IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530, Plaintiff, v. DANIEL CHAPTER ONE, a corporation 1028 East Main Road Portsmouth, RI 02871 and JAMES FEIJO, Individually and as an officer of Daniel Chapter One 1028 East Main Road Portsmouth, RI 02871, Defendants.	)	Civil No. 10-1362 (EGS)

DEFENDANTS' MOTION TO DISMISS COMPLAINT

Defendants herein, Daniel Chapter One and James Feijo, through their undersigned attorneys, move this Court, pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, for an order dismissing the complaint herein for lack of jurisdiction. For reasons therefor, defendants say that exclusive jurisdiction over the matters set forth in the complaint is reserved to the United States Court of Appeals for the District of Columbia Circuit, and that the plaintiff's complaint therefore should be dismissed for lack of jurisdiction, as more fully set forth in the attached Memorandum of Points and Authorities in support of this motion.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 10-1362 (EGS)
v.	)	
	)	
DANIEL CHAPTER ONE,	)	
	)	
and	)	
	)	
JAMES FEIJO,	)	
	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT

Defendants, Daniel Chapter One and James Feijo (hereinafter collectively "DCO"), have filed a motion to dismiss this case against them for lack of jurisdiction, pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure. This Memorandum of Points and Authorities is submitted in support of that motion.

STATEMENT OF MATERIAL FACTS

On September 18, 2008, the Federal Trade Commission ("FTC") filed a complaint charging DCO with having engaged in deceptive acts and practices respecting the marketing of four named dietary supplements in violation of 15 U.S.C. sections 45(a) and 52. *See In the Matter of Daniel Chapter One and James Feijo*, FTC Docket No. 9329. The Complaint sought an order commanding DCO, *inter alia*, to cease and desist making any advertisement in connection with any of DCO's dietary supplements "unless the representation is true, nonmisleading, and at the time that it is made, [DCO] possess and rely on competent and

reliable scientific evidence that substantiates the representation." Complaint, FTC Docket No. 9329, pp. 7-8.

After an administrative adjudicatory hearing, an Administrative Law Judge ("ALJ") issued his initial decision rejecting all of DCO's legal and constitutional claims and defenses and granting the requested order. On appeal, the Commission affirmed and, on January 25, 2010, issued its Modified Final Order ("Order").

On February 25, 2010, pursuant to 15 U.S.C. section 45(g)(2)(A) and 16 C.F.R. section 3.56(b), DCO applied to the Commission for a stay of the Order. On March 23, 2010, the application was denied. Pursuant to 15 U.S.C. section 45(g)(2)(B), F.R. App. P. 18, and D.C. Cir. R. 18, DCO filed an emergency motion with the court of appeals for a stay pending review of the Order. On April 1, 2010, that motion was denied. On April 2, 2010, pursuant to 15 U.S.C. section 45(g), the Order became "effective." *See* 16 C.F.R. § 3.56(a).

In the meantime, on March 17, 2010, pursuant to 15 U.S.C. section 45(c), DCO filed a timely petition for review contesting the legality and constitutionality of the Order with the United States Court of Appeals for the District of Columbia Circuit. On May 7, 2010, as required by 15 U.S.C. section 45(c), the Commission filed the administrative record.

The petition for review in the court of appeals is pending, DCO having filed its opening brief on August 18, 2010. The FTC is scheduled to file its response on September 17, 2010, and DCO its reply on October 1, 2010. *See* Daniel Chapter One, *et al.* v. FTC, Docket No. 10-1064 (D.C. Cir.). Attached as Exhibit A is a copy of the D.C. Circuit's Order, dated July 6, 2010, setting out the briefing schedule for the petition for review.

On August 13, 2010, the United States Government filed with this Court a Complaint charging DCO with having violated the Order, and a motion seeking a preliminary injunction enforcing Parts II and V.B of the Order. DCO has moved to dismiss that Complaint, and this memorandum is submitted in support of that motion.

ARGUMENT

I. THIS COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION.

Purporting to bring this action under 15 U.S.C. sections 45(l), 53(b), and 56(a), and claiming jurisdiction in this Court under 28 U.S.C. sections 1331, 1337(a), 1345, and 1355, as well as 15 U.S.C. sections 45(l), 53(b), and 56(a), Plaintiff, the United States (the "Government"), filed a Complaint against the Defendants seeking monetary civil penalties under 15 U.S.C. section 45(l), as well as injunctive and other equitable relief pursuant to 15 U.S.C. sections 45(l) and 53(b). *See* Complaint ¶¶ 1 and 2. However, in response to the questions raised by the Court at the status conference on August 17, 2010, and the Court's Minute Order entered on August 18, 2010 — directing the Government "to address … this Court's authority to grant injunctive relief enforcing an administrative order while the lawfulness of the administrative order is on appeal to the United States Court of Appeals for the District of Columbia Circuit" — the Government now appears to assert jurisdiction solely on 15 U.S.C. section 45(l). *See* Memorandum in Support of United States' Revised Motion for Preliminary Injunction, p. 6 ("Govt. Memo").[1] In essence, the Government argues that,

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[1] Implicitly, and for good reason, the Government appears to have abandoned 15 U.S.C. section 53(b) as a basis for jurisdiction. *Compare* Govt. Memo, pp. 6-10, *with* Complaint ¶¶ 1, 2, and 25. As the Government acknowledges, its motion for a preliminary injunction seeks to enforce an FTC cease and desist order issued **after** the filing of an FTC

because the Order has become "final" after Defendants unsuccessfully sought a stay under 15 U.S.C. section 45(g), this Court has concurrent jurisdiction under 15 U.S.C. section 45(l) "while the appeal is pending" in the United States Court of Appeals for the District of Columbia. *See* Govt. Memo, pp. 6-7. The Government's contention is erroneous.

A. 15 U.S.C. Sections 45(c) and 45(d) Establish Exclusive Jurisdiction Over the FTC Order in the United States Court of Appeals for the District of Columbia Circuit.

After the filing of a complaint against DCO, and conducting an administrative hearing, the FTC issued the cease and desist Order that is the subject matter of this case. From this Order, DCO has filed a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit. According to 15 U.S.C. section 45(c):

> Any person … or corporation required by an order of the Commission to cease and desist from using any … act or practice may **obtain review of such order in the court of appeals for the United States** … by filing in the court, within sixty days from the date of the service of the order, a written petition praying that the order of the Commission be set aside. [Emphasis added.]

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complaint and the conduct of an administrative hearing before an ALJ and an appeal to the Commission, as provided in 15 U.S.C. section 45(b). *See* Complaint ¶¶ 7, 15. 15 U.S.C. section 53(b) does not vest jurisdiction; rather, it assumes that jurisdiction has been established under 15 U.S.C. section 53(a). But section 53(a) does not apply to the enforcement of an FTC order, such as the one in this case. Instead, it establishes jurisdiction in a federal district court "[w]henever the Commission has reason to believe … that any person or corporation is engaged in … **the dissemination of any advertisement in violation of section 52 of this title."** *Id.* (emphasis added). There is no such allegation in either the Complaint or in the motion for preliminary injunction filed in this case. Furthermore, 15 U.S.C. section 53(a) confers jurisdiction "pending the issuance of a complaint by the Commission under section 45 of this title." But a complaint has already been issued against DCO under that section. Clearly, 15 U.S.C. section 53 does not apply to this case. *See* FTC v. Weyerhaeuser, 665 F.2d 1072, 1073 (D.C. Cir. 1981) ("Invoking … 15 U.S.C. §53(b), the Commission sought to preserve the status quo pending initiation and completion of administrative proceedings and any judicial review subsequent thereto."). *See also* FTC v. Whole Foods Market, Inc., 533 F.3d 869, 873, 875-76 (D.C. Cir. 2008).

Section 45(c) further provides that "[u]pon such filing of the petition **the court [of appeals] shall have jurisdiction of the proceeding** and of the question determined therein concurrently with the Commission until the filing of the record and **shall have power to make and enter a decree** affirming, modifying, or setting aside the order of the Commission, and **enforcing the same** to the extent that such order is affirmed and **to issue such writs as are ancillary to its jurisdiction or** are necessary in its judgment to **prevent injury to the public … pendente lite."** *Id.* (emphasis added). Moreover, section 45(d) provides that "[u]pon the **filing of the record with** [the court of appeals] **the jurisdiction of the court of appeals** … **to** affirm, **enforce,** modify, or set aside orders of the Commission **shall be exclusive**." *Id.* (emphasis added). As noted above, on May 7, 2010, the FTC filed the administrative record (*In the Matter of Daniel Chapter One and James Feijo*, FTC Docket No. 9239) in Docket No. 10-1064 (D.C. Cir.). At that point, the jurisdiction of the FTC to enforce, modify, or set aside the Order came to an end, and the jurisdiction of the court of appeals became "exclusive."

Notwithstanding this explicit statutory language that the appellate court's **jurisdiction** to **enforce an order** — the validity of which is before the court of appeals on a petition for review — is **"exclusive"** upon the filing of the administrative record, the Government insists that this Court's "jurisdiction over actions for civil penalties, injunctive relief, and other equitable relief … exists **concurrently** with the appellate proceeding before the D.C. Circuit Court." *See* Govt. Memo, p. 10 (emphasis added). The Government offers in support of this contention three assertions, none of which is persuasive.

First, it cites two district court cases for the proposition that "**while the appeal is pending** [in the court of appeals], the district court has jurisdiction over enforcement actions,

like this one, under 15 U.S.C. section 45(l)." Govt. Memo, p. 7. Citing United States v. Standard Ed. Soc., 55 F. Supp. 189, 193 (N.D. Ill. 1943), the Government asserts that "suits for civil penalties … can be pursued in the district court **concurrently** with proceedings in the circuit court." *See* Govt. Memo, p. 7 (emphasis added). The Government ignores, however, the court's actual ruling in the Standard Ed. case. A petition for review in the court of appeals was not "pending"; instead, in that case the court of appeals had issued its final order. What was pending in the court of appeals was a proceeding to enforce the court of appeals' final order, not to determine the validity of the FTC's administrative order, as is the case here. *See* Standard Ed, 55 F. Supp. at 192-93. Thus, Standard Ed. stands for the simple proposition that **after the court of appeals has issued its final order** on a petition for review, its exclusive enforcement jurisdiction comes to an end, as contemplated by the last sentence of section 45(c). Indeed, in United States v. Standard Distributors, Inc., 267 F. Supp. 7 (N.D. Ill. 1967) (also cited by the Government herein), the district court ruled that a civil penalty action instituted **after a court of appeals had ruled the order to be valid** was consistent with Congress' intent in section 45(l) to provide a remedy in addition to the power of the court of appeals to enforce its final order by means of a contempt proceeding. *Id.*, 267 F. Supp. 8-11.

Second, the Government argues that "[w]ithout the ability to file enforcement actions in district court **during the pendency** of an appeal, section 45(l) would become superfluous." Govt. Memo, p. 9 (emphasis added). However, while the FTC may not utilize section 45(l) **before** issuance of a final order under section 45(c), it may initiate a 45(l) enforcement action at any time **after** the decision on the petition for review becomes final. *See* Standard Ed., 55

F. Supp. at 193. Prior to the enactment of section 45(l), the FTC would have had to rely solely on the court of appeals to enforce its order. Thus, section 45(l) is not superfluous.

Third, the Government argues that limiting the Government's authority to initiate a section 45(l) enforcement action in district court during the pendency of a section 45(c) petition for review proceeding would produce "the anomalous result of granting defendants a *de facto* stay pending appeal." Govt. Memo, pp. 9-10. To the contrary, during the pendency of a petition for review under 45(c), the court of appeals is plainly empowered "to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public … **pendente lite**," including the exercise of its contempt power. *See* United States v. Morton Salt Co., 174 F.2d 703 (7th Cir. 1949) (emphasis added).

The Government has expressed its dissatisfaction with the remedy that Congress has provided it, allowing it to go to the court of appeals, but disallowing access to this Court under section 45(l) at this time. *See* Govt. Memo, p. 8. It is a settled principle of statutory construction, however, that if the terms of a statute are plain and unambiguous, as here, then a court must apply the statute according to its terms without further inquiry. *See, e.g.*, Carcieri v. Salazar, 555 U.S. ___, 129 S.Ct. 1058, 1063-64 (2009); Dodd v. United States, 545 U.S. 353, 359 (2005). Ironically, the Government has argued in this case that a statute should be construed so as to prevent any clause, sentence, or word from being "superfluous, void or insignificant." Govt. Mem., p. 8 n.10. Yet, the Government is urging this Court to interpret 15 U.S.C. section 45(d) as if the word, "exclusive," were not even there. *See* Govt. Memo, p. 8 n.10.

B. 15 U.S.C. Section 45(l) Creates a Cause of Action, But Does Not Establish Jurisdiction.

The statute relied on by the Government, 15 U.S.C. Section 45(l), does not purport to establish jurisdiction in any court. Rather, it creates a cause of action for the forfeiture and payment of a civil penalty upon proof of a violation of an FTC order "**after it has become final.**" *Id.* (emphasis added). And it authorizes the Attorney General to bring a "civil action" for recovery of the penalty, but it does not state in what court that civil action may be brought. To be sure, the last sentence of section 45(l) contemplates that a section 45(l) civil action will be brought in a United States district court, but even that sentence does not vest jurisdiction in any court. Rather, it simply authorizes the exercise of equitable powers, having presupposed that district court jurisdiction is vested elsewhere. Indeed, as the Government itself acknowledges, the last sentence was added to section 45(l) in 1973 "to empower district courts to provide injunctive relief," **not** to vest jurisdiction. *See* Govt. Memo, pp. 7-8. After all, prior to the equitable power add-on, district courts had been exercising jurisdiction over enforcement actions under section 45(l), but then were empowered only to impose a civil monetary penalty.

While an FTC order itself may become "effective" before the court of appeals has disposed of a petition for review (*see* Govt. Memo, p. 3), the effectiveness of that order does not divest the court of appeals of its exclusive power to enforce it, as set forth in 15 U.S.C. section 45(d). 15 U.S.C. section 45(l) provides nothing to the contrary. Although that section provides that the Government may seek in district court a civil penalty and equitable relief for violation of an order of the Commission after it has become final, section 45(l) does not divest

the court of appeals of its "exclusive" right to enforce that order so long as the court of appeals has not disposed of the petition by issuance of its final order. And for good reason. In a 15 U.S.C. section 45(l) enforcement action, the validity of the order is not normally before the district court, the only question being whether the order has been violated. *See* Govt. Memo, pp. 10-11. If jurisdiction of the court of appeals were not exclusive, the district judge would be put in the position of prejudging the court of appeals — enforcing an order that court of appeals may subsequently find, in whole or in part, to be invalid.

Thus the phrase, "after [the order] becomes final" as it appears in 15 U.S.C. section 45(l), refers to finality of an order after the court of appeals has handed down its mandate. *See* 15 U.S.C. section 45(c) ("The judgment and decree of the court [of appeals] shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28."). *See also* 15 U.S.C. sections 45(h), (i), and (j). In the meantime, the Government must look to the court of appeals exclusively — not to a new action in district court — for enforcement of the order. Additionally, the FTC does not have authority to enforce an order outside the court of appeals in which the petition for review is pending until the court of appeals rules on the merits of the petition. The FTC cannot unilaterally enforce the order unless and until the petition for review is denied — and even then only as modified (if the court so rules). *See*, *e.g.*, J.B. Williams Co., Inc. v. FTC, 381 F.2d 884, 891 (6th Cir. 1967).

While jurisdiction over section 45(l) claims may be lodged in the United States district courts by the general grant of jurisdiction over "civil actions arising under the … laws … of the United States" (28 U.S.C. section 1331) or, perhaps, under the general grant of

jurisdiction to district courts of "civil actions" brought by the United States under 28 U.S.C. section 1345, or some other general grant of jurisdiction referred to in the Complaint, none of these general grants displaces or countermands Congress' vesting of "exclusive" jurisdiction in the courts of appeals over petitions for review of FTC orders, while those petitions are pending, as explicitly provided in 15 U.S.C. sections 45(c) and 45(d).

CONCLUSION

For the foregoing reasons, the Defendants' Motion to Dismiss Complaint should be granted, and Plaintiff's Complaint should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

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