

FEDERAL TRADE COMMISSION
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UNITED STATES OF AMERICA

that this FTC action violates the Fifth Amendment due process guarantee of a fair and impartial

hearing and the constitutional protection of generation of business. See Motion to Dismiss, pp. 24

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their other First Amendment claims, as resting upon factual claims about the noncommercial nature of their activities, factual claims that, with respect to a motion to dismiss, must be resolved in favor of Complaint Counsel. *See* Order, p. 8.

Respondents' prior restraint claim is not so limited. Rather, it rests upon the constitutional insufficiency of the administrative process whereby Respondents' First

Amendment claims are being denied a "prompt judicial determination," a safeguard that the Supreme Court has applied to government efforts to suppress even pornography. *See* Motion to

At a minimum, Respondents deserve, and we believe that the law requires that Respondents receive, a ruling on this question from the ALJ, a ruling which we believe the law requires should be favorable to our motion to dismiss.

II. RESPONDENT'S DUE PROCESS AND FIRST AMENDMENT RIGHTS

~~THE DUE PROCESS AND FIRST AMENDMENT RIGHTS OF RESPONDENTS ARE AS FOLLOWS:~~

~~As noted above, Complaint Counsel completely disregarded Respondents' Due Process~~

neither Respondent is a part. By this action of “misjoinder,” the FTC has “implicate[d] the independent value of individual responsibility and our deep abhorrence of the notion of ‘guilt by association.’” See United States v. Lane, 474 U.S. 438, 475 (1986) (Stevens, J., concurring and dissenting). Indeed, as Justice Stevens pointed out in Lane, “[t]he rule against misjoinder [is] an ultimate safeguard of our cherished principle that one is tried for one’s own deeds, and not for another’s.” *Id.*

Ordinarily, “the harmfulness of misjoinder is... the type of error that has consequences

FTC news release is itself a direct assault on Defendants' First Amendment rights. See

NAACP v. Clairborne, 458 U.S. at 919-920.

While the Order ostensibly rests upon an analysis of Respondents' Motion to Dismiss in

representation is true, non-misleading, and supported by reliable scientific evidence." See

"FTC Sues Stone Peddlers of Remy Coeur Cream" 1/6/11, 11/11/11

In sum, the fairness and impartiality of the administrative process in this case has been
tainted by the FTC press release, the filing of which is not only unauthorized by the FTC D. 11/11/11

Practice, but violative of Respondents' right not to be denied their liberty and their property
without due process of law.

III. RESPONDENTS' RIGHTS ARE BEING DENIED BY THE FTC'S

(3) "a form of the order which the Commission has reason to believe should issue"; and (4)

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As James Madison wrote in Federalist No. 47, the central purpose of separating

legislative, executive and judicial powers...

Supreme Court observed in 1881, "it is essential to the successful working of this system [of separated powers], that the persons entrusted with power in any one of the[] [three] branches shall not be permitted to encroach upon the powers confided to the others, but each shall by the

IV. CONCLUSION


For the reasons stated herein, and in the Motion to Dismiss, Respondents' Motion for

Reconsideration should be granted. [REDACTED]

February 6, 2009.

Respectfully submitted:

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James S. Turner

Of Counsel:

Herbert W. Titus

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IN THE UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE

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**IN THE UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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Courtesy Copies:

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