

**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,)	PUBLIC DOCUMENT
individually, and as an officer of)	
Daniel Chapter One.)	
)	
)	

**MEMORANDUM IN SUPPORT OF RESPONDENTS'
APPLICATION FOR STAY OF MODIFIED FINAL ORDER
PENDING PETITION FOR REVIEW**

Herbert W. Titus
William J. Olson
John S. Miles
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.
370 Maple Avenue West, Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com

Attorneys for Respondents

February 25, 2010

TABLE OF CONTENTS

INTRODUCTION..... 1

ARGUMENT

I. RESPONDENTS’ LEGAL AND CONSTITUTIONAL CHALLENGES TO THE ORDER ARE SUBSTANTIAL..... 1

 A. The FTC Failed to Apply the Statutory Requirements Governing FTC Jurisdiction over Respondents’ Nonprofit Religious Ministry. 2

 B. As Applied Here, the FTC’s “Reasonable Basis Theory” Is Unauthorized by Statute and Violative of Respondents’ First Amendment Rights. 6

 1. The FTC’s “ Reasonable Basis Theory” Is a Not a Rule of Law, but Only a Policy Guide Wholly Inapplicable to this Case..... 6

 2. The Reasonable Basis Theory Erroneously Shifted the Burden of Proof to Respondents. 10

 3. The Reasonable Basis Theory Is *Ultra Vires*, an FTC Add-On that Prejudiced Respondents. 12

 4. The FTC’s “Reasonable Basis Theory” Collided with Respondents’ Rights under the First Amendment Commercial Speech Doctrine..... 13

 C. Paragraphs II and III of the Final Order Unconstitutionally Deny Respondents Free Exercise of Religion and Freedom of Speech..... 15

 D. The FTC Denied Respondents’ Liberty and Property without Due Process of Law. 17

 E. The FTC Erroneously Dismissed Respondents’ Religious Freedom Restoration Act Claim..... 19

 F. Paragraph V of the Final Order Violates the Well-Established First Amendment Principle of Speaker Autonomy. 21

II. IF THE STAY IS NOT GRANTED, RESPONDENTS WILL SUFFER IRREPARABLE HARM. 23

A. The Cease and Desist Sections of the Order Will Cause Irreparable Harm. . . 23

1. Paragraph III Shuts Down Respondents’ Health Ministry. 24

2. Paragraph II Shuts Down the DCO Health Ministry. 27

3. The Harm Caused by Paragraphs II and III Would Be without Remedy. 28

B. The Paragraph V Mandate Would Cause Irreparable Harm. 29

C. Respondents Will Suffer Irreparable Harm from the Entire Order. 30

III. GRANTING A STAY WOULD NOT INJURE ANY PARTY AND WOULD PROMOTE THE PUBLIC INTEREST. 31

A. A Stay Would Not Injure Any Party. 32

B. A Stay Would Be in the Public Interest. 33

CONCLUSION. 36

TABLE OF AUTHORITIES

HOLY BIBLE

Deuteronomy 19:15. 20
 John 8:17. 20
 Luke 4:43. 2
 Acts 3:1-10. 28
 Acts 4:1-20. 28
 Acts 5:17-40. 28

STATUTES

FTC Act, Section 5. 6, 10
 FTC Act, Section 12. 6, 10
 RCW 24.12.010. 2
 RCW 24.12.020. 2
 RCW 24.12.030. 2
 Religious Freedom Restoration Act. 19

CASES

A & B Steel Shearing and Processing, Inc. v. United States, 174 F.R.D. 65
 (E.D. Mich. 1997). 33
American Home Products Corp. v. FTC, 695 F.2d 681 (9th Cir. 1982). 7, 8
Bolger v. Young Drugs Prods. Corp., 463 U.S. 60 (1983). 15
In re California Dental Ass’n, 1996 FTC LEXIS 277 (May 22, 1996). 1, 31, 32
In re Catholic Bishop of Spokane, 329 Bankr. Rep. 304 (E.D. Wash. 2005). 3
Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C.
 Cir. 1970). 18, 19
Citizens United v. FEC, __ U.S. __, Majority Slip Opinion (Jan. 21, 2010). 16
Community Blood Bank of the Kansas City Area, Inc. v. FTC, 504 F.2d 1011
 (8th Cir. 1969). 3, 4, 5
Deu Thapa v. Gonzales, 460 F.3d 323 (2d Cir. 2006). 1
EEOC v. Quad/Graphics Inc., 875 F. Supp. 558 (E.D. Wis. 1995). 33
Elrod v. Burns, 427 U.S. 347 (1976). 31
Employment Division, Dept. of Human Resources v. Smith, 494 U.S. 872 (1990). 20
Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969). 30
FTC v. Garvey, 383 F.3d 891, 901 (9th Cir. 2004). 7
FTC v. National Urological Group, Inc., 2008 U.S. Dist. LEXIS 44145
 (N.D. Ga. 2008). 7
F.T.C. v. Pantron I, 33 F.3d. 1088 (9th Cir. 1994). 6, 7, 11
Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006). 20, 21
Gonzales v. Raich, 545 U.S. 1 (2005). 25
Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557
 (1995). 22, 23

Illinois ex rel Madigan v. Telemarketing Associates, Inc., 538 U.S. 600 (2003). 16

McDaniel v. Paty, 435 U.S. 618 (1978). 20

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). 22, 23

Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150
(6th Cir. 1991). 1

New York Times v. Sullivan, 376 U.S. 254 (1964). 16

Nike, Inc. v. Kasky, 539 U.S. 654 (2003). 15,16

Pacific Gas and Electric Company v. California P.U.C., 475 U.S. 1 (1986). 22, 23

Pearson v. Shalala, 164 F.3d 650 (D.C. Cir. 1999). 14

Reuters Limited v. United Press International, Inc., 903 F.2d 904 (2d Cir. 1990). 23, 29

Ross-Simmons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12 (2d Cir. 1996). 23

Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353 (4th Cir. 1991). 1

Safety-Kleen, Inc. v. Wyche, 274 F.3d 846 (4th Cir. 2001). 2

Thompson Medical Co., Inc. v. FTC, 791 F.2d 189 (D.C. Cir. 1986). 7

In the Matter of Toys “R” Us, Inc., Docket No. 9278, Order Granting Partial Stay
(Dec. 1, 1998). 32

United States v. Ballard, 322 U.S. 78 (1944). 30, 35

United States v. Baylor University Medical Center, 711 F.2d 38 (5th Cir. 1983). 2, 28, 33

Washington Metropolitan Area Transit Co. v. Holiday Tours, Inc., 559 F.2d 841
(D.C. Cir. 1977). 1, 31

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). 23

Wooley v. Maynard, 430 U.S. 705 (1977). 21, 23

MISCELLANEOUS

FTC Guide, *Dietary Supplements: An Advertising Guide for Industry* (Apr. 2001). 8

J. O’Hara, “The Modern Corporation Sole,” 93 *Dickinson L. Rev.* 23 (1988). 3

H. Schlossburg, Idols for Destruction (Thomas Nelson, NY: 1986). 31

INTRODUCTION

This Memorandum is submitted, pursuant to 16 C.F.R. section 3.56(b) and 15 U.S.C. section 45(g)(2)(A), in support of Respondents' Application for Stay of the Modified Final Order ("Order") of the Federal Trade Commission ("FTC") issued on January 25, 2010.

The Order should be stayed pending judicial review because:

- (I) Respondents' legal and constitutional challenges are substantial;
- (II) if a stay is not granted, Respondents will suffer irreparable harm;
- (III) if the stay is granted, no party will be injured and if the stay is granted, the public interest would be benefitted.

See Washington Metropolitan Area Transit Co. v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); FTC Rule 3.56(c).

ARGUMENT

I. RESPONDENTS' LEGAL AND CONSTITUTIONAL CHALLENGES TO THE ORDER ARE SUBSTANTIAL.

In assessing the likelihood of Respondents' success on the merits on appeal, the Commission need not "harbor doubt about its decision in order to grant the stay." In re California Dental Ass'n., 1996 FTC LEXIS 277, at *9 (May 22, 1996). Respondents satisfy the "merits" factor if their argument on at least one claim is "substantial" — so long as the other three factors weigh in their favor. *See* Deu Thapa v. Gonzales, 460 F.3d 323, 335-36 (2d Cir. 2006). *See also* WMAT v. Holiday Tours, 559 F.2d at 844-45; Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150 (6th Cir. 1991); Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991). Because the balance of the equities weighs in favor of Respondents, as shown in Parts II and III below, it is enough that

Respondents raise questions sufficiently serious and substantial to constitute “fair ground for litigation.” Safety-Kleen, Inc. v. Wyche, 274 F.3d 846, 859 (4th Cir. 2001). *See also* United States v. Baylor University Medical Center, 711 F.2d 38, 39-40 (5th Cir. 1983).

A. The FTC Failed to Apply the Statutory Requirements Governing FTC Jurisdiction over Respondents’ Nonprofit Religious Ministry.

The FTC complaint charged that, beginning in 2005 and continuing to the present, Respondents engaged in the allegedly-deceptive practices specified therein. *See* Complaint, ¶ 5. During this entire period, Daniel Chapter One (“DCO”) was operating as a “corporation sole,” having been so organized in 2002 under the laws of the State of Washington. Opinion of the Commission (“Op.”), p. 4. Under Washington law, only **churches or religious societies** may “become a corporation sole.” RCW 24.12.010. A corporation sole is permitted to engage in commerce (RCW 24.12.020), but its “overseer” is required to hold all property gained from such commerce “**in trust** for the use, purpose, benefit, and behoof of his religious ... society or church.” RCW 24.12.030 (emphasis added).

The FTC stated that DCO’s Articles of Incorporation failed to “specifically declare that DCO was organized exclusively for charitable or other clearly nonprofit purposes.” Op., p. 4. To the contrary, the Articles clearly state that DCO is a “church” dedicated to “promote the Kingdom of God.”¹ *See* DCO Articles of Incorporation. Indeed, by definition, a Washington corporation sole is dedicated to engage in “religious” activities. *See* RCW 24.12.030.

The FTC found fault, however, with DCO’s Articles for not expressly stating that, “upon dissolution,” none of DCO’s assets or earnings may distributed to “any individual or

¹ Luke 4:43 (“[Jesus] said ... I must preach the kingdom of God.”).

for-profit corporation.” Op., p. 4. But Article 4 of DCO’s Articles ensures the same result — having created an express trust whereby all assets, are held in trust for DCO’s overarching religious purpose. See In re Catholic Bishop of Spokane, 329 Bankr. Rep. 304, 325-26 (E.D. Wash. 2005).

The FTC also incorrectly presumed that, by engaging in money-generating sales of products, DCO must necessarily be engaged in such activities for a commercial, profit-making purpose. See Op., pp. 4-8. Under Washington law, however, a corporation sole is authorized to “transact[] business” without negating the corporation’s charitable purpose. See Catholic Bishop, 329 Bankr. Rep. at 327-28. Indeed, the history and modern use of the corporation sole form strongly establish their essential “ecclesiastical” nature and purpose. See J. O’Hara, “The Modern Corporation Sole,” 93 *Dickinson L. Rev.* 23 (1988).

The FTC compounded its misunderstanding of state law by its misapplication of the federal law that circumscribes FTC jurisdiction over nonprofit corporations. Purporting to apply the rule in Community Blood Bank of the Kansas City Area, Inc. v. FTC, 504 F.2d 1011, 1015 (8th Cir. 1969), the FTC erroneously ruled that DCO was subject to FTC jurisdiction because “**by engaging in commercial activities**, DCO operates a commercial enterprise and thereby is not ... organized or engaged in only charitable purposes.” Op., p. 7 (emphasis added). By this statement, the FTC repeated the same error that it made in Community Blood Bank when it claimed jurisdiction over “any corporation engaged in business only for charitable purposes ... that receives income in excess of expenses.” See *id.*, 405 F.2d at 1016.

However, the court in Community Blood Bank expressly rejected that argument, ruling that “even though a corporation’s income exceeds its disbursements its nonprofit character is not necessarily destroyed.” *Id.*, 405 F.2d at 1017. Instead, the court adopted the rule that an entity’s nonprofit character is lost **only if it can be shown that** either the entity or its members “derived a profit **over and above** the ability to **perpetuate or maintain** [its] existence.” *Id.*, 405 F.2d at 1019 (emphasis added).

Applying this rule here, the FTC must prove that the income from DCO’s marketed products was **not** being “used exclusively for the purposes authorized by law and their articles of incorporation.” *See id.*, 405 F.2d at 1020. As pointed out above, the FTC erroneously presumed that simply “by engaging in commercial activities, DCO operates a commercial enterprise and thereby is not a business organized or engaged in only charitable purposes.” *Op.*, p. 7. But DCO is fully authorized by Washington state law governing corporation soles to engage in commercial activities for the benefit of its religious purpose of advancing the Kingdom of God. The mere fact that it “engages in commercial activities” does not transform the organization into a “commercial enterprise.” Indeed, if the FTC’s reasoning were adopted, it would extend FTC jurisdiction to cover **any** nonprofit organization that engages in **any** commercial activity, no matter what the purpose and use of the income.

In the alternative, the FTC determined that it had jurisdiction over DCO because Mr. Feijo, as overseer, “distributed [DCO] funds to himself and his wife for their benefit.” *Op.*, p. 8. In support of this finding, the FTC observed that the Feijos lived in two homes and used two cars, each of which was owned by “DCO or its affiliate,” and DCO “was the source of all of [the Feijos’] living expenses.” *Id.* But the legal test whether the FTC has jurisdiction over

DCO as a nonprofit organization is not whether the Feijos utilized DCO's assets, or even benefitted from DCO's payment of their expenses. Rather, the question is whether Mr. Feijo "derived a profit" for his personal "pecuniary gain," that is, whether DCO was "merely [a] vehicle through which a pecuniary profit could be realized for [himself and his wife]." *See Community Blood Bank*, 405 F.2d at 1017.

Notably absent from the Commission's ruling was any finding about the specific use to which the two homes and the two cars were put, and the reason for payment of certain expenses reimbursed to the Feijos'. *See Op.*, p. 8. Under the rule of *Community Blood Bank*, it is incumbent upon the FTC to prove that such use and payments were for the Feijos' "personal profit, benefit, or advantage[,] and not for the purpose of perpetuating and maintaining DCO's religious services and programs. *See id.*, 405 F.2d at 1021. The record shows that the Feijos, as the sole officers of DCO, are engaged full-time in the DCO "house ministry" — including, "spiritual counseling," health education, marketing DCO products, producing its publications, maintaining its website, and hosting its radio program. *See Op.*, pp. 2, 4-6. As the court pointed out in *Community Blood Bank*, the **FTC has the burden** to show that the Feijos' use of DCO properties and receipt of payment for certain expenses were "infected with commercial intent," not with the intent of "promoting [DCO's] program in the public interest." *See id.*, 405 F.2d at 1022. **The FTC never met this burden.**

B. As Applied Here, the FTC's "Reasonable Basis Theory" Is Unauthorized by Statute and Violative of Respondents' First Amendment Rights.

The FTC has characterized its ruling as one in which it “found” DCO’s representations with respect to BioShark, 7 Herb Formula, GDU, and BioMixx (hereinafter “the four Challenged Products”) to be “deceptive because they were not substantiated by competent and reliable scientific evidence.” *See* Order, Attachment A. Throughout the administrative proceedings, the FTC made **no effort** to demonstrate that Respondents’ representations were, in fact, **untruthful** or **misleading**. *See* ALJ Initial Decision (“ALJ Dec.”), p. 99 n.4; Op., pp. 11-12. Instead, utilizing its “reasonable basis theory,” the FTC foisted upon Respondents the burden to “substantiate” their representations by what the FTC deemed to be “competent and reliable scientific evidence.” ALJ Dec., pp. 99-100; Op., p. 20. The FTC’s “**reasonable basis theory**” **presumes** that, if Respondents’ representations are “**unsubstantiated**,” they are inherently **deceptive**. *See* Op., pp. 11-12. Such a presumption violates both sections 5 and 12 of the FTC Act, as well as the First Amendment commercial speech doctrine.

1. The FTC’s “ Reasonable Basis Theory” Is a Not a Rule of Law, but Only a Policy Guide Wholly Inapplicable to this Case.

The FTC claims that its “reasonable basis theory” is established by “Commission and federal case law.” *Id.*, p. 11. However, neither of the two cases cited by the FTC demonstrates how the language of either section 5 or 12 of the FTC Act could possibly be construed to require marketing representations to meet an FTC-contrived standard of “reasonableness.” Rather, it appears that the courts in the two cited cases simply assumed that the FTC’s construct is authorized by law. *See* F.T.C. v. Pantron I, 33 F.3d. 1088 (9th Cir. 1994); Thompson Medical Co., Inc. v. FTC, 791 F.2d 189 (D.C. Cir. 1986). While the parties in these (and other) cases have “concede[d] the validity of the reasonable basis theory,”

along with its “competent-and-reliable-scientific-evidence” offspring,² Respondents vigorously contest them both.

The FTC standard of “competent and reliable scientific evidence” is not derived from the statutory language, but from the “reasonable basis theory,” itself. *See* FTC v. National Urological Group, Inc., 2008 U.S. Dist. LEXIS 44145, *45-*44 (N.D. Ga. 2008). And the “reasonable basis theory” appears to have been created “because it does not require the FTC to prove that [a] message was false in order to prevail.” *See* FTC v. Garvey, 383 F.3d 891, 901 (9th Cir. 2004). If the FTC is **not required** to shoulder its statutory burden of having to prove an advertisement to be, in fact, “false” or “deceptive,” as it chose not to do in this case,³ “it is difficult to imagine **how the Commission could fail to prevail** on a reasonable basis theory.” Pantron I, 33 F.3d at 1096 (emphasis added). According to that theory, the advertiser has the burden to substantiate by “competent and reliable scientific evidence” any health-benefit claim, and the FTC is free to set the bar as high or as low as it wants. *See, e.g.,* Thompson Medical, 791 F.2d at 193-96.

The reasonable basis/scientific evidence standard is **not** a rule enacted pursuant to the Administrative Procedure Act’s (“APA”) rulemaking procedures. Rather, as FTC Commissioner J. Thomas Rosch has explained, the FTC aborted its effort to adopt a regulation

² *See, e.g.* American Home Products Corp. v. FTC, 695 F.2d 681, 693, 710 (9th Cir. 1982).

³ *See* ALJ Dec., p. 99, n.4.

because “there did not appear to be a way to develop workable rules.”⁴ Instead, the FTC resorted to the promulgation of an Industry Guide to establish its policy governing health claims about dietary supplements. FTC Guide, *Dietary Supplements: An Advertising Guide for Industry* (hereinafter “DSG”) (Apr. 2001).⁵ Industry Guides are “administrative interpretations of the law intended to help advertisers comply with the [FTC] Act; [but] they are **not binding law themselves.**” See “FTC Publishes Final Guides Governing Endorsements, Testimonials,” (“Testimony Guide”) p. 2 (Oct. 5, 2009) (emphasis added).

As an Industry Guide, the “require[ment] [that] claims about the efficacy or safety of dietary supplements ... be supported with ‘competent and reliable scientific evidence’” is **not a fixed legal standard**, but is “**flexible.**” See *Op.*, p. 16 (emphasis added). As the court noted in the American Home Products, “the Commission has chosen not to bind itself in advance to rules as to the interpretation of the phrase ‘reasonable basis,’” and therefore any order issued by the FTC is deliberately “imprecise.” *Id.*, 695 F.2d at 710. Thus, the Guide states that the standard is only “**typically** require[d] [of] claims about the efficacy and safety of dietary supplements.” DSG, p. 9 (emphasis added). Further, the evidentiary standard is “sufficiently flexible” so that it may be raised or lowered depending upon the FTC’s assessment of the type of product or claim, the cost/feasibility of developing substantiation of the claim, the risk of harm, and the opinions of experts. *Id.*, pp. 8-9, 25.

⁴ J. T. Rosch, “Self-Regulation and Consumer Protection: A Complement to Federal Law Enforcement,” (hereinafter “Rosch”) pp. 10-11 (Sep. 23, 2008). This article is provided to the public on the FTC website, <http://www.ftc.gov/>.

⁵ <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus09.shtm>.

In this case, however, the FTC has presented the reasonable basis theory, with its companion “competent and reliable scientific evidence” standard, as if it were a fixed rule of law governing every FTC enforcement action against allegedly misleading health claims concerning dietary supplements:

[W]here ... Respondents represented that the four Challenged Products would treat or cure cancer, prevent or shrink tumors, and/or ameliorate the destructive side effects of radiation or chemotherapy, the competent and reliable scientific standard **applies** under the Guide. [Op., p. 16 (emphasis added).]

The use of such flexible standard in an enforcement case is the rule of man masquerading as the rule of law. Not only does the Guide fail to provide any fixed rule of application, it does not purport to set the “competent and reliable scientific evidence” as the rule governing FTC enforcement actions. Rather, the Guide is “intended to help advertisers comply with the [FTC] Act.” DSG, p. 2. As a “help to comply,” the Guide serves the practical goal of ensuring an advertiser that — if he affirmatively substantiates “each interpretation” of every express and implied claim by competent and reliable scientific evidence — then the ad would be in “compliance with FTC law.” DSG, p. 25. By imposing upon the advertiser this affirmative burden, the Guide is designed to provide a kind of “safe harbor” from a subsequent FTC enforcement action, **not** to impose upon the advertiser in that enforcement action the affirmative — and extra-statutory — burden of substantiating his health-benefit claims by what the FTC deems to be competent and reliable scientific evidence. Yet that is what happened in this case.

2. The Reasonable Basis Theory Erroneously Shifted the Burden of Proof to Respondents.

Both the ALJ and the Commission asserted that “**Respondents have the burden** of establishing what substantiation they relied on for their product claims.” *See* ALJ Dec., p. 99; Op., p. 12 (emphasis added). This ruling is not derived from sections 5 and 12 of the FTC Act, but from the DSG, which states that “advertising for ... dietary supplements ... must be truthful, not misleading, **and substantiated.**” DSG, p. 1 (emphasis added). Further, “supplement marketers are cautioned that the FTC will require **both** [i] strong scientific support **and** [ii] careful presentation for [health] claims.” *Id.*, p. 2 (emphasis added). These two statements demonstrate why an Industry Guide is ill-suited to provide a legal standard governing an FTC enforcement action. It makes sense to advise an advertiser who is seeking a wide berth from an FTC enforcement action to assume the burden of affirmatively substantiating his product claims **before** he makes them. It does not make sense, however, to impose upon an advertiser **after** he has run an ad to affirmatively substantiate his claims in an enforcement proceeding in which the FTC has the statutory burden of proving that the claims are false or deceptive. But that is exactly what has occurred here.

While the FTC claims that “Complaint Counsel had borne the burden of proving that Respondents’ representations were not substantiated” by competent and reliable scientific evidence (Op., p. 22), that is quite different from the burden imposed on the FTC under a fair construction of the language of the FTC Act. Section 5 declares that “false” advertisements are unlawful; section 12 declares “deceptive” ones to be so. It naturally follows from such language that the burden is upon the FTC to prove falsity or deceptiveness. *See* ALJ Dec., p. 99 n.4.

In this case, however, the Commission finds fault with Respondents for “hav[ing] not produced anything to show that they possessed and relied on any competent and reliable scientific evidence to support the overall net impressions conveyed by the advertisements at issue.” *Op.*, p. 18. If the FTC’s theory is that an advertising claim is false or deceptive because there is no “competent and reliable scientific evidence” to support the claim, then the FTC should be required to “produce” such evidence showing that the “overall net impression” of Respondents’ claims was demonstrably **false or deceptive**. Instead, the FTC has the burden only to show that the advertiser does **not** have sufficient scientific evidence acceptable to the FTC that his claim is demonstrably **true or nonmisleading**. *See Op.*, p. 20. Thus, the Commission has characterized its ruling against Respondents as one in which the FTC “found [DCO’s] claims for the [four Challenged Products] to be deceptive because they were **not substantiated** by competent and reliable scientific evidence.” *See Order, Attachment A* (emphasis added).

As the court of appeals observed in Pantron I, “it is difficult to imagine how the Commission could fail to prevail ... on a reasonable basis theory,”⁶ whereby the FTC has complete discretion to impose whatever evidentiary standard of reasonableness that it chooses and then, to require the advertiser to prove affirmatively that his claims meet that standard.

3. The Reasonable Basis Theory Is *Ultra Vires*, an FTC Add-On that Prejudiced Respondents.

⁶ Pantron I, 33 F.3d at 1096 n.23.

The DSG insists not merely that “that advertising for any product — including dietary supplements — must be truthful, not misleading, **and substantiated.**” DSG, p. 1 (underlining original; bold added). To be substantiated, an advertisement for a dietary supplement must “typically” rest upon “competent and reliable scientific evidence.” *Id.* at 3. But the DSG cites neither statutory provision nor agency regulation that imposes an affirmative duty upon any advertiser that “before disseminating an ad, [he] must have adequate substantiation for all objective product claims.” *Id.* at 3. Rather, it is based on **yet another** FTC “policy” statement, purportedly resting upon “the FTC’s deception authority.” *Id.* n.6. In fact, it is an FTC add-on, a usurpation of authority never conferred by Congress.

Paragraphs II and III of the Order mandate not only that each of Respondents’ representations concerning their products be “true” and “nonmisleading,” but that “at the time it is made, Respondents **possess and rely** upon competent and reliable scientific evidence that substantiates the representation.” (Emphasis added.) Further, the Commission affirmed the ALJ’s decision not because it found DCO’s claims “false” and “misleading,” but because Respondents had failed to substantiate its claims “by ‘competent and reliable scientific evidence.’” *Op.*, p. 20.

Although the DSG claims that the FTC’s “role” is “to ensure that consumers get **accurate** information about dietary supplements so that they can make an **informed decision** about these products” (DSG, p. 1 (emphasis added)), **the FTC makes the decision** for the consumer under the Guide’s “reasonable basis theory.” For example, the Guide states that “[i]t is not enough that a testimonial represents the honest opinion of the endorser. Advertisers **must also have appropriate scientific evidence** to back up the underlying claim.” *Id.*, p. 18

(emphasis added). Thus, no matter how truthful and nonmisleading an advertising representation based upon an individual testimony may be, “**anecdotal evidence** of a product’s effect, based solely on the experiences of individual consumers, is **generally insufficient** to substantiate a claim.” *Id.*, p. 18 (emphasis added). In like manner, the Guide states that in “**some situations ... traditional use evidence** alone will be inadequate to substantiate a claim, even if that claim is carefully qualified to convey the limited nature of the support.” *Id.*, p. 21 (emphasis added). In both instances, the Guide substitutes its standard of “competent and relevant scientific evidence” (*id.*, pp. 19-21), as the Commission did in this case. *See Op.*, pp. 19-22.

In short, the FTC has presumptuously assumed a paternalistic role, selectively usurping the part of American consumers to choose, instead of enforcing the Congressional mandate to police false and deceptive ads so that **consumers can make an informed decision for themselves**. This is not only contrary to statute, but contrary to the First Amendment commercial speech doctrine.

4. The FTC’s “Reasonable Basis Theory” Collided with Respondents’ Rights under the First Amendment Commercial Speech Doctrine.

Throughout this proceeding, the FTC has rejected Respondents’ claim that the FTC action against them violated the Supreme Court’s First Amendment commercial speech doctrine. The Commission ruled that because the ALJ found “Respondents’ commercial speech deceptive[,] no further analysis is necessary.” *See Op.*, p. 14. But the ALJ did **not** find that Respondents’ representations were **actually** misleading or deceptive; rather, he presumed, and the Commission agreed, that they were misleading **solely** because they were not

supported by “competent and reliable scientific evidence.” *See* ALJ Dec., pp. 99-106; Op., pp. 18-22. Such bootstrapping is constitutionally impermissible.

In Pearson v. Shalala, 164 F.3d 650 (D.C. Cir. 1999), marketers of dietary supplements made claims that their products would help people in their battle against cancer, similar to DCO’s representations here. *Compare* Pearson, 164 F.3d at 652, *with* ALJ Dec., pp. 83-95. In Pearson, as here, the government agency found such claims to be misleading because, as here, they did not meet a pre-determined “scientific” standard. *Compare* Pearson, 164 F.3d at 652-55, *with* ALJ Dec., pp. 99-106. In Pearson, the agency, as here, ruled that the health claims made were “entirely outside the protection of the First Amendment.” *Compare* Pearson, 164 F.3d at 655, *with* ALJ Dec., pp. 115-16. In Pearson, the court rejected this ruling as “almost frivolous,” based as it was upon a “paternalistic assumption” that “claims lacking ‘significant scientific agreement’ are inherently misleading.” *Id.*, 164 F.3d at 655.

Unquestionably, the FTC case against Respondents is on all fours with Pearson. The FTC’s predetermined standard of “competent and reliable scientific evidence” played the same role in this case as did the FDA’s “significant scientific agreement” standard — establishing that DCO’s advertising claims were *per se* misleading. In a futile effort to show that “*Pearson* bears no resemblance to this case,” the Commission asserted that “[t]his case involves a purely **adjudicatory challenge to specific representations** made in [DCO’s] advertisements.” Op., p. 21 (emphasis added). But, from beginning to end, the FTC’s case has been exclusively based upon the asserted lack of “competent and reliable scientific evidence” for DCO’s claims. And the standard by which those claims were measured to be “misleading” was pre-set in an

Industry Guide, which, in turn, was not even subjected to the APA rulemaking procedure, much less to the adversarial process characteristic of an adjudication.

C. Paragraphs II and III of the Final Order Unconstitutionally Deny Respondents Free Exercise of Religion and Freedom of Speech.

The FTC also misapplied Bolger v. Young Drugs Prods. Corp., 463 U.S. 60 (1983), to cut off Respondents' broader First Amendment claim that DCO's product claims must be considered in the context of its active engagement in the national debate on health care. *See Op.*, p. 13. While the Bolger Court found that the ads in that case were "properly characterized as commercial speech," it warned that "an **economic motivation** ... would clearly be **insufficient** by itself to turn the materials into commercial speech." *See Bolger*, 463 U.S. at 66. (emphasis added). The FTC, however, did not heed that warning, having already erroneously and summarily concluded that "the **primary purpose and effect** of Respondents' representations concerning the four Challenged Products was to **sell** those products." *Op.*, p. 13 (emphasis added).

In remarks delivered just five days after the FTC announced its Cancer Cure Sweep, FTC Commissioner Rosch acknowledged that the First Amendment raised a higher barrier to FTC regulation where an entity was engaged in an activity that "blend[ed] commercial speech [with] noncommercial speech and debate on an issue of public importance." Rosch, p. 5. Citing Nike, Inc. v. Kasky, 539 U.S. 654 (2003), Commissioner Rosch acknowledged that such blending of speech "pose[s] difficult constitutional issues." *Id.* Yet, despite Justice Stevens' strong suggestion in Nike that the New York Times rule of knowing falsity or

reckless disregard of such falsity,⁷ would apply when “commercial speech, noncommercial speech and debate on an issue of public importance” converge,⁸ Commissioner Rosch found the Supreme Court’s New York Times rule totally inapplicable. *See Op.*, p. 13.

Commissioner Rosch was equally dismissive of the Schaumburg test⁹ that requires proof of actual fraud or deception in the regulation of money solicitations by nonprofit organizations.

Id. In short, the FTC decided that neither New York Times nor Schaumburg applied because Respondents were engaged in a commercial activity.

The First Amendment cannot be divorced from the money that is required to participate fully in the marketplace of ideas, whether it be the ongoing debate over healthcare, or the solicitation of money by nonprofit organizations, or the election of candidates for public office. Just a few weeks ago, the U.S. Supreme Court ruled that the government cannot deprive the people of vital “information, knowledge and opinion” by erecting economic barriers of entry into the electioneering marketplace. *See Citizens United v. FEC*, ___ U.S. ___, Majority Slip Opinion, p. 38 (Jan. 21, 2010). Nor does the First Amendment permit “[p]rolix laws [that] chill speech,” as the Federal Election Commission (“FEC”) is wont to do by “amorphous regulatory interpretation.” *Id.*, Slip Op., p. 7. Neither can the FTC censor Respondents’ overall healthcare speech by its overly complex “scientific” evidentiary standard.

⁷ New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).

⁸ Nike, 539 U.S. at 664 (Stevens, J., concurring).

⁹ *See Illinois ex rel Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612, 619-20 (2003).

D. The FTC Denied Respondents' Liberty and Property without Due Process of Law.

On September 23, 2008, five days after the FTC had issued its press release announcing its “Bogus Cancer Cures” sweep, Commissioner Rosch made public comments prejudicial to Respondents. *See* Rosch, p. 16. With specific reference to the “sweep,” the Commissioner stressed that the FTC was most concerned about “consumer injury [that] goes beyond the consumer’s pocketbook.” *Id.*, pp. 16-17. Unwittingly, the Commissioner revealed that the FTC was partial to “conventional” medicine, decrying marketing:

- (i) “‘natural’ cures” to cancer patients who are “afraid of conventional treatment [and] find out too late that the treatment does not work”;
- (ii) “‘natural’ remedies [that] cause[] unexpected side effects”; and
- (iii) “‘natural’ remedies [that] made conventional treatment less effective.” [*Id.*, pp. 16-17.]¹⁰

The **FTC’s press release**, however, stated nothing about misleading claims about medical safety, only about “efficacy.”¹¹ Indeed, the FTC’s litigation of this case in no way correlates

¹⁰ Commissioner Rosch’s official biography indicates no health-related qualifications or experience undergirding these opinions. <http://www.ftc.gov/commissioners/rosch/index.shtml>. Interestingly, “[t]he [sweep] began through an Internet surf conducted by the FTC, the U.S. Food and Drug Administration (FDA), and Competition Bureau Canada in June 2007.” <http://www.ftc.gov/opa/2008/09/boguscures.shtml>.) This raises the question as to whether the FTC’s decision to support “conventional” medicine against “natural remedies” originated with the FDA or the government of Canada, creating the appearance that the FTC may be using its statutory enforcement powers against “false” and “deceptive” advertising in pursuit of what may be a political agenda of the FDA or a foreign government.

¹¹ *See* “FTC Sweep Stops Peddlers of Bogus Cancer Cures” (Sept. 18, 2008) <http://www.ftc.gov/opa/2008/09/boguscures.shtml>.

with the FTC’s stated concerns — as there is **no allegation** in the complaint, and **no record proof**, that the four Challenged Products pose a danger to consumer safety. *See Op.*, pp. 1-2.

In Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir.

1970), the court of appeals observed:

There is a marked difference between the issuance of a **press release** which states that the Commission has filed a complaint because it has “reason to believe” that there may have been a violation, and **statements by a Commissioner** ... which give the appearance that he has already prejudged the case. [*Id.*, 425 F.2d at 590 (emphasis added).]

Indeed, a Commissioner is duty-bound to take care not to “prejudge cases or **to make speeches which give the appearance that the case has been prejudged.**” *Id.* (emphasis added). In his September 23, 2008 remarks, Commissioner Rosch described the FTC “bogus cancer cure” targets, among which was DCO, as actively engaged in “particularly harmful practice[s].” Rosch, p. 16. Clearly, Commissioner Rosch had already made up his mind that DCO was “marketing ... bogus cancer cures,” and that such marketing was a “particularly harmful practice.” While Commissioner Rosch claims that the views expressed in his 2008 speech are only his own, the speech appears on the official FTC website, accessible from the FTC home page. Additionally, the speech appears on official FTC stationery. Altogether, Commissioner Rosch has created the public perception that he, the author of the FTC 2009 opinion against DCO, had made up his mind as far back as September 23, 2008.

Additionally, at the December 3, 2009 oral argument there is evidence that Commissioner Pamela Harbour shared Commissioner Rosch’s personal bias. Twice she expressed concern about the potential impact that the four Challenged Products might have on

“[p]eople who are terminally ill [who] are relying on these medicines to cure them.” Tr. Oral Arg., p. 21, ll. 16-21; and p. 24, ll. 8-10. And in a breach of judicial propriety, Commissioner Harbour warned Respondents that they faced what could only be understood as divine judgment:

You know, ultimately the Commission will render its judgment, but I know that your clients must realize that **there will come a time** when their actions will be judged by a **higher tribunal**.... [*Id.*, Oral Arg. Tr., p. 26, ll. 7- 11 (emphasis added).]

Not only did Commissioner Harbour’s words bespeak an attitude of partiality, they rested on a charge that the four Challenged Products threatened consumer health and safety, totally unsupported by the record. *Id.*, p. 26, ll. 12-15. As a matter of due process of law, an FTC Commissioner, sitting in final judgment of an adjudicated case, can neither prejudge the case nor rely on information *dehors* the record, nor give the impression that such information might be relied on. *See Cinderella*, 425 F.2d at 589.

E. The FTC Erroneously Dismissed Respondents’ Religious Freedom Restoration Act Claim.

The Commission summarily dismissed Respondents’ Religious Freedom Restoration Act (“RFRA”) claim on the ground that the “Order imposes no burden on Respondents’ exercise of religion; it only applies to their commercial advertising.” Op., p. 24. This ruling is clearly erroneous.

The Order is not limited to Respondents’ “advertising.” Rather, Paragraph V of the Order mandates that Respondents both produce the names of the consumers who purchased one or more of the four Challenged Products, and to write a letter to them, imposing upon them duties that would be violative of their religious convictions and practices. Declaration of

James Feijo (“J. Feijo Decl.”) ¶¶ 21, 24-25; Declaration of Patricia Feijo (“P. Feijo Decl.”) ¶ 40. Enforcement of such an order against Respondents would substantially burden Respondents’ “exercise of religion” which, by definition includes more than mere “belief and profession,” but includes ... **abstention from physical acts.**” See Employment Division, Dept. of Human Resources v. Smith, 494 U.S. 872, 877 (1990) (emphasis added).

The Order also is not limited to the “commercial” aspect of Respondents’ advertising. Rather, it would require Respondents to embrace the FTC’s **secular belief in science as their own**, thereby “fencing” Respondents out of the dietary supplement market because Respondents rely upon God’s revelation and individual testimonials, rather than so-called “science.” See J. Feijo Decl. ¶¶ 7-11. Indeed, individual testimonies appear to be anathema to the FTC. See DSG, pp. 18-19. The Bible, however, states that they set the standard of truth. See, e.g., Deuteronomy 19:15; John 8:17. In McDaniel v. Paty, 435 U.S. 618 (1978), the Supreme Court warned against the civil enforcement of a standard that denied “[r]eligionists ... the full measure of protection afforded speech [and] association.” *Id.*, 435 U.S. at 641. Indeed, the law should not be used as a sword to “justify repression of religion or its adherents from any aspect of public life,”¹² including participation in healthcare or commerce.

In Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006), the Supreme Court ruled that “RFRA expressly adopted the compelling interest test ‘as set forth in Sherbert v. Verner ... and Wisconsin v. Yoder....’ § 2000bb(b)(1).” O Centro, 546

¹² *Id.*

U.S. 418, 431 (2006). Accordingly, on a petition for review, the court of appeals would decide whether RFRA applies, and if so, whether its compelling interest test has been met. *See id.*, 546 U.S. at 430-31. Thus, the 15 U.S.C. section 45(c) rule of due deference to FTC factual findings would not apply.

F. Paragraph V of the Final Order Violates the Well-Established First Amendment Principle of Speaker Autonomy.

The FTC has treated Respondents' objection to Paragraph V and the Attachment A letter as if it were based solely upon the religious guarantee of the First Amendment. *See Op.*, p. 25. But Respondents' moral, ethical, and religious objection to this paragraph and the coerced letter has also been based on the First Amendment guarantees of the freedom of speech and of the press.¹³ In Wooley v. Maynard, 430 U.S. 705 (1977), the petitioner filed an affidavit wherein he stated that he "refused to be coerced by the State into advertising a slogan which [he found] morally, ethically, religiously and politically abhorrent." *Id.*, 430 U.S. at 713. The Court ruled that government may not "require" persons to "use their private property ... for the State's ideological message — or suffer a penalty" for noncompliance. *Id.*, 430 U.S. at 715.

Respondents have repeatedly voiced their moral, ethical, and religious objections to the FTC-extrapolated secular standard of "competent and reliable scientific evidence," prompting both the ALJ and the Commission to make changes in the Attachment A letter. *See ALJ Dec.*, p. 121; *Op.*, p. 25. Nevertheless, the Order would still require that the FTC "scientific" viewpoint be sent at Respondents' expense, on Respondents' stationery, and in an envelope

¹³ *See* Respondents' Appeal Brief, p. 65 and Respondents' Reply Brief, p. 64.

with Respondents' return address — mandating that Respondents use their private property as a vehicle for the FTC's infomercial, or suffer a crushing “civil” sanction of up to \$11,000 for each letter unsent. *See* 15 U.S.C. § 45(m).

Neither the ALJ's nor the Commission's modifications are of constitutional avail. In Pacific Gas and Electric Company v. California P.U.C., 475 U.S. 1 (1986), the Supreme Court extended the Wooley rule to a company “billing envelope[] to distribute the message of another.” *See id.*, 475 U.S. at 17. Citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the Court in Pacific Gas ruled that “[f]or corporations as for individuals, the choice to speak, includes within it the choice of what not to say.” *Id.*, 475 U.S. at 16, citing Tornillo, 418 U.S. at 258. Thus, the Court held that the California P.U.C. Commission's order to disseminate a message “in envelopes that [Pacific Gas] owns and that bear [its] return address” would unconstitutionally “forc[e] [Pacific Gas] to speak where it would prefer to remain silent.” Pacific Gas, 475 U.S. at 18.

This principle of “speaker autonomy” — the right “to choose the content of his own message” — is a “fundamental rule of protection under the First Amendment.” *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573 (1995). To be sure, the Court has acknowledged that even this bedrock principle must yield if the government can demonstrate that its mandate is “a narrowly tailored means of serving a compelling state interest.” *See* Pacific Gas, 475 U.S. at 19. But neither the ALJ nor the FTC made any such

attempt. And even if such an attempt were made, it would fail, just as such efforts by the government failed in Wooley,¹⁴ Pacific Gas,¹⁵ Tornillo,¹⁶ Hurley,¹⁷ and Barnette.¹⁸

II. IF THE STAY IS NOT GRANTED, RESPONDENTS WILL SUFFER IRREPARABLE HARM.

Compliance with the Order would be nearly fatal to the DCO ministry, imposing incalculable losses that can neither be accurately measured nor compensated, and causing serious harm to its “good will.” See Ross-Simmons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 18-19 (2d Cir. 1996). Indeed, even if the court of appeals eventually reversed the Order, having to comply would cause such disruption in the Respondents’ ability to maintain contact and credibility with their current ministry base that it would threaten the “viability” of the product line currently offered by DCO. See Reuters Limited v. United Press International, Inc., 903 F.2d 904, 907-08 (2d Cir. 1990). And it would cause Respondents other irreparable injury as described below.

A. The Cease and Desist Sections of the Order Will Cause Irreparable Harm.

The cease and desist sections (*i.e.*, Paragraphs II and III) of the Order apply to:

[A]ny efficacy claims [and] embraces not just the four Challenged Products, but other dietary supplements, foods, drugs, or other health and related programs, services, or products. [Op., p. 24.]

¹⁴ 430 U.S. at 715-17.

¹⁵ 475 U.S. at 19-21.

¹⁶ 418 U.S. at 247-54.

¹⁷ 515 U.S. at 575-81.

¹⁸ West Virginia State Board of Education v. Barnette, 319 U.S. 624 at 633-41 (1943).

Thus, the Order is designed to “fence in” DCO’s entire ministry, not just the “cancer and tumor” representations¹⁹ about the four Challenged Products, which were the exclusive subjects of this case.

1. Paragraph III Shuts Down Respondents’ Health Ministry.

According to Paragraph III, the Order extends to:

[A]ny representation, in any manner, directly or by implication ... about the efficacy, performance, or health-related benefits of any [dietary supplement, food, drug, or health-related product, service or program]. [Emphasis added.]

Thus, Paragraph III applies to each and every:

- **product** (150-200) that DCO currently markets.
- claimed “**efficacy, performance, or other health-related benefit**” — cancer, tumor or otherwise — for such products.
- health-related DCO “**services or programs**” (as defined in Paragraph I.B) whether or not those programs include the marketing or distribution of any health-related product.
- DCO representation made **directly or by implication**, such as through **any person** by means of an “**endorsement**,” including any testimonial about the efficacy, performance or health-related benefit of any health-related product, service or program.

¹⁹ The FTC objected not to DCO’s **actual** claims that it made about the four Challenged Products, but alleged claims as drafted by complaint counsel and characterized as “Respondents’ Unsubstantiated Representations.” *Compare* Complaint ¶¶ 9-13 *with* ¶¶ 14-17. By its “restatement,” the FTC not only erroneously placed upon Respondents the burden of proving “the [alleged] representation [to be] true, non-misleading, and at the time it was made, [that] Respondents possess[ed] and rel[ied] upon competent and reliable scientific evidence that substantiates the representation” (*see* Part I.B above), but based its entire case on allegations, not evidence.

- DCO “**promotion**” or “**distribution**” of any health-related product, service, or program, whether or not offered for sale by DCO.²⁰
- representation of any health-related product, service or program, in **any** manner, whether by book, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase, display, packaging, package insert, label, film, slide, radio, television, or cable television, video news release, audio program transmitted over a telephone system, infomercial, the Internet, e-mail, or in **any other medium**. [Order, Paragraph I.D (emphasis added).²¹]

Paragraph III permits no representation as to the encompassed matters:

unless the representation is **true, non-misleading**, and, at the time it is made, [DCO] **possess[es] and rel[ies]** upon **competent and reliable scientific evidence** that **substantiates** the representation.

According to Paragraph I.A of the Order:

“Competent and reliable scientific evidence” shall mean **tests, analyses, research, studies, or other evidence** based on the **expertise of professionals in the relevant area**, that has been conducted and evaluated in an **objective manner by persons qualified** to do so, using **procedures generally accepted in the profession** to yield accurate and reliable results. [Emphasis added.]

Thus, under Paragraph III of the Order, Respondents would have the burden:

- **of proving** that a representation is “**true**.”

²⁰ Although the Order states that it is limited to those activities “**affecting commerce**,” that broad term reaches any “purely local activity ... not itself, ‘commercial’,” if there is a “rational basis” for believing that, “when viewed in the aggregate,” leaving such noncommercial intrastate activity “outside” the FTC “regulatory scheme” would have a “substantial” effect on the commercial marketing and promotion of health-related products, services, and programs. See Gonzales v. Raich, 545 U.S. 1, 18-19 (2005).

²¹ No “medium” would be a safe harbor. Not even one-on-one personal conversations, seminar discussions, classroom lectures, nor **church sermons** would be outside the Order’s “fence.”

- **of proving** that a representation is “**nonmisleading.**”
- to “**substantiate**” a representation by competent and reliable scientific evidence.”
- **of proving** that, **at the time** that the representation was made DCO, in fact, “**possess[ed]**” the substantiating competent and reliable scientific evidence.
- **of proving** that **at the time** that the representation was made, DCO, in fact, “**relied upon**” the substantiating competent and reliable scientific evidence.
- **of proving** that the “tests, analyses, research, studies, or other evidence” relied upon meets the FTC’s standard of “**competency and reliability.**”
- **of proving** to the satisfaction of the FTC that the evidence was “**based on the expertise of professionals in the relevant area.**”
- **of proving** that the test or study that produced the evidence “has been **evaluated** in an **objective** manner by persons **qualified** to do so.”
- **of proving** that the “**procedures**” were “**generally accepted in the profession** to yield **accurate and reliable results.**”

It appears impossible for Respondents to continue any aspect of their healthcare ministry and, at the same time, to comply with Paragraph III of the Order, because:

- DCO **does not currently possess** the kind of “competent and reliable scientific evidence” required by the FTC to **substantiate** any **representation** of the **health-benefits** of any of its 150-200 products. J. Feijo Decl. ¶¶ 5-9, 19.
- The health-benefit qualities of DCO’s products are not ordinarily detectible by the kinds of studies, tests, and analyses, making it almost **impossible** for DCO to obtain the kind of “scientific evidence” required by the FTC to **substantiate** any **representation** of the **health-benefits** of DCO’s many products. J. Feijo Decl. ¶¶ 5-10, 19.
- There would be no assurance that the FTC would be satisfied that the evidence presented met its discretionary standards of relevance, objectivity, qualifications, and accuracy or reliability. J. Feijo Decl. ¶¶ 9-10, 19.

- The Order requires not only that Respondents **possess** the requisite “scientific evidence,” but that Respondents must **“rely upon”** that evidence to **substantiate** DCO’s **representations** when, because of their religious faith, Respondents can **rely** only upon Almighty God, such scientific evidence that it may or may not have serving only to confirm God’s revelation and natural reason. J. Feijo Decl. ¶¶ 5-10, 13-14, 18-19.
- Virtually **all** of DCO’s current income is generated by the sales of its products, the stoppage of such sales would immediately **deprive DCO of its major source of income**, thereby bringing DCO’s healing ministry to a screeching halt, ending its Internet outreach, its daily Monday through Friday radio programs, its e-mail, telephone, and other one-on-one contacts, discontinuing DCO’s health-benefit services and programs until funds from other sources were provided. J. Feijo Decl. ¶ 11-17, 19.

2. Paragraph II Shuts Down the DCO Health Ministry.

Although Paragraph II is limited to representations that DCO might make concerning the “prevent[ion], treat[ment] or cure[] of any type of **tumor or cancer**,” enforcement of that paragraph would have the same effect on Respondents as Paragraph III. DCO’s cancer-and-tumor-treatment representations are no more amenable to the FTC’s so-called scientific standards than any of its other health-related representations. Although, if read apart from Paragraph III, Paragraph II would permit Respondents to make other health-related-benefit-representations as to all of its products, including the four challenged ones, enforcement of that paragraph, alone, would shut down the current DCO health ministry in the following ways:

- DCO’s Monday through Friday radio program regularly receives calls from persons who are battling cancer, or are concerned about tumors, or are worried about nutritional problems during or following chemotherapy, or who have other like concerns. Taking such a call would **imply** that DCO was representing that its products, services, or program would treat or assist in the treatment of cancer. Such calls would have to be screened out. J. Feijo Decl. ¶ 15.
- DCO’s radio program regularly receives calls from persons who give testimony of how DCO’s products or services or program has assisted them in the treatment of cancer, such as “healing the destructive effects of radiation or

chemotherapy.” Taking such a call would be an “endorsement” of DCO’s product, service, or program. Such calls would have to be screened out. J. Feijo Decl. ¶ 15.

- Because of past cancer/tumor representations about some of its products, and past ministry on the radio, by e-mail, by telephone, and other means, DCO would be required to take affirmative steps to establish that it is an anything-but-cancer healing ministry lest it be implied by silence that those products so marketed in the past have not changed. J. Feijo Decl. ¶ 16. *See also* Declaration of Karen Orr, D.C. (“Orr Decl.”) ¶ 8.
- God’s call on DCO as a healing ministry is governed by the principle against “respect of persons.” Paragraph II would require DCO to violate that entrustment, cutting off those suffering from cancer for only one reason: that the FTC requires it. DCO must answer to God, not man. Refusing to reach out to cancer victims would be analogous to being ordered **not** to heal on the Sabbath, reserving to DCO the same condemnation as the Pharisees. J. Feijo Decl. ¶ 16.

3. The Harm Caused by Paragraphs II and III Would Be without Remedy.

Since 2002, James and Patricia Feijo have worked full-time building DCO as a Christian ministry, the marketing of DCO’s products being an integral part of that ministry. J. Feijo Decl. ¶¶ 1, 3-7; P. Feijo Decl. ¶¶ 1, 10, 35-39. Unlike an ordinary commercial enterprise, Respondents’ ministry cannot be measured by a valuation in dollars and cents. The Order would force upon the Feijos a Hobson’s choice, whether to obey God or man. *See* J. Feijo Decl. ¶¶ 5, 10, 13; *Acts* 3:1-10; 4:1-20. They should not be put at loggerheads with the civil governing authorities before being afforded the opportunity to seek judicial relief from an Article III court. *See Baylor Medical Center*, 711 F.2d at 40. Respondents have substantial grounds for their petition for review that, if decided in their favor, could avert a confrontation between church and state. *See Acts* 5:17-40.

Courts generally recognize that an order should be stayed in those cases where the moving party can show injury to a business's goodwill in relation to its steady customers. *See Reuters v. UPI*, 903 F. 2d at 908. Not only is there evidence that DCO's goodwill would be jeopardized by the enforcement of Paragraphs II and/or III of the Order (*see* J. Feijo Decl. ¶¶ 12-17), but a cessation of the current ministry under either of those paragraphs would undermine Respondents' goodwill with those depending upon their ministry. *See* P. Feijo Decl. ¶¶ 6-10, 35-38; Declaration of Jerry Hughes ("Hughes Decl.") ¶¶ 4, 6; Orr Decl. ¶¶ 4-5, 8; Declaration of Deane Mink, D.C. ("Mink Decl.") ¶¶ 4-5, 8; Declaration of Charles Sizemore, D.D.S. ("Sizemore Decl") ¶ 4.

B. The Paragraph V Mandate Would Cause Irreparable Harm.

Paragraph V of the Final Order would require Respondents to disclose its list of consumers of one or more of the four Challenged Products, and to send a letter to such consumers that would tell them (a) that the FTC found Respondents' advertising claims with respect to those four products to be "deceptive" for lack of "scientific evidence," and (b) there is "information from the FTC" about how those products and other "herbal products" generally are either ineffective or unsafe, in contrast to other "cancer treatments that have been scientifically proven to be safe and effective." Furthermore, Paragraph V would require that the letter be sent on DCO letterhead in an envelope with DCO's return address, and that the letter be signed by James Feijo as Overseer of DCO.

Brushing aside Respondents' religious and constitutional objections to both the disclosure of the names of DCO's customers and the contents of the coerced letter, the Commission asserted that it "it did not "see[] any evidence that the ALJ **punished** Respondents

for their political or religious beliefs in his proposed order.” Op., p. 25 (emphasis added). However, the question is not whether the letter “punishes,” but whether Respondents can be faulted for failing to have produced any “evidence” that might satisfy the FTC that Respondents’ religious conscience is violated by the disclosure and letter mandates. It is not within the FTC’s jurisdiction to put Respondents “to the proof of their religious doctrines or beliefs.” See United States v. Ballard, 322 U.S. 78, 86 (1944). Indeed, “[m]en may believe what they cannot prove,”²² and thus, it is not within the FTC’s domain to hold Respondents accountable for the truth or falsity of their beliefs. *Id.*, 322 U.S. at 87; see also Founding Church of Scientology v. United States, 409 F.2d 1146, 1157 (D.C. Cir. 1969). It is enough that Respondents’ religious beliefs are sincerely held. See J. Feijo Decl. ¶¶ 21, 24-25; P. Feijo Decl. ¶ 40.

C. Respondents Will Suffer Irreparable Harm from the Entire Order.

This is not an ordinary false advertising/deceptive practice case. From the beginning, Respondents have made it clear — because of their duty to Almighty God — that they can neither ignore Biblical and testimonial evidence, nor conform their advertising practices to meet an undefined government-prescribed secular standard of scientific evidence. Thus, early in these administrative proceedings, Respondents sought dismissal of this case on the grounds that the FTC policy requiring that Respondents justify their health-benefit claims by “competent and reliable scientific evidence” unconstitutionally violates Respondents’ freedom

²² *Id.*

of religion. *See* Respondents' Motion to Dismiss for Lack of Jurisdiction and Violation of Respondents' Constitutional Rights and Memorandum in Support, pp. 9-12.

Throughout this administrative proceeding, the FTC has turned a deaf ear to Respondents' objections, refusing even to entertain the possibility that rigid adherence to its so-called scientific test is, in reality, an unconstitutional endorsement of "scientism," namely, that materialistic science is the sole source of truth. *See* H. Schlossburg, Idols for Destruction, pp. 142-46 (Thomas Nelson, NY: 1986). Not surprisingly, the entire Order issued by the FTC in this case rests upon its singular devotion to "competent and reliable scientific evidence," a term that is neither defined by regulation, nor authorized by statute. Yet, unrelentingly, the FTC insists upon conformity, including in its cease and desist order that not only must Respondents "possess," but "rely" on "competent and reliable scientific evidence." To meet this standard, the FTC would coerce Respondents to subordinate their religious faith to the state. When "First Amendment freedoms, for even minimal periods of time" are "threatened," there is "irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion).

III. GRANTING A STAY WOULD NOT INJURE ANY PARTY AND WOULD PROMOTE THE PUBLIC INTEREST.

The only remaining question is whether, as demonstrated above, the factors supporting a stay are outweighed by a showing that a stay would harm other parties to the case and/or the public interest. *See, e.g.,* WMAT, 559 F.2d at 844-45; In re California Dental Ass'n, 1996 FTC LEXIS 277, at *7-8. While these two factors are stated separately, the FTC considers them together in cases where Complaint Counsel purports to represent the public by enforcing

the law. *See California Dental*, 1996 FTC LEXIS 277 at 8. *See also* Order Granting Partial Stay, *In the Matter of Toys “R” Us, Inc.*, Docket No. 9278 (Dec. 1, 1998).

A. A Stay Would Not Injure Any Party.

The letter mandated by Paragraph V of the Order requires Respondents to send a letter to some DCO customers “information from the FTC,” including the statement: “Some herbal products may **interfere or affect** your cancer or other medical treatment, may **keep** your medicines **from doing** what they are supposed to do, or could be **harmful** when taken with other medicines or high doses.” Order, Attachment A (emphasis added). Yet, there is no evidence in the record demonstrating that any one of the four Challenged Products (or any other DCO product) (i) interfered with or adversely affected any cancer or other medical treatment, (ii) kept any medicine from working the way it is supposed to, or (iii) harmed anyone. *See Op.*, pp. 1-3; ALJ Dec., pp. 56-58. Nor is there any evidence that the FTC has ever been recognized by Congress as an agency endowed with the expertise to give medical advice, nor for that matter the expertise to establish scientific standards governing dietary supplements.

Nor is there a scintilla of evidence in this record that any consumer was economically harmed, or actually misled by Respondents’s representations with respect to the four Challenged Products (or any other product). *See Op.*, p. 10. Indeed, Complaint Counsel deliberately elected to try this case on the “reasonable basis” theory, rather than the “falsity theory,” and thereby bypassed having to prove that anyone was actually deceived. *See ALJ Dec.*, p. 99; *Op.*, p. 12. To bolster its case that it need not adduce proof of actual injury, physical or otherwise, the FTC relied solely on the claim that “[f]ederal courts have long held

that the Commission has the common sense and expertise” to ascertain the “claims, including implied ones [that] are conveyed in a challenged advertisement.” Op., pp. 10-11. In fact, Respondents have received no complaints from any person using their products; rather, they have received “hundreds of expressions of thanks for [DCO’s] work.” P. Feijo Decl. ¶ 9. *See also* Mink Decl. ¶¶ 4-6; Orr Decl. ¶¶ 4, 6; Hughes Decl. ¶ 3.

In short, the record in this case fails to document any bona fide injury to any consumer. Quite simply, the only harm to the FTC/Complaint Counsel and/or consumers resulting from granting a stay of the Order (assuming the FTC prevailed on appeal) would be a period of delay in obtaining compliance with the Order. Respondents submit that the prospect of such delay carries no prejudice or risk of harm to the FTC — or even to the public. Indeed, delay in obtaining compliance simply does not measure up as a significant factor under the traditional federal standards governing stays pending appeal or judicial review. *See Baylor Medical Center*, 711 F.2d at 40. *See also EEOC v. Quad/Graphics Inc.*, 875 F. Supp. 558, 560-61 (E.D. Wis. 1995); *A & B Steel Shearing and Processing, Inc. v. United States*, 174 F.R.D. 65, 69-70 (E.D. Mich. 1997).

B. A Stay Would Be in the Public Interest.

The letter mandated by Paragraph V to be sent to DCO customers includes the statement that “[i]t is important that you talk to your doctor or health care provider before you decide to take any herbal product instead of taking treatments that have been **scientifically proven to be safe and effective.**” Order, Attachment A (emphasis added). Not only is there nothing in the record identifying any such “safe and effective” treatments, there was evidence

of significant safety risks of conventional cancer treatment testified to by the FTC's own expert witness. *See* Tr. 1/55-56, 221-22, 227; P. Feijo Decl. ¶¶ 3, 27.

By endorsing without qualification the “safe[ty] and effective[ness]” of conventional cancer treatments, the required letter is highly misleading. In addition to the specific risks identified by the FTC's expert oncologist, there are numerous others, including:

- (i) glandular and brain injury (P. Feijo Decl. ¶¶ 23-24, 27);
- (ii) secondary cancers from treatment for primary cancers (*Id.* ¶¶ 19-20); and
- (iii) serious damage to bodily organs. *Id.* ¶ 27.

There is also evidence that so-called “scientific studies” are oftentimes sullied by:

- (i) special interest group financial interests (*Id.* ¶¶ 12-14, 21); and
- (ii) human jealousies, rivalries, and other like foibles (*Id.* ¶¶ 16-18).

Not surprisingly, a survey documented that 64 out of 79 oncologists indicated that they would not personally have undergone the same chemotherapy treatment that they had prescribed for their patients. *Id.* ¶ 28.

There are also studies that demonstrate that dietary supplements and nutritional programs, such as those promoted by Respondents, are helpful, as evidenced by:

- (i) the growth of alternative health-care in America (*Id.* ¶¶ 19-21);
- (ii) officially-recognized studies showing that nutrients and other dietary supplements help prevent diseases, including cancer and tumors. *Id.* ¶¶ 29-34; Orr Decl. ¶ 4.

Indeed, Respondents have received numerous testimonies from people who have benefitted in the past from their nutritional programs and dietary supplements (P. Feijo Decl. ¶¶ 6-9, 36-

37), and who are continuing to benefit today from DCO products,²³ the ingredients of which are “GRAS” — “Generally Recognized as Safe.” P. Feijo Decl. ¶ 38.

In sum, the public interest would actually benefit from the grant of a stay. As demonstrated above, enforcement of the Order would threaten the continued existence of Respondents’ ministry. Hughes Decl. ¶¶ 4, 6. Even a severe cut-back in DCO’s outreach would deprive persons who are continuing to benefit from DCO’s nutritional programs, dietary supplements, and herbal products. Orr Decl. ¶¶ 4-8; Mink Decl. ¶¶ 4-6; Hughes Decl. ¶¶ 3-6. This is particularly true for those persons who have been through surgery, chemotherapy, and/or radiation unsuccessfully and been sent home by their doctors to die. *See* P. Feijo Decl. ¶ 6.

While the FTC has faulted Respondents for not being able to substantiate their representations by “competent and reliable scientific evidence,” it has done so blindly, assuming that “modern medicine” must be based solely upon “science,” and “science” displaces God. But, in recognition of the limits of “science,” the practice of modern medicine is based on faith. *See* P. Feijo Decl. ¶¶ 11,14-15. Ours is a nation built on the foundation that matters of faith are for the individual and family to choose for themselves, not for a regulatory commission and the state to choose for them. *See Ballard*, 322 U.S. at 86-87.

²³ *See* P. Feijo Decl. ¶ 36; Orr Decl. ¶¶ 4-7; Mink Decl. ¶¶ 4-6.

CONCLUSION

For the reasons set out above, the FTC should stay its Order pending review.

Respectfully submitted,

Herbert W. Titus
William J. Olson
John S. Miles
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.
370 Maple Avenue West, Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com

Attorneys for Respondents

February 25, 2010