UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT ON LIABILITY

The only argument Daniel Chapter One and James Feijo ("Defendants") raise in opposition to the pending motion for summary judgment is the assertion that the government has failed to provide sufficient evidentiary support for several facts within Plaintiff's Statement of Material Facts Not in Genuine Dispute, precluding adverse inferences based on Defendants' Fifth Amendment assertions of privilege in connection with those facts. Defendants' argument fails as sufficient independent evidence exists for adverse inferences to be drawn against Defendants. Defendants' argument should be rejected, and as there are no genuine issues of material fact, summary judgment should be granted on liability.

Sufficient Corroborating Evidence Exists for an Adverse Inference That Defendants Control the Websites

The United States has requested that the Court draw an adverse inference from Defendants' invocation of the Fifth Amendment concerning their control of various websites. In their response, Defendants assert that an adverse inference is inappropriate as the government has failed to meet its burden related to Plaintiff's Statement of Material Facts Not in Genuine Dispute numbered 21, 25, 28, 31, and 38.[1] The websites at issue are:

- 21: www.dc1freedom.com/guilty-of-healing-cancer
- 25: http://dc1fellowship.com/forum/viewtopic.php?f=1&t=291
- 28: http://healthfellowship.org/thread-313.html
- 31: http://health.groups.yahoo.com/group/danielchapterone/files/
- 38: http://feeds.thepodzone.com/dc1hw

It is well established that adverse inferences can be drawn against litigants who assert their Fifth Amendment right in a civil proceeding. See Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). Adverse inferences are permitted as the "inference balances the equities after Defendants failed to give the [government] material which they were entitled to as an opposing party." SEC v. Suman, 684 F.Supp.2d 378, 387 (S.D.N.Y. 2010). The United States need only "offer evidence which at least tends to prove each part of the plaintiff's case. Once that has been done, the Court can then add to the weight of the evidence by use of the inference." In re Cunningham, 365 B.R. 352, 362 (D. Mass. 2007) (quoting Trustmark Nat'l Bank v. Curtis, 177 B.R. 717, 720 (S.D. Ala.

[1] These statements of fact each include a different website, and state that "Defendants, or those defined as 'respondents' in Part1.E of the [Order] controlled the content published on the website . . . ."

1995)); see also In re Winstar Comunications, Inc., 2007 WL 1232185, at * (D.Del. April 26, 2007) (only corroborating evidence was communications showing that Lucent employees were involved).

This standard is satisfied here. An adverse inference is appropriate for statement of fact 25 based on the information in Patricia Feijo's declaration.[2] Patricia Feijo's declaration establishes Defendants' control of the http://dc1fellowship.com website. The fact that Ms. Feijo's declaration does not correspond to the entire date range at issue does not prevent an adverse inference from being granted as to this fact.

Similarly, Defendants' use of the other websites and the links they provide to the websites in statements of fact 25, 28, 31, and 38 constitutes "evidence which at least tends to prove" that Defendants controlled the websites. In re Cunningham, 365 B.R. at 362 (quoting Trustmark Nat'l Bank, 177 B.R. at 720). For example, Defendants direct potential customers to these websites for more information about their products. As detailed in Paragraph 44 of Plaintiff's Statement of Material Facts Not in Genuine Dispute, on the Daniel Chapter One CENSORED show broadcast on May 28, 2010, James Feijo said, "Marcia, you can go to DanielChapterOneFreedom.com. . . . And you can join the DC1 fellowship and people from all over the country are helping each other, okay?" Patricia Feijo then echoed this sentiment, stating, "again, you can join the fellowship for more ministry. She can join the fellowship directly if she'd like." Subsequently, James Feijo stated, "[a]nd please don't hesitate - - now, Marcia, if you go and join the fellowship, then more people can offer you more help."

[2] Ms. Feijo's declaration is attached to the Motion for Summary Judgment as Exhibit X.

As detailed in Paragraph 47 of Plaintiff's Statement of Material Facts Not in Genuine Dispute, Defendants also accepted and broadcasted a call from "Greg." During this broadcast, Greg informed listeners about how to find and join the danielchapterone Yahoo Group. James Feijo told Greg to "[t]ell them what the publications are on there - awesome list, man[,]" and Greg responded by listing several available publications, including "we've got the BioGuide, we've got the Most Simple Guide[.]" James Feijo then told listeners that "there's another site too, besides the Yahoo Group" and Greg responded, "yeah and that's, health, health, let's see, healthfellowship.org[.]"

Defendants also provide links between many of these websites for potential customers to easily view their websites and access these materials. For example, Defendants have a link from their website www.danielchapterone.com[3] to www.dc1freedom.com.[4] The www.danielchapterone.com website also has a link to the http://feeds.thepodzone.com/dc1hw website, which contains recordings of recent Daniel Chapter One broadcasts.[5] Defendants link their to www.dc1freedom.com website to their http://dc1fellowship.com website, where they

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[3] Paragraph 6 of James Feijo's Declaration states that "[s]ince 2005 our healing ministry has utilized several Internet websites (*e.g.*, www.danielchapterone.com, www.dc1pages.com, www.dc1store.com, www.7herbformula.com, and www.gdu2000.com)[.]" This declaration is attached as Exhibit A to the Motion for Summary Judgment. Additionally, Paragraph 3C of Patricia Feijo's declaration details Daniel Chapter One's control of the www.danielchapterone.com website. Ms. Feijo's Declaration is attached as Exhibit X to the Motion for Summary Judgment.

[4] See the "Health Fight" link on p. 1 and 6 of Exhibit B, which contains a copy of the www.danielchapterone.com website as it existed on May 6, 2011, and July 18, 2011.

[5] See the "Accent Radio Network" links on p. 2 and 7 of Exhibit B, which contains a copy of the www.danielchapterone.com website as it existed on May 6, 2011, and July 18, 2011.

invite potential customers to "officially join today[.]"[6] The interweaving links between these websites and Defendants' use of these websites constitutes "evidence which at least tends to prove" that Defendants control all these websites. In re Cunningham, 365 B.R. at 362 (quoting Trustmark Nat'l Bank, 177 B.R. at 720). This evidence is sufficient corroborating evidence to support the drawing of an adverse inference that Defendants control the websites at issue.

Summary Judgment is Appropriate Regardless of Whether Defendants Control the Websites

Nonetheless, it is not necessary that an adverse inference be granted for facts 21, 25, 28, 31, and 38 from Plaintiff's Statement of Material Facts Not in Genuine Dispute for the Court to find that Defendants' actions in directing customers to these websites violated Part II of the Modified Final Order.[7] Part II of the Modified Final Order specifies "that Respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device . . . ." are barred from making certain representations about the products.[8] As a result, it is not necessary that respondents control the websites at issue. The terms of the Modified Final Order extend its reach to encompass any "device" respondents may use to make the prohibited

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[6] See p. 5, 14, 21, 52, 55, 56, 58, and 59 of Exhibit J, a copy of the www.dc1freedom.com website as it existed on March 4, 2011, that was submitted to the Court with the Motion for Preliminary Injunction [doc. #16-14].

[7] Additionally, Plaintiff is entitled to summary judgment on Count I of the Complaint solely on the basis of the representations made on Defendants' radio show. The statements on these websites show the breadth and scope of Defendants' violation of Part II of the Modified Final Order, but are not necessary for summary judgment on Count I of the Complaint.

[8] The term "Respondents" is defined in Part I.E. of the Modified Final Order as "Daniel Chapter One and its successors and assigns, affiliates or subsidiaries, and its officer, James Feijo, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees."

representations. These websites constitute such a device under Part II of the Modified Final Order.

The evidence detailed above demonstrates that Defendants steer their potential customers to all five of the websites at issue. Defendants are using each of these websites as a "device" through which they are able to convey the prohibited representations to potential customers. As a result, Defendants' actions violate the Modified Final Order.

Defendants Do Not Possess or Rely Upon Competent and Reliable Scientific Evidence

Part II of the Modified Final Order bars Defendants from making certain representations related to the products unless "Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation." Defendants assert that statement of fact # 51 of Plaintiff's Statement of Material Facts Not in Genuine Dispute does not have sufficient evidentiary support for the Court to draw an adverse inference. This statement of fact reads as follows:

> 51. At the time the representations in Exhibits K-M and O-U were made, Defendants, or those defined as "Respondents" in Part 1.E of the Modified Final Order entered by the Federal Trade Commission on January 25, 2010, did not possess or rely upon competent and reliable scientific evidence, as defined in Part I.A of the Modified Final Order, that substantiated the representations. See 4(t) of Plaintiff's Request for Admissions Under Rule 36 and Defendants' Response, attached at Exhibit B.

Defendants' argument should be rejected as there is sufficient corroborative evidence for an adverse inference to be drawn against Defendants.

As detailed above, adverse inferences are permitted as the "inference balances the equities after Defendants failed to give the [government] material which they were entitled to as an opposing party." Suman, 684 F.Supp.2d at 387. The United States need only "offer evidence

which at least tends to prove each part of the plaintiff's case. Once that has been done, the Court can then add to the weight of the evidence by use of the inference." In re Cunningham, 365 B.R. at 362 (quoting Trustmark Nat'l Bank, 177 B.R. at 720). The government has met its burden.

The issue of whether Defendants possess competent and reliable scientific evidence was litigated during the proceedings before the Federal Trade Commission. Expert testimony was presented on this very issue. The Administrative Law Judge considered the evidence, and determined that "[t]here is no competent and reliable scientific evidence that the Challenged Products are effective, either alone or in combination with other DCO products, in the prevention, treatment, or cure of cancer[.]"[9] On appeal, the United States Court of Appeals for the District of Columbia Circuit noted that, "it is undisputed that DCO did not support its claims with 'competent and reliable scientific evidence' including clinical trials with human subjects, the Commission properly concluded DCO's advertisements were deceptive for want of a reasonable basis." Daniel Chapter One v. FTC, No. 10-1064 (D.C. Cir. December 10, 2010). The products and representations at issue in this proceeding are identical to the products and representations considered by the Commission. As a result, these findings are corroborative evidence that Defendants do not possess competent and reliable scientific evidence to support their claims, and an adverse inference is appropriate.

[9] FTC Docket No. 9329. The Initial Decision of the Administrative Law Judge was filed on August 5, 2009, and is available at http://www.ftc.gov/os/adjpro/d9329/090811dcoinitialdecision.pdf.

Defendants are Collaterally Estopped

The representations and products that are issue in this proceeding are identical to the representations the Federal Trade Commission considered. The Administrative Law Judge considered the evidence, including expert testimony, and determined that:[10]

> Respondents did not possess or rely upon competent and reliable scientific evidence to substantiate their claims that any of the challenged products is effective, either alone or in combination with other DCO products, in the prevention, treatment, or cure of cancer, in inhibiting tumor formation, or in ameliorating the adverse effects of radiation and chemotherapy, and in fact, no such evidence exists.

Because this issue was determined in the proceeding before the FTC, and affirmed on appeal, Defendants are collaterally estopped from arguing at this juncture that they possess and rely upon competent and reliable scientific evidence.

"[O]nce a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a difference cause of action involving a party to the first case." Yamaha Corp. of America v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992) (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980). A prior holding has a preclusive effect when:

> First, the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case. Second, the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case. . . . Third, preclusion in the second case must not work a basic unfairness to the party bound by the first determination.

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[10] FTC Docket No. 9329, http://www.ftc.gov/os/adjpro/d9329/090811dcoinitialdecision.pdf.

Yamaha Corp. of America, 961 F.2d at 254 (quoting McLaughlin v. Bradlee, 803 F.2d 1197, 1201 (D.C. Cir. 1986); Restatement (Second) of Judgments § 27 (1982)). All three requirements for collateral estoppel are met here. This issue was contested and submitted for determination in the proceeding before the Commission. This issue was actually determined by the Administrative Law Judge, who devoted more than 12 pages of the Initial Decision to a discussion of Defendants' failure to possess or rely upon competent and reliable scientific evidence to substantiate their claims. This issue was a necessary and integral part of the ALJ's determination of whether Defendants had violated the FTC Act. Finally, applying collateral estoppel in this case would not work a basic unfairness to Defendants as they were able to fully present their arguments in the proceeding before the Commission. There is nothing fundamentally unfair in finding that the proceedings before the Commission have preclusive effect, especially as the facts and claims presented to this Court are identical to the issues raised before the FTC.

Conclusion

Defendants' argument fails as the government has presented sufficient corroborating evidence for an adverse inference to be drawn on facts 21, 25, 28, 31, 38, and 51. As there are no genuine issues of material fact summary judgment should be entered on liability.

Respectfully submitted this 16th day of November, 2011.

Of Counsel:

WILLARD TOM
General Counsel

JAMES A. KOHM
Associate Director for Enforcement

FOR THE UNITED STATES OF AMERICA

TONY WEST
Assistant Attorney General
Civil Division
U.S. Department of Justice

LAURA KIM
Assistant Director for Enforcement

KRISTIN M. WILLIAMS
Attorney, Division of Enforcement

Federal Trade Commission

MAAME EWUSI-MENSAH FRIMPONG
Acting Deputy Assistant Attorney General

MICHAEL S. BLUME
Director
Consumer Protection Branch

KENNETH L. JOST
Deputy Director
Consumer Protection Branch

s/ JESSICA R. GUNDER
JESSICA R. GUNDER
Trial Attorney
Consumer Protection Branch
U.S. Department of Justice

CERTIFICATE OF SERVICE

I certify that on November 16, 2011, I caused a true and correct copy of the above-entitled **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON LIABILITY**, to be served via the Court's Electronic Case Filing System to counsel for the Defendants as follows:

Robert M. Sanger
125 East De La Guerra Street
Suite 102
Santa Barbara, CA 93101
Telephone: (805) 962-4887
Fax: (805) 963-7311
E-mail: lawyers@sangerswysen.com

counsel for defendants

s/ JESSICA R. GUNDER
JESSICA R. GUNDER
Consumer Protection Branch