

LAURA DEMARTINO
Assistant Director for Enforcement

KRISTIN M. WILLIAMS
Attorney, Division of Enforcement

Federal Trade Commission

FOR THE UNITED STATES OF AMERICA

TONY WEST
Assistant Attorney General
Civil Division
U.S. Department of Justice

MAAME EWUSI-MENSAH FRIMPONG
Acting Deputy Assistant Attorney General

KENNETH L. JOST
Acting Director,
Office of Consumer Protection Litigation

s/ JESSICA R. GUNDER
JESSICA R. GUNDER
Trial Attorney
Office of Consumer Protection Litigation
U.S. Department of Justice

CERTIFICATE OF SERVICE

I certify that on May 16, 2011, I caused a true and correct copy of the above-entitled **UNITED STATES' SUPPLEMENTAL PLEADING IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**, to be served via the Court's Electronic Case Filing System to counsel for the Defendants as follows:

Robert M. Sanger
125 East De La Guerra Street
Suite 102
Santa Barbara, CA 93101
Telephone: (805) 962-4887
Fax: (805) 963-7311
E-mail: lawyers@sangerswysen.com

counsel for defendants

s/ JESSICA R. GUNDER
JESSICA R. GUNDER