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	)	**Docket No. 9329**
	)	
JAMES FEIJO,	)	**Public Document**
individually, and as an officer of	)	
Daniel Chapter One	)	
	)	
	)	

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION FOR A RULE 3.23(b) DETERMINATION

I. Introduction

The trial in this action has concluded. Nevertheless, Respondents seek an immediate interlocutory appeal to the Federal Trade Commission ("FTC" or "Commission") with respect to the Court's determination that the FTC has jurisdiction over Respondents. Significantly, the Court's ruling does ***not***, as is required by Rule 3.23(b), involve "a controlling question of law or policy as to which there is substantial ground for difference of opinion." As noted by Respondents in their Motion for a Rule 3.23(b) Determination ("Motion"), the Court has yet to issue a written opinion setting forth its grounds for holding that the FTC has jurisdiction over Respondents. Accordingly, it is entirely speculative for Respondents to claim that the ruling will rest on an unsettled question of law. Moreover, Respondents have not established that any such legal question exists in connection with this case, let alone that it will be determinative of the Court's opinion. In addition, Respondents cannot satisfy – and do not even attempt to address – either portion of the second prong of the Rule 3.23(b) test.

Finally, Respondents' professed need for an immediate interlocutory appeal is a situation entirely of their own making. Respondents failed to raise *any* jurisdictional argument in October 2008, when they filed their Answer and met with the Court during the pre-hearing scheduling conference. In January 2009, Respondents only attacked the face of the Complaint in making their first jurisdictional challenge. After this was unsuccessful, Respondents continued in their refusal to provide relevant information and then waited until ***after the close of discovery*** to make a bare bones factual challenge to jurisdiction, which could have been made in connection with its earlier challenge or in October 2008. Had Respondents promptly and adequately raised their challenge to the FTC's jurisdiction, this issue could have been determined well in advance of trial. Trial is concluded, however, and it would be a waste of both this Court's and the Commission's resources to allow an immediate interlocutory appeal to the Commission on this jurisdictional issue alone.

II. Argument

A. Respondents Cannot Meet Either Prong of the Rule 3.23(b) Test.

"Appeals of intermediate rulings are disfavored by the Commission. The federal courts have a strong policy of discouraging piecemeal litigation." *In re Int'l Ass'n of Conference Interpreters*, 1995 WL 17003147 (F.T.C. Feb. 15, 1995) (citations omitted). Thus, applicants for immediate review of a ruling by an Administrative Law Judge must meet both prongs of the following two prong test:

> First, the ruling must involve "a controlling question of law or policy as to which there is substantial ground for difference of opinion." Second, the Administrative Law Judge must determine "that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation *or* [that] subsequent review will be an inadequate remedy."

In re Schering-Plough Corp., 2002 WL 31433937 (F.T.C. Feb. 12, 2002) (citing 16

C.F.R. § 3.23(b)). Respondents cannot satisfy either prong of this test.

1. There is No Controlling Question of Law As to Which There is Substantial Ground for Difference of Opinion.

"The first prong of Commission Rule 3.23(b) contains two requirements that must be met. First, the ruling must involve a controlling question of law or policy. Second, there must also be a substantial ground for difference of opinion." *In re Schering-Plough Corp.*, 2002 WL 31433937. Neither requirement is met here. "Controlling questions are 'not equivalent to merely a question of law which is determinative of the case at hand. To the contrary, such a question is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases." *In re Rambus, Inc.*, 2003 WL 1866416 (F.T.C. Mar. 26, 2003) (citing *In re Auto. Breakthrough Scis., Inc.*, 1996 FTC Lexis 478 at *1 (Nov. 5, 1996); *see also In re Int'l Ass'n of Conference Interpreters*, 1995 WL 17003147 (F.T.C. Feb. 15, 1995) (decisions that are "fact specific" are not subject to interlocutory appeal). Here, the Court's ruling cannot involve a "controlling question of law," when the Court has not yet issued its written decision and/or provided the basis for its decision. Indeed, Respondents' Motion is predicated upon pure ***speculation*** that the Court's ruling will hinge upon an alleged legal controversy, as set forth in their Motion:

> The ALJ in this case has not yet provided a written opinion setting forth the findings of fact and conclusions of law that support his determination that the FTC does have jurisdiction over a non profit religious organization,[1] but it will ***presumably*** address the standard

[1] Contrary to Respondents' suggestion in their Motion, there has never been any finding in this action that DCO is a non-profit organization. In order to eliminate irrelevant and duplicative testimony at the jurisdictional hearing, the Court stated that it would consider DCO a "religious ministry" for the limited purpose of jurisdiction and asked that Respondents amend their witness list accordingly. *See* Rough Jurisdictional Hearing Transcript, Docket No. 9329,

set out in the *California Dental Association* case.

Respondents' Mot. at 4 (emphasis added). The contingent nature of Respondents' argument alone necessitates the denial of its Motion.

Respondents also fail to meet the second requirement of the first prong of the Rule 3.23(b) test. "The phrase 'substantial ground for difference of opinion' requires a finding that the question presents a novel or difficult legal issue." *In re Schering-Plough Corp.*, 2002 WL 31433937 (citation omitted). Contrary to Respondents' arguments, the FTC has jurisdiction over Respondents pursuant to well settled case law, not law "as to which there is substantial ground for difference of opinion." As explained in Complaint Counsel's Pre-Hearing Brief on Jurisdiction dated April 10, 2009, while the test for determining whether a corporation "is organized to carry on business for its own profit or that of its members" has been stated in various ways over time, the focus of any such inquiry remains the same.[2] Based upon the

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April 21, 2009, at 3. Respondents are now misusing the Court's effort to streamline the hearing to argue that "[a]s a religious ministry, Daniel Chapter One meets the criteria set out in the Internal Revenue Code for a non profit organization subject to the exception in section 508." Respondents' Mot. at 2-3. The Court's statement was not intended to presuppose a legal determination bearing upon the ultimate question of jurisdiction. Moreover, even if it is assumed that DCO is a religious ministry, this does not qualify DCO as a "church," as is required by Internal Revenue Code Section 508. *See e.g.*, *Chapman v. Comm'r*, 48 T.C. 358, 363 (1967) ("though every church may be a religious organization, every religious organization is not per se a church"). In short, DCO (i) has never sought and does not have 501(c)(3) status; and (ii) has not established that it qualifies as an exception to 501(c)(3) pursuant to 508(c)(1)(A). As recognized by the IRS, mere incorporation as a corporation sole does not provide an entity with non-profit status under 501(c)(3). *See* Rev. Rul. 2004-27 (I.R.B. 2004-12) (Mar. 22, 2004).

[2] In *California Dental*, the Supreme Court explained that the application of the FTC Act does not state how much of the entity's activities must go to raising the members' bottom lines to be considered one that carries on business for its own profit or that of its members. "There is accordingly no apparent reason to let the statute's application turn on meeting some threshold percentage of activity for this purpose, or even satisfying a softer formulation calling for a substantial part of the nonprofit entity's total activities to be aimed at its members' pecuniary benefit. To be sure, proximate relation to lucre must appear . . ." 526 U.S. 756, 766 (1999). The Supreme Court concluded that "an entity organized to carry on activities that will confer

evidence presented in this action, Respondents are squarely within the FTC's jurisdiction regardless of the precise formulation of the test used. *See* Compl. Counsel's Pre-Hr'g Br. on Jurisdiction at 8-21.

In addition, "[c]ommission precedent also holds that to establish a 'substantial ground for difference of opinion' under Rule 3.23(b), a party seeking certification must make a showing of a likelihood of success on the merits," *In re Schering-Plough Corp.*, 2002 WL 31433937 (citation omitted), and Respondents completely fail to do that here.

2. An Immediate Appeal Would Not Advance the Ultimate Termination of This Litigation and Subsequent Review Will Not be an Inadequate Remedy.

"The second prong [of the Rule 3.23(b) test] is that the Administrative Law Judge must determine 'that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or [that] subsequent review will be an inadequate remedy.'" *In re Rambus, Inc.*, 2003 WL 1866416 (citing 16 C.F.R. § 3.23(b)). In their Motion, Respondents make no attempt to address the second prong of Rule 3.23(b) and they cannot meet either portion of that prong. An immediate appeal to the Commission would not materially advance the ultimate termination of this litigation because the trial has concluded and an initial decision is expected within 90 days after closure of the hearing record. *See* Rules of Practice § 3.51(a). It is likely that if Complaint Counsel prevail on the merits, Respondents will appeal that decision as well. Under such circumstances, it is difficult to envision how a piecemeal approach to any

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greater than *de minimis* or presumed economic benefits on profit-seeking members certainly falls within the Commission's jurisdiction." *Id.* at 767 n.6. Contrary to Respondents' argument, the Supreme Court's opinion simply does not present a novel or difficult legal question which requires resolution in order to determine whether the FTC has jurisdiction over Respondents.

appeals would expedite matters. To the contrary, such an approach would simply waste judicial resources. Finally, Respondents have not articulated (and Complaint Counsel are not aware of) how addressing any appealable issues all at once after the Court issues both its decision on the merits and its written decision on jurisdiction will be an inadequate remedy.

B. Respondents Failed to Timely and Adequately Raise Their Jurisdictional Challenge.

Respondents' request for an immediate appeal is also unjustified in light of their own failure to timely and adequately raise a jurisdictional challenge. Respondents did not assert that the FTC lacked jurisdiction in their October 14, 2008 Answer nor did they raise this issue at the October 28, 2008 pre-hearing scheduling conference before this Court. After unjustifiably refusing to produce information relevant to their financial status, Respondents filed a Motion to Dismiss on January 13, 2009 asserting in relevant part that jurisdiction was lacking. As noted by the Court in its February 2, 2009 Order denying Respondents' Motion to Dismiss, "Respondents have not attached to their Motion any documents, affidavits, or other exhibits. Therefore, Respondents' challenges are deemed a facial attack only . . . ." Feb. 2 Order at 4. Notwithstanding the fact that Respondents continued to provide non-responsive, incomplete, and evasive answers to jurisdictionally relevant matters, Respondents filed a second Motion to Dismiss on February 24, 2009 – *after the close of discovery* – purporting to make a factual attack on jurisdiction. This "factual" attack consisted of citations to self-serving statements made by Respondents in discovery as well as DCO's Certificate of Incorporation and Articles of Incorporation.[3] Respondents' bare bones factual attack could have been made in connection

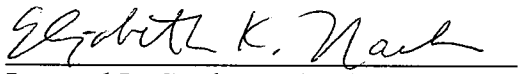
[3] Respondents' unjustified refusal to provide information in discovery directly relevant to the jurisdictional issue alone could support a finding that the FTC has jurisdiction over

with Respondents' first challenge to jurisdiction, or earlier, in October 2008. Accordingly, any professed need for an immediate appeal was created by Respondents' conduct in this action, and their delay does not constitute good cause for the extraordinary relief sought.

IV. Conclusion

For the reasons set forth herein, Respondents' Motion for a Rule 3.23(b) Determination should be denied.

Respectfully submitted,



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Dated: April 28, 2009

Respondents. *See* Rule of Practice 3.38; *see also* Compl. Counsel's Pre-Hr'g Br. on Jurisdiction at 22.

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[Proposed] ORDER DENYING RESPONDENTS' MOTION FOR A RULE 3.23(b) DETERMINATION

On April 23, 2009, Respondents filed a Motion For a Rule 3.23(b) Determination. Complaint Counsel filed their Opposition to Respondents' Motion For a Rule 3.23(b) Determination on April 28, 2009.

IT IS HEREBY ORDERED that Respondents' Motion For a Rule 3.23(b) Determination is DENIED.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Dated:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 28, 2009, I have filed and served the attached **COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION FOR A RULE 3.23(b) DETERMINATION** upon the following as set forth below:

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

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Two paper copies via overnight delivery to:

The Honorable D. Michael Chappell
Administrative Law Judge
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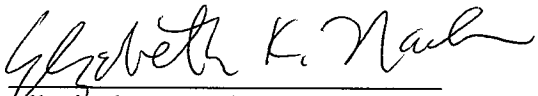

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