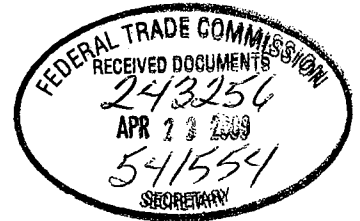


ORIGINAL

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)	
)	
)	

**RESPONDENTS' MOTION FOR A RULE 3.23(b)
DETERMINATION AUTHORIZING RESPONDENTS TO
IMMEDIATELY APPEAL THE DENIAL OF RESPONDENTS'
MOTION TO DISMISS FOR LACK OF JURISDICTION**

As permitted under Federal Trade Commission Rule 3.23(b), Respondents move the hearing officer for a determination authorizing Respondents to immediately appeal the denial of Respondents' Motion to Dismiss for Lack of Jurisdiction and Violation of Respondents Constitutional Rights. This motion is made on the ground that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion, specifically, does FTC have jurisdiction over Respondents, a non profit religious ministry organized as corporation sole and its overseer, that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation and/or subsequent review will be an inadequate remedy.

INTRODUCTION

Respondents respectfully request interlocutory review of the Administrative Law Judge's ("ALJ") April 22, 2009 Order ("Order") that FTC has jurisdiction over

Respondents Daniel Chapter One, a religious corporation sole, and its overseer James Feijo.

The Federal Trade Commission is on record before Congress saying:

Section 4 of the FTC Act gives the Commission jurisdiction over corporations that are operated for their own profit or that of their members. Although the Commission has successfully asserted jurisdiction over various non-profit entities, purely charitable organizations have been considered outside the Commission's jurisdiction under the FTC Act.

Absent some other grounds for jurisdiction, we are unlikely to open an investigation into charities that have been granted tax-exempt status by the IRS under Section 501 (c)(3) of the Internal Revenue Code.¹

Daniel Chapter One (“DCO”) is a religious corporation sole and as such is subject to section 508 of the Internal Revenue Code (“IRC”). IRC section 508 contains exceptions to the requirements of section 501(c)(3) of the Code. According to 26 U.S.C. § 508(c)(1)(A): Special rules with respect to section 501(c)(3) organizations:

(a) New organizations must notify the secretary that they are applying for recognition of section 501(c)(3) status.

...

(c) Exceptions.

(1) Mandatory exceptions. Subsections (a) and (b) shall not apply to—
(A) churches, their integrated auxiliaries, and conventions or associations of churches.

The ALJ has said of Daniel Chapter One, “I’m going to assume that the respondent is a religious ministry, only for the limited purpose of jurisdiction.”

Transcript of hearing on jurisdiction, April 21, 2009, p. 4. As a religious ministry, Daniel Chapter One meets the criteria set out in the Internal Revenue Code for a non profit

¹ Statement of William C. Macleod, Director of the Bureau of Consumer Protection, Federal Trade Commission, before the U.S. House of Representatives Committee on Energy and Commerce; Subcommittee on Transportation and Hazardous Materials; Hearing on Deceptive Fundraising by Charities. <http://www.freespeechcoalition.org/macleod.htm> The testimony is undated. Mr. Macleod served as Bureau Director from 1986 to 1990.

organization subject to the exception in section 508. It is this entity that the administrative law judge has determined falls under the jurisdiction of the FTC.

Respondents seek designation of an interlocutory appeal of this ruling. This ruling attempts to address, and in this case answer, the question left open by the U.S. Supreme Court in *California Dental Association v. FTC*² as to where to draw the line between a non profit organization that the FTC is precluded from having jurisdiction over and a non profit organization that the FTC does have jurisdiction over.

This question is highly controversial. As the ALJ indicated, we needed to consider this question with an evidentiary hearing because the Supreme Court did not draw a line making the distinction. Respondents argue that their interlocutory appeal should be granted because the Commission should be given an immediate chance to determine whether it desires to assert FTC jurisdiction over an entity about which there is no finding that it is not a bona fide religious organization. Respondents assert that the FTC has no authority under the First Amendment to the U.S. Constitution to exercise jurisdiction over a bona fide religious organization.

ARGUMENT

The U.S. Supreme Court spelled out the standard by which it determined FTC jurisdiction for regulation of a non profit organization in the case of *California Dental Association v. FTC* as follows:

The FTC Act gives the Commission authority over “persons, partnerships, or corporations,” 15 U.S.C. § 45(a)(2), and defines “corporation” to include “any company ... or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members,” §44. Although the Circuits have not agreed on the precise extent of this definition, see n. 4, *supra*, the Commission has long held that some circumstances give it

² 526 U.S. 756 (1999)

jurisdiction over an entity that seeks no profit for itself. While the Commission has claimed to have jurisdiction over a nonprofit entity if a substantial part of its total activities provide pecuniary benefits to its members, see *In re American Medical Assn.*, 94 F. T. C. 701, 983—984 (1980), respondent now advances the slightly different formulation that the Commission has jurisdiction “over anticompetitive practices by nonprofit associations whose activities provid[e] substantial economic benefits to their for-profit members’ businesses.” Brief for Respondent at 20. *California Dental Association v. FTC* (97-1625) 526 U.S. 756 (1999) 128 F.3d 720.

The standard used by the court in *California Dental Association* is that the Commission has jurisdiction over “...nonprofit associations whose activities provid[e] substantial economic benefits to their for-profit members’ businesses.” Brief for Respondent at 20. The ALJ in this case has not yet provided a written opinion setting forth the findings of fact and conclusions of law that support his determination that the FTC does have jurisdiction over a non profit religious organization, but it will presumably address the standard set out in the *California Dental Association* case.

As the ALJ stated during the hearing, the Supreme Court has not yet drawn a line indicating the dividing point between non profit organizations over which the FTC has jurisdiction and those over which it does not. The ALJ’s ruling in this instance draws such a line to include an organization that is a non profit religious ministry. In the testimony before Congress on non-profit jurisdiction Director Macleod stated, “The Commission in the past has taken enforcement action against entities whose non-profit status appeared to be a sham.” “Sham” appears to be part of the definition of the line that the FTC has announced to the public over which a non profit steps at the peril of falling under the jurisdiction of the FTC. There has been no finding that Daniel Chapter One is a sham.

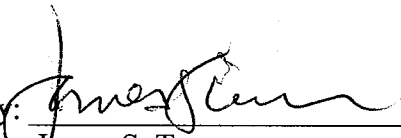
This determination is a major step taken by the ALJ on behalf of the Commission to expand its jurisdiction beyond, in Respondents’ view, Constitutionally permitted

limits. It is crucial that the Commission have the opportunity to decide on this matter immediately, because of its profound implications. For this reason, Respondents respectfully request that the ALJ certify the question of FTC jurisdiction over Respondents to the Commission for an interlocutory finding on jurisdiction in this matter.

Respectfully Submitted,

Dated: April 23, 2009

SWANKIN & TURNER

By: 
James S. Turner
1400 16th Street, NW, Suite 101
Washington, DC 20036
Attorneys for Respondents

CERTIFICATE OF SERVICE

I certify that on April 23, 2009, I filed, served or caused to be filed or served, the following documents on the individuals listed below by electronic mail, and hand delivery, as indicated:

- Respondents' Motion for an Order of Determination Pursuant to Rule 3.23(b)
- [Proposed] Order Granting Respondents' Motion for an Order of Determination Pursuant to Rule 3.23(b)

The original and one paper copy by hand and one electronic copy via email to:

Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Room H-135
Washington, DC 20580
Email: secretary@ftc.gov

Four paper copies via Federal Express and one electronic copy to each to:

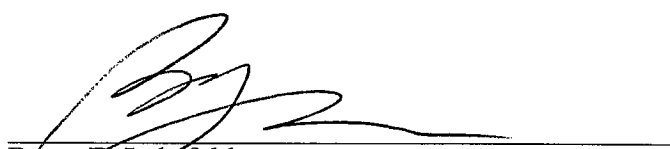
Leonard L. Gordon, Esq. (lgordon@ftc.gov)
Theodore Zang, Jr., Esq. (tzang@ftc.gov)
Carole A. Paynter, Esq. (cpaynter@ftc.gov)
David W. Dulabon, Esq. (ddulabon@ftc.gov)
Federal Trade Commission – Northeast Region
One Bowling Green, Suite 318
New York, NY 10004

One electronic copy to:

Elizabeth Nach, Esq. (enach@ftc.gov)
William Efron (wefron@ftc.gov)

Two paper copies by hand and one electronic copy to:

Hon. D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Avenue, NW, Room H-106
Washington, DC 20580
Email: oalj@ftc.gov



Betsy E. Lehrfeld
Swankin & Turner
1400 16th Street, NW, Suite 101
Washington, DC 20036