

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



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

**COMPLAINT COUNSEL’S MEMORANDUM IN OPPOSITION
TO RESPONDENTS’ MOTION TO RECONSIDER ORDER
DENYING RESPONDENTS’ MOTION TO DISMISS COMPLAINT**

Complaint Counsel oppose Respondents’ Motion to Reconsider Order Denying Respondents’ Motion to Dismiss Complaint (the “Motion”), which for the reasons set forth below, should be denied.

I. INTRODUCTION

On January 11, 2009, almost three months after the Respondents answered the Complaint filed by the Federal Trade Commission (the “FTC” or the “Commission”), Respondents filed a Motion to Dismiss the Complaint. Respondents offered no excuse for the delay. On February 2, 2009, this Court issued a thorough and well-reasoned Order Denying Respondents’ Motion to Dismiss the Complaint. On February 6, 2009, Respondents filed the instant Motion. Respondents raise no legitimate basis for reconsideration.

II. ARGUMENT

A. **The FTC is not violating the Respondents' First Amendment Rights.**

In the Memorandum in Opposition to Respondents' Motion to Dismiss, Complaint Counsel previously addressed Respondents' flawed contention that the instant proceedings operate as an unconstitutional prior restraint. *See Complaint Counsel's Mem. in Opp. To Respondents' Mot. to Dismiss* at 10-11. As explained more fully in Complaint Counsel's Opposition Brief (10-14) and this Court's February 2, 2009 Order, the FTC is not violating Respondents' First Amendment rights. The Motion to Reconsider raises no new issues in this regard, and Respondents' Motion should be denied.

B. **The FTC is not violating Respondents' Fifth Amendment Rights.**

In their instant Motion, Respondents argue that Complaint Counsel and this Court "cavalier[ly] dismiss[ed]" Respondents' Fifth Amendment argument. Respondents claim that the "fairness and impartiality of the administrative process in this case has been tainted by the FTC press release, the filing of which is not only unauthorized by the FTC Rules of Practice, but violative of Respondents' right not to be denied their liberty and their property without due process of law." *Respondents' Mot. to Reconsider* at 7. Respondents are wrong. The Commission routinely files press releases in connection with the filing of a lawsuit, and no FTC case has been dismissed on Fifth Amendment grounds for doing so.

FTC v. Cinderella Career and Finishing Schools, Inc. is squarely on point. In that case, the plaintiffs filed a complaint requesting a restraining order against the defendant FTC to enjoin it from issuing a news release regarding alleged unfair or deceptive business practices on the part of the plaintiffs. *FTC v. Cinderella Career and Finishing Sch., Inc.*, 404 F.2d 1308, 1310 (D.C. Cir. 1968). The plaintiffs argued that the filing of the press release violated their Due Process

rights and asserted that the press release “constitutes an alignment, or appearance of an alignment, of the Commission ‘with the prosecution’ resulting in a prejudgment (or appearance thereof) of the merits of the complaint prior to hearing.” *Id.* at 1312-13. The Court of Appeals found that the “appellees have not been deprived of any due process rights by the Commission’s press release in this case.” *Id.* at 1316 (reversing the district court’s order denying the Commission’s motion to dismiss and remanding the case to the district court with instructions to dismiss the plaintiffs’ complaint).

In reaching this decision, the Court of Appeals noted that Congress granted the FTC the authority to issue press releases “to alert the public to suspected violations of the law. . . whenever the Commission shall have reason to believe that a respondent is engaged in activities made unlawful by the Act.” *Id.* at 1314. Specifically, 15 U.S.C. § 46(f) authorizes the FTC to issue factual press releases concerning pending adjudicatory proceedings. *Id.* (citing 15 U.S.C. § 46(f)). Finding “in fact and law authority in the Commission,” the court concluded that “press releases predicated upon official action of the Commission constitute a warning or caution to the public, the welfare of which the Commission is in these matters charged.” *Id.*

The Court of Appeals then addressed appellees’ contention that the “Commission has a duty in a quasi-judicial proceeding to avoid prejudgment . . . and that the press release program, by violating this duty, constitutes a violation of their due process rights.” *Id.* at 1315. In dismissing this argument, the court first cited the Administrative Procedure Act, 5 U.S.C. § 500, and stated that “Congress has . . . vested administrative agencies with both the specified power to act in an accusatory capacity through the initiation of an action designed to enforce compliance with or prevent further violation of a statutory provision and with the responsibility of ultimately determining the merits of the charges so presented.” *Id.* The court found that the Commission’s

procedures comply with the Administrative Procedure Act and concluded that the “appellees have not been deprived of any due process rights by the Commission’s press release in this case.” *Id.*; see also *Bowman v. United States Dep’t of Agric.*, 363 F.2d 81, 86 (5th Cir. 1966) (declaring that “the contention that the press release in some manner denied petitioner due process of law in that it prevented the Hearing Examiner and the Judicial Officer from acting fairly in the premises is frivolous”).

Other courts addressing Fifth Amendment challenges to the FTC Act and its Rules routinely have rejected such challenges. See, e.g., *Nat’l Harness Mfrs. Ass’n v. FTC*, 268 F. 705, 707-08 (6th Cir. 1920) (rejecting petitioner’s argument that the FTC Act violates the Fifth Amendment); *Nat’l Fed’n of the Blind v. FTC*, 303 F. Supp. 2d 707, 724 (D. Md. 2004) (rejecting plaintiffs’ argument that the FTC’s Telemarketing Sales Rule violates the Fifth Amendment). In fact, Respondents themselves acknowledge the validity of the FTC administrative process. See *Respondents’ Mot. to Dismiss* at 27 (stating that “it is true that ‘[t]he courts have uniformly rejected the claim that the FTC Act involves an invalid delegation of judicial power’”)(citing B. Schwartz, Administrative Law, Section 2.17, p. 63 (2d ed., Little Brown: 1984)).

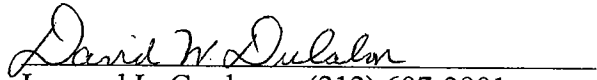
In their Motion to Reconsider, Respondents cite not a single case supporting the proposition that the FTC’s process for administrative litigation violates due process. Rather, the well-established case law indicates that their argument must fail. Respondents’ invocation of the Magna Carta and civil rights cases cannot change the straightforward nature of this proceeding, nor do such protestations provide any basis for dismissing this matter.

Therefore, Respondents’ Fifth Amendment challenge to this action is without merit, and Respondents’ Motion for Reconsideration should be denied.

III. CONCLUSION

For the reasons set forth above, Complaint Counsel respectfully requests that the Administrative Law Judge deny Respondents' Motion to Reconsider.

Respectfully submitted,



Leonard L. Gordon (212) 607-2801
Theodore Zang, Jr. (212) 607-2816
Carole A. Paynter (212) 607-2813
David W. Dulabon (212) 607-2814
Elizabeth Nach (202) 326-2611

Federal Trade Commission
Alexander Hamilton U.S. Custom House
One Bowling Green, Suite 318
New York, NY 10004

Dated: February 12, 2009

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 12, 2009, I have filed and served the attached **COMPLAINT COUNSEL'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO RECONSIDER ORDER DENYING RESPONDENTS' MOTION TO DISMISS COMPLAINT** and **[Proposed] ORDER DENYING RESPONDENTS' MOTION TO RECONSIDER** upon the following as set forth below:

The original and one paper copy via overnight delivery and one electronic copy via email to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room H-159
Washington, DC 20580
E-mail: secretary@ftc.gov

Two paper copies via overnight delivery to:

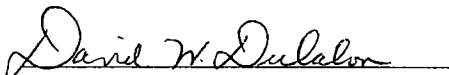
The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave., N.W., Room H-528
Washington, DC 20580

One electronic copy via email and one paper copy via overnight delivery to:

James S. Turner, Esq.
Betsy Lehrfeld, Esq.
Martin Yerrick, Esq.
Swankin & Turner
1400 16th St., N.W., Suite 101
Washington, D.C. 20036
jim@swankin-turner.com

One electronic copy via email to:

Michael McCormack, Esq.
M.mccormack@mac.com


David W. Dulabon
Complaint Counsel

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**[Proposed] ORDER DENYING RESPONDENTS' MOTION TO RECONSIDER ORDER
DENYING RESPONDENTS' MOTION TO DISMISS COMPLAINT**

On February 2, 2009, this Court denied Respondents' Motion to Dismiss Complaint. On February 6, 2009, Respondents filed a Motion to Reconsider Order Denying Respondents' Motion to Dismiss Complaint. Complaint Counsel filed their Opposition to Respondents' Motion to Reconsider Order Denying Respondents' Motion to Dismiss Complaint on February 12, 2009.

IT IS HEREBY ORDERED that Respondents' Motion To Reconsider Order Denying Respondents' Motion to Dismiss Complaint is DENIED.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Dated: