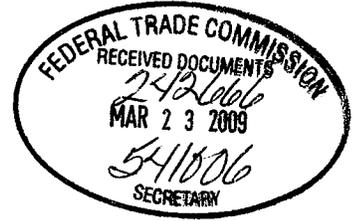


ORIGINAL



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

\_\_\_\_\_  
In the Matter of )  
 )  
 )  
DANIEL CHAPTER ONE, )  
a corporation, and )  
 )  
JAMES FEIJO, )  
individually, and as an officer of )  
Daniel Chapter One )  
 )  
 )  
\_\_\_\_\_ )

Docket No. 9329

Public Document

**COMPLAINT COUNSEL’S MEMORANDUM IN OPPOSITION  
TO RESPONDENTS’ MOTION TO ALLOW ADDITIONAL WITNESSES DURING  
RESPONDENTS’ CASE-IN-CHIEF**

Complaint Counsel oppose Respondents’ Motion to Allow Additional Witnesses During Respondents’ Case-in-Chief (the “Motion”), which for the reasons set forth below, should be denied.

**I. INTRODUCTION**

Respondents have once again failed to abide by this Court’s Scheduling Order. Respondents now seek to call witnesses at trial that they failed to identify in a timely fashion. Respondents have failed to offer good cause for their delay. Moreover, Respondents seek to elicit testimony from these two witnesses (Lynne Colbert and Richard Cleland) concerning the FTC’s pre-Complaint investigation in this matter. Such testimony is irrelevant, and the irrelevant nature of the testimony to be elicited from these witnesses further dictates that the Motion be denied.

## II. ARGUMENT

This Court's Scheduling Order clearly sets forth the procedure for designating witnesses.

Additional Provision 14 states:

The revised and final witness lists shall represent counsels' good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief. Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order. The final proposed witness list may not include additional witnesses not listed in the preliminary or revised preliminary witness lists previously exchanged unless by order of the Administrative Law Judge upon a showing of good cause.

Respondents' preliminary witness list was due on December 2, 2008. Respondents' revised witness list was due on January 13, 2009. Respondents deposed Richard Cleland and Lynne Colbert on January 22, 2009. Now, two months later, Respondents seek to add these two FTC employees to the witness list. Respondents fail to offer good cause for the extensive delay. Indeed, Respondents admit in their Motion papers that Complaint Counsel "provided the name of witness Lynn[e] J. Colbert on or before January 12, 2009." Motion at p. 2.

Respondents' maintain that it took them time to review and consider the deposition testimony. Motion at p. 2. Respondents, however, quoted extensively from both of these depositions in their Summary Decision papers filed on February 24. See Respondents' Motion for Summary Decision and Memorandum in Support at pp. 17-20.

Respondents have failed to offer good cause to add the additional witnesses, and the Motion should be denied.

Moreover, the Respondents seek to elicit testimony from Ms. Colbert and Mr. Cleland that is irrelevant, providing an additional basis for denying the Motion. According to Respondents' Proposed Final Witness List (attached to Respondents' Motion as Ex. 2), Respondents will call Mr. Cleland and Ms. Colbert to testify "[w]ith regard to the FTC activities

that identified Daniel Chapter One as the focus of FTC actions. . .” Respondents’ Proposed Final Witness List at 5. The Respondents describe Mr. Cleland’s proposed testimony as: “We anticipate that Mr. Cleland to [sic] testify to the details of the process by which the FTC organized its case against Respondents.” *Id.* at 5. Respondents’ describe Ms. Colbert’s proposed testimony as: “We anticipate that Ms. Colbert will testify about the organization, conduct and review of the FTC cancer cure internet ‘surf’ that provided the basis for the allegations made against Daniel Chapter One.” Respondents’ Final Proposed Witness List at 5.

Evidence of Complaint Counsel’s pre-Complaint investigation is irrelevant. As the Commission has noted: “Once the Commission has . . . issued a complaint, the issue to be litigated is not the adequacy of the Commission’s pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred.” *In re Exxon Corp.*, 83 F.T.C. 1759, 1760 (1974) (order denying respondents’ motion for reconsideration of Commission’s prior denial of respondents’ motions to dismiss complaint). *See also In the Matter of Basic Research, LLC*, Docket No. 9318 at 8 (Jan. 10, 2006) (granting complaint counsel’s motion *in limine* to the extent respondents sought to introduce evidence on complaint counsel’s pre-Complaint protocol and the reasonable basis for issuing the Complaint, and holding: “The pre-Complaint investigations are clearly irrelevant to the present matters before the Court.”). The witnesses that Respondents seek to add have been offered only to testify to matters that are irrelevant. As a result, the motion to amend the witness list should be denied.

**III. CONCLUSION**

For the reasons set forth above, Complaint Counsel respectfully request that the Administrative Law Judge deny Respondents' Motion to Allow Additional Witnesses During Respondents' Case-In-Chief.

Respectfully submitted,



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

Dated: March 20, 2009

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

\_\_\_\_\_  
**In the Matter of** )  
 )  
**DANIEL CHAPTER ONE,** )  
**a corporation, and** )  
 )  
**JAMES FEIJO,** )  
**individually, and as an officer of** )  
**Daniel Chapter One** )  
\_\_\_\_\_)

**Docket No. 9329**  
**Public Document**

**[Proposed] ORDER DENYING RESPONDENTS' MOTION TO ALLOW ADDITIONAL  
WITNESSES DURING RESPONDENTS' CASE-IN-CHIEF**

On March 10, 2009, Respondents filed a Motion To Allow Additional Witnesses During Respondents' Case-In-Chief. Complaint Counsel filed their Opposition to Respondents' Motion on March 20, 2009.

IT IS HEREBY ORDERED that Respondents' Motion To Allow Additional Witnesses During Respondents' Cae-In-Chief is DENIED.

ORDERED:

\_\_\_\_\_  
D. Michael Chappell  
Administrative Law Judge

Dated:

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on March 20, 2009, I have filed and served the attached **COMPLAINT COUNSEL'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO ALLOW ADDITIONAL WITNESSES DURING RESPONDENTS' CASE-IN-CHIEF and [Proposed] ORDER DENYING RESPONDENTS' MOTION** 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](mailto:secretary@ftc.gov)

Two paper copies via overnight delivery to:

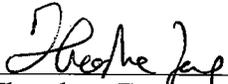
The Honorable D. Michael Chappell  
Administrative Law Judge  
600 Pennsylvania Ave., N.W., Room H-528  
Washington, DC 20580

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

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1400 16<sup>th</sup> St., N.W., Suite 101  
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\_\_\_\_\_  
Theodore Zang  
Complaint Counsel