UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: **Jon Leibowitz, Chairman**
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch

In the Matter of **DANIEL CHAPTER ONE,** **a corporation, and** **JAMES FEIJO,** **individually, and as an officer of** **Daniel Chapter One.**	**Docket No. 9329**

ORDER DENYING RESPONDENTS' APPLICATION FOR STAY OF MODIFIED FINAL ORDER PENDING PETITION FOR REVIEW

The Commission issued its Opinion on December 18, 2009 ("Opinion") and its Modified Final Order ("Order") on January 25, 2010[1]. The Commission's Order was served on Respondents Daniel Chapter One ("DCO") and James Feijo (collectively "Respondents") and counsel by February 1, 2010. Respondents' compliance is required no later than 60 days after service of the Order; that is, by April 2, 2010. 15 U.S.C. § 45(b).

On February 25, 2010, pursuant to Rule 3.56 of the Commission's Rules of Practice, 16 C.F.R. § 3.56, Respondents moved for a stay of the Order until the later of the following: (1) the expiration of the time for filing a petition for review of the Order in a United States Court of Appeals; (2) the issuance of a final order regarding Respondents' petition for review; (3) the denial of a petition for panel rehearing; (4) the denial of a petition for rehearing *en banc*, or the expiration of the time for filing such petitions for rehearing; or (5) the denial of a petition for certiorari in the United States Supreme Court, or the expiration of time to file such petition.

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[1] Citation references to the materials are abbreviated: "Order" refers to the Modified Final Order issued on January 25, 2010; "R. Mem." refers to Respondents' Memorandum in Support of Respondents' Application for Stay, filed on February 25, 2010.

[2] DCO currently sells 150 to 200 products, including the four products challenged in the

Applicable Standard

Section 5(g) of the Federal Trade Commission Act provides that Commission cease and desist orders (except divestiture orders) take effect "upon the sixtieth day after such order is served," unless "stayed, in whole or in part and subject to such conditions as may be appropriate, by … the Commission" or "an appropriate court of appeals of the United States." 15 U.S.C. § 45(g)(2); see also 16 C.F.R. § 3.56(a). A party seeking a stay must first apply for such relief to the Commission, 15 U.S.C. § 45(g)(2)(A), (B)(ii). Pursuant to Rule 3.56(c) of the Commission's Rules of Practice, an application for a stay must address the following four factors: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) why the stay is in the public interest. 16 C.F.R. § 3.56(c); see, e.g., In the Matter of Toys "R" Us, Inc., 126 F.T.C. 695, 696 (1998). We consider these factors below.

Analysis

1. Likelihood of Respondents' Success on Appeal

Respondents correctly note that in assessing the likelihood of their success on the merits on appeal, the Commission need not "have doubt about its decision in order to grant the stay." In the Matter of California Dental Ass'n, 1996 FTC LEXIS 277, at *10 (May 22, 1996). Respondents also correctly state they may satisfy the "'merits' factor if their argument on at least one claim is 'substantial' – so long as the other three factors weigh in their favor." R. Mem. at 1 (citations omitted). Finally, if the equities decidedly tip in favor of the Respondents it is enough that they "raise questions sufficiently serious and substantial to constitute fair 'ground for litigation.'" R. Mem. at 1-2 (citations omitted). Respondents' arguments, however, merely disagree with the Opinion of the Commission and raise no serious or substantial questions on the merits; disagreement does not establish a likelihood of success on appeal.

a. Jurisdiction

Respondents argue that the Commission does not have jurisdiction because DCO is a corporation sole operating under the laws of Washington, and as such is dedicated to religious, nonprofit purposes. See R. Resp

jurisdictional arguments).[3] As we stated in North Texas Specialty Physicians, Docket No. 9312 (Jan. 20, 2006), merely repeating arguments the Commission rejected before does not provide the Commission with "sufficient reason to question its prior decision or any of the bases for it, and Respondent[s'] renewal of its legal arg

[3] The Commission's factual findings must be accepted if they are supported by relevant evidence sufficient so that a reasonable mind might agree with the conclusions. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986). See also Section 5(c) of the Act, 15 U.S.C. § 45(c), which provides that "(t)he findings of the Commission as to the facts, if supported by evidence, shall be conclusive" upon review in the Court of Appeals.

Respondents may not like the case law, they cannot dispute that courts continue to hold the FTC may show a respondent made deceptive claims if it did not have a reasonable basis for their advertisements. Applying that standard in the matter before us now and after reviewing the evidence, the Administrative Law Judge ("ALJ") and the Commission found Respondents did not possess any adequate substantiation for their health-related efficacy claims.

Respondents assert the ALJ and the Commission misapplied the FTC Guide, Dietary Supplements: An Advertising Guide for Industry, ("Guide") contending that the ALJ and the Commission applied the Guides as a fixed rule of law rather than a flexible standard. The standard's flexibility, however, lies in its tailoring the level of substantiation required to the nature of the product claims at issue. Here, Respondents claimed that the Challenged Products could prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy. As the Guide itself notes, such claims about efficacy typically should be supported with competent and reliable scientific evidence. See Guide at 9. Further, case law supports holding the Respondents to a competent and reliable scientific standard for the efficacy claims they made. See FTC v. Natural Solution, Inc., No. CV 06-6112-JFW, 2007 U.S. Dist. LEXIS 60783, at *11-12 (C.D. Cal. Aug. 7, 2007); Nat'l Urological Group, 645 F. Supp. 2d at 1189; Direct Mktg., 569 F. Supp. 2d at 300, 303; FTC v. QT, Inc., 448 F. Supp. 2d 908, 961 (N.D. Ill. 2006), aff'd, 512 F. 3d 858 (7th Cir. 2008). Finally, the ALJ and the Commission relied on expert testimony to determine what competent and reliable scientific evidence would adequately substantiate Respondents' claims.

c. First Amendment Arguments

Respondents argue the Commission's Opinion and Order unconstitutionally deprives them of free exercise of religion and freedom of speech, denies Respondents' liberty and property without due process, and erroneously dismissed their Religious Freedom Restoration Act Claim. Respondents' arguments are without merit.

The evidence established the primary purpose and effect of the speech at issue here – Respondents' representations relating to the Challenged Products – was to sell those products, not to solicit charitable contributions. Op. at 13. Such commercial speech is accorded less protection than other constitutionally protected forms of speech. See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562-63 (1980). Specifically, misleading or deceptive commercial speech is afforded no protection under the First Amendment. See, e.g., Cent. Hudson, 447 U.S. 557; Edenfield v. Fane, 507 U.S. 761 (1993); and Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999)

Rosch in 2008[4] and Commissioner Harbour's statements during oral argument. Respondents' reliance on *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970) is misplaced. In that case, the court noted that the statements relied on to show prejudgment were made while the appeal was pending before the Commission; here Commissioner Rosch made these general statements about "bogus career cure" sweeps as only a small part of a larger speech on self-regulation. Commissioner Rosch delivered this speech almost a full year before Respondents had even filed their appeal in this case, before evidence was entered in the matter, and before the ALJ issued his Initial Decision (August 2009). Further, if Respondents had wanted to disqualify

[4] J. Thomas Rosch, *Self-Regulation And Consumer Protection: A Complement To Federal Law Enforcement*, before the 2008 National Advertising Division Annual Conference, at 16-17 (Sept. 23, 2008).

the FTC Act, which provides the Commission with the authority to fashion an order requiring respondents to cease and desist from such acts and practices. FTC v. Nat'l Lead Co., 352 U.S. 419, 428 (1957). The Commission took great care in issuing the Order in this matter and making it clear that the letter informing consumers of the FTC's Opinion and Order plainly state it is the FTC's Order that requires Respondents to transmit the information. The Order does not require that Respondents profess to agree with the FTC or that Respondents modify their religious ministry in anyway.

2. Irreparable Injury

Respondents argue that c

[5] We accept Respondents' Declarations submitted for the purposes of supporting their irreparable harm argument, but do not find they are sufficient to meet their burden of showing irreparable injury.

P.U.C., 475 U.S. 1, 19 (1986)). The compelling interest here is protec

potential harm to Respondents from denying the request for a stay. We find that DCO and James Feijo have not met their burden for showing a stay of the Modified Final Order pending judicial review is warranted. Accordingly,

IT IS ORDERED THAT the Respondents' Application for Stay of Modified Final Order Pending Judicial Review is **DENIED**.

By the Commission.

Donald S. Clark
Secretary

ISSUED: March 22, 2010