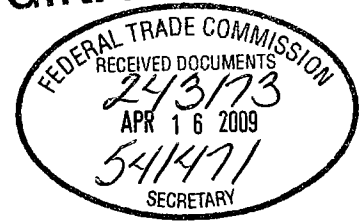


ORIGINAL



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

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

Docket No. 9329

Public Document

COMPLAINT COUNSEL’S REPLY PRE-HEARING BRIEF ON JURISDICTION

I. Introduction

In attempting to evade the FTC’s jurisdiction, Respondents continue to make self-serving statements that are not only unsubstantiated but are directly contradicted by the evidence in this action. In their Pre-Hearing Memorandum on Jurisdiction, Respondents claim that DCO’s property “does not, in fact, inure to the private benefit of the Feijo’s [sic] who receive no salary and are under *a de facto vow of poverty*.” Apparently, this de facto vow of poverty includes an American Express Gold Card paid for by DCO and used by the Feijos in connection with playing golf, buying cigars and eating at expensive restaurants on a regular basis. Contrary to Respondents’ self-description, in reality, DCO’s profits substantially inure to the benefit of James Feijo and his family.

In attempting to portray DCO’s purposes as charitable, Respondents also claim in their Brief that DCO “*maintains a non profit charitable program* that allows any user of DCO products to obtain its products for free or for smaller than recommended donations.”

Respondents have produced no documentation to evidence this self-serving statement. Indeed, Patricia Feijo's deposition testimony casts serious doubt on whether such a program even exists. Moreover, that Respondents provide some product for free or at a discount does not change the commercial nature of their enterprise. Most major pharmaceutical companies have patient assistance programs, and Intel and Microsoft have donated hundreds of computers to schools. Nevertheless, these entities are for-profit entities. Here, Respondents' assertion only serves to highlight that any charitable purposes of DCO are merely incidental to its for-profit nature.

The evidence demonstrates that DCO is far from a business "organized for and actually engaged in business for only charitable purposes." Under well-settled case law interpreting Section 4 of the FTC Act, both DCO and James Feijo are within the FTC's jurisdiction.

II. DCO And James Feijo Are Within The FTC's Jurisdiction

A. DCO's Profit Inures to the Benefit of James Feijo and His Family

Respondents' rhetoric and unsupported statements cannot obscure the fact that DCO's "profit" inures to James Feijo and his family. To begin with, "[p]rofit, for the purpose of Section 4 of the Federal Trade Commission Act, is not limited to dividends, gains or direct reward." *See Ohio Christian Coll. (of Calvary Grace Christian Churches of Faith, Inc.)*, 80 F.T.C. 815, 847-48 (1972) (finding jurisdiction where "shell game" gave the "individual respondents much of their subsistence and shelter and provided expensive automobiles for them to drive"); *see also Cmty. Blood Bank v. FTC*, 405 F.2d 1011, 1020 (8th Cir. 1969) (finding no jurisdiction where, among other things, "no part of any funds received by Community and AHA have ever been distributed or inured to the benefit of any of their members, directors or officers"). Respondents quote the Supreme Court's opinion in *California Dental Association v. FTC* for an explanation of what "profit" means under Section 4 of the FTC Act but omit the Court's conclusion that "an

entity organized to carry on activities that will confer greater than *de minimis* or presumed economic benefits on profit-seeking members certainly falls within the Commission's jurisdiction." 526 U.S. 756, 768 (1999). Under any definition of "profit" as set forth in the case law interpreting Section 4, when an individual uses the guise of a nonprofit corporation to reap substantial pecuniary benefits for himself and his family, neither the nonprofit organization nor the individual is exempt from the FTC's jurisdiction.

As set forth in Complaint Counsel's Pre-Hearing Brief on Jurisdiction, dated April 10, 2009, some of the ways in which James Feijo and his family benefit are as follows:

- DCO defrays James Feijo's personal expenses and provides for his support;
- James Feijo and his wife make use of and live in two properties owned by DCO, one of which is a three bedroom house in Deerfield Beach, Florida;
- DCO owns two Cadillacs, which James Feijo keeps in Florida and Rhode Island for the use of himself and his family;
- Both James Feijo's wife and daughter are employed by DCO and James Feijo pays his daughter \$700 per week in cash for her work at DCO;
- James and Patricia Feijo charge thousands upon thousands of dollars to an American Express Business Gold Card in the names of DCO and Patricia Feijo in order to, among other things, eat at expensive restaurants regularly, play golf on a regular basis, and buy cigars, automobiles, expensive shoes, electronics, home decor items, and sporting goods;¹ and
- James Feijo has signed checks for such luxuries as pool and gardening services rendered on the Deerfield Beach, Florida home used by the Feijos and fees apparently incurred by Patricia Feijo for playing tennis.

B. DCO's Alleged Charitable Activities Are Merely Incidental to its For-Profit Nature

¹ The American Express records referred to here likely reflect only a portion of the Feijos' personal use of DCO's funds. The bank records that Complaint Counsel recently received in response to their subpoena indicate that DCO also maintains at least one other credit card with Chase bank.

In their Pre-Hearing Brief on Jurisdiction, Respondents list a number of allegedly charitable endeavors undertaken by DCO over the years. However, this list does not alter the fact that DCO is not a business organized for or engaged in only charitable purposes. Indeed, DCO's distinctly commercial nature belies Respondents' claim that the company is a nonprofit entity. Among other things,

- Respondents offer 150 to 200 products and DCO has generated approximately \$2 million in annual sales for the years 2006, 2007, and 2008 for these products;
- Respondents charge consumers three to ten times what it costs them to purchase the DCO products from manufacturers; and
- Respondents have promoted an affiliate sales program which offers "website owners a means of profiting from their websites."

In an attempt to obscure the decidedly for-profit nature of DCO, Respondents point to DCO's alleged "non profit charitable program" that supposedly offers DCO products for free or smaller than recommended donations. Apart from refusing to provide any documentary evidence supporting this claim, Patricia Feijo's sworn deposition testimony in this action indicates that in fact, DCO "suggest[s] to the person that they go to a church" and then ask the church "to chip in a bit." *Deposition of Patricia Feijo*, January 14, 2009, at 65, l. 17 - 66, l. 5. Having customers ask their church to pay for DCO products is hardly charitable on the part of DCO. Moreover, even having such a program does not transform a commercial enterprise into a charity, nor does charging consumers "the same or less than similar dietary supplements in the for profit dietary supplement market." *Resp'ts' Pre-Hearing Mem.* at 2.

C. DCO is Not a Legitimate Corporation Sole

Respondents devote several pages of their Pre-Hearing Brief on Jurisdiction to explaining the background and structure of corporation soles. However, while corporation soles may in

certain instances be used for their intended purposes, that is not the case here. Even the circumstances surrounding DCO's registration as a corporation sole reinforce the conclusion that DCO is exactly the type of scam that the IRS has warned the public about. Indeed, prior to forming a corporation sole, DCO operated as a health food store and then a for-profit Rhode Island corporation. Despite having no discernible presence in Washington state,² DCO formed a corporation sole there with the assistance of a promoter, Rita Johnson. Ms. Johnson was subsequently enjoined by a District Court in Washington from, among other things, assisting or advising others to violate the tax laws through participation in a corporation sole.

On April 10, 2009, the Washington state legislature passed a bill banning the formation of corporations sole after August 1, 2009, and requiring existing corporations sole to file annual reports. *See* SHB 1592, "An act relating to business entities and associations registered with the secretary of state," <http://www.leg.wa.gov>. The accompanying "House Bill Report" explained:

Corporations sole have become the subject of abuse. People are using corporations sole to avoid paying taxes. . . . The bill requires corporations sole to file an annual report . . . [and] [m]any illegitimate corporations sole will not be able to file annually because they provide false addresses. Washington is one of 15 states that allow corporations sole registrations. Oregon and Idaho recently prohibited the formation of corporations sole. Washington is on the Internal Revenue Service's radar for

² As set forth in Complaint Counsel's brief dated April 10, 2009, it is difficult to understand how DCO did or will be able to continue to qualify as a registered corporation sole in Washington state given that pursuant to Washington state law, "any person being the . . . overseer . . . of any church or religious denomination *in this state*, may in conformity with the constitution, canons, rules, regulations or discipline of such church or denomination, become a corporation sole." WASH. REV. CODE § 24.12.010 (2009) (emphasis added). Respondents do not appear to have any connection with the state of Washington beyond the Enumclaw, Washington address they list as their "mailing and principal location" in their Articles of Incorporation. To the contrary, Respondents have repeatedly represented that their principal office and place of business is in Portsmouth, Rhode Island and have never referred to a location in Washington state.

fraudulent corporations sole registrations. Disallowing further registrations will prevent new fraud.

See House Bill Report, SHB 1592, at 3, *available at* <http://www.leg.wa.gov>.

D. Complaint Counsel Has Satisfied its Burden of Proof that the FTC Has Jurisdiction in this Action

It is ironic that Respondents attempt to rely on a burden argument in order to evade the FTC's jurisdiction when Respondents have refused to provide any meaningful information regarding their financial condition in response to Complaint Counsel's discovery requests, even after the Court ordered them to do so. Significantly, there is more than sufficient evidence to establish that Respondents are squarely within the jurisdiction of the FTC Act. Nevertheless, Complaint Counsel believe an adverse inference that the information sought in discovery would have defeated Respondents' nonprofit argument is warranted based on the circumstances here.

III. Objections to Respondents' Proposed Witnesses

In an effort to obscure the for-profit nature of DCO and the benefits that the Feijos obtain through DCO, Respondents have indicated their intention to call a litany of consumers who purportedly will testify to the religious and charitable nature of DCO and the all around goodness of the Feijos. This "character" evidence is irrelevant and should be excluded.

Respondents' list of witnesses for the hearing on jurisdiction contains numerous irrelevant witnesses.³ In particular, Respondents' witness list includes the following witnesses who will not offer relevant testimony, and whose testimony should be precluded: Tracey

³ On March 16, 2009, Complaint Counsel filed two Motions in Limine seeking to preclude the testimony of these witnesses at trial and hereby incorporate these motions. The first Motion in Limine sought to preclude Respondents from introducing evidence of purported consumer satisfaction as a defense to liability. The second Motion in Limine sought to preclude Respondents from introducing evidence of Respondents' "good faith" and non-expert opinions about the DCO Products as a defense to liability.

Kulikowski, Robert Hicks, Glenda Shaw, Laura Phair-Rudin, Sherman C. “Red” Smith, Pastor Wayne Robertson, David Bertrand, Richard Duffy, Dean Mink, D.C., and Ernie Jensen. For example, Sherman C. “Red” Smith “will testify that he considers [the Feijos] to be ministers of God, and feel [sic] that they work according to the dictates of their conscience and the Word of God.” David Bertrand “will testify to the style of life they had in the early days of the ministry, including that they would eat the grains that got buggy (skim the worms off the water as the rice cooked) and eat the food that went past date, to leave the good food for customers and to make ends meet, that the heat was kept low, no electricity used unnecessarily, each would shower only every other day and use the same towel all week” Laura Phair-Rudin “will testify that DCO is a ministry, that Tricia helped her dog with homeopathy at no charge,” and that Ms. Phair-Rudin herself received unspecified discounted DCO products and help at no charge with her ovarian cysts, sprained back, and the flu. Robert Hicks will testify that “Jim and Tricia have spent many hours with him on the phone, at no charge”; that he received unspecified DCO products at no charge and at a discount from one of DCO’s distributors; and that Tricia Feijo “helped his son who drowned.”

None of these witnesses can or will testify to the issue before the Court – the financial status of Respondents. Respondents allege only that some of these individuals may have been provided with some DCO products – including those which are not at issue in this case – at discounts or no charge in some instances. Even if Respondents’ allegation about such discounts is true, that fact is not relevant to whether DCO is operating as a for-profit company.

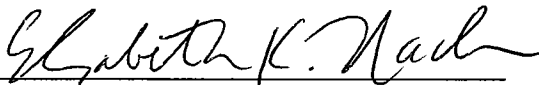
Moreover, as Complaint Counsel previously argued in their Motions in Limine, evidence of Respondents’ “good faith” and purported consumer satisfaction are not defenses to a violation of Section 5 of the FTC Act.

For the foregoing reasons, Complaint Counsel respectfully requests that the Court preclude Respondents from offering these witnesses at the hearing on jurisdiction.

IV. Conclusion

For the reasons set forth herein and in Complaint Counsel's Pre-Hearing Brief on Jurisdiction dated April 10, 2009, the Court has jurisdiction over DCO and James Feijo and this action should proceed to trial.

Respectfully submitted,


Leonard L. Gordon (212) 607-2801
Theodore Zang, Jr. (212) 607-2816
Carole A. Paynter (212) 607-2813
David W. Dulabon (212) 607-2814
Elizabeth K. Nach (202) 326-2611
William H. Efron (212) 607-2827

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

Dated: April 15, 2009

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 15, 2009, I have filed and served the attached **COMPLAINT COUNSEL'S REPLY PRE-HEARING BRIEF ON JURISDICTION** upon the following as set forth below:

The original and one paper copy via overnight delivery and one electronic copy via email to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room H-159
Washington, DC 20580
E-mail: secretary@ftc.gov

Two paper copies via overnight delivery to:

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

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

James S. Turner, Esq.
Betsy Lehrfeld, Esq.
Martin Yerick, Esq.
Swankin & Turner
1400 16th St., N.W., Suite 101
Washington, D.C. 20036
jim@swankin-turner.com

One electronic copy via email to:

Michael McCormack, Esq.
M.mccormack@mac.com



Elizabeth K. Nach
Complaint Counsel