IN THE UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	**Docket No.: 9329**
DANIEL CHAPTER ONE,	)	
a corporation, and	)	
JAMES FEIJO,	)	**PUBLIC DOCUMENT**
individually, and as an officer of	)	
Daniel Chapter One	)	
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RESPONDENTS' MOTION FOR STAY OF DISCOVERY AND SUPPORTING MEMORANDUM

INTRODUCTION

Respondents move for a stay of the discovery proceedings herein pending resolution of the Respondents' Motion to Dismiss, which is being filed contemporaneously with the filing of this motion. Respondents submit that continuation of discovery herein, prior to resolution of the substantial jurisdictional and constitutional issues upon which Respondents' Motion to Dismiss is based, would be unduly and unnecessarily costly and burdensome to the parties, particularly Respondents, would impair Respondents' exercise of their constitutional rights, and would unnecessarily consume judicial resources. Entering a stay of discovery pending resolution of the jurisdictional question, on the other hand, would conserve judicial resources, would spare the parties unnecessary expenditures of time and expense, and would prejudice no one.

ARGUMENT

I. Based Upon Legal and Equitable Considerations, Respondents' Motion to Dismiss Should be Decided Prior to Conducting Further Discovery Proceedings.

Clearly, the Respondents' motion to dismiss based upon the absence of Federal Trade Commission ("FTC") jurisdiction over the Respondents in this matter should be determined prior to this case moving forward on discovery. Resolution of the motion to dismiss is typically the first order of business, especially in a case such as this, where the arguments against jurisdiction of the FTC over the Respondents are compelling and where the very process of discovery violates Respondents' constitutional rights. Furthermore, if the discovery process goes forward and jurisdiction is ultimately determined not to exist, the Respondents will have suffered significant, unnecessary, and irreparable injury to their finances, their reputation, and their ministry.

There is no question that the financial consequences to the Respondents in litigating this matter already have been substantial, and that the FTC's pursuit of additional discovery against the Respondents would greatly increase those costs. If the Respondents should ultimately prevail, they are unaware of any avenue of redress for their significant losses. For this reason as well, Respondents' financial loss, in this sense, should be considered irreparable.

In this case, the Respondents are asserting, *inter alia*, several statutory and jurisdictional defenses. *See* Respondents' Motion to Dismiss, pp. 5-11.

Some of the constitutional defenses were raised by Respondents in opposition to Complaint Counsel's Motion to Compel. However, this Court's Order Granting Complaint Counsel's Motion to Compel Production of Documents, January 9, 2009, stated that "constitutional arguments ... are not appropriately raised in the context of a discovery motion."

Order of January 9, 2009, p. 2. However, such constitutional arguments are most certainly appropriate to be raised in the context of the Motion to Dismiss filed today, filed well in advance of the deadline anticipated in the current scheduling order. Allowing time for the Court to consider the serious issues in Respondent's Motion to Dismiss justifies a stay of discovery, to evaluate the legitimacy of proceeding against Respondent under the complaint filed by Complaint Counsel.

By way of illustration,[1] Respondents raise two statutory defenses. First, the FTC's complaint, based upon 15 U.S.C. § 45, which prohibits "unfair or deceptive acts or practices in or affecting commerce," fails to allege facts that would establish its jurisdiction over the Respondents. Although Paragraph 5 of the Complaint vaguely alleges deceptive acts and practices on the part of the Respondents in promoting certain materials, the Respondents vigorously contest that characterization of their promotions. The Respondents submit that their communications with the public are in the nature of religious and educational messages, deserving of the full protection of the religion, speech, and press guarantees of the First Amendment to the United States Constitution, and of the due process of law right of the Fifth Amendment.

Second, Daniel Chapter One ("DCO") is a "corporation sole" and a church under Washington law. Historically, there appears to be no case law or other legal authority supporting the exercise of FTC jurisdiction over a nonprofit entity such as DCO. *See* California Dental Ass'n v. Federal Trade Commission, 526 U.S. 756, 767 n.6 (1999) ("we do not, and indeed, on the facts here, could not, decide today whether the Commission has jurisdiction over nonprofit

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[1] A stay is justified due to the constitutional defenses as well. *See* Motion to Dismiss, pp. 11-28.

organizations that do not confer profit on for-profit members but do, for example, show annual income surpluses, engage in significant commerce, or compete in relevant markets with for-profit players...."). Indeed, according to a statement of William C. Macleod, Director of the Bureau of Consumer Protection of the Federal Trade Commission, Section 4 of the FTC Act gives the Commission jurisdiction over nonprofit corporations only operated for their own profit or that of its members.[2] While that FTC statement asserts that the Commission has interpreted Section 4 to permit the FTC to assert its jurisdiction over any nonprofit association whose activities engender a pecuniary benefit to its members, the Commission apparently has so acted only against trade associations or entities whose nonprofit status appeared to be a sham. *Id.* Daniel Chapter One is within the category of nonprofit organization over which the FTC historically has not asserted jurisdiction, or over which the courts have decided no FTC jurisdiction exists. *See* Community Blood Bank v. FTC, 405 F.2d 1011 (8th Cir. 1969). In short, the FTC Complaint appears to be devoid of any foundation that would justify proceeding against the Respondents.

In sum, the Respondents are engaged in protected First Amendment activity, which the FTC's action is attempting to halt. In addition to the continuation of discovery without disposition of Respondents' motion to dismiss being a continued threat to Respondents' constitutional rights, there is a significant public interest in having the jurisdictional and constitutional matters resolved at the outset of this case. Any entity or person against which such a complaint is filed is confronted with the choice between a long and expensive litigation process and settlement. In practice, respondents will often choose settlement — not because the FTC is

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[2] *See* http://www.freespeechcoalition.org/macleod.htm.

correct on the merits of its complaint, but because the respondent cannot afford the cost of defense. The administrative discovery and hearing process must be a method to achieve justice, not a bludgeon with which to hammer Americans.

II. A Stay of Discovery Pending Resolution of the Respondents' Motion to Dismiss Would Not Be Prejudicial to Any Party or to the Public, Would Avoid Unnecessary and Duplicative Appearances and Proceedings, and Would Promote Judicial Economy.

If Respondents are required to go forward with the discovery process, including the scheduled depositions during the week of January 12, 2009, Respondents will be forced to continue to raise objections to interrogatories, requests for admission and document production, as well as deposition inquiries, similar or identical to those that have already been advanced in this proceeding. The depositions, therefore, could be expected to be contentious and to accomplish very little. Furthermore, if the Respondents' refusal to answer questions and produce documents were to lead to a motion to compel, the loss of time, additional expense and exhaustion of resources would begin to multiply. Aside from whatever losses were occasioned by the motions proceedings, including possible efforts to appeal the decision, the result — if the Respondents' objections were not sustained by the administrative law judge and/or the FTC or on appeal — could expose Respondents to the risk, expense, and burden of a second round of depositions, an unnecessarily long record, and needless expenditures of time, funds, and resources. All of this can, and should, be avoided.

In short, there should be a resolution of the Respondents' motion to dismiss, including their defense that the FTC lacks jurisdiction over the Respondents, before the Respondents — and the Government as well — are required to invest all of the time, effort and resources that otherwise would be necessary to litigate this matter.

CONCLUSION

For the foregoing reasons, discovery herein should be stayed pending disposition of the Respondents' Motion to Dismiss.

Respectfully submitted,

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Attorneys for Respondents

Dated: January 10, 2009

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IN THE UNITED STATES OF AMERICA
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[PROPOSED] ORDER
GRANTING RESPONDENTS' MOTION TO STAY DISCOVERY

On January 11, 2009, counsel for Respondents filed a motion to stay further discovery in the administrative action *In the Matter of Daniel Chapter One*, Docket No. 9329. The matter being heard on _____, 2009, and the Court being fully advised,

IT IS ORDERED that further discovery proceedings, including the taking of depositions, the service of additional discovery requests upon a party, and running of time on any responses to pending discovery requests in the administrative action *In the Matter of Daniel Chapter One*, Docket No. 9329, be, and are hereby STAYED until further Order of this Court.

Dated this___ day of _____, 2009.

_____
D. Michael Chappell
Administrative Law Judge

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STATEMENT OF COUNSEL FOR RESPONDENT

This statement is being submitted in accordance with Additional Provision #5 of the Court's Scheduling Order of October 28, 2008.

I certify that I have conferred with Complaint Counsel in a good faith effort to resolve the issues raised by the attached Motion to Stay Proceedings and have been unable to reach agreement. I have conferred by telephone and email with Theodore Zang, Jr. and his legal team, Complaint Counsel, most recently with David Dulabon on January 9, 2009.

Dated this 10th day of January, 2009.

Swankin & Turner
Attorneys for Respondents

By: _____
James S. Turner

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RESPONDENTS' MOTION TO DISMISS AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND

Respondent Daniel Chapter One ("DCO") is a nonprofit organization, a religious ministry organized as a church, and recognized as a corporate sole under the laws of Washington State.[1] Respondent James Feijo is Overseer of the DCO corporate sole in accordance with the laws of Washington State.[2]

As a religious ministry, DCO is actively engaged in national debate concerning the best ways to achieve optimal human health. Committed to the right of the individual to address his or her own personal physical and spiritual well-being, DCO promotes a variety of holistic health

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[1] *See* Exhibit 1 (Washington State Certificate of Existence of Daniel Chapter One and Articles of Incorporation of Daniel Chapter One as a Corporate Sole).

[2] *See* Exhibit 1, p. 3.

and nutritional approaches to supplement, or to take the place of, so-called conventional medicine, including pharmaceutical drugs, radiation and surgery. *See* www.DanielChapterOne.com. To that end, Respondent Feijo and his wife, Tricia Feijo, regularly pray, search the Holy Bible, and consult a variety of people and informational sources as led by the Holy Spirit, sharing personal testimonies through a two-hour daily radio broadcast on nutrition and health, the DCO Internet website, and various other oral and written means of communication. Additionally, as part of its ministry work, DCO makes available dietary supplements and herbal products designed to minister to persons seeking to restore or improve their health.

ADMINISTRATIVE PROCEEDINGS

On September 18, 2008, after an unsuccessful effort to effect a settlement, the Federal Trade Commission (FTC) filed an 11-page Complaint against the Respondents alleging that "[s]ince 2005, Respondents have engaged in deceptive acts and practices in connection with the advertising, promotion, offering for sale, sale, and distribution of DCO Products which purport to prevent, treat, or cure cancer or tumors, and other serious medical illnesses." *See* Complaint, Para. 5. In support of these charges, the FTC alleged that Respondents had no "reasonable basis" upon which to make such "representations," having failed to substantiate them by "competent and reliable scientific evidence." *See* Complaint, Paras.15 and 16, and Order, Para. I. In its Complaint, the FTC has given notice that, after a hearing before one of its administrative law judges, it will seek an Order requiring Respondents to "cease and desist" from making "unsubstantiated" representations. *See* Complaint, Orders I and II. Additionally, the FTC seeks an Order requiring Respondents to send letters to every person who obtained a product promoted by such representations not only retracting those representations, but also adopting the FTC's

narrow views on a controversial issue of public policy, that only "conventional cancer treatments ... have been scientifically proven to be safe and effective in humans." *See* Complaint, Order Para. IV, and Attachment A.

On October 11, 2008, and in their Answer to the Complaint, Respondents denied the allegations in Paragraph 5 of the Complaint, asserting that Respondents "operate a website that provides information on the named products in a religious and educational context." *See* Answer, Para. 5. Further, Respondents denied the allegations in Paragraph 16 of the Complaint that Respondents' representations were "unsubstantiated," countering the Complaint's reliance upon the claim that only representations based upon "competent and reliable scientific evidence" are permitted by the FTC Act. *See* Answer, Para. 16, and First Affirmative Defense which, as all affirmative defenses, is stricken by stipulation and order because the "same defenses are raised in the general denial section of the Answer." Order. In response to the FTC's effort in its Complaint to "forc[e] Respondents to make statements that they believe, based on evidence they have reviewed[3] to be untrue," Respondents "allege[d] that the actions in filing the Complaint in this matter are improper." *See* Answer, Fourth Affirmative Defense stricken, as stated above, since "same defenses are raised...in the Answer." Finally, after stating their several responses denying that any of the actions and practices set forth in the Complaint violated the FTC Act, Respondents interposed their Fifth and Sixth Affirmative Defenses alleging "that the actions of the [FTC] in **filing** the Complaint in this case are an infringement of Respondents' rights to free speech [and] to practice religion under the First Amendment to the U.S. Constitution." *See* Answer, Fifth and Sixth Affirmative Defenses stricken, as stated above, since "same defenses are raised...in the Answer."

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[3] Acquired by the Holy Spirit through Biblical revelation, prayer, faith, life experiences, and study.

At the outset of the discovery process, it was not apparent that Respondents' constitutional claims would be compromised by their responses to the FTC's first set of interrogatories and the first request for production of documents. Thus, no constitutional objections were interposed at that time. *See* Respondents' Responses to Complaint Counsel's First Set of Interrogatories and Respondents' Responses to Complaint Counsel's First Request for Production of Documentary Materials and Tangible Things. But when Complaint Counsel responded to Respondents' refusal to produce certain financial documents,[4] Complaint Counsel informed Respondents and this Court that he sought such documents because they were, in part, "relevant to Respondents' defenses ... that their conduct at issue here is religious speech protected by the First Amendment to the U.S. Constitution." *See* Complaint Counsel's Motion and Memorandum to Compel Production of Documents, p. 3.

At this point, then, Complaint Counsel placed Respondents' First Amendment claims squarely at issue in the discovery process, stating that "[e]xamining the financial records of Respondents will help Complaint Counsel, and eventually this Court, to assess the strength of Respondents' First Amendment claims." *Id.* Respondents were left no choice but to raise their constitutional objections in response to Complaint Counsel's motion to compel, as well as to Complaint Counsel's Second Set of Interrogatories, Second Request for Production of Documents, and Requests for Admission. *See* Respondents' Objection and Memorandum in Opposition to Complaint Counsel's Motion to Compel Production of Documents, Respondents' Objections to Complaint Counsel's Second Set of Interrogatories, Respondents' Objections to Complaint Counsel's Second Request for Production of Documents, and Respondents' Objections to Complaint Counsel's Request for Admissions.

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[4] Requests # 22 and # 23. *See* Complaint Counsel's Motion and Memorandum to Compel Production of Documents.

In his motion to compel, Complaint Counsel sought to justify the request for Respondents' financial records because they "bear directly on the Respondents' efforts to **shield** their conduct from scrutiny by virtue of the First Amendment,"[5] as if to suggest that Respondents were misusing the protections afforded by the United States Constitution to hide unlawful conduct. In fact, however, as this motion and memorandum establishes, the First Amendment religion, speech, and press guarantees and the Fifth Amendment right to Due Process of Law deprive this Court and the FTC from exercising jurisdiction over Respondents in this matter. And, for the reasons set forth in a companion Motion to Stay Discovery, this Court should take immediate steps to suspend the discovery process and to dismiss this proceeding. Continuation of the discovery process herein — including the taking of the depositions of Mr. and Mrs. Feijo during the week of January 12, 2009 — without resolution of Respondents' jurisdictional claims would violate Respondents' rights because those claims, if sustained, would require dismissal of this proceeding for lack of jurisdiction.

MOTION

Respondents hereby move to dismiss the Complaint filed against them on the grounds set forth below.

ARGUMENT

I. THE FTC HAS NO STATUTORY JURISDICTION IN THIS MATTER.

"When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a **cardinal principle** that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Crowell v. Benson, 285 U.S. 22, 62 (1932) (emphasis added). Adherence to this well-established rule is of

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[5] *Id.* (Emphasis added.)

special importance in this matter. As Justice Oliver Wendell Holmes observed in United States v. Johnson, 221 U.S. 488 (1911), it is one thing for Congress "to regulate commerce in food and drugs with reference to plain matter of **fact**, so that food and drugs should be what they professed to be, when the kind was stated, than to **distort** the uses of its **constitutional** power to establish criteria in regions where **opinions** are far apart." *Id.*, 221 U.S. at 498 (emphasis added). Thus, Justice Holmes construed a statute prohibiting the "misbranding" of drugs to ban only "a false statement of fact concerning their nature and kind, [not] a statement ... shown to be false only in its commendatory and prophetic aspect." *Id.*

A. 15 U.S.C. Section 45(a)(1) Prohibits Only "Unfair or Deceptive" Statements of "Fact," Not "Opinion."

The Complaint in this matter does not charge Respondents with having made any false, unfair or deceptive statement of fact concerning the several dietary supplements or herbal formulas itemized in Paragraphs 6 through 12 of the Complaint. Rather, the Complaint charges that Respondents' representations as to the efficacy of such supplements and formulas were without "reasonable basis." Complaint, Paras. 14-16. Thus, the allegations here, like the allegations in the indictment in United States v. Johnson, charge Respondents with having made "inflated or false **commendation** of wares," which, if sustained, would make Respondents "answerable for **mistaken praise**" of such products, not for a false description of product identity. *Id.*, 221 U.S. at 497-98 (emphasis added). Thus, the Complaint here, like the indictment in Johnson, has clearly charged Respondents with having expressed a false, unfair and deceptive "opinion" as to the effect that such dietary supplements or herbal formulas would have, not a false, unfair or deceptive statement of fact as to the ingredients in such supplements or herbal formulas. *Id.*, 211 U.S. at 498.

Indeed, like the indictment in Johnson, the Complaint herein has charged Respondents with having expressed a false, unfair, and deceptive opinion about the "medical effects" of the products. As Justice Holmes pointed out in Johnson, however, the statute prohibiting the "misbranding" of drugs in that case could not properly be construed to reach statements as to "medical effects" when the question of misbranding was "left to the Bureau of Chemistry of the Department of Agriculture, which is most natural if the question concerns the ingredients and kind, but hardly so as to medical effects." *Id.*, 211 U.S. at 498. Likewise here, the question of falsity, unfairness and deception is to be determined by the FTC, a government agency created by Congress to protect consumers from deceptive **marketplace** practices, **not** from allegedly deceptive opinions about the physical and spiritual efficacy of a product.

To be sure, the FTC could attempt to base its claim of jurisdiction over this matter based on its general authority over "false advertisements," as provided in 15 U.S.C. Section 52. But the Complaint is not limited to Respondents' "advertisements." Moreover, the Complaint contains Orders that, if granted, would extend the FTC's jurisdiction beyond the specific "advertisements" of products to the "manufacturing, labeling, [and] promotion" of the products. *See* Complaint, Orders I and II. Indeed, the Complaint's allegations that Respondents have misrepresented the effects of products on their labels[6] and on their informational and educational website, as if it had plenary jurisdiction over the public health, rather than the more limited jurisdiction over commerce, as stated in 15 U.S.C. Sections 45(a)(1) and 52. *See* Complaint, Paras. 6-14.

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[6] *See* Complaint, Paras. 6, 8, 10, 12. According to the Food and Drug Administration ("FDA"), it — the FDA, not the FTC — has jurisdiction over the **labeling** of dietary supplements. *See* "Overview of Dietary Supplements," http://www.cfsan.fda.gov/~dms/ds-oview.html.

Neither Section 45(a)(1) nor Section 52 should be so broadly construed. The FTC is not an agency within the Department of Health and Human Services, staffed with health professionals and assigned the responsibility of protecting the public health. Rather, the FTC is an independent regulatory agency, staffed with economic professionals and lawyers assigned the responsibility of protecting the public marketplace. In short, the FTC has no jurisdiction over "medical effects," a "region where opinions are far apart," but only over "plain matter[s] of fact, so that food and drugs should be what they are professed to be." *See* Johnson, 221 U.S. at 498. The Complaint herein is not so limited, but is based upon an extravagant claim of jurisdiction outside the confines of the authorizing statutes. According to a constitutionally appropriate interpretation of the statute in this case, the FTC lacks jurisdiction of this matter, there being no allegation of any misstatement of fact, but only a difference of opinion.

B. The FTC Act does not prohibit representations based upon opinions unsubstantiated by "competent and reliable scientific evidence."

While the body of the Complaint does not state the criterion by which the FTC asserts that the "reasonableness" of Respondents' statements in relation to the products at issue is to be measured,[7] the FTC's proposed Orders I and II do. If granted, Orders I and II would prohibit Respondents from making any statement about any product "unless the representation is true, non-misleading, and at the time it is made, Respondents possess and rely upon **competent and reliable scientific evidence that substantiates the representation."** Complaint, Order I (emphasis added). The Complaint, therefore, is based upon the erroneous assumption that any representation other than one supported by what the FTC views to be "competent and reliable scientific evidence" is, per se, false, unfair and misleading. *See* Paras. 14-17 and Order Para. I.

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[7] *See* Complaint, Paras. 14-17.

In their First Affirmative Defense (stricken, as stated above, since "same defenses are raised...in the Answer."), Respondents have, in essence, asserted that the FTC has no statutory authority to use its "competent and reliable scientific evidence" standard to measure the truth or falsity of Respondents' representations about their products, to the exclusion of other "traditional" standards upon which "Respondents have a right to rely." Indeed, there is nothing in either 15 U.S.C. Section 45(a)(1) or Section 52 that dictates that the truth or falsity of an advertisement or the fairness or deceptiveness of a representation about the workings of a product must, "at the time that it is made," be substantiated by "tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results," as the FTC demands in its "definition" of "competent and reliable scientific evidence." *See* Complaint, Order, Definition 1.

Nor is such an elaborate, one-dimensional standard permitted by the statute. In the marketing of products generally, statements about the quality and effectiveness of such products are oftentimes based upon testimonials of individuals who express personal satisfaction of the product's utility and effectiveness. According to the FTC, however, such personal testimonials — while permitted for automobiles, household cleaners, and lawyers — would not be allowed for herbal supplements, without regard to whether such supplements pose any threat whatsoever to the health and spiritual well-being of the consumer. Such a double-standard of "substantiation" is not contemplated by the statutory language.

Moreover, the FTC standard would shift the burden of proof from the agency to Respondents. In effect, the FTC's reading of the statutory language would presume that if

Respondents cannot prove by "competent and reliable scientific evidence" that their products perform as represented, such representations are necessarily "false, unfair, and deceptive." After all, according to Paragraphs 15 and 16 of the Complaint, the FTC requires Respondents to substantiate their claims in such a way to demonstrate affirmatively that their claims are **not** false, unfair or deceptive. But the language of the relevant statutes clearly places the burden on the agency, requiring the FTC to establish that the "advertisement" at issue is "false" and that the "acts or practices" are "unfair and deceptive." If the FTC believes that the standard by which Respondents' statements are to be measured is "competent and reliable scientific evidence," then it is the FTC that must establish that there is no reliable and competent scientific evidence to support Respondents' claims. That would — according to the FTC's own definition of such evidence — require the FTC to have relied upon objective "tests, analyses, research, [and] studies" of each of Respondents' products at issue by qualified "professionals in the relevant area" using "procedures generally accepted in the profession to yield accurate and reliable results." There is no such allegation that the FTC has itself conducted, or relied upon, such tests. Thus, it has no jurisdiction to proceed with this Complaint.

C. The FTC Has No Jurisdiction Over Respondent Daniel Chapter One, Having Failed to Allege that Daniel Chapter One is Organized or Operated as a Commercial Enterprise, as Required by Section 4 of the FTC Act.

The FTC complaint is predicated based upon 15 U.S.C. section 45, which prohibits "unfair or deceptive acts or practices in or affecting commerce." As a nonprofit corporation, Daniel Chapter One is a religious ministry, not a commercial enterprise. According to a statement of William C. Macleod, Director of the Bureau of Consumer Protection of the Federal Trade Commission, the FTC has interpreted Section 4 of the FTC Act to permit it to assert jurisdiction over any nonprofit association whose activities engender a pecuniary benefit to its

members (*i.e.,* trade associations), but the Commission apparently has so acted only against other nonprofit entities whose nonprofit status appeared to be a sham. *See* http://www.freespeechcoalition.org/macleod.htm.

The FTC Complaint, however, fails to allege that Daniel Chapter One is a corporation organized to carry on business for its own profit or that of its members or that it so operates, as required by Section 4 of the FTC Act. Thus, on the face of the Complaint, the FTC has no jurisdiction of this matter, having failed to state a cause of action.

II. FTC JURISDICTION IN THIS MATTER IS BARRED BY THE FIRST AMENDMENT.

The Complaint in this matter rests entirely upon the faulty premise that the FTC has total jurisdiction over DCO, just as if it were solely a commercial enterprise. This assumption is erroneous. As noted above, DCO is a church, a nonprofit entity engaged in protected First Amendment religious and speech activities concerning health care matters of great public importance, matters that are completely outside the jurisdiction of the FTC. *See* Complaint Paras. 1-5.

A. The Complaint is Based upon the Erroneous Assumption that Respondents' Speech is Totally Unprotected by the First Amendment.

In Complaint Counsel's Motion to Compel the production of certain financial documents, the FTC asserts that the matter before this Court concerns only "commercial speech," and that Respondents are using the First Amendment "to shield their conduct from scrutiny by virtue of the First Amendment." Complaint Counsel is seriously mistaken.

First, "commercial speech" is not outside the protection of the freedom of speech guarantee of the First Amendment. As the Supreme Court has consistently ruled since Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), commercial

speech receives First Amendment protection unless, "as a threshold matter ... the commercial speech concerns unlawful activity or is misleading." *See* Thompson v. Western States Med. Ctr., 535 U.S. 357, 366-67 (2002).

Second, "as a threshold matter," the Complaint fails to allege any factual predicate upon which to rest its claim that Respondents' speech is either wholly commercial, or "unlawful" or "misleading." *See* Complaint, Para. 5. To the contrary, as noted above , Paragraphs 15 and 16 coupled with Order I and II of the Complaint are based upon the unconstitutional assumption that Respondents, not the FTC, have the burden to show that Respondents' representations about their products are **not** misleading. The FTC's unconstitutional effort not only violates the basic rule of the Supreme Court's commercial speech doctrine (*see* Thompson, 535 U.S. at 367), but if allowed to stand would stifle "the free flow of commercial information" which, the Supreme Court in the Virginia Board of Pharmacy case observed, is "as keen, if not keener by far, than [the consumer's] interest in the day's most urgent political debate." *See* Virginia Bd. of Pharmacy, 425 U.S. at 763.

Third, having failed to disqualify Respondents' speech under the threshold "unlawful or misleading" test, the complaint utterly fails to down any factual predicate that would justify the FTC's action against Respondents even if Respondents' speech would be ruled to be wholly commercial. As the Supreme Court has stated, commercial speech that survives the threshold test may not be regulated unless the proposed regulation is pursuant to a "substantial" government interest, and not more extensive than necessary to advance that interest. *Id.*, 535 U.S. at 367.

The Complaint, having failed to meet the First Amendment standards governing speech that Complaint Counsel concedes to be "commercial speech," cannot give the FTC jurisdiction

over this matter. As the Supreme Court has consistently held, the government has the burden of showing that the speech in question is not protected by the First Amendment. *See* Illinois, ex rel Madigan v. Telemarketing Associates, Inc., 538 U.S. 600, 620 n.9 (2003). Otherwise, the granting of such a request would violate the foundational principle of the First Amendment commercial free speech doctrine "that the speaker and the audience, not the government, assess the value of the information presented" by Respondents. *See* Edenfield v. Fane, 507 U.S. 761, 767 (1993).

B. The Complaint Rests Upon the Erroneous Assumption that Respondents' Speech Deserves Only the First Amendment Protection Afforded Commercial Speech, Whereas Respondents' Speech Deserves the Highest Protection Afforded Political Speech.

As Complaint Counsel has conceded in his Motion to Compel, the FTC complaint is based upon the assumption that Respondents' speech deserves only the First Amendment protection afforded commercial speech, whereas it appears, on the face of the Complaint, that Respondents' speech at issue in this matter addresses issues of highest public interest and concern, deserving the highest protection of the freedom of speech guarantee as set forth in New York Times v. Sullivan, 376 U.S. 254 (1964).

In an effort to avoid such a First Amendment barrier, the Complaint has encapsulated Respondents' communicative activities in such a way as to make it appear that those activities do no more than propose a commercial transaction. *See* Complaint, Paras. 5-14. While even such communications are "entitled to the coverage of the First Amendment,"[8] Respondents' promotional materials related to Daniel Chapter One's products cannot be isolated from their overall religious ministry of health freedom and healing. Rather, those promotional materials are

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[8] *See* Edenfield, 507 U.S. at 767.

an integral part of Daniel Chapter One's informational campaign to educate the public on nutrition, herbal, and other dietary alternatives to the pharmaceutical-drug-based medical care system endorsed and sustained by the Food and Drug Administration and other governmental agencies. *See* www.danielchapterone.com.

The FTC Complaint process, backed up by the full force of the federal government, has the effect — if not the purpose — of cutting off the funding sources supporting Respondents' health freedom initiatives which, like those that helped launch the 1960's civil rights movement, communicate "information, express[] opinions, recite[] grievances, protest[] claimed abuses, and [seek] financial support on behalf of a movement whose existence and objectives are matters of highest public interest and concern." *See* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964). And the FTC effort to cut off Respondents' source of funds is like those efforts in the 1960's to cut off paid advertisements in national media outlets which, if successful, "might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities" of those who oppose them. *Id.*

As the Supreme Court observed in New York Times Co. v. Sullivan, "[t]he effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources." *Id.* Thus, the Court pronounced that even "libelous statements" that would "otherwise be constitutionally protected ... do not forfeit that protection because they were published in the form of a paid advertisement." *Id.*

For like reasons, Respondents' allegedly deceptive statements about Daniel Chapter One's alternative nutritional and herbal products cannot serve as a basis for claiming that Respondents have forfeited the constitutional protection otherwise afforded Respondents' general informational activities. Indeed, in a recent case involving a business corporation

charged with violation of state prohibitions against unfair and deceptive practices and false advertising, Supreme Court Justice John Paul Stevens observed that where communications are a "blending of commercial speech, noncommercial speech and debate on an issue of public importance," "[t]he interest in protecting [the communicators] from the chilling effect of the prospect of expensive litigation is ... a matter of great importance." *See* Nike, Inc. v. Kasky, 539 U.S. 654, 656, 664 (2003) (*per curiam* opinion dismissing writ of certiorari as improvidently granted, Stevens, J., concurring). Thus, Justice Stevens suggested that, in such cases, statements made about products might deserve the kind of First Amendment protection afforded "for misstatements about public figures that are not animated by malice." *Id.*, 539 U.S. at 664.

In this case the Complaint contains no allegation whatsoever that Respondents' statements about Daniel Chapter One's products were made with malice, *i.e.*, with knowledge of their falsity, or in reckless disregard of their truth or falsity. *See* Complaint, Para. 15-16. Respondents' statements can be likened to those of the participants in the civil rights movement, to which First Amendment protected was extended in New York Times v. Sullivan, 376 U.S. at 279-80. Comparable protection is warranted here, particularly in light of the absence of any allegation in the administrative complaint that anyone has actually been injured by Respondents' products. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). In short, the FTC has no jurisdiction over Respondents' speech in this matter, absent an allegation of knowing falsity or reckless disregard of truth or falsity.

C. The Complaint Rests Upon a Constitutionally Impermissible Legal Theory of Viewpoint Discrimination.

As noted above, the Complaint rests upon the charge that, unless Respondents' claims concerning the efficacy of their products are substantiated by "competent and reliable scientific evidence," those claims are false and deceptive. Indeed, as defined by the Complaint, the FTC's

evidentiary standard must conform to "tests, analyses, research, [and] studies" undertaken by professional experts in relevant fields and according to "procedures generally accepted in the profession to yield accurate and reliable results." In short, the Complaint rests upon an unstated materialistic philosophy that the only truth is that which can be empirically verifiable, excluding altogether reliance on traditional uses, personal experience, know alternatives to reductionist science and Respondents' Christian epistemology based upon the revelation of Almighty God. Accordingly, Respondents' reliance upon Biblical revelation, natural health knowledge and personal testimonies as the source of their representations about the efficacy of their products is disallowed.[9]

But the FTC has no proof that its empirical methodology is the only legitimate path to truth. Rather, it has simply taken its hyper-secular views and imposed them upon an otherwise viewpoint-neutral statute, and in the process has violated the Supreme Court's *per se* rule against viewpoint discrimination laid down in Rosenberger v. University of Virginia, 515 U.S. 819 (1995). As the Rosenberger Court stated, "[w]hen the government targets not subject matter, but

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[9] The FTC would have Daniel Chapter One place its exclusive faith in so-called scientific methodologies, such as randomized, double-blind, placebo-controlled studies, and articles published in peer-reviewed medical journals. While these sources have their role, they are certainly not without problems. For example, medical journals have been revealed to be subject to manipulation by pharmaceutical companies with powerful financial interests in maintaining the public's exclusive reliance on the prevailing medical orthodoxy. See Duff Wilson, "Wyeth's Use of Medical Ghostwriters Questioned," New York Times, December 12, 2008. http://www.nytimes.com/2008/12/13/business/13wyeth.html?_r=2&ref=business

On the other hand, divine revelation and personal testimony are the primary methodologies of Biblical theology. For example, followers of Jesus at that time and Biblical Christians today believe the testimony of a man blind from birth that he had his sight restored merely from washing in the pool of Siloam. The fact that the politically-powerful Pharisees of that time would not accept that testimony did not and does not alter their conviction that the testimony of the blind man was true. *See* John 9:10-11, 25 ("Therefore said they unto him, How were thine eyes opened? He answered and said, A man that is called Jesus made clay, and anointed mine eyes, and said unto me, Go to the pool of Siloam, and wash: and I went and washed, and I received sight.... He answered and said, Whether he be a sinner or no, I know not: **one thing I know, that, whereas I was blind, now I see.**" [Emphasis added.]).

particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.*, 515 U.S. at 828. By discriminating against Respondents' religious approach to truth, the FTC's policy on permissible advertising in this case is no different from the school district policy which prohibited the showing of a film on family values because the film's "religious perspective" did not conform to the school district's secular educational philosophy. *See* Good News Club v. Milford Central School, 533 U.S. 98, 107-08 (2001). The FTC simply lacks the jurisdiction to impose its scientific materialistic view of the world on the Respondents' health and wellness advocacy including their making available to followers health-enhancing products.

D. The Complaint Would Impose an Unconstitutional Orthodoxy of Opinion and Belief Upon Respondents.

In United States v. Ballard, 322 U.S. 78 (1944), the United States Supreme Court ruled that the First Amendment guarantees of freedom of religion precluded the prosecution of a mail fraud indictment based upon allegations that the defendant was promoting false beliefs. Among the promoted beliefs that the government had contended to be false was "the power to heal persons of ailments and diseases ... normally classified as curable, and also of diseases which are ordinarily classified by the medical profession as being incurable." *Id.*, 322 U.S. at 80. At issue in the case, the Court concluded, was "the truth or verity of ... religious doctrines," which, in turn, the Court ruled to be a "forbidden domain" into which the government may not enter. *Id.*, 322 U.S. at 86-87.

Similarly, the Complaint in this case charges Respondents with engaging in "deceptive acts or practices in connection with the advertising, promotion, offering for sale, and distribution of DCO Products which purport to prevent, treat, or cure cancer or tumors, and other serious medical illnesses." *See* Complaint, Para. 5. According to the Complaint, the allegedly

deceptive promotional materials "expressly or by implication" contained "representations" that were "substantiated" upon a "reasonable basis," whereas "in truth and in fact, Respondents did not possess and rely upon a reasonable basis that substantiated the representations [and] [t]herefore, the representation ... was, and is unsubstantiated." Complaint Paras. 15-16. Finally, according to the proposed Order attached to the Complaint, in order for any promotional material to be based upon reasonable substantiation, it must be based "upon competent and reliable scientific evidence." Complaint, Order, Paras. I and II.

In short, the Complaint charges that Respondents' promotional materials had no "reasonable basis" because they did not accord with reason as defined by science. Thus, the Complaint discounts personal healing testimony — in support of the representation that 7 Herb Formula battles cancer — as absolutely irrelevant to the question whether there was a "reasonable basis" for such a representation solely because such a testimony is not based upon "competent and reliable scientific evidence." *See* Complaint, Paras. 9B, 14, and 15 and attached Order Paras. I and II. In other words, Respondents stand charged with having committed "heresy," in violation of the FTC's faith in "modern" science. In one fell swoop, complainant would dismiss out of hand the testimonial base upon which Respondents rely for the presentation of their products,[10] not on the basis of reasoned analysis, but solely as a matter of the FTC's own unsubstantiated secular faith. After all, even science relies upon individual testimonies when engaged in "outcome-based" studies.

But, as the United States Supreme Court stated in Ballard, the First Amendment precludes such governmental action: "'The law knows no heresy, and is committed to the support of no dogma....'":

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[10] *See* DanielChapterOne.com Home Page: "Testimonies."

> It embraces the right to maintain theories of life and death ... which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may **not be put to the proof** of their **religious doctrines or beliefs.** Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made **suspect before the law**. [*Id.*, 322 at 86-87 (emphasis added).]

The FTC, however, would have this Court believe that Respondents are engaged in an ordinary commercial business, not in a religious ministry. *See* Complaint, Paras. 1-5. But that is not the case. Incorporated in the State of Washington, Respondent Daniel Chapter One is "a private corporate sole," recognized by the state as a "viceregent of the Sovereign Creator..., deriving its powers of existence from our Creator, the Lord God Almighty and the Lord Jesus Christ." Articles of Corporation Sole and Charter for Daniel Chapter One (hereinafter "Corp. Art."), Introduction. Respondent James Feijo is the duly appointed "Overseer," having "canonically taken possession of this responsibility ... in accordance with the discipline Daniel Chapter One of a sovereign church and an unincorporated sovereign religious assembly." *Id.* Both are "joyfully submit[ted] to the Headship of the Lord God's Sovereignty and seek[] first His Kingdom and His Righteousness" and dedicated to "worthwhile projects for the common good." *Id.,* Arts. 2 and 3.

In accordance with these articles, Respondents promote health care freedom, providing alternative health care information and teachings based upon available natural healing products revealed by The Creator of the world. Indeed, by taking the name of Daniel Chapter One, Respondents invoke the Biblical narrative of health and nutrition where the Hebrew prophet Daniel refused the government dietary and health orders of the Babylonian King Nebuchadnezzar. *Daniel* 1:1-5, 8. Instead, Daniel and his three companions freely chose a

divinely-revealed sustenance regime, the consequence of which produced in them better health than the government-prescribed regimen. *Daniel* 1:11-16. This account serves as the very foundation upon which Respondents' rest their health care products, as demonstrated by their personal testimonies.

According to the proposed Order accompanying the Complaint, however, DCO would be required to abandon Daniel's example of free choice and conform its sincerely-held religious beliefs and teachings about health and nutrition, and its products promoted in pursuance of them, to the secular standards and mandates set by the United States Government's FTC and Food and Drug Administration (FDA), as if the "scientific" knowledge of FTC and FDA officials were superior to the supernatural revelation of God Almighty. *Compare* Complaint, Order, Paras. I, II and III, *with* http://dc1pages.com/danielchapterone/index.php?option=com_content&task =view&id=2.

In sum, the Complaint is erroneously premised upon the power of the federal government to impose a modern "scientific" orthodoxy concerning health care upon the people of the United States. Not only is such a blatantly discriminatory effort a violation of the free exercise guarantee of the First Amendment, but, by wedding its claim that "reasonableness" of any health care claim made by Respondents must conform to "competent and reliable scientific evidence," the Complaint herein would run afoul of the "no establishment" guarantee, having established "scientism," that is "the belief that only [the scientific method] can fruitfully be used in the pursuit of knowledge." Webster's Third International Dictionary, p. 2033 (1964). Such a belief system, even though it may not be viewed by the federal government to be a religious one, is nonetheless a "religion" within the meaning of the First Amendment. *See* Torcaso v. Watkins, 367 U.S. 488, 495 n. 11 (1961).

In sum, according to the First Amendment, the FTC has no jurisdiction to impose upon Daniel Chapter One any form of orthodoxy of opinion, including a religious system of "scientism." *See* West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) ("[If] there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion...." *See also* T. Jefferson's Preamble to Virginia's 1786 Statute Establishing Religious Freedom ("to suffer a civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill-tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment")

E. As an Integral Part of a Prolonged Administrative Process, Complaint Counsel's Motion to Compel Operates as an Unconstitutional Prior Restraint.

The FTC administrative process imposes an unconstitutional prior restraint in violation of the freedoms of speech and press, in that it fails to provide prompt judicial review of Respondents' First Amendment claims, virtually denying to Respondents any access to an Article III court review of their constitutional claims until after a lengthy and expensive administrative process that empowers the FTC to impose censorship settlements without evidence that such censorship powers are necessary to protect a government interest of the highest order. *See* Freedman v. Maryland, 380 U.S. 51 (1965) and Near v. Minnesota, 283 U.S. 697, 716 (1931).

In Nike, Justice Stevens observed that "novel First Amendment questions [would be presented by] speech [that] blend[s] commercial speech, noncommercial speech and debate on an issue of public importance." Nike, 539 U.S. at 663. As Justice Stevens also observed, Nike

faced "expensive litigation" over whether its statements constituted unfair and deceptive business practices and false advertising which put a "chilling effect" on Nike's communicative activities. *Id.*, 539 U.S. at 664. Likewise, here, Respondents face extensive and expensive litigation before this administrative agency during which time Respondents have no opportunity to put their First Amendment speech and press claims before an Article III judicial tribunal.

In his Motion to Compel certain documents, Complaint Counsel has contended that the financial records that the FTC seeks "will help enable Complaint Counsel, and eventually this Court, to assess the strength of Respondents' First Amendment claims." Complaint Motion, p. 4. It is one thing for one's First Amendment rights to be assessed by an administrative agency charged with the enforcement of a statute; it is quite another to have such a claim of right resolved by an impartial judicial tribunal. Thus, the Supreme Court has for many years imposed a rule that assures "prompt judicial determination" of a First Amendment claim in a "censorship proceeding." *See* Freedman v. Maryland, 380 U.S. 54, 58-59 (1965).

While it may be true that federal law does not require a license from the FTC or other government agency before Daniel Chapter One may publish promotional materials related to the products at issue, Respondents nevertheless face the prospect of a cease and desist order that would establish the FTC as censor of what Respondents may communicate in the future about these products, including a requirement that such communications be based upon competent and reliable scientific evidence that substantiates the representation as determined by the FTC or prior approval of the federal Food and Drug Administration. *See* Complaint, Order, Paras. I, II, and III. According to Complaint Counsel's Motion, however, Respondents have asserted First Amendment claims and FTC access to Respondents' documents "will help enable Complaint Counsel, and [the administrative judge], to assess the strength of [those] claims." Motion to

Compel, p. 4. In the meantime, the FTC interpretation of the governing statutes provides no avenue for Respondents to present their First Amendment claims to an Article III Court until after the administrative process runs its course. Even then, such claims must be based upon the administrative record, not on evidence presented in an Article III judicial proceeding. *See* 15 U.S.C. Section 45(c) and (d).

In Waters v. Churchill, 511 U.S. 661 (1994), the Supreme Court "agree[d] that it is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures," including "allocation of the burden of proof, a particular quantum of proof, a particular type of appellate review ... to be constitutionally required in proceedings that may penalize protected speech." *Id.*, 511 U.S. at 669. While the Waters Court did not lay down a definitive rule when a prescribed procedure may be constitutionally insufficient to safeguard First Amendment rights, it did state that First Amendment procedural safeguards are not limited to "licensing schemes" such as the one in Freedman.

And for good reason. Censorship, whether or not imposed as a precondition before any communication is made, operates as a prior restraint. And if that censorship is not strictly limited to unprotected speech, then it violates the freedom of the press. *See, e.g.,* Lovell v. Griffin, 303 U.S. 444 (1938). Respondents' free speech claim should not, as it is in this case, be relegated to an administrative process that provides no access to an impartial judicial review, until after the administrative process has run its course. After all, the FTC is not constrained by a statute limiting its powers to "content neutral" principles of "time, place and manner," as was the case in Thomas v. Chicago Park District, 534 U.S. 316 (2002). Rather, as in Freedman, the FTC has been clothed with the power to "censor" if it finds that a particular promotional

communication is "unfair or deceptive" (*see* 15 U.S.C. Section 45(a)(1)), and thereby, is likely to "overestimate the dangers of [unfair or deceptive] speech when determining, without regard to [its] actual effect on an audience, whether speech is likely 'to [deceive].'" *See* Thomas v. Chicago Park District, 534 U.S. at 321.

In sum, the FTC administrative process is not suited to assess the sufficiency of any asserted government interest justifying the imposition of the kinds of prior restraints upon Daniel Chapter One's informational materials included in the proposed Order attached to the Complaint. To the contrary, the government interest in protecting the people from "unfair and deceptive" practices and false advertising is not of the highest order necessary to justify a court injunction against Respondents' speech, much less one issue by an administrative agency. *See* New York Times v. United States, 403 U.S. 713, 725-27 (1971) (Brennan, J., concurring). *See also* Near v. Minnesota, 283 U.S. 697, 716 (1931).

F. The FTC Action Lacks the Necessary Impartiality, and Appearance of Impartiality, Required by the Constitutional Principles of Due Process of Law and Separation of Powers.

The FTC administrative process in this matter lacks impartiality, and the appearance of impartiality, in the adjudication of Respondents' constitutional claims, having divested itself of jurisdiction by the docket filing of a news release prejudging the merits of its complaint and imposing upon Respondents guilt by association, thereby unconstitutionally prejudicing Respondents' right to a fair hearing as guaranteed by the due process clause of the Fifth Amendment. *See* Concrete Pipe v. Construction Laborers, 508 U.S. 602 (1993).

Alongside the docket entry for this Complaint, and entered into the record on the same day as the Complaint, appears an FTC-issued media news release announcing that Daniel

Chapter One was among 11 companies to which the FTC had issued warning letters charging them with "peddl[ing] bogus cancer cures." While the press release acknowledged that the FTC had not yet proved its case, that acknowledgment was buried on page 3, following two and one-half pages of unchallenged accusations of deceptive practices without differentiation of one entity from another. Not surprisingly, among the 11 companies so maligned, six had already entered into settlement agreements with the FTC, Daniel Chapter One not being one of them.

On September 18, 2008, the date on which the Complaint was filed in this matter and docket No. 9329 was assigned, the FTC issued a news release with the headline: "FTC Sweep Stops Peddlers of Bogus Cancer Cures." The news release was filed with the complaint and made a part of the record, appearing as a docket entry In the Matter of Daniel Chapter One ... and James Feijo...."

The News Release not only states that the FTC has "charged [11] companies with making unsupported claims that their products cured or treated one of more types of cancer," an allegation Respondents deny, but that respondents "in **all** cases — both those settled and those to be litigated — **will be required to notify consumers who purchased the products challenged in the complaints that there was little or no scientific evidence demonstrating the products' effectiveness** for treating or curing cancer." (Emphasis added.) (Over the years, Respondents have received hundreds of testimonials in support of the effects of their products, have recognized data to support their claims, and have received no complaints.) Further, the news release announced that "[m]any of these products are **scams**," followed by a detailed list of **all** eleven cases — both those to be litigated and those settled — in an obvious effort to establish guilt by association.[11]

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[11] http://www2.ftc.gov/opa/2008/09/boguscures.shtm

The press release was issued by the FTC Office of Public Affairs, which reports directly to the FTC members, through the Chairman. http://www.ftc.gov/ftc/ftc-org-chart.pdf. Therefore, the FTC members who will need to adjudicate the case after the administrative law judge's decision is released have failed to insulate themselves from FTC's enforcement arm. Rather, at the outset of the investigation, the FTC members have put the reputation of the Commission and the Commissioners on the line behind the allegations against these Respondents, jeopardizing their independence in subsequently adjudicating the case. *See* American Cyanamid Co. v. FTC, 363 F.2d 757 (1966).

By prejudging its claim against the Respondents, and creating the impression that Respondents' claims are no different from ones made by companies that have gone out of business or settled with the FTC, the FTC news release not only demonstrates that the Commission cannot sit in impartial judgment of Respondents, but that its proceeding completely lacks even the appearance of impartiality, thereby depriving Respondents of the essential guarantee of due process, *i.e.*, fairness. *See* In re Murchison, 349 U.S. 133, 136 (1965). As the Supreme Court so aptly put it in Concrete Pipe & Products, Inc. v. Construction Laborers and Pension Trust Fund, 508 U.S. 602 (1993), "due process requires a 'neutral and detached judge in the first instance'.... Even appeal and a trial de novo will not cure a failure to provide a neutral and detached adjudicator." *Id.*, 508 U.S. at 617-18. Indeed, as the Concrete Pipe Court further observed, "one is entitled as a matter of due process of law to an adjudicator who is not in a

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"Daniel Chapter One – This company markets several herbal formulations as well as shark cartilage. According to the complaint, in addition to making deceptive and false claims that these products effectively prevent, treat, and cure cancer, the respondents also claim that one of their herbal formulations mitigates the side effects of radiation and chemotherapy. In addition to the FTC action announced today, this company received a warning letter from FDA."

situation 'which would offer a possible temptation to the average man as a judge'.... 'Justice,' indeed, 'must satisfy the appearance of justice....'" *Id.*

While the news release includes a disclaimer that its accusations in the news release are not the equivalent of a finding that the law has been violated, the disclaimer is buried at the bottom of the news release. Furthermore, by issuing the news release and making it a part of the docket in this case, the FTC has not acted in such a way as to keep separate its enforcement function from its adjudicative function, thereby violating the constitutional principle of separation of powers. Although it is true that "[t]he courts have uniformly rejected the claim that the FTC Act involves an invalid delegation of judicial power,"[t]he reality, of course, is that the FTC does exercise judicial power." *See* B. Schwartz, Administrative Law, Section 2.17, p. 63 (2d ed., Little, Brown: 1984). As Professor Schwartz has pointed out, "[t]he constitutionality of the FTC delegation has been assumed, rather than decided in most of the cases involving the commission in courts." *Id.* By its failure to carefully respect the separation of the enforcement and adjudicatory power here, this case could provide a most appropriate vehicle for a reinvigoration of the constitutional doctrine of separation of powers.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss should be granted and the Complaint dismissed.

Respectfully submitted,

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COPY

IN THE UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

[PROPOSED] ORDER
GRANTING RESPONDENTS' MOTION TO DISMISS PROCEEDINGS

On January 11, 2009, counsel for Respondents filed a motion to dismiss the administrative action *In the Matter of Daniel Chapter One*, Docket No. 9329. The matter being heard on _____, 2009, and the Court being fully advised,

IT IS ORDERED that the administrative action *In the Matter of Daniel Chapter One*, Docket No. 9329, be, and is hereby DISMISSED WITH PREJUDICE against all Respondents.

Dated this___ day of _____, 2009.

_____
D. Michael Chappell
Administrative Law Judge

IN THE UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

CERTIFICATE OF SERVICE

I certify that on January 11, 2009, I served or caused to be served the following documents on the individuals listed below by electronic mail, followed by Federal Express delivery:

Respondents' Motion to Dismiss and Supporting Memorandum of Points and Authorities
[Proposed] Order Granting Respondents' Motion to Dismiss Proceedings
Respondents' Motion for Stay of Discovery and Supporting Memorandum
[Proposed] Order Granting Respondents' Motion to Stay Discovery
Statement of Counsel for Respondent

Service on:

Donald S. Clark
Office of the Secretary
Federal Trade Commission
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