IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

10-1064

DANIEL CHAPTER ONE, et al.,
Petitioners,
v.

FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE
THE UNITED STATES FEDERAL TRADE COMMISSION

OPPOSITION OF RESPONDENT FEDERAL TRADE COMMISSION TO PETITIONERS' EMERGENCY MOTION FOR STAY PENDING REVIEW

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FEDERAL TRADE COMMISSION'S OPPOSITION TO PETITIONERS' MOTION FOR STAY PENDING APPEAL

Petitioners Daniel Chapter One and James Feijo (collectively, "DCO") sell dietary supplements to the general public. The Federal Trade Commission ("FTC" or "Commission") found, on an extensive adjudicative record, that DCO had engaged in deception by making baseless promises of cancer cures for several products: "BioShark," "7 Herb Formula," "GDU," and "BioMixx" (the "challenged products"). The Modified Final Order ("Order") under review requires DCO to stop making unsubstantiated or otherwise deceptive claims for these and other products. It also requires DCO to send a letter to past purchasers of the challenged products that informs them that the FTC has "found [DCO's] advertising claims for these products to be deceptive because they were not substantiated by competent and reliable scientific evidence * * *."

In its Emergency Motion for Stay Pending Review ("Mot."), DCO contends that these steps to protect consumers from unproven cancer "cures" will cause it irreparable injury and will not serve the public interest, and that this Court is likely to overturn the Order on review. We respectfully submit that DCO is wrong on all counts and its motion should be denied.

BACKGROUND

1. DCO and its marketing of the challenged products

DCO attracted the Commission's attention through its advertising for the four

challenged products, in which it claimed that the products could cure or treat cancer. BioShark is a capsule whose primary ingredient is shark cartilage. Initial Decision Finding ("IDF") 126.[1] DCO advertises that BioShark "stops tumor growth." IDF 223, 233. 7 Herb Formula is a liquid tea concentrate concocted of, *inter alia*, Turkey rhubarb root, sheep sorrel, Siberian ginseng, and cat's claw. IDF 134. DCO advertises that 7 Herb Formula will "decrease cell mutation" and "fight * * * tumor formation." IDF 237. GDU capsules contain, *inter alia*, bromelain, turmeric, quercetin, feverfew, and boron. IDF 139. DCO claims that GDU helps the body "digest * * * unwanted tumors and cysts," and "can aid the body in eliminating a tumor." IDF 263, 276. BioMixx is a powder that contains goldenseal, echinacea, and ginseng. IDF 143. DCO touts BioMixx as able to "assist the body in fighting cancer." IDF 293.

DCO's advertising is replete with testimonials that tout the products' success in treating cancer. *See* IDF 184 (after taking 7 Herb Formula and BioMixx, the consumer claimed to have gone into remission from leukemia and three inoperable tumors); IDF 243 (consumer who took 7 Herb Formula experienced "massive tumor shrinkage"); IDF 268 (consumer who took GDU "cured breast cancer in 3 months").

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[1] The Commission attached examples of DCO advertising to its administrative complaint. Those advertisements are attached hereto as Exhibit A. The Administrative Law Judge's Initial Decision ("ID") is attached hereto as Exhibit B. The findings of fact cited herein were adopted by the Commission. Mot. at Ex. G, p. 3.

DCO was first incorporated in 1990 as a for-profit corporation for the purpose of marketing dietary supplements. IDF 22, 23. Since at least 1993, it marketed dietary supplements from its headquarters in Rhode Island. Petitioner James Feijo ("Feijo") was responsible for the development, creation, production, and pricing of DCO's products. IDF 37. By 1998, DCO was making sales nationwide through its danielchapterone.com website. IDF 14. It operated a call center and a warehouse. IDF 33.

At some point, DCO's corporate status was revoked, IDF 26, and in 2002, it reorganized itself as a "corporation sole" under the laws of the state of Washington.[2] IDF 28. Feijo became the "overseer" of DCO, and the trustee of all its assets. IDF 5, 6. DCO's articles of incorporation as a corporation sole provide that its purpose is:

> to do whatever will promote the Kingdom of God, All Righteousness, and the principals [sic] of Liberty and Justice to provide for the comfort, happiness and improvement of an indefinite number of natural men and women, with special forerunner emphases upon the firm practice and lawful operation of the law * * * as well as other worthwhile projects for the common good of Daniel Chapter One and its close associates * * *.

IDF 29.

Even after its reorganization as a corporation sole, DCO continued to market

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[2] The corporation sole is a corporate structure that, under Washington state law, allows the "presiding elder" of any church to assume the rights of a corporation. *See* Wash. Rev. Code § 24.12.010. According to DCO, it operates as a "house church." IDF 11. That is, it has no established doctrine or set location, meeting at various times in various locations. *Id.*

dietary supplements to the general public, IDF 80, using several websites, IDF 103, a radio show (hosted by Feijo and his wife) IDF 108-111, and various publications, IDF 85-98. The radio show and publications provide consumers with DCO's toll-free number, which is answered by DCO's telemarketers at its Rhode Island call center. IDF 99-102. DCO sells its products to anyone, regardless of whether the purchaser belongs to DCO's religious community. IDF 82. DCO also sells its products through distributors and stores in Florida, Georgia, Missouri, and Pennsylvania. IDF 117.

DCO charges a substantial markup on the challenged products. It sells a bottle of 100 BioShark capsules (which lasts consumers from two to three weeks) for a price of $30.95. IDF 126-27. However, it purchases that bottle for $3.15 from a wholesaler. IDF 128. It sells a 120-capsule bottle of GDU (which lasts consumers from one to three weeks) for $29.95, and it purchases that bottle for $3.28 from its wholesaler. IDF 139-41. It sells a three-pound container of BioMixx for $40.95, but pays only $11.50 for that container. IDF 144-45. Finally, DCO itself formulates the 32-ounce bottles of 7 Herb Formula. DCO charges $70.95 for each bottle, which will last a consumer from eight to 16 days. IDF 135-136. From 2006 through 2008, DCO's sales of the four products totaled approximately $400,000 to $600,000 per year. IDF 80.

2. Administrative proceedings

The Commission's administrative complaint alleged that DCO's advertising

represented, *inter alia*, that BioShark is effective for the treatment of cancer, that 7 Herb Formula inhibits the formation of tumors, that GDU eliminates tumors, and that BioMixx is effective in the treatment of cancer. The complaint further alleged that DCO lacked a reasonable basis to substantiate those claims. ID at 1. As provided for in Commission Rule of Practice 3.42, 16 C.F.R. § 3.42, the case was assigned to Chief Administrative Law Judge D. Michael Chappell. DCO moved to dismiss the complaint, arguing that it was a nonprofit religious ministry outside the Commission's jurisdiction. After an evidentiary hearing on this motion, the ALJ concluded that jurisdiction did exist. ID at 3. The ALJ then conducted 2½ days of trial regarding the allegations in the Commission's complaint. Over 70 exhibits were admitted into evidence and 11 witnesses testified. *Id.* The Commission presented the testimony of expert witness Dr. Miller, a board-certified pediatric hematologist/oncologist. IDF 320. The ALJ concluded that Dr. Miller was qualified to give expert opinions regarding cancer, cancer research, and research methodology. IDF 326. Dr. Miller testified that no competent and reliable scientific evidence substantiated DCO's cancer-cure claims. IDF 362-386. Dr. Miller also reviewed 30 of DCO's testimonials and concluded that there was insufficient documentation to establish that any of the testimonialists actually had cancer. IDF 353. Although DCO proffered five experts, none was a medical doctor, none had specialized training regarding cancer or cancer treatment, and none had conducted clinical studies regarding cancer. IDF 335-337.

On August 5, 2009, the ALJ issued a 124-page Initial Decision, in which he concluded that DCO engaged in a business for profit, that DCO had advertised that the four challenged products could cure or inhibit cancer, and that DCO did not have a reasonable basis for those claims. ID at 5. The ALJ recommended entry of an order prohibiting DCO from making any of the claims challenged in the Commission's complaint unless such claim is true and DCO possesses competent and reliable scientific evidence to support that claim. He also recommended that DCO be required to notify past purchasers of the challenged products that there was no scientific evidence supporting the cancer-cure claims that DCO had made. Finally, he recommended that DCO be prohibited from making any efficacy- or health-related claim regarding any product that it sold unless that claim was true and DCO possessed competent and reliable scientific evidence to back up that claim. ID at 117-122.

As provided by Commission Rule 3.52, 16 C.F.R. § 3.52, DCO appealed the Initial Decision to the Commission. A unanimous Commission denied DCO's appeal. Mot. at Ex. G. The Commission first rejected DCO's contention that DCO was a nonprofit corporation exempt from the Commission's jurisdiction. It observed that "DCO bears none of the substantive indicia of a corporation that is truly organized only for charitable purposes," and that the DCO did not devote its profits to any charitable purpose, but used them instead to support a lavish lifestyle for Feijo. *Id.* at 8. The Commission next rejected DCO's contention that its cancer-cure claims

were protected by the First Amendment, *id.* at 13-17; that the ALJ failed to accord it due process, *id.* at 17-18; and that it had substantiation for its cancer-cure claims, *id.* at 18-22. Finally, the Commission rejected DCO's contention that the remedy recommended by the ALJ was arbitrary or capricious, or violated its constitutional rights. *Id.* at 22-25. The Commission's Modified Final Order included remedial provisions substantially identical to the relief recommended by the ALJ. Mot. at Ex. A.

On February 25, 2010, DCO filed a motion with the Commission seeking a stay pending resolution of a petition for review. The Commission denied that motion on March 22. On March 17, 2010, DCO filed its petition for review with this Court.

ARGUMENT

DCO's emergency stay motion should be denied because it does not satisfy the stringent criteria for such a stay. A party seeking a stay must show "(1) that it has a substantial likelihood of success on the merits; (2) that it will suffer irreparable injury if the stay is denied; (3) that issuance of the stay will not cause substantial harm to other parties; and (4) that the public interest will be served by issuance of the stay." *United States v. Philip Morris Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003), citing *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Although DCO is clearly dissatisfied with the Commission's

decision in this case, it has failed to make a showing sufficient to justify a stay.[3]

1. DCO has not shown any likelihood of success on the merits

a. DCO is not likely to succeed in showing that the Commission lacked jurisdiction to prohibit its deceptive advertising

DCO is not likely to succeed in showing that the Commission lacked jurisdiction over it. The Commission may exercise jurisdiction over those not-for-profit corporations that carry on business for the profit of their members. 15 U.S.C. §§ 44, 45. "Congress did not intend to provide a blanket exclusion of all nonprofit corporations, for it was also aware that corporations ostensibly organized not-for-profit, such as trade associations, were merely vehicles through which a pecuniary profit could be realized for themselves or their members." *Community Blood Bank of the Kan. City Area, Inc. v. FTC*, 405 F.2d 1011, 1017 (8th Cir. 1969); *see California Dental Assn. v. FTC*, 526 U.S. 756, 766 (1999) ("[t]he FTC Act is at pains to include not only an entity 'organized to carry on business for its own profit,' * * *, but also one that carries on business for the profit 'of its members'").

Community Blood Bank suggests a two-part analysis when assessing whether

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[3] DCO contends that it need only show that it has a substantial argument to satisfy the first requirement for a stay. In fact, however, as this Court has explained, where a party "has made a substantial case on the merits," this Court may, in its discretion, grant a stay if "the other three factors *strongly favor* interim relief." *WMATA v. Holiday Tours*, 559 F.2d at 843 (emphasis added). As explained below, DCO cannot show any likelihood of success, and the other factors most certainly do not strongly favor relief.

the FTC Act provides jurisdiction over an ostensibly nonprofit corporation. This analysis considers both the source of the corporation's income and the distribution of that income; either one can provide a basis for the Commission's jurisdiction. *College Football Ass'n*, 117 F.T.C. 971, 993-994 (1994). With respect to the first part of the analysis, the source of the income, it is necessary to determine whether the corporation is actually engaged in business for a charitable purpose. The Commission concluded that DCO conducted its business for a commercial purpose: it operated to maximize the sale of the challenged products. Mot. at Ex. G, p. 7.

The Commission also held that the second part of the analysis, the destination of DCO's income, independently establishes the Commission's jurisdiction. *Id.* at 8. Even if DCO is nominally organized as a corporation sole to "promote the Kingdom of God," *see* IDF 29, the Commission found that there is abundant evidence that DCO actually operates for the profit (*i.e.*, "pecuniary" or "economic" benefit) of its member, Feijo. Mot. at Ex. G, p. 8. The reality is that Feijo, the overseer of DCO, treats DCO as his personal bank account. *See Community Blood Bank*, 405 F.2d at 1018-19 (it is the reality of a corporation's actions, not its mere form, that determines whether a corporation is beyond the reach of the FTC Act). DCO's assets are under Feijo's complete control. IDF 40. He makes frequent cash withdrawals from DCO's accounts but maintains no records as to how that money is used. IDF 47. Indeed, DCO has a policy of not maintaining records. IDF 50. But the evidence does show

that Feijo uses DCO's funds to pay for all his living expenses. IDF 58. These include funds to pay for Feijo's two homes (one in Rhode Island, and one on a Florida country club), for his two Cadillacs, for his country club membership, for his wife's tennis club, and for a wide variety of other expenses (including $9936 for golfing expenses, and $1077 for cigars). IDF 47, 55, 56, 58, 62, 63, 67, 70.[4] Although DCO puts forward an eleemosynary front, the backroom reality is otherwise. Because DCO's revenues provide a pecuniary benefit to Feijo, DCO is subject to the FTC Act.

DCO argues that, to establish jurisdiction, the Commission was obligated to present specific evidence showing that each of the payments made from DCO's bank accounts to support Feijo's living expenses did not somehow advance DCO's mission. Mot. at 6-7. However, the Commission is entitled to infer that payments that were devoted to supporting Feijo's lavish lifestyle were not exclusively devoted to furthering a charitable mission. *See* Mot. at Ex. G, p. 8. Because this inference can be reasonably drawn from the facts (*i.e.*, payments for multiple homes, country club memberships, and cigars), it should be sustained by this Court. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 386 (1965) (sustaining inferences drawn by the Commission). Accordingly, DCO is not likely to succeed in showing that the Commission lacks jurisdiction over its deceptive advertising.

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[4] This Court must uphold the Commission's findings of fact if they are supported by substantial evidence. *Novartis Corp. v. FTC*, 223 F.3d 783, 787 (D.C. Cir. 2000).

b. DCO is not likely to succeed in overturning the advertising substantiation doctrine

Instead of arguing that it can somehow substantiate its cancer-cure claims, DCO challenges the long-established principle of law under the FTC Act recognizing "that in general an advertisement is considered deceptive if the advertiser lacks a 'reasonable basis' to support the claims made in it." *Thompson Med. Co. v. FTC*, 791 F.2d 189, 193 (D.C. Cir. 1986); *see* Mot. at 7-9. This legal doctrine is based, not, as DCO mistakenly contends, on a pamphlet providing industry guidance, *see* Mot. at 8, but on the unremarkable proposition that consumers expect advertisers to have support for the claims they make. Thus, if an advertiser does not possess a reasonable basis to back up the claims it makes in its advertising, the advertising is deceptive. This principle has been routinely applied in cases in which the Commission challenges deceptive advertising. *See, e.g.*, *Thompson Medical*, *supra*; *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489 (1st Cir. 1989); *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146 (9th Cir. 1984); *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294 (7th Cir. 1979); *American Home Prods. Corp. v. FTC*, 695 F.2d 681 (3d Cir. 1982).

DCO incorrectly suggests that application of this legal principle shifts the burden of proof to a defendant in a case brought by the Commission. Mot. at 8 & n.4. It is always the Commission's burden to show, as it did in this case, that the substantiation possessed by the advertiser was not sufficient to support the claims that the advertiser made. Plainly, DCO is not likely to succeed in overturning this long-stand-

ing rule of law. In addition, the mere fact that it is unable to locate any case in which an advertiser has raised a similar argument, *see* Mot. at 8, hardly demonstrates that it is likely to succeed.

c. None of DCO's First Amendment arguments is likely to succeed

Pearson v. Shalala, 164 F.3d 650 (D.C. Cir. 1999), does not advance DCO's cause. *See* Mot. at 9-11. As DCO notes, "there must be concrete evidence that an advertisement is, in fact, misleading or deceptive; otherwise, the First Amendment commercial speech doctrine applies." Mot. at 11. But in this case, there was such evidence. The Commission concluded that DCO made cancer-cure claims regarding the challenged products. It is well established that, if an advertiser lacks adequate substantiation for these sorts of claims, the claims are deceptive. *See* Part 1.b, *supra*. Because the Commission also concluded that the evidence showed that DCO lacked substantiation for its claims, there was concrete evidence that DCO's claims were deceptive. The Supreme Court has made clear that deceptive advertising claims are entitled to no First Amendment protection at all. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980).

Unlike here, in *Pearson*, there was no concrete evidence that particular advertisements were deceptive. That case involved a challenge to an FDA regulation that required marketers to obtain pre-approval of any health claim for a dietary supplement. FDA would give such approval if there was "'significant scientific

agreement' among experts that the claim is supported by the available evidence." *Id.* at 651. Under this stringent standard, imposed in a regulatory, non-adjudicative context, this Court concluded that FDA's prophylactic rule reached beyond claims that could be characterized as "inherently misleading." *Id.* at 655. Instead, the Court concluded that claims that were not supported by significant agreement among experts were merely "potentially misleading," and hence FDA's restrictions were subject to the multi-factored test of *Central Hudson*. *Id*. In the present case, however, the Commission has determined that DCO's cancer-cure advertisements are actually deceptive. Accordingly, they are entitled to no First Amendment protection.[5]

DCO also contends that its advertising should be treated as fully protected speech under the First Amendment because its "commercial speech is blended with noncommercial speech on an issue of public importance." Mot. at 13. This argument fails because, as the Supreme Court explained, "[w]e have made clear that advertising which links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech." *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 475 (1989) (internal quotation marks and citations omitted).

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[5] DCO also gets no support from *Ibanez v. Florida Dept. of Bus. and Prof. Reg.*, 512 U.S. 136 (1994), and *Peel v. Atty. Reg. and Discip. Comm'n of Ill.*, 496 U.S. 91 (1990), *see* Mot. at 11, because the Court determined that the commercial speech at issue in those cases was not deceptive.

DCO mistakenly contends that *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1986), somehow precludes the Commission from requiring it to send a letter to purchasers of the challenged products informing them of the Commission's determination in this case. *See* Mot. at 14. In *PG&E*, the utility company included a newsletter with each monthly bill. This newsletter set forth PG&E's views on various issues. The PUC had attempted to require PG&E to provide its customers with statements from an organization that had opposing views. The Court held that requiring PG&E to provide a forum for the views of others would constitute an infringement on PG&E's fully protected speech. 475 U.S. at 16.

This case is very different. The letter that DCO will be required to send to purchasers of the challenged products addresses attributes of those products and corrects the deception in DCO's prior advertising. As such, to the extent there is any restriction on speech, it is a restriction on commercial speech that will be upheld if it passes *Central Hudson*'s three-part commercial speech test. *See Novartis v. FTC*, 223 F.3d 783, 788 (applying that test to a corrective advertising requirement). The government has the power to regulate commercial speech if (1) its interest in doing so is "substantial," and the regulation it proposes both (2) "directly advances" that interest, and (3) "is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566. The letter easily passes that test. The government's interest is substantial -- correcting the false impression created by DCO's advertising

(*i.e.*, that DCO had substantiation for its cancer-cure claims). *See Novartis*, 223 F.3d at 788. The letter directly advances that interest because it contains information that specifically corrects that false impression. It also serves to protect consumers whose health might have been compromised by reliance on DCO's deceptive statements, because it advises them to consult a health care provider about the use of herbal remedies, particularly if they have taken such remedies in lieu of other cancer treatments. And finally, the letter is not more extensive than necessary because DCO is required to send it only to those consumers who bought the challenged products during the last five years. Thus, it is specifically targeted to those who were most likely to have been deceived by DCO's advertising. Accordingly, the First Amendment imposes no impediment to that portion of the Commission's Order that requires DCO to send a letter to its customers.[6]

d. DCO's due process argument is not likely to succeed

DCO's due process arguments are completely meritless. *See* Mot. at 11-12. DCO contends that it was denied due process because two of the four Commissioners who resolved its appeal had prejudged the matter. In particular, it refers to a speech

[6] Even if the letter were treated as fully protected speech, DCO's First Amendment rights would not be infringed because, as the Commission concluded, the letter furthers a compelling interest (protecting cancer patients from deceptive cancer-cure claims), and the letter, which is directed only to those customers who bought the challenged products, is narrowly tailored to further that interest. *See* Mot. at Ex. B, p. 8.

by Commissioner Rosch in which he decried natural remedies that do not work, natural remedies that have unexpected side effects, and natural remedies that interfere with conventional treatments. *See* Mot. at Ex. C, p. 17. But Commissioner Rosch never referred to DCO, and he gave this speech nearly a year before DCO filed its appeal to the Commission. Moreover, DCO never made a timely request for Commissioner Rosch's disqualification; it raised the issue for the first time in its motion for a stay, after the Commission had already resolved the appeal. In any event, if the sort of comments that DCO complains of were sufficient to disqualify a commissioner from adjudicating a case, commissioners would be virtually precluded from speaking or writing on legal issues that may come before the Commission, or on the Commission's efforts to take actions against particular types of unfair, deceptive, or anticompetitive behavior. This is not the law. On the contrary, the same Congress that empowered the Commission to act as an adjudicator also specifically contemplated that it would also make public reports about its activities and inquiries. *See* 15 U.S.C. § 46(f).

There is also no merit to DCO's contention that its rights were somehow violated because, during the oral argument before the Commission, Commissioner Harbour made a statement that, in DCO's view, "bespeak[s] an attitude of partiality." *See* Mot. at Ex. C, p. 19. Even if DCO had properly characterized Commissioner Harbour's statements, DCO cites to no authority that even remotely suggests that it

is somehow improper for a member of an appellate tribunal, during oral argument, to press counsel vigorously on points that are in dispute, or even to telegraph how she is likely ultimately to decide the case.

e. DCO's RFRA defense is not likely to succeed

There is no merit to DCO's contention that the Commission's Order somehow substantially burdens its exercise of religion. Mot. at 13-16. The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et seq.*, provides a defense if a government action substantially burdens a person's exercise of religion. It is for the entity asserting the defense to establish the substantial burden, *Diaz v. Collins*, 114 F.3d 69, 71-72 (5th Cir. 1997), and DCO has failed to do so. To establish the substantial burden triggering RFRA, DCO would have to show that the Commission's Order "forces [it] to engage in conduct that [its] religion forbids or that [the order] prevents [it] from engaging in conduct [its] religion requires." *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001). It would also have to show that the Order "significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of [DCO's] beliefs." *Id.* (internal quotation marks omitted).

DCO describes its ministry as "present[ing] the Gospel of Jesus Christ, teach[ing] Biblical principles of healthcare and healing, and offer[ing] a number of herbal and nutritional products for sale to the public * * *." Mot. at 3. It also claims that its ministry includes "'proselytizing' persons of other faiths or of no faith." Mot.

at 15. Nothing in the Order prohibits DCO from presenting the Gospel, teaching Biblical principles, or offering their products for sale. Nothing in the Order prevents it from proselytizing. The Commission's Order merely prohibits DCO from promoting its products with unsubstantiated claims, and DCO never contends that the use of such claims is, in any way, a central tenet of its religion. It may be that DCO was motivated by religion to make the sorts of claims that it made. However, religious motivation alone is insufficient to trigger application of RFRA. *Henderson v. Kennedy*, 253 F.3d at 17.

2. DCO has failed to demonstrate irreparable injury

The burden falls on DCO to show that it is likely to be irreparably harmed if a stay is not entered, and absent such a showing, no stay is appropriate. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Moreover, the injury must be "certain and great"; theoretical harm is not sufficient. *Id.* "[E]conomic loss does not, in and of itself, constitute irreparable harm." *Id.* DCO contends that the Order would "essentially shut down" its business and harm its goodwill with steady customers.[7]

[7] DCO claims that the Commission "acknowledges" that the Order will require DCO to terminate its sales of dietary supplements. Mot. at 16, citing FTC Stay Order (Mot. at Ex. B) at 7. In fact, the Commission acknowledged nothing of the sort. It simply restated DCO's contention. Moreover, when the Commission "accepted" the declarations submitted by DCO in support of its motion for a stay, it did not thereby indicate that it agreed with the speculative statements contained therein. *See* Mot. at 17. The Commission merely indicated that it accepted the declarations into the administrative record of the proceeding.

Mot. at 16. But DCO's contention that the Order would terminate its business is based on a misunderstanding of the Order. In fact, nothing in the Order prohibits DCO from continuing to sell any of its products. The only restriction imposed by the Order is that it may not tout those products with unsubstantiated health or efficacy claims.

Nor has DCO made any showing that the Order will somehow damage its goodwill. Again, its only support for this contention is speculation: in Feijo's declaration, he contends that if DCO were to comply with Order ¶ V and supply the Commission with the names of its customers, this would infringe "consumers' confidence in [DCO] to protect their privacy." Mot. at Ex. D, Decl. of Feijo at 9. Such speculation cannot support DCO's motion. *See Wisconsin Gas v. FERC*, 758 F.2d at 674. Indeed, DCO has not shown that its customers' privacy would be infringed merely by providing a list of names to the Commission. Nor has it shown that its customers have a reasonable expectation that DCO will not reveal their names to someone else.

3. The public interest does not favor entry of a stay

Because the Commission acts in the public interest, the final two stay factors merge into one. The public interest does not favor entry of a stay because, as the Commission explained, until the Order goes into effect, DCO may continue to make unsubstantiated cancer-cure claims for its products.

> Consumers are harmed when they purchase products that are marketed to prevent, treat, or cure cancer, inhibit tumors * * * and there is no

> substantiation for those claims. As the findings of fact show, this harm arises if consumers forego beneficial and effective therapy for untested therapies like the ones at issue here. * * * These harms are real and they are substantial.

Mot. at Ex. B, p. 8. Because real harm would result if the effective date of the Order is delayed, the stay should be denied.[8]

CONCLUSION

For the reasons set forth above, this Court should deny DCO's Emergency Motion for Stay Pending Review.

Respectfully submitted,

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[8] DCO mistakenly contends that there is no evidence that its practices cause harm. *See* Mot. at 18-19. In fact, however, the Commission's expert, Dr. Miller, testified in detail regarding the harm caused by DCO's advertising. IDF 354-361.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties and intervenors appearing below and in this Court are listed in the Emergency Motion for Stay Pending Review filed by petitioners with this Court on March 25, 2010.

B. Ruling Under Review

Reference to the ruling at issue appears in the Emergency Motion for Stay Pending Review filed by petitioners with this Court on March 25, 2010.

C. Related Cases

This case has not been previously before this Court. There are no related cases.

CERTIFICATE OF SERVICE

I hereby certify that, on March 31, 2010, I electronically filed the Opposition of Respondent Federal Trade Commission to Petitioners' Emergency Motion for Stay Pending Review with the Clerk of the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that counsel for appellants, who are named below, are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. In addition, I also filed with this Court four paper copies of the Commission's Opposition. These copies were filed by hand.

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