

IN THE UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

Commissioners: Jon Leibowitz, Chairman  
Pamela Jones Harbour  
William E. Kovacic  
J. Thomas Rosch



\_\_\_\_\_  
In the Matter of )  
DANIEL CHAPTER ONE, )  
a corporation, and )

DOCKET NO. 9329

JAMES FEIJO, )  
Individually, and as an officer of )  
Daniel Chapter One. )  
\_\_\_\_\_ )

PUBLIC DOCUMENT

**RESPONDENTS' APPEAL BRIEF**

Respondents Daniel Chapter One, a corporation, and James Feijo, individually and as an officer of Daniel Chapter One, hereby submit the following Appeal Brief in the above-captioned action.

Dated: September 18, 2009

Respectfully Submitted,

Handwritten signature of Michael McCormack in cursive.

Michael McCormack  
26828 Maple Valley Hwy, Suite 242  
Maple Valley, WA 98038  
Phone: 425-785-9446

Handwritten signature of James S. Turner in cursive.

James S. Turner  
Swankin & Turner  
1400 16<sup>th</sup> Street NW, Suite 101  
Washington, DC 20036  
Phone: 202-462-8800  
Fax: 202-265-6564

Of Counsel:

Herbert W. Titus  
William J. Olson  
John S. Miles  
Jeremiah L. Morgan  
William J. Olson, P.C.  
370 Maple Ave West, Suite 4  
Vienna, VA 22180-5615  
Phone: 703-356-5070  
Fax: 703-356-5085

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## STATEMENT OF THE CASE

### A. STATEMENT OF RELEVANT FACTS

The Federal Trade Commission ("FTC") issued the Complaint in this matter on September 16, 2008 against Daniel Chapter One ("DCO") and James Feijo ("Respondents"). The Complaint alleged that Respondents engaged in deceptive acts or practices in connection with the advertising, promotion, offering for sale, sale, and distribution of four products: BioShark, 7 Herb Formula, GDU, and BioMixx (collectively, the "Challenged Products"). The Complaint also alleged that Respondents operated linked web pages on the website, [www.danielchapterone.com](http://www.danielchapterone.com), through which they advertised and sold the Challenged Products.

The Complaint alleged that the Challenged Products are advertised to prevent, treat, or cure cancer or tumors, and specifically charged that the advertisements represent, expressly or impliedly, that:

- Bio\*Shark inhibits tumor growth;
- Bio\*Shark is effective in the treatment of cancer;
- 7 Herb Formula is effective in the treatment or cure of cancer;
- 7 Herb Formula inhibits tumor formation;
- GDU eliminates tumors;
- GDU is effective in the treatment of cancer;
- BioMixx is effective in the treatment of cancer; and
- BioMixx heals the destructive effects of radiation and chemotherapy.

The Complaint further alleged that Respondents represented, either expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the claims made, but that Respondents did not, in fact, possess and rely upon such reasonable basis. The Complaint charged Respondents with unfair or deceptive acts or practices, in or affecting commerce, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act ("FTC Act").

In their Answer, Respondents admitted that they operate a website that provides information on the Challenged Products in a religious and educational context, but otherwise denied allegations that they engaged in deceptive acts or practices in connection with the advertising or sale of the Challenged Products. Respondents averred that they did possess and rely upon a reasonable basis that substantiated the representations made about the Challenged Products at the time the representations were made. Respondents further asserted, and the record reflects, that Respondents did not expressly make any of the foregoing claims.

At the hearing before the Administrative Law Judge, Complaint Counsel provided one expert witness, Dr. Denis Miller, a research oncologist, who testified concerning the standard for chemotherapeutic agents used in the treatment of cancer. Respondents offered five, and were permitted two, expert witnesses, Dr. James Duke, a widely known ethnobotanist formerly with the U.S. Department of Agriculture, and Dr. Sally Lamont, a licensed naturopathic doctor, both of whom testified that in their opinions the statements made by Respondents on their website and in their materials were supported by competent and reliable scientific evidence concerning herbal dietary supplements. Respondent James Feijo and Patricia Feijo, his wife, testified that for over 26 years Daniel Chapter One had operated as a religious ministry and was organized as a religious corporation sole under the laws of Washington State. They further testified that James Feijo, as Overseer of Daniel Chapter One, held all assets in trust for its religious purposes, and that they took no salary.

## **B. SUMMARY OF THE ARGUMENT**

In this brief Respondents argue that the FTC lacks jurisdiction over them on the grounds that Respondents are a religious ministry organized and operated for charitable purposes.

Respondents also argue that the Initial Decision violates the FTC Act and their right to due process of law by shifting the burden of proof from Complaint Counsel to Respondents, that their speech is protected by the First Amendment to the U.S. Constitution, that Complaint Counsel has the burden of proving that the information provided by Respondents is misleading and that its suppression is necessary to achieve a substantial government interest, and that Complaint Counsel failed to do so.

Respondents also argue that the Administrative Law Judge (ALJ) improperly regulated their conduct by adjudication, that the Challenged Products are not drugs as found by the ALJ, that Respondents' claims were permitted structure/function claims for dietary supplements and that an incorrect standard was applied to those claims.

Finally, Respondents argue that adoption of the proposed order contained would violate their constitutional and statutory rights.

#### **STATEMENT OF THE QUESTIONS PRESENTED**

1. Should the Initial Decision of the Administrative Law Judge finding that the Federal Trade Commission has jurisdiction over respondents Daniel Chapter One, a non profit religious organization, and its single member and overseer James Feijo, be rejected as mistaken?
2. Did the Initial Decision of the Administrative Law Judge violate the FTC Act, the Due Process Clause and/or the First Amendment to the U.S. Constitution by:
  - (a) improperly shifting the burden of proof to Respondents on certain key Constitutional and statutory elements, including but not limited to (i) the governmental burdens associated with Free Speech under *Central Hudson*; (ii) the elements of allegedly

deceptive and misleading speech; and (iii) the required perceptions of consumers allegedly misled or harmed by Respondents' speech?

(b) permitting "evidence by presumption"?

(c) applying the incorrect standard of proof, to substantive elements of their charges against Respondents, including but not limited to the elements of alleged violations under 15 U.S.C. §§45 and 52?

(d) attempting to exercise FTC jurisdiction over Respondent Daniel Chapter One despite an express finding by the Administrative Law Judge that Respondent Daniel Chapter One is a religious organization?

(e) its overbroad ban on truthful statements about dietary supplements?

(f) engaging in illegal rule-making by adjudication, in that the Administrative Law Judge substituted his own presumptions for the evidence required for an "overall net impression" case?

(g) failing to consider the element of "intent" and arbitrarily rejecting Respondents' evidence while permitting presumptions to substitute for the evidence the statute requires Complaint Counsel to produce?

(h) improperly requiring double-blind, placebo-based clinical trials as the only acceptable substantiation for structure-function claims authorized by the Dietary Supplement Health and Education Act (DSHEA)?

(i) improperly accepting Complaint Counsel's testifying oncologist as an expert witness regarding the express structure/function claims authorized by DSHEA, despite that oncologist's admission that he did not know what a structure/function claim was?

(j) improperly rejecting Respondents' experts' bona fide qualifications to address structure/function claims?

(k) prohibiting truthful, authorized structure/function claims under the guise of an "overall net impression" analysis?

## ARGUMENT

### I. INTRODUCTION

#### A. Overview: Policy Considerations

The twelve years from 1969 to 1981 were tumultuous ones for the United States and for the FTC. During a period that included the presidential terms of Richard Nixon, Gerald Ford and Jimmy Carter, and the FTC Chairmanships from Paul Rand Dixon to Michael Pertschuk, both nation and agency went through major upheavals. The nation's trials and triumphs of the period are generally recalled. The agency's are not so well remembered.

For the agency, the period began with the 1969 Nader Report on the FTC, reinforced by an American Bar Association report requested by President Nixon, which brought it from obscurity to front page prominence. The period closed for the agency with near loss of its budget in 1980 for becoming seen, as the Washington Post editorialized, as the "nation's nanny." The Nader/ABA analysis found the FTC to be strikingly out of touch with the American Public.

#### 1. FTC and the National Health Debate: Rodale Press

Part of the FTC's disorientation came from its effort to control the national health care discussion between buyers and sellers. In its 1967 Rodale Press, Inc. decision, 71 FTC 1184, overturned by a court the next year, the agency attempted, using a legal stratagem to get around the First Amendment, to assert authority over advertising of a book of health recommendations which it found to be unorthodox and therefore false or misleading. Concurring Commissioner

