UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DANIEL CHAPTER ONE, a corporate sole, and JAMES FEIJO individually, and as an officer of Daniel Chapter One, Petitioners, v. FEDERAL TRADE COMMISSION, Respondent.	)	No. 10-1064

PETITIONERS' MOTION FOR HEARING ON PETITIONERS' CLAIM THAT APPLICATION OF PARAGRAPHS II, III AND V.B OF THE FTC MODIFIED FINAL ORDER SUBSTANTIALLY BURDEN PETITIONERS' EXERCISE OF RELIGION IN VIOLATION OF 42 U.S. C. SECTION 2000bb-1(a)

Petitioners, pursuant to 42 U.S.C. section 2000bb-1(c) and in accordance with Rule 27, Federal Rules of Appellate Procedure, and D.C. Circuit Rule 27, respectfully move this Court for entry of an order to hold an evidentiary hearing on Petitioners' claim that Paragraphs II, III, and V.B. of the Modified Final Order ("Order") issued by the Federal Trade Commission ("FTC") on January 25, 2010, in the case entitled *In the Matter of Daniel Chapter One, et al.*, FTC

Docket No. 9329, substantially burdens Petitioners' exercise of religion in violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. section 2000bb-1(a) *et seq*.

ARGUMENT

PETITIONERS ARE ENTITLED TO A *DE NOVO* HEARING ON THEIR CLAIM THAT ENFORCEMENT OF PARAGRAPHS II, III AND V.B WOULD VIOLATE THEIR FREE EXERCISE OF RELIGION, AS PROTECTED BY 42 UNITED STATES CODE SECTION 2000bb-1.

The Statement of the Issues raised by the Petition for Review herein, filed contemporaneously herewith, includes Petitioners' claim that Paragraphs II, III, and V.B of the FTC's Modified Final Order ("Order") violate Petitioners' free exercise of religion as specifically protected by 42 U.S.C. section 2000bb-1. *See* Petitioners' Statement of Issues To Be Raised, paragraph 11.

With respect to Paragraphs II and III, the Order would compel Petitioners to "rely"on "scientific evidence," as defined and dictated by the FTC, to support any representation that they would make about the health benefits of their dietary supplements, rather than to rely exclusively upon their faith in God's revelation, as defined and dictated by their Christian faith. With respect to Paragraph V.B, the Order would coerce Petitioners to send a letter to the consumers of the dietary supplements challenged in this case — conveying negative information to those

consumers about dietary supplements and positive information about conventional medical treatments — that would place them in direct conflict with God's call upon them as a "watchman ministry" to warn people about the dangers of conventional allopathic medicine and to inform people about holistic healing alternatives. In support of these claims, Petitioners file this motion for an evidentiary hearing before this Court on the ground that this Court has jurisdiction of Petitioners' RFRA claim, both as to fact and law.

According to 42 U.S.C. section 2000bb-1(a) and (b), "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the "Government ... demonstrates that application of the burden to the person ... is in furtherance of a compelling government interest ... and ... is the least restrictive means of furthering that compelling governmental interest." Further, 42 U.S.C. section 2000bb-2 states that "the term 'government' includes a branch, department, agency, instrumentality, and official ... of the United States." As an agency of the United States government, the Federal Trade Commission is subject to RFRA. And Paragraphs II, III, and V.B of the Order, based upon alleged violations of the rules of general applicability set forth in sections 5(a) and (12) of the FTC Act, are governed by the RFRA. *See* 42 U.S.C. § 2000bb-1(a).

In order to sustain a RFRA claim or defense, section 2000bb-1(a) requires Petitioners to demonstrate that their exercise of religion is "substantially burden[ed]" by the Order. *See* 42 U.S.C. §2000bb-1(a). Whether or not Petitioners' claim or defense is an "exercise of religion" is a mixed question of fact and law, as provided in 42 U.S.C. sections 2000bb-2(4) and 2000cc-5(7)(A). *See* Navajo Nation v. United States Forest Service, 535 F.3d 1058, 1068 (9th Cir. 2008). *See also* Henderson v. Kennedy, 253 F.3d 12, 15-16 (D.C. Cir. 2001). In addition, whether or not an agency's action "substantially burdens" Petitioners' exercise of religion is also a mixed question of fact and law. *See id. See also* Yahweh v. U.S. Parole Commission, 158 F. Supp. 1332, 1345-46 (S.D. Fl. 2001).

Furthermore, 42 U.S.C. section 2000bb-1(c) entitles Petitioners to a judicial determination of each of the two elements of their RFRA claim or defense. *See* 42 U.S.C. § 2000bb-1(c) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a **judicial proceeding** and obtain appropriate relief against a government." (emphasis added)). As the Supreme Court explained in Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006), "RFRA ... plainly contemplates that **courts** would recognize exceptions — that is how the law works [—] that it is the obligation of the **courts** to consider whether exceptions are

required under the test set forth by Congress." *Id.*, 546 U.S. at 434 (emphasis added). Indeed, one of the major purposes of RFRA is "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972),"[1] — cases in which the Supreme Court "scrutinized the asserted harm of granting of granting specific exemptions to particular religious claimants." O Centro, 546 U.S. at 431.

Typically, an evidentiary hearing respecting a RFRA claim or defense is unnecessary at the appellate level because such claim or defense would have been litigated in a federal trial court — a judicial proceeding. *See* Navajo Nation, 535 F.3d at 1066-67. By statutory mandate, however, this case comes directly from an administrative proceeding to this court of appeals on a petition for review. *See* 15 U.S.C. § 45(c). While the Commission purported to decide Petitioners' RFRA claim,[2] its decision was not based upon any finding of fact or conclusion of law of the Administrative Law Judge ("ALJ") who had previously rejected Petitioners' motion to amend their answer to the FTC Complaint to add their RFRA claim as

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[1] 42 U.S.C. § 2000bb-1(b)(1).

[2] *See* Opinion of the Commission, p. 24 (Dec. 18, 2009) (separately submitted herein).

an affirmative defense.[3] Thus, Petitioners were barred from establishing in the administrative proceedings a factual predicate for their RFRA claim. Moreover, neither the trial before the ALJ nor the appeal before the Commission is a "judicial proceeding" within the meaning of 42 U.S.C. § 2000bb-1(c), and therefore, the Commission's decision against Petitioners' RFRA claim cannot meet the requirement that a RFRA claim must be decided by a "court." *See* O Centro, 546 U.S. at 434. Any other procedure would compromise RFRA's purpose of establishing a **judicial** check on government agencies, such as the FTC. *See* 42 U.S.C. § 2000bb-1(b).

Petitioners submit that they are entitled by law and by this record to an evidentiary hearing before an Article III court — which could appoint a special master as provided by Federal Rule of Appellate Procedure 48 — in order to have an opportunity to present evidence and arguments that Paragraphs II, III, and V.B violate their rights to free exercise of religion as secured by 42 U.S.C. section 2000bb-1(a).

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[3] *See* Order Denying Respondents' Second Motion to Amend Answer, pp. 1, 3-6 (Mar. 9, 2009), a copy of which is attached hereto.

CONCLUSION

For the reasons stated, Petitioners request an evidentiary hearing before this Court for the purpose of establishing that Paragraphs II, III and V.B of the Order "substantially burden" their free "exercise of religion" in violation of 42 U.S.C. section 2000bb-1(a), and that the hearing be scheduled so as to allow for a reasonable time between the conclusion of such hearing and the filing of Petitioners' opening brief.

Respectfully submitted,

/s/ Herbert W. Titus

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