UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. DANIEL CHAPTER ONE and JAMES FEIJO, Defendants.	Case No. 1:10CV01362 EGS

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ORDER FOR EQUITABLE MONETARY RELIEF, CIVIL PENALTIES, AND INJUNCTIVE RELIEF

This Court found that Daniel Chapter One and James Feijo ("Defendants") ignored an Order issued by the Federal Trade Commission ("FTC") and repeatedly violated that Order for over two years. The Court determined that the United States was entitled to summary judgment on liability (Doc #58), and the United States now asks that the Court enter a final order that includes injunctive relief, equitable monetary relief in the amount of $1,347,237.33, and a civil penalty award of $3,528,000. A Proposed Order is attached for the Court's consideration.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant Daniel Chapter One is incorporated as a "corporation sole" under the laws of the State of Washington. Its principal place of business is in Portsmouth, Rhode Island. Defendant James Feijo is the sole member and overseer of Daniel Chapter One. Daniel Chapter One advertises and sells a variety of products, including dietary supplements. Defendants made unsubstantiated claims that some of the dietary supplements they sell are effective in treating or

curing cancer: BioShark, 7 Herb Formula, GDU, Endo24, and BioMixx (collectively, "the Products").

As a result of Defendants' unsubstantiated claims, the FTC brought an administrative proceeding alleging that Defendants' marketing of the Products violated the Federal Trade Commission Act ("FTC Act"). In the proceeding before the Commission, Defendants were charged with violating Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.[1] Following trial, an Administrative Law Judge concluded that Defendants violated the FTC Act by making unsubstantiated claims that the Products prevented, treated, or cured tumors or cancer. Defendants appealed this decision to the Commission.[2] On December 24, 2009, the Commission upheld the decision and issued a Final Order to cease and desist certain practices. On January 25, 2010, the Commission issued a Modified Final Order ("FTC Order"),[3] which made non-substantive modifications to clarify required time periods in the Final Order. The FTC Order was served on Defendants and their attorneys on January 29, January 30, and February 1, 2010. Pursuant to Section 5(g) of the FTC Act, 15 U.S.C. § 45(g), the FTC Order became effective on April 2, 2010.

The FTC Order imposed several requirements upon Defendants. Part II of the FTC Order prohibited Defendants from representing that the Products or any other products prevent, treat, or cure any type of tumor or cancer, without possessing and relying upon competent and reliable

[1] Section 5(a) of the FTC Act prohibits engaging in "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce[.]" 15 U.S.C. § 45(a)(1). Section 12 provides that "[t]he dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of [Section 5.]" 15 U.S.C. § 52(b).
[2] FTC Docket No. 9329, http://www.ftc.gov/os/adjpro/d9329/index.shtm.
[3] The Modified Final Order is attached as Exhibit A.

scientific evidence that substantiates the representation. Part V.B of the FTC Order required Defendants to send a letter to past purchasers of the Products informing them of the Commission's conclusion that Defendants' advertising claims were deceptive because they lacked substantiation. The FTC Order required that this notice be sent on or before May 17, 2010.

Defendants appealed the FTC Order to the United States Court of Appeals for the District of Columbia Circuit.[4] Defendants refused to comply with the terms of the FTC Order while their appeal was pending, and they filed a motion with the FTC asking that the FTC Order be stayed pending the outcome of their appeal. That motion was denied. Defendants then filed an emergency motion with the D.C. Circuit Court, asking that the Circuit Court stay the FTC Order pending review. The Circuit Court denied this emergency motion.

This action was filed on August 13, 2010. While Defendants' appeal was still pending, the United States sought to prevent Defendants' continued violation of the FTC Order, and filed a motion for a preliminary injunction. (Doc. #3). This Court denied that motion, and stayed this action. (Doc. #11). The Federal Trade Commission then sought an Order of Enforcement Pendente Lite from the Court of Appeals, to enforce the FTC Order while the appellate proceedings were ongoing. The Court of Appeals granted this request in a *per curiam* order on November 22, 2010, stating that "Daniel Chapter One is hereby enjoined to obey forthwith the modified final order of the Federal Trade Commission issued January 25, 2010[.]"[5] Defendants then filed a motion asking the Court of Appeals to stay the enforcement of the section of the FTC

[4] United States Court of Appeals for the District of Columbia Circuit, Case No. 10-1064.
[5] The D.C. Circuit Court's Order is attached as Exhibit B.

Order requiring them to send the letter to their customers. The Court of Appeals rejected this request on December 7, 2010.[6]

Subsequently, the Court of Appeals denied Defendants' appeal. Defendants' request for a rehearing *en banc* was denied, and the Court of Appeals issued the Mandate on February 28, 2011. This matter was unstayed after the appellate proceedings concluded, and the United States sought a preliminary injunction to enjoin Defendants' ongoing violations of the FTC Order. (Doc. #16). The motion was granted on June 22, 2011. (Doc. #31).

Defendants continued to refuse to comply with the terms of the FTC Order while the proceedings detailed above were ongoing. The Court held Defendants in civil contempt on May 9, 2012, for their refusal to comply with the Court's Preliminary Injunction. (Doc. #50). From April 2, 2010, when the FTC Order went into effect, through May 24, 2012, when the Court found that Defendants had finally ceased their contempt, Defendants violated Part II or Part V.B of the FTC Order.[7]

On September 24, 2012, the Court granted the United States' Motion for Summary Judgment on Liability against Defendants for promoting the Products in violation of the FTC's Order. (Doc. #58 & 59). The United States then took discovery regarding Defendants' ability to pay, and now files this motion asking that the Court enter a final order that includes injunctive relief, equitable monetary relief in the amount of $1,347,237.33, and a civil penalty award of $3,528,000.

[6] The D.C. Circuit Court's denial of the Motion for Partial Stay is attached as Exhibit C.
[7] The Court found that Defendants had taken sufficient action to comply with the FTC Order in a Minute Order issued on May 24, 2012.

II. DISCUSSION

A. Injunctive Relief is Necessary to Protect Consumers

The FTC Order's purpose was to protect the public from Defendants' deceptive claims and from the health risk posed by its products. It attempted to accomplish this goal by prohibiting Defendants from making false and unsubstantiated representations and by requiring Defendants to provide a corrective notice to their customers. Defendants' non-compliance with the FTC Order and their continued victimization of consumers show that the Court should impose permanent injunctive relief that includes additional restrictions and requirements.

Specifically, in order to protect consumers, there is an overwhelming need to: (1) broaden coverage of the FTC Order provisions to ban the Defendants from selling any dietary supplement and from marketing any product or service with disease claims; and (2) enhance the compliance monitoring provisions to help the FTC guard against order violations in the future. Injunctive relief is authorized under 15 U.S.C. § 45(l). The statute specifies that "United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission." 15 U.S.C. § 45(l).

Defendants' pervasive and flagrant order violations evidence that the FTC Order did not achieve its purpose of protecting the public and demonstrate that they likely will repeat their fraudulent activities and victimize consumers unless their practices are more significantly curtailed.[8] The injunctive relief sought by the United States is necessary because of Defendants'

[8] The injunctive relief requested under 15 U.S.C. § 45(l), however, it would also be appropriate under Fed. R. Civ. P. 60(b), as it is analogous to a motion to modify final orders. *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932); *Reynolds v. McInnes*, 338 F.3d 1221, 1226 (11th Cir. 2003); *Jacksonville Branch, NAACP v. Duval Co. School Bd.*, 978 F.2d 1574, 1582 (11th Cir.

demonstrated recidivism. By creating simple, bright line tests to address the Defendants' future order compliance and tying it to stricter compliance-monitoring provisions, the modifications better serve the FTC Order's purpose of protecting consumers from Defendants' deceptive advertising tactics.

1. Defendants Should be Banned from Selling any Dietary Supplement and Making Disease Claims

Modifying the FTC Order to ban Defendants from selling any dietary supplement and from making disease claims is reasonable and suitably tailored to curtail future law violations. Defendants' pattern of deceiving consumers in complete disregard of orders from the FTC, this Court, and the U.S. Court of Appeals for the District of Columbia, raises serious concerns that they would inflict further injury on consumers in the future without these bans.

Courts have banned defendants from engaging in broad categories of conduct, both in the first instance, as part of initial permanent injunctions, and in modified injunctions. Numerous courts have banned defendants from broad marketing practices, such as telemarketing,[9] from engaging in particular lines of business,[10] and from selling certain types of products, such as

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1992); *Newman v. Graddick*, 740 F.2d 1513, 1520 (11th Cir. 1984). Rule 60(b)(5) provides in relevant part that, upon motion and such terms as are just, a party may seek relief from a final judgment or order when "applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). Defendants' non-compliance with the FTC Order and their continued victimization of consumers show that applying the FTC Order prospectively without modification would not be equitable.

[9] *See, e.g.*, *FTC v. Vocational Guides, Inc.*, No. 3:01-0170, 2009 WL 943486 (M.D. Tenn. Apr. 6, 2009) (district court modified final judgment to permanently ban defendant from participating in telemarketing); *FTC v. Five-Star Auto Club*, 97 F. Supp. 2d 502, 536 (S.D.N.Y. 2000) (ban on multi-level marketing); *FTC v. Pub. Clearinghouse, Inc.*, No. CV-S-94-623, 1995 WL 367901, *4 (D. Nev. May 12, 1995) (ban on participating in any manner in any telephone premium promotion).

[10] *See, e.g.*, *FTC v. Gill*, 265 F.3d 944, 957-58 (9th Cir. 2001) (ban on engaging in the credit repair business); *FTC v. Dinamica Financiera LLC*, CV-09-03554, 2010 WL 9488821, *12-13

dietary supplements.[11] Thus, this Court clearly has the authority to impose bans on Defendants to curtail their deceptive practices.

Defendants' conduct supports the requested bans. Defendants have made widely-disseminated efficacy claims for a multitude of products belonging to various product categories without possessing competent and reliable scientific evidence to substantiate those representations. Defendants' dietary supplement marketing involves deliberate, deceptive strategies that are easily adaptable or transferable to other products, and evidence in this case shows that in addition to their claims that the Products cure cancer, they also make health-related representations about their other products. Indeed, Defendants' overarching marketing strategy

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(C.D. Cal. Aug. 19, 2010) (ban on mortgage loan modification and foreclosure relief services); *FTC v. Cruz*, No. 08-1877, 2008 WL 5277735, *3 (D. PR. 2009) (ban on marketing any business venture, employment opportunity, investment opportunity, or work-at-home opportunity); *FTC v. Assail Inc.*, Civ. No. W03CA007 (W.D. Tex. Dec. 5, 2008) (ban on sale of home mortgage or home mortgage refinance-related services); *FTC v. Neiswonger*, 494 F. Supp. 2d 1067, 1084 (E.D. Mo. 2007) (ban on selling business opportunity programs, including telemarketing such programs); *FTC v. Int'l Prod. Design, Inc.*, No. 1:97-cv-01114-AVB (E.D. Va. Jul 12, 2007) (ban on participating in invention promotion services); *FTC v. Check Enforcement*, No. 03-2115, 2005 WL 1677480 (D.N.J. July 18, 2005) (ban on debt collection activities); *FTC v. Bay Area Bus. Council, Inc.*, No. 02 C 5762, 2004 WL 769388 (N.D. Ill. Apr. 9, 2004) (ban on telemarketing in US and on sale of credit-related products); *FTC v. Credit Enhancement Servs.*, CV-02-2134, (E.D.N.Y. Mar.31, 2004) (ban on marketing or selling any advance fee credit card or any other credit-related goods or services); *FTC v. Consumer Alliance*, No. 02 C 2429, 2003 WL 22287364 (N.D. Ill. Sept. 29, 2003) (ban on all telemarketing in United States and ban on sale of credit card protection and sale of credit-related products).

[11] *FTC v. Xacta 3000, Inc.*, No. 09-CV-0399 (D. N.J. Oct. 27, 2010) (stipulated ban on selling any dietary supplement, food, drug, or device); *FTC v. Transdermal Prods. Mktg. Corp.*, 04cv5794 (E.D. Pa. Jul. 24, 2007) (stipulated ban on selling any transdermal product for the purpose of losing or controlling weight); *FTC v. Enforma Natural Prods.*, 2:00-cv-04376-SVW-CW (C.D. Cal. Jan. 12, 2005) (stipulated ban from advertising or marketing weight loss products except exercise programs or equipment); *FTC v. Braswell*, 2005 U.S. Dist. LEXIS 39245, at *9-10 (C.D. Cal. Dec. 28, 2005) (ban, subject to various exceptions, on the direct response marketing of any food, dietary supplement, or drug, for which a health benefit is claimed directly or by implication); *FTC v. No. 1025798 ONTARIO, INC.*, 03-1:03-cv-00910-RJA-HBS (W.D.N.Y. Oct. 18, 2005)(stipulated ban on selling any dietary supplement, food, drug, or weight loss product).

is to make outrageous, unsubstantiated efficacy claims. As a result, Defendants are likely to continue their deceptive practices unless banned. *See Telebrands Corp. v. FTC*, 457 F.3d 354, 358 (4th Cir. 2006); *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392 (9th Cir. 1982).

Defendants have engaged in serious, deliberate, and transferable deceptive practices that support easily enforceable, bright-line bans from both selling dietary supplements and making disease claims. Even after being enjoined by this Court, Defendants showed that they cannot be trusted to market lawfully. Defendants have been given multiple "bites at the apple," and have demonstrated that they are unable to abide by the requirements imposed upon them. As a result, it is now necessary and appropriate to prohibit the Defendants from selling any dietary supplement and from making disease claims to ensure that they will not continue to harm consumers.

2. Injunctive Relief Should be Entered to Enhance the Government's Compliance Monitoring Authority

Lastly, the proposed Modified Final Judgment includes revised compliance monitoring provisions. The revised provisions, which are routinely included in many federal court orders in FTC cases, update and supplement provisions in the FTC Order. The requested modifications would require Defendants to: (a) dispose of customer information; (b) acknowledge receipt of the final order in this case and distribute it to certain company representatives; (c) provide a written report on their business activities and periodic updates such as change of address notifications; (d) maintain specified records in future businesses; and (e) produce information to the Commission upon request about their compliance.

Stringent compliance monitoring provisions are appropriate to ensure Defendants' compliance in the future. *Neiswonger*, 494 F. Supp. 2d at 1084 (adopting enhanced compliance monitoring provisions in response to FTC defendant's order violations); *see also Think*

Achievement Corp., 144 F. Supp. 2d at 1018; *FTC v. U.S. Sales Corp.*, 785 F. Supp. 737, 753 (N.D. Ill. 1992); *FTC v. Sharp*, 782 F. Supp. 1445, 1456-57 (D. Nev. 1991). The requested provisions will provide an oversight mechanism to better ensure that Defendants do not engage in future recidivism.

B. Equitable Monetary Relief is Appropriate in this Case

This action was brought pursuant to Section 5(l), 13(b), and 16(a) of the FTC Act, codified at 15 U.S.C. §§ 45(l), 53(b), and 56(a). As was noted by Judge Howell in 2011, "Every court that has considered the issue this far appears to have ruled that Section 13(b) *does* entitle the FTC to seek equitable monetary relief, including courts in this district and multiple Courts of Appeals." *FTC v. Cantkier*, 767 F. Supp. 2d 147, 160 (D.D.C. 2011) (emphasis in original) (*citing FTC v. Mylan Labs, Inc.* 62 F. Supp. 2d 25, 37 (D.D.C. 1999); *FTC v. Gem Merch.*, 87 F.3d 466, 470 (11th Cir. 1996); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989); *FTC v. Swish Marketing*, No. C 09-03814 RS, 2010 WL 653486, at *6-10 (N.D. Cal. Feb. 22, 2010)).

Equitable monetary relief is calculated using a "two-step burden-shifting framework . . . [that] requires a court to look first to the FTC to 'show that its calculations reasonably approximated the amount of the defendant[s'] unjust gains' and then shift the burden 'to the defendants to show that those figures were inaccurate.'" *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 364 (2d Cir. 2011) (*quoting FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006)). Pursuant to a discovery request served by the Government, Defendants provided their sales records for BioShark, 7 Herb Formula, GDU, Endo24, and BioMixx. Between April 2, 2010,

when the FTC's Order went into effect, and May 24, 2012, when Defendants stopped violating the order, consumers spent the following on the Products:

- 7 Herb Formula: $485,935.92
- Endo24: $265,095.50
- BioShark: $50,208.70
- GDU: $338,376.41
- 1st Kings 17:6: $206,215.90[12]

As a result, Defendants received $1,345,832.43 as a result of their unsubstantiated representations and refusal to comply with the FTC Order. The United States requests that equitable monetary relief in the amount of $1,345,832.43 be awarded in this case.

C. Defendants Should be Ordered to Pay a Civil Penalty of $3,528,000

1. Defendants are Subject to a Statutory Maximum of over Twelve Million Dollars in Civil Penalties

Under the FTC Act, the Court is authorized to impose civil penalties upon "[a]ny person, partnership or corporation who violates an order of the Commission[.]" 15 U.S.C. § 45(l). The statute originally provided for "a civil penalty of not more than $10,000 for each violation," however, that sum was modified pursuant to the Federal Civil Penalties Inflation Adjustment Act, and is now $16,000 per violation. 15 U.S.C. § 45(l); 28 U.S.C. § 2461; 16 C.F.R. § 1.98(d).

The statute provides that "[e]ach separate violation of such an order shall be a separate offense[.]" 15 U.S.C. § 45(l). Here, Defendants were in violation of the FTC Order from April 2, 2010, when the FTC's Order went into effect, to May 24, 2012, when Defendants came into

[12] Defendants' sales records contain personally identifying information, and the Government can file documentation supporting these sums under seal if requested to do so by the Court.

compliance with the order. During each of these 784 days, Defendants committed multiple violations of the FTC Order. They promoted the Products as cancer treatments in multiple locations, including placing misrepresentations on several websites under their control and on online forums. Defendants told customers the Products treat and cure cancer on their radio show, and would then post the shows online so that others could access the information. They additionally neglected to send the required notices to their prior customers. Each individual misrepresentation is a separate violation, and every corrective notice they failed to send is a separate violation. *See, e.g., United States v. Nat'l Fin. Servs. Inc.*, 98 F.3d 131, 141 (4th Cir. 1996) (finding that each letter sent was a separate violation). This adds up to thousands of violations, and an enormous civil penalty sum.

Where the violation is a "continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense." 15 U.S.C. § 45(l). Under this theory, each day that Defendants failed to comply with the FTC Order should be deemed a separate violation. While Defendants would certainly be liable for a much higher penalty amount if the Court were to count each individual violation, the United States seeks the more conservative "continuing failure" calculation as appropriate in this instance. At the statutory maximum of $16,000 per violation, Defendants would be liable for a civil penalty up to the amount of $12,544,000 for the 784 days they failed to comply with the FTC Order.

2. The Civil Penalty Award is Determined Upon Consideration of Five Factors

While the Defendants are subject to a $12,544,000 statutory maximum civil penalty, the court should determine the appropriate civil penalty to be imposed by considering five separate factors. *See United States v. Danube Carpet Mills, Inc.*, 737 F.2d 988, 993 (11th Cir. 1984);

United States v. Reader's Digest Ass'n, 662 F.2d 955, 967 (3d Cir. 1981). Courts consider: "(1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendants' ability to pay; (4) the desire to eliminate the benefits derived by the violations; and (5) the necessity of vindicating the authority of the FTC." *Danube Carpet Mills, Inc.*, 737 F.2d at 994. As discussed in more detail below, a civil penalty award of $3,528,000, is appropriate based upon analysis of the five factors.

a. *Defendants Acted in Bad Faith*

The first factor courts consider in assessing a penalty is the good or bad faith of the defendant in violating the order. Bad faith exists where a violation is "willful and deliberate[,]" and is an important factor in assessing the appropriate penalty. *United States v. Phelps Dodge Indus.*, 589 F. Supp. 1340, 1363 (D.C.N.Y. 1984). Courts have found that "willful or reckless disregard of the law warrants a penalty 'at or near the maximum prescribed[.]'" *United States v. Mac's Muffler Shop, Inc.*, No. C85-138R, 1986 WL 15443, at *9 (N.D. Ga. Nov. 4, 1986) (*quoting United States v. J.B. Williams Co.*, 354 F.Supp. 521, 551 (S.D.N.Y. 1973)).

Here, Defendants' violations were not the result of mistake or negligence, but were willful, as they deliberately flouted the terms of the FTC Order. The FTC Order became effective on April 2, 2010, but Defendants did not make any legitimate attempt to comply with the FTC Order. Instead, they knowingly and deliberately continued to represent on websites, online forums, and their radio show that the Products would treat or cure cancer.

Defendants' own statements demonstrate that their conduct was willful and deliberate. For example, as noted in this Court's Memorandum Opinion issued on September 24, 2012,

> [D]uring a radio show broadcast on June 23, 2011, the Feijos took a call from an individual who identified himself as Curtis, and who said that his daughter had cancer. James Feijo advised Curtis to go online and read the testimonies the Daniel Chapter One website to learn more, and stated that they support "God's

> way" of treating cancer through the use of 7 Herb Formula, BioShark, and GDU. In addition, James Feijo told Curtis that "the government is trying to stop us from helping you and your daughter . . . they want to not let us tell you about 7 Herb Formula, BioShark, and GDU, that God has given us to help people around the world." Patricia Feijo added:
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> ["W]e do care about your daughter . . . **we just heard from our lawyer that a judge ruled in favor of the Trade Commission, and so, you know, basically we can be fined out of existence tonight or, or, put into prison,** and we want people to know the reality that we're sitting here, willing to risk even our lives, to serve the lord and to serve you, right, but the situation is such that I would say get the product while you can, even stock up while you can, and if one day you won't be able to get our products then just, you know, try to continue to follow pretty much what those products are, the herbs, the enzymes, because that's what we have seen work for many years.["]
>
> James Feijo then gave Curtis information on how to order the products, and directed Curtis to the healthfellowship.org website for more information. At other times during this same show, James Feijo stated that Daniel Chapter One's products, including GDU, were created and intended by God "for you, for your health and healing, as a prevention, to mitigate, to treat, to heal, to cure." Patricia Feijo told listeners that they did not share their experiences with the products had used it for a while and saw that it did indeed work, and then we began to share with people, hey, this is what works for this and that." Patricia Feijo stated that the testimonies the Feijos had received from their customers and placed on their website and in their BioGuide were a sampling of their customers' experiences and that the results in the testimonials were "very typical of what people experience." James and Patricia Feijo went on to describe how 7-Herb Formula had cured a man who had renal cancer.

See Doc. 59 (emphasis added, internal citations omitted).

Additionally, Defendants knowingly and deliberately ignored provisions in the FTC Order that required them to send a corrective notice to past purchasers. The FTC Order became final on April 2, 2010, and it required Defendants to mail a corrective notice to past purchases "[w]ithin forty-five (45) days after the final and effective date of this order." As a result, the notices should have been sent on or before May 17, 2010. This did not happen. Defendants refused to send the corrective notice, and did not send the notice until May 18, 2012, five days before the contempt hearing in this case.

Defendants' own statements make it clear that they knew what they were required to do, and that they were deliberately not complying with the FTC Order. For example, after the Court of Appeals issued its Judgment, Defendants posted the following message on their website:

> Daniel Chapter One is being tortured right now for its opinion-- its knowledge -- about healing that is different from conventional medicine. Overseeer Jim Feijo has been threatened with bankrupting fines and incarceration for refusing to sign a government agency letter saying, in essense, the earth is flat. Literally, the letter denounces what Mr. Feijo knows to be true -- that Daniel Chapter One natural products are safe and effective in helping fight cancer and there is science supporting efficacy of their various ingredients -- and states what Mr Feijo and countless others know to be FALSE: that conventional cancer treatment has been proven safe and effective.

(typographic errors in original).[13] Additionally, the introduction to the Daniel Chapter One Freedom website states that:

> They ordered that we sign a letter they wrote, a deceptive letter saying that only conventional cancer treatment has been **proven safe and effective in humans**, and send it to thousands of people.
>
> **But Daniel Chapter One cannot bear false witness...**

(emphasis in original).[14]

Here, the Defendants engaged in multiple violations over many years and their actions were both willful and deliberate. Defendants failed to demonstrate any serious intent to comply with the FTC Order during the first two years in which it was in effect, and it was not until they were facing coercive imprisonment sanctions during the civil contempt proceeding that they agreed to comply with the FTC Order. Defendants' bad faith violations of the FTC Order warrant the maximum civil penalty.

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[13] http://www.danielchapterone.com/dc1freedom/component/content/article/40-write-something/662-so-it-is-written-so-let-it-be-done. A screen shot of this page is attached as page 1 of Exhibit D.

[14] http://www.danielchapterone.com/dc1freedom/index.php. A screen shot of this page can be seen at page 2 of Exhibit D.

b. *Defendants Have Injured the Public*

Courts also consider whether the conduct injured the public. *See, e.g., Nat'l Fin. Servs.*, 98 F.3d at 140. The public harm in this case is significant and it occurred in several ways. First, consumers who purchased the Products suffered financial harm. Second, Defendants caused harm by publicizing deceptive information about their products and by failing to send the corrective notice to prior purchasers. Third, as described further below, Defendants injured the public when they instructed consumers to stop using conventional, proven treatments and instead use Defendants' products.

Injury to the public can be found when consumers have lost money due to the violative conduct. *See, e.g., United States v. Prochnow*, No. 07-10273, 2007 WL 3082139, at *4 (11th Cir. Oct. 22, 2007) ("customers [of a magazine telemarketer] were harmed by both the payments made for the magazine packages and the frustration, inconvenience, and expense involved in cancelling their subscription."). The financial harm is easily calculated in this case. As detailed in Section II(A) above, Defendants collected $1,345,832.43 from the sale of 7 Herb Formula, Endo 24, BioShark, GDU, and 1st Kings between April 2, 2010, when the FTC's Order went into effect, and May 24, 2012, when Defendants appeared to have stopped violating the FTC Order. [15]

In addition to the financial harm, injury to the public occurred whenever Defendants' deceptive and violative materials reached the public. *See Danube Carpet Mills*, 737 F.2d at 994;

[15] This sum is a conservative calculation of consumer financial harm because it only includes sales through the date Defendants ceased their order violations. Defendants' representations would also be responsible for any subsequent sales, as Defendants' customers would not purchase these products if they did not believe they provided a health benefit based on Defendants' previous representations. Defendants' sales records contain personally identifying information, and the Government can file documentation supporting these sums under seal if requested to do so by the Court.

Reader's Digest, 662 F.2d at 969. The Government does not need to introduce "evidence of consumer confusion or deception" because "(t)he principal purpose of a cease and desist order is to prevent material having a capacity to confuse or deceive from reaching the public . . . (t)hus, whether such promotional items reach the public, that in and of itself causes harm and injury." *Reader's Digest*, 662 F.2d at 969 (internal citations omitted). Here, the Defendants caused substantial public harm by using deceptive promotional information on websites, online forums, and their radio show. Defendants' representations reached the public, which is sufficient under the law to constitute injury to the public. This injury to the public was further exacerbated because Defendants refused to mail the required notice informing consumers that Defendants' advertising claims were found by the FTC to be deceptive because they were not substantiated by competent and reliable scientific evidence.

Finally, the Court can find injury to the public because of Defendants' conduct and history of preying upon vulnerable consumers. When Defendants learned that someone may have cancer, their advice was always that the person should stop conventional medical treatment and take Defendants' products instead. For example, as noted in this Court's Memorandum Opinion issued on September 24, 2012,

> During a radio show broadcast on February 22, 2011, Defendants accepted a call from a caller named Patricia, who stated that her doctor had found a mass on her breast. . . . James and Patricia Feijo instructed the caller not to get a biopsy, and Patricia Feijo stated that "if it is cancer, it can stir up the cells and can get them to spread[.]" . . . Patricia Feijo told the caller that she should take products "to treat it worst case scenario." . . . Defendants then asked someone to call in to help answer the caller's questions, and accepted a call from a caller named Greg, who said that, for "cancer . . . one thing I would add is BioShark to that." . . . Patricia Feijo confirmed this suggestion, stating, "yeah, definitely."

See Doc. 59 (internal citations omitted). This demonstrates the third way in which the public was harmed by Defendants' conduct; consumers suffered harm when they

followed Defendants' advice, stopping conventional, proven treatments to use Defendants' products.

c. *Civil Money Penalties Are Necessary to Eliminate Benefits Derived by Defendants*

Another factor courts consider in assessing a penalty is the desire to eliminate the benefits derived by the violation. *See, e.g., Nat'l Fin. Servs.*, 98 F.3d at 140. "Elimination of the benefits of noncompliance is an essential element of the penalty, so that there is no incentive to violate the law[.]" *Mac's Muffler Shop*, 1986 WL 15443, *10; *see also Reader's Digest*, 662 F.2d at 969. Here, the Defendants derived over $1,259,000 in benefits from violating the FTC Order. From April 2, 2010, when the FTC Order went into effect, to May 24, 2012 when this Court found that Defendants ceased their violative conduct, Defendants continued to sell the Products. As detailed in Section II(A) above, Defendants collected $1,345,832.43 from the sale of 7 Herb Formula, Endo 24, BioShark, GDU, and 1st Kings during that time period.[16] Defendants "should be deprived of any benefit derived from violating an FTC order." *Phelps Dodge Indus.*, 589 F. Supp. at 1365. A civil money penalty of at least $1,345,832.43 is necessary to eliminate the benefits Defendants derived from noncompliance with the FTC Order. Because a civil penalty should "be more than . . . an acceptable cost of doing business," the penalty imposed by the court must be higher than the amount the Defendants benefited. *FTC v. Onkyo U.S.A. Corp.*, #95-1378-LFO, 1995 WL 579811, at *4 n.6 (D.D.C. Aug. 21, 1995). As the Government justifies in this memorandum, the higher penalty of $3,528,000 is appropriate.

[16] This sum is a conservative calculation of consumer financial harm because it only includes sales through the date Defendants stopped affirmatively making statements that violated the order. Defendants' representations would also be responsible for any subsequent sales, as Defendants' customers would not purchase these products if they did not believe they provided a health benefit based on Defendants' previous representations.

d. *Civil Money Penalties Are Necessary to Vindicate the Authority of the FTC*

The necessity of vindicating the authority of the FTC is another factor to be considered when assessing a civil penalty. *Danube Carpet Mills, Inc.*, 737 F.2d at 994. "Since the Commission has no plenary power to enforce its own orders, it must enlist the aid of the federal district courts for that purpose. The penalty to be assessed must therefore be a significant one." *FTC v. Consolidated Food Corp.*, 396 F. Supp. 1353, 1357 (S.D.N.Y. 1975). Defendants' conduct has implications beyond this case. As the court described in *Mac's Muffler Shop,* "[i]f the regulated community perceives that violations of the law are treated lightly, the government's regulatory program is subverted." 1986 WL 15443, at *10. If a penalty is "[t]o have any deterrent effect, [it] must be large enough to be more than just . . . an acceptable cost of doing business." *Onkyo U.S.A. Corp.*, 1995 WL 579811, at *4 n.6. For the penalty award to provide meaningful deterrence, it "'should be large enough to hurt, and to deter anyone in the future from showing as little concern as [Defendants] did for the need to [comply].'" *Phelps Dodge Indus.*, 589 F. Supp. at 1367 (*quoting United States v. Swingline, Inc.*, 371 F. Supp. 37, 47 (E.D.N.Y. 1974)).

The Defendants have flouted the authority of the FTC and of the Court by ignoring the FTC Order. Defendants continued to represent the Products as treatments for cancer and other tumors despite the FTC Order prohibiting them from doing so. Even after receiving Orders from this Court and the U.S. Court of Appeals for the District of Columbia, Defendants continued to make unsubstantiated claims that the Products treat cancer. Defendants' flagrant disregard for the FTC's authority merits a substantial penalty in order to vindicate the government's authority and deter future violations. Accordingly, the Government requests that a penalty of $3,528,000 –

a sum which equals a $4,500 penalty for every day in which Defendants failed to comply with the FTC Order – be entered in this case.

e. *Defendants are Able to Pay a Civil Penalty*

The final factor to be considered when assessing a penalty is the ability of the defendant to pay a civil penalty. *See, e.g., Reader's Digest*, 494 F. Supp. at 779. Courts look at a variety of data points when assessing a defendant's ability to pay. In *Danube Carpet Mills*, the Eleventh Circuit affirmed the district court's calculation of ability to pay based on the defendant's yearly profits and net worth, including both liquid and illiquid assets. 737 F.2d at 994-95. However, other courts considering this factor have looked beyond the funds and assets currently in a defendant's possession. For example, in *United States v. Lasseter*, the district court imposed a civil penalty award after finding that the defendant received a "significant benefit" from the sale of his business, despite the defendant's assertion that he couldn't afford to pay a civil penalty because he was in Chapter 7 Bankruptcy. No. 3:03-1177, 2005 WL 1638735, at *6 (M.D. Tenn June 30, 2005). Similarly, the defendant's ability to pay in *United States v. Prochnow* was determined based on the fact that he "had substantial draws in excess of $1 million per year from his company and sold it for $25 million[,]" without any discussion of what amount of money was currently in the defendant's possession. 1:02-cv-00917-JOF (N.D. Ga Dec. 2, 2005).

While Defendants acknowledged possessing assets and funds totaling $2,001,959.73, discovery in this case revealed that Defendants have dissipated approximately $2.7 million dollars of proceeds and assets since this lawsuit was initiated. The dissipated funds are largely unaccounted for, and, as discussed below, should be included in the Court's calculation of Defendants' ability to pay. The evidence shows that Defendants are able to pay a substantial civil penalty, and the United States asks that a penalty of $3,528,000 be imposed.

(1) Defendants' Disclosures Show That They Currently Possess Funds and Assets Totaling $2,001,959.73

Defendants' disclosures evidence $2,001,959.73 in assets, including bank accounts, cash on hand, real property, and other property. First, Defendants control several bank accounts, which together contain $913,746.53:

Bank Name	Account Number	Account Name	Balance
Bank of America	x7259	Daniel Chapter One	$45,917.65
Bank of America	x7262	Daniel Chapter One Ministry	$182,647.95
Bank of America	x2605	Daniel Chapter One	$22,178.95
Bank of America	x3380	Messiah Y'Sua Shalom Fellowship Account	$5,445.62
Bank of America	x9510	Messiah Y'Sua Shalom	$4,705.33
Citizens Bank	x1853	Daniel Chapter One DBA Creation Science Funding	$13,284.16
Citizens Bank	x1845	Daniel Chapter One	$72,857.99
Newport Federal	x2506	Messiah Y'Shua Shalom	$20,000.00
Lincoln Financial Group	x9529	Universitas Christ Centered Homeopathy	$546,708.88
		TOTAL	**$ 913,746.53**[17]

Defendant Feijo testified that he also has cash on hand totaling $20,000.[18] Together, these monetary assets total $933,746.53.

While some of the bank accounts listed above are not in the name of Defendant James Feijo or Defendant Daniel Chapter One, discovery in this case revealed that the money in these accounts was transferred from Daniel Chapter One's proceeds. For example, Defendant James Feijo is the overseer of Messiah Y' Shua Shalom, and Messiah Y'Shua Shalom is completely funded by Daniel Chapter One.[19] Similarly, Patricia Feijo, wife of Defendant James Feijo, is the

[17] *See* pages 9-10 and 27-28 of Exhibit G. The Government is in possession of Defendants' bank account records, and can file documentation supporting these sums under seal if requested to do so by the Court.
[18] *See* Feijo Deposition 55:14-17, attached as Exhibit E.
[19] *See* DC1 30(b)(6) 50:21-51:3 and 109:1-5, attached as Exhibit F.

overseer of Universitas Christ Centered Homeopathy and Defendant James Feijo is the secretary.[20] Defendant James Feijo testified at Daniel Chapter One's 30(b)(6) deposition that Universitas Christ Centered Homeopathy is solely supported by Daniel Chapter One.[21]

Discovery revealed three real estate properties worth a combined $990,328. First, Messiah Y'Shua Shalom owns real estate located in Portsmouth, Rhode Island.[22] The property is valued at $579,000.00, and was paid for by funds transferred to Messiah Y'Shua Shalom from Defendant Daniel Chapter One.[23] Second, Pilgrim House owns real estate located in Deerfield Beach, Florida, valued at $400,328.00.[24] The Government learned through discovery in this case that this property was paid for by funds transferred from Defendant Daniel Chapter One to Pilgrim House.[25] Finally, the third piece of real property is owned by James and Patricia Feijo. This real property is undeveloped land in Nova Scotia, Canada, valued at $11,000.[26] Together, these three properties have a value of $990,328.00.

Next, Defendants possess other assets totaling $77,885.20. This includes Defendants' inventory, which is valued at $56,232.20.[27] Additionally, Defendants' own automobiles valued at $21,653, including a 2004 Jaguar Vanden Plas valued at $9,144.00, a 2004 Cadillac DeVille valued at $5,475.00, a 1995 Jaguar XJ6 valued at $3,638.00, and a 2003 Cadillac DeVille valued

[20] *See* DC1 30(b)(6) 59:21-60:4, attached as Exhibit F.
[21] *See* DC1 30(b)(6) 60:5-14 and 77:9-19, attached as Exhibit F.
[22] *See* DC1 30(b)(6) 108:15-22, attached as Exhibit F.
[23] *See* DC1 30(b)(6) 108:15-109:8, attached as Exhibit F and page 29 of Exhibit G.
[24] *See* DC1 30(b)(6) 106:6-108:14, attached as Exhibit F. This value comes from Zillow.com on February 27, 2014. Defendant Daniel Chapter One's Supplemental Interrogatory Response states that the assessed value of this property is $280,060.00. *See* page 29 of Exhibit G.
[25] *See* DC1 30(b)(6) 107:21-108:3, attached as Exhibit F.
[26] *See* pages 22-23 of Exhibit H.
[27] *See* pages 29-30 of Exhibit G.

at $3,396.00.[28] While some of these vehicles were purchased in the name of other entities controlled by Defendants, discovery in this case found that all of these vehicles were purchased with funds from Defendant Daniel Chapter One.[29] The value of these items – bank accounts, cash on hand, real property, and other assets – totals $2,001,959.73.

(2) Dissipated Funds Should be Added to Defendants' Ability to Pay

Discovery in this case has revealed that Defendants have dissipated their assets since this lawsuit was filed. As discussed below, Defendants admitted in discovery that they gave away $515,000 in cash and other gifts. However, review of Defendants' proceeds and expenses show that, in addition to the dissipation they admitted, Defendants have failed to account for approximately $2.2 million in proceeds. These dissipated funds and assets should be added to Defendants' ability to pay a civil penalty.

Defendants admitted that, in time since the pending action was filed, they have given away $515,000 in cash and other gifts. These gifts include $160,000 in cash to Hue Shaw,[30] $35,000 to Michael Powers,[31] and $115,000 to Ben Benavides Manuel, a high school friend of Defendant James Feijo.[32] Defendants' also gifted their radio station, valued at $185,000, to DAD Enterprises;[33] and a van, valued at $20,000, to Jedediah Harrison.[34] These transfers did not take place until after the Defendants began incurring civil penalties and after this lawsuit was filed.

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[28] *See* DC1 30(b)(6) 112:2-115:12, attached as Exhibit F and pages 10-12 of Exhibit H. The stated value for these vehicles was determined via KBB.com on August 12, 2013.
[29] *See* DC1 30(b)(6) 113:8-115:12, attached as Exhibit F.
[30] *See* DC1 30(b)(6) 226:21-227:3, attached as Exhibit F.
[31] *See* DC1 30(b)(6) 227:12-21, attached as Exhibit F.
[32] *See* DC1 30(b)(6) 194:22-197:17, attached as Exhibit F.
[33] *See* DC1 30(b)(6) 70:16-71:12, attached as Exhibit F.
[34] *See* DC1 30(b)(6) 227:22-228:6, attached as Exhibit F.

The United States has reviewed the financial records Defendants provided during discovery, and that review revealed that Defendants have failed to account for account for approximately $2.2 million in proceeds. Defendants' records show the following sales totals:

- 2010: $1,458,394.02
- 2011: 1,088,177.55
- 2012: $973,683.31
- January-May 2013: $330,683.03[35]

Interrogatories served upon Defendant Daniel Chapter One asked for employee salary information and summary financial information, including information regarding Daniel Chapter One's expenses. In response to these interrogatories, Daniel Chapter One provided information on everything from the cost of their products, to the cost of heating oil for their warehouse, printer toner cartridges, and radio station expenses.[36] The salaries and expenses Daniel Chapter One disclosed total only $1,661,961.55, leaving $2,188,976.36 unaccounted for.

Defendants and their associates should not be permitted to benefit from their blatant attempt to dissipate their assets during this litigation, and these funds should be included in any calculation of Defendants' ability to pay. *See SEC v. Metcalf*, No. 11-493, 2012 WL 5519358, at *8 (S.D.N.Y. Nov. 13, 2012) (discounting Defendants' claims of poverty where the Defendant "knowing that he faced the very real possibility of civil financial penalties, chose to spend down his assets or failed to adjust his lifestyle."). The dissipated funds – both the $515,000

[35] *See* Exhibit I. Defendants also reported $1,662,674.43 in proceeds in 2009, however, that sum is not included above as the Government does not have Defendants' expense records for that year.

[36] See pages 7-9, 15-17, and 25-27 of Exhibit G. Defendants disclosed that Defendant Daniel Chapter One pays Defendant Feijo's expenses, and that sum is included in the calculations above. *See* page 18 of Exhibit G and pages 18-19 of Exhibit H.

Defendants admitted dissipating and the $2,188,976.36 that is unaccounted for – should be considered when determining their ability to pay. Indeed, a judgment that limited a defendant's ability to pay to just the sum of money currently in their possession "would allow con artists to escape disgorgement liability by spending their ill-gotten gains – an absurd result." *SEC v. Warren*, 534 F.3d 1368, 1370 n.2 (11th Cir. 2008). When considered together, Defendants' known assets and the dissipated funds total $4,705,936.09. As a result, Defendants are able to pay a civil penalty, and a civil penalty of $3,528,000 is reasonable given Defendants' ability to pay and the balance of the other factors.

III. CONCLUSION

The Defendants ignored and repeatedly violated the FTC Order for over two years. As a result, a final order that includes injunctive relief, equitable monetary relief in the amount of $1,347,237.33, and a civil penalty award of $3,528,000 is appropriate in this case.

Defendants' disregard for the FTC Order, along with Orders issued by this Court and the U.S. Court of Appeals for the District of Columbia demonstrates that there is an overwhelming need to: (1) broaden coverage of the FTC Order provisions to ban the Defendants from selling any dietary supplement and from marketing any product or service with disease claims; and (2) enhance the compliance monitoring provisions to help the FTC guard against order violations in the future. The FTC Order has not achieved its purpose of protecting the public and Defendants are likely to repeat their fraudulent activities and victimize consumers unless their practices are more significantly curtailed.

Equitable monetary relief is necessary to eliminate Defendants' unjust gains, and should be entered in the amount of $1,345,832.43, which represents the Defendants' proceeds from the sale of the Products between April 2, 2010 and May 24, 2012. Additionally, all five of the civil

penalties factors demonstrate that imposing a significant civil penalty is appropriate in this case. First, the Defendants acted in bad faith, as they willfully and deliberately violated the FTC Order. *See Phelps Dodge Indus., Inc.*, 589 F. Supp. at 1363. Next, the public was significantly injured by Defendants' conduct. Third, it is important that a civil penalty eliminate any benefits to the Defendants "so that there is no incentive to violate the law[.]" *Mac's Muffler Shop, Inc.*, 1986 WL 15443, at *10. Additionally, a significant penalty is necessary to vindicate the authority of the FTC. Finally, Defendants have significant assets on-hand, and have dissipated a large percentage of their proceeds over the past several years, and should not benefit from any attempt to spend down or hide their assets. As a result, the Government requests that the Court enter a civil penalty of $3,528,000, which equals a $4,500 penalty for every day in which Defendants failed to comply with the FTC Order.

For the forgoing reasons, the United States respectfully requests that the Court enter a final order that includes injunctive relief, equitable monetary relief in the amount of $1,347,237.33, and a civil penalty award of $3,528,000.