**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>DANIEL CHAPTER ONE and<br><br>JAMES FEIJO,<br><br>Defendants. | Case No. 1:10CV01362 EGS |

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF ORDER FOR EQUITABLE MONETARY RELIEF, CIVIL PENALTIES, AND INJUNCTIVE RELIEF**

This Court found that Daniel Chapter One and James Feijo ("Defendants") ignored an Order issued by the Federal Trade Commission ("FTC") and repeatedly violated that Order for over two years. The Court determined that the United States was entitled to summary judgment on liability (Doc #58), and the United States now asks that the Court enter a final order that

scientific evidence that substantiates the representation. Part V.B of the FTC Order required 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. The FTC Order required that this notice be sent on or before May 17, 2010.

Defendants appealed the FTC Order to the United States Court of Appeals for the District of Columbia Circuit.[4] Defendants refused to comply with the terms of the FTC Order while their appeal was pending, and they filed a motion with the FTC asking that the FTC Order be stayed pending the outcome of their appeal. That motion was denied. Defendants then filed an emergency motion with the D.C. Circuit Court, asking that the Circuit Court stay the FTC Order pending review. The Circuit Court denied this emergency motion.

This action was filed on August 13, 2010. While Defendants' appeal was still pending, the United States sought to prevent Defendants' continued violation of the FTC Order, and filed a motion for a preliminary injunction. (Doc. #3). This Court denied that motion, and stayed this action. (Doc. #11). The Federal Trade Commission then sought an Order of Enforcement Pendente Lite from the Court of Appeals, to enforce the FTC 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 Trade Commission issued January 25, 2010[.]"[5] Defendants then filed a motion asking the Court of Appeals to stay the enforcement of the section of the FTC

[4] United States Court of Appeals for the District of Columbia Circuit, Case No. 10-1064.
[5] The D.C. Circuit Court's Order is attached as Exhibit B.

Order requiring them to send the letter to their customers. The Court of Appeals rejected this request on December 7, 2010.[6]

Subsequently, the Court of Appeals denied Defendants' appeal. Defendants' request for a rehearing *en banc* was denied, and the Court of Appeals issued the Mandate on February 28, 2011. This matter was unstayed after the appellate proceedings concluded, and the United States sought a preliminary injunction to enjoin Defendants' ongoing violations of the FTC Order. (Doc. #16). The motion was granted on June 22, 2011. (Doc. #31).

Defendants continued to refuse to comply with the terms of the FTC Order while the proceedings detailed above were ongoing. The Court held Defendants in civil contempt on May 9, 2012, for their refusal to comply with the Court's Preliminary Injunction. (Doc. #50). From April 2, 2010, when the FTC Order went into effect, through May 24, 2012, when the Court found that Defendants had finally ceased their contempt, Defendants violated Part II or Part V.B of the FTC Order.[7]

On September 24, 2012, the Court granted the United States' Motion for Summary Judgment on Liability against Defendants for promoting the Products in violation of the FTC's Order. (Doc. #58 & 59). The United States then took discovery regarding Defendants' ability to pay, and now files this motion asking that the Court enter a final order that includes injunctive relief, equitable monetary relief in the amount of $1,347,237.33, and a civil penalty award of $3,528,000.

[6] The D.C. Circuit Court's denial of the Motion for Partial Stay is attached as Exhibit C.
[7] The Court found that Defendants had taken sufficient action to comply with the FTC Order in a Minute Order issued on May 24, 2012.

## II. DISCUSSION

### A. Injunctive Relief is Necessary to Protect Consumers

demonstrated recidivism. By creating simple, bri

dietary supplements.[11] Thus, this Court clearly has the authority to impose bans on Defendants to curtail their deceptive practices.

Defendants' conduct supports the requested bans. Defendants have made widely-disseminated efficacy claims for a multitude of products belonging to various product categories without possessing competent and reliable scientific evidence to substantiate those representations. Defendants' dietary supplement marketing involves deliberate, deceptive strategies that are easily adaptable or transferable to other products, and evidence in this case shows that in addition to their claims that the Products cure cancer, they also make health-related representations about their other products. Indeed, Defendants' overarching marketing strategy

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(C.D. Cal. Aug. 19, 2010) (ban on mortgage loan modification and foreclosure relief services); *FTC v. Cruz*, No. 08-1877, 2008 WL 5277735, *3 (D. PR. 2009) (ban on marketing any business venture, employment opportunity, investment opportunity, or work-at-home opportunity); *FTC v. Assail Inc.*, Civ. No. W03CA007 (W.D. Tex. Dec. 5, 2008) (ban on sale of home mortgage or home mortgage refinance-related services); *FTC v. Neiswonger*, 494 F. Supp. 2d 1067, 1084 (E.D. Mo. 2007) (ban on selling business opportunity programs, including telemarketing such programs); *FTC v. Int'l Prod. Design, Inc.*, No. 1:97-cv-01114-AVB (E.D. Va. Jul 12, 2007) (ban on participating in invention promotion services); *FTC v. Check Enforcement*, No. 03-2115,

*Achievement Corp.*, 144 F. Supp. 2d at 1018; *FTC v. U.S. Sales Corp.*, 785 F. Supp. 737, 753 (N.D. Ill. 1992); *FTC v. Sharp*, 782 F. Supp. 1445, 1456-57 (D. Nev. 1991). The requested provisions will provide an oversight mechanism to better ensure that Defendants do not engage in future recidivism.

**B. Equitable Monetary Relief is Appropriate in this Case**

This action was brought pursuant to Section 5(l), 13(b), and 16(a) of the FTC Act, codified at 15 U.S.C. §§ 45(l), 53(b), and 56(a). As was noted by Judge Howell in 2011, "Every court that has considered the issue this far appears to have ruled that Section 13(b) *does* entitle the FTC to seek equitable monetary relief, including courts in this district and multiple Courts of Appeals." *FTC v. Cantkier*, 767 F. Supp. 2d 147, 160 (D.D.C. 2011) (emphasis in original) (*citing FTC v. Mylan Labs, Inc.* 62 F. Supp. 2d 25, 37 (D.D.C. 1999); *FTC v. Gem Merch.*, 87 F.3d 466, 470 (11th Cir. 1996); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989); *FTC v. Swish Marketing*, No. C 09-03814 RS, 2010 WL 653486, at *6-10 (N.D. Cal. Feb. 22, 2010)).

Equitable monetary relief is calculated using a "two-step burden-shifting framework . . . [that] requires a court to look first to the FTC to 'show that its calculations reasonably approximated the amount of the defendant[s'] unjust gains' and then shift the burden 'to the defendants to show that those figures were inaccurate.'" *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 364 (2d Cir. 2011) (*quoting FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006)). Pursuant to a discovery request served by the Government, Defendants provided their sales records for BioShark, 7 Herb Formula, GDU, Endo24, and BioMixx. Between April 2, 2010,

when the FTC's Order went into effect, and May 24, 2012, when Defendants stopped violating the order, consumers spent the following on the Products:

- 7 Herb Formula: $485,935.92
- Endo24: $265,095.50
- BioShark: $50,208.70
- GDU: $338,376.41
- 1st Kings 17:6: $206,215.90[12]

As a result, Defendants received $1,345,832.43 as a result of their unsubstantiated representations and refusal to comply with the FTC Order. The United States requests that equitable monetary relief in the amount of $1,345,832.43 be awarded in this case.

**C. Defendants Should be Ordered to Pay a Civil Penalty of $3,528,000**

***1. Defendants are Subject to a Statutory Maximum of over Twelve Million Dollars in Civil Penalties***

Under the FTC Act, the Court is authorized to impose civil penalties upon "[a]ny person, partnership or corporation who violates an order of the Commission[.]" 15 U.S.C. § 45(l). The statute originally provided for "a civil penalty of not more than $10,000 for each violation," however, that sum was modified pursuant to the Federal Civil Penalties Inflation Adjustment Act, and is now $16,000 per violation. 15 U.S.C. § 45(l); 28 U.S.C. § 2461; 16 C.F.R. § 1.98(d).

The statute provides that "[e]ach separate violation of such an order shall be a separate offense[.]" 15 U.S.C. § 45(l). Here, Defendants were in violation of the FTC Order from April

compliance with the order. During each of these 784 days, Defendants committed multiple violations of the FTC Order. They promoted the Products as cancer treatments in multiple locations, including placing misrepresentations on several websites under their control and on online forums. Defendants told customers the Products treat and cure cancer on their radio show, and would then post the shows online so that others could access the information. They additionally neglected to send the required notices to their prior customers. Each individual misrepresentation is a separate violation, and every corrective notice they failed to send is a separate violation. *See, e.g., United States v. Nat'l Fin. Servs. Inc.*, 98 F.3d 131, 141 (4th Cir. 1996) (finding that each letter sent was a separate violation); [illegible]

*United States v. Reader's Digest Ass'n*, 662 F.2d 955, 967 (3d Cir. 1981). Courts consider: "(1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendants' ability to pay; (4) the desire to eliminate the benefits derived by the violations; and (5) the necessity of vindicating the authority of the FTC." *Danube Carpet Mills, Inc.*, 737 F.2d at 994. As discussed in more detail below, a civil penalty award of $3,528,000, is appropriate based upon analysis of the five factors.

*a.* *Defendants Acted in Bad Faith*

The first factor courts consider in assessing a penalty is the good or bad faith of the defendant in violating the order. Bad faith exists where a violation is "willful and deliberate[,]" and is an important factor in assessing the appropriate penalty. *United States v. Phelps Dodge Indus.*, 589 F. Supp. 1340, 1363 (D.C.N.Y. 1984). Courts have found that "willful or reckless disregard of the law warrants a penalty 'at or near the maximum prescribed[.]'" *United States v. Mac's Muffler Shop, Inc.*, No. C85-138R, 1986 WL 15443, at *9 (N.D. Ga. Nov. 4, 1986) (*quoting United States v. J.B. Williams Co.*, 354 F.Supp. 521, 551 (S.D.N.Y. 1973)).

Here, Defendants' violations were not the result of mistake or negligence, but were willful, as they deliberately flouted the terms of the FTC Order. The FTC Order became effective on April 2, 2010, but Defendants did not make any legitimate attempt to comply with the FTC Order. Instead, they knowingly and deliberately continued to represent on websites, online forums, and their radio show that the Products would treat or cure cancer.

Defendants' own statements demonstrate that they

> way" of treating cancer through the use of 7 Herb Formula, BioShark, and GDU. In addition, James Feijo told Curtis that "the government is trying to stop us from helping you and your daughter . . . they want to not let us tell you about 7 Herb Formula, BioShark, and GDU, that God has given us to help people around the world." Patricia Feijo added:
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> ["W]e do care about your daughter . . . **we just heard from our lawyer that a judge ruled in favor of the Trade Commission, and so, you know, basically we can be fined out of existence tonight or, or, put into prison,** and we want people to know the reality that we're sitting here, willing to risk even our lives, to serve the lord and to serve you, right, but the situation is such that I would say get the product while you can, even stock up while you can, and if one day you won't be able to get our products then just, you know, try to continue to follow pretty much what those products are, the herbs, the enzymes, because that's what we have seen work for many years.["]
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> James Feijo then gave Curtis information on how to order the products, and directed Curtis to the healthfellowship.org website for more information. At other times during this same show, James Feijo stated that Daniel Chapter One's products, including GDU, were created and intended by God "for you, for your health and healing, as a prevention, to mitigate, to treat, to heal, to cure." Patricia Feijo told listeners that they did not share their experiences with the products had used it for a while and saw that it did indeed work, and then we began to share with people, hey, this is what works for this and that." Patricia Feijo stated that the testimonies the Feijos had received from their customers and placed on their website and in their BioGuide were a sampling of their customers' experiences and that the results in the testimonials were "very typical of what people experience." James and Patricia Feijo went on to describe how 7-Herb Formula had cured a man who had renal cancer.

*See* Doc. 59 (emphasis added, internal citations omitted).

Additionally, Defendants knowingly and deliberately ignored provisions in the FTC Order that required them to send a corrective notice to past purchasers. The FTC Order became final on April 2, 2010, and it required Defendants to mail a corrective notice to past purchases "[w]ithin forty-five (45) days after the final and effective date of this order." As a result, the notices should have been sent on or before May 17, 2010. This did not happen. Defendants refused to send the corrective notice, and did not send the notice until May 18, 2012, five days before the contempt hearing in this case.

Defendants' own statements make it clear that they knew what they were required to do, and that they were deliberately not complying with the FTC Order. For example, after the Court of Appeals issued its Judgment, Defendants posted the following message on their website:

> Daniel Chapter One is being tortured right now for its opinion-- its knowledge -- about healing that is different from conventional medicine. Overseeer Jim Feijo has been threatened with bankrupting fines and incarceration for refusing to sign a government agency letter saying, in essense, 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).[13] 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).[14]

Here, the Defendants engaged in multiple violations over many years and their actions were both willful and deliberate. Defendants failed to demonstrate any serious intent to comply with the FTC Order during the first two years in which it was in effect, and it was not until they /cience

*b.* *Defendants Have Injured the Public*

Courts also consider whether the conduct injured the public. *See, e.g., Nat'l Fin. Servs.*, 98 F.3d at 140. The public harm in this case is significant and it occurred in several ways. First, consumers who purchased the Products suffered financial harm. Second, Defendants caused harm by publicizing deceptive information about their products and by failing to send the corrective notice to prior purchasers. Third, as described further below, Defendants injured the public when they instructed consumers to stop using conventional, proven treatments and instead use Defendants' products.

Injury to the public can be found when consumers have lost money due to the violative conduct. *See, e.g., United States v. Prochnow*, No. 07-10273, 2007 WL 3082139, at *4 (11th Cir. Oct. 22, 2007) ("customers [of a magazine telemarketer] were harmed by both the payments made for the magazine packages and the frustration, inconvenience, and expense involved in cancelling their subscription."). The financial harm is easily calculated in this case. As detailed in Section II(A) above, Defendants collected $1,345,832.43 from the sale of 7 Herb Formula, Endo 24, BioShark, GDU, and 1st Kings between April 2, 2010, when the FTC's Order went into effect, and May 24, 2012, when Defendants appeared to have stopped violating the FTC Order. [15]

In addition to the financial harm, injury to the public occurred whenever Defendants' deceptive and violative materials reached the public. *See Danube Carpet Mills*, 737 F.2d at 994;

[15] This sum is a conservative calculation of consumer financial harm because it only includes sales through the date Defendants ceased their order violations. Defendants' representations would also be responsible for any subsequent sales, as Defendants' customers would not purchase these products if they did not believe they provided a health benefit based on Defendants' previous representations. Defendants' sales records contain personally identifying information, and the Government can file documentation supporting these sums under seal if requested to do so by the Court.

*Reader's Digest*, 662 F.2d at 969. The Government does not need to introduce "evidence of consumer confusion or deception" because "(t)he principal purpose of a cease and desist order is to prevent material having a capacity to confuse or deceive from reaching the public . . . (t)hus, whether such promotional items reach the public, that in and of itself causes harm and injury." *Reader's Digest*, 662 F.2d at 969 (internal citations omitted). Here, the Defendants caused substantial public harm by using deceptive promotional information on websites, online forums, and their radio show. Defendants' representations reached the public, which is sufficient under the law to constitute injury to the public. This injury to the public was further exacerbated because Defendants refused to mail the required notice informing consumers that Defendants' advertising claims were found by the FTC to be deceptive because they were not substantiated by competent and reliable scientific evidence.

Finally, the Court can find injury to the public because of Defendants' conduct and history of preying upon vulnerable consumers. When Defendants learned that someone may have cancer, their advice was always that the person should stop conventional medical treatment and take Defendants' products instead. For example, as noted in this Court's Memorandum Opinion issued on September 24, 2012,

> During a radio show broadcast on February 22, 2011, Defendants accepted a call from a caller named Patricia, who stated that her doctor had found a mass on her breast. . . . James and Patricia Feijo instructed the caller not to get a biopsy, and Patricia Feijo stated that "if it is cancer, it can stir up the cells and can get them to spread[.]" . . . Patricia Feijo told the caller that she should take products "to treat it worst case scenario." . . . Defendants then asked someone to call in to help answer the caller's questions, and accepte

*d.* *Civil Money Penalties Are Necessary to Vindicate the Authority of the FTC*

The necessity of vindicating the authority of the FTC is another factor to be considered when assessing a civil penalty. *Danube Carpet Mills, Inc.*, 737 F.2d at 994. "Since the Commission has no plenary power to enforce its own orders, it must enlist the aid of the federal district courts for that purpose. The penalty to be assessed must therefore be a significant one." *FTC v. Consolidated Food Corp.*, 396 F. Supp. 1353, 1357 (S.D.N.Y. 1975). Defendants' conduct has implications beyond this case. As the court described in *Mac's Muffler Shop*, "[i]f the regulated community perceives that violations of the law are treated lightly, the government's regulatory program is subverted." 1986 WL 15443, at *10. If a penalty is "[t]o have any deterrent effect, [it] must be large enough to be more than just . . . an acceptable cost of doing business." *Onkyo U.S.A. Corp.*, 1995 WL 579811, at *4 n.6. For the penalty award to provide meaningful deterrence, it "'should be large enough to hurt, and to deter anyone in the future from showing as little concern as [Defendants] did for the need to [comply].'" *Phelps Dodge Indus.*, 589 F. Supp. at 1367 (*quoting United States v. Swingline, Inc.*, 371 F. Supp. 37, 47 (E.D.N.Y. 1974)).

The Defendants have flouted the authority of the FTC and of the Court by ignoring the FTC Order. Defendants continued to represent the Products as treatments for cancer and other tumors despite the FTC Order prohibiting them from doing so. Even after receiving Orders from this Court and the U.S. Court of Appeals for the District of Columbia, Defendants continued to make unsubstantiated claims that the Products treat cancer. Defendants' flagrant disregard for the FTC's authority merits a substantial penalty in order to vindicate the government's authority and deter future violations. Accordingly, the Government requests that a penalty of $3,528,000 –

a sum which equals a $4,500 penalty for every day in which Defendants failed to comply with the FTC Order – be entered in this case.

*e.* *Defendants are Able to Pay a Civil Penalty*

The final factor to be considered when assessing a penalty is the ability of the defendant to pay a civil penalty. *See, e.g., Reader's Digest*, 494 F. Supp. at 779. Courts look at a variety of data points when assessing a defendant's ability to pay. In *Danube Carpet Mills*, the Eleventh Circuit affirmed the district court's calculation

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at $3,396.00.[28] While some of these vehicles were purchased in the name of other entities controlled by Defendants, discovery in this case found that all of these vehicles were purchased with funds from Defendant Daniel Chapter One.[29] The value of these items – bank accounts, cash on hand, real property, and other assets – totals $2,001,959.73.

*(2) Dissipated Funds Should be Added to Defendants' Ability to Pay*

Discovery in this case has revealed that Defendants have dissipated their assets since this lawsuit was filed. As discussed below, Defendants admitted in discovery that they gave away $515,000 in cash and other gifts. However, review of Defendants' proceeds and expenses show that, in addition to the dissipation they admitted, Defendants have failed to account for approximately $2.2 million in proceeds. These dissipated funds and assets should be added to Defendants' ability to pay a civil penalty.

Defendants admitted that, in time since the pending action was filed, they have given away $515,000 in cash and other gifts. These gifts include $160,000 in cash to Hue Shaw,[30] $35,000 to Michael Powers,[31] and $115,000 to Ben Benavides Manuel, a high school friend of Defendant James Feijo.[32] Defendants' also gifted their radio station, valued at $185,000, to DAD Enterprises;[33] and a van, valued at $20,000, to Jedediah Harrison.[34] These transfers did not take place until after the Defendants began incurring civil penalties and after this lawsuit was filed.

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[28] *See* DC1 30(b)(6) 112:2-115:12, attached as Exhibit F and pages 10-12 of Exhibit H. The stated value for these vehicles was determined via KBB.com on August 12, 2013.
[29] *See* DC1 30(b)(6) 113:8-115:12, attached as Exhibit F.
[30] *See* DC1 30(b)(6) 226:21-227:3, attached as Exhibit F.
[31] *See* DC1 30(b)(6) 227:12-21, attached as Exhibit F.
[32] *See* DC1 30(b)(6) 194:22-197:17, attached as Exhibit F.
[33] *See* DC1 30(b)(6) 70:16-71:12, attached as Exhibit F.
[34] *See* DC1 30(b)(6) 227:22-228:6, attached as Exhibit F.

Defendants admitted dissipating and the $2,188,976.36 that is unaccounted for – should be considered when determining their ability to pay. Indeed, a judgment that limited a defendant's ability to pay to just the sum of money currently in their possession "would allow con artists to escape disgorgement liability by spending their ill-gotten gains – an absurd result." *SEC v. Warren*, 534 F.3d 1368, 1370 n.2 (11th Cir. 2008). When considered together, Defendants' known assets and the dissipated funds total $4,705,936.09. As a result, Defendants are able to pay a civil penalty, and a civil penalty of $3,528,000 is reasonable given Defendants' ability to pay and the balance of the other factors.

## III. CONCLUSION

The Defendants ignored and repeatedly violated the FTC Order for over two years. As a result, a final order that includes injunctive relief, equitable monetary relief in the amount of $1,347,237.33, and a civil penalty award of $3,528,000 is appropriate in this case.

Defendants' disregard for the FTC Order, along with Orders issued by this Court and the U.S. Court of Appeals for the District of Columbia demonstrates that there is an overwhelming need to: (1) broaden coverage of the FTC Order provisions to ban the Defendants from selling any dietary supplement and from marketing any product or service with disease claims; and (2) enhance the compliance monitoring provisions to help the FTC guard against order violations in the future. The FTC Order has not achieved its purpose of protecting the public and Defendants are likely to repeat their fraudulent activities and victimize consumers unless their practices are more significantly curtailed.

Equitable monetary relief is necessary to eliminate Defendants' unjust gains, and should be entered in the amount of $1,345,832.43, which represents the Defendants' proceeds from the sale of the Products between April 2, 2010 and May 24, 2012. Additionally, all five of the civil

penalties factors demonstrate that imposing a significant civil penalty is appropriate in this case. First, the Defendants acted in bad faith, as they willfully and deliberately violated the FTC Order. *See Phelps Dodge Indus., Inc.*, 589 F. Supp. at 1363. Next, the public was significantly injured by Defendants' conduct. Third, it is important that a civil penalty eliminate any benefits to the Defendants "so that there is no incentive to violate the law[.]"