INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

INTEL CORPORATION

Docket No. 9341. Order, January 19, 2010

Opinion and Order denying respondent's motion to disqualify Commissioner Rosch with respect to any adjudicative proceeding against Intel.

OPINION AND ORDER OF THE COMMISSION
DENYING MOTION FOR DISQUALIFICATION

By Leibowitz, Chairman:

Intel Corporation interacted with Commissioner Rosch for many months, attempting to persuade him to vote against a complaint in this matter without ever voicing a concern about his involvement in the case. But on December 15, after being informed of the Commissioner's tentative views on the matter and within hours of the Commission's vote to initiate the present case, it filed a motion to disqualify him on the ground that he served as Intel's primary outside antitrust counsel from about 1987 until mid-1993 ("Motion").[1] In its Motion, Intel neither specifies any relevant confidential information that Commissioner Rosch possesses as a result of his representation, nor makes any

[1] The Motion sought to disqualify Commissioner Rosch both from participating in the current adjudication and from voting on whether to issue a complaint. Because the latter act is non-adjudicative, it does not fall under FTC Rule 4.17, 16 C.F.R.§ 4.17, and, therefore, Commissioner Rosch's denial of that request was final. The denial was also understandable in light of the eleventh-hour nature of the request, its apparent tactical nature in light of the many hours of meetings Commissioner Rosch held with Intel over an extended period of time at Intel's request with no hint of disqualification being raised, and the absence of a connection between the current matter and the work Commissioner Rosch did for Intel over a decade and a half ago.

allegation of partiality by Commissioner Rosch against Intel. Instead, the bulk of the Motion is dedicated to showing simply that Commissioner Rosch represented Intel before the Commission in another antitrust matter a number of years ago. After careful consideration, we find as follows: the matters upon which Commissioner Rosch previously advised Intel are so distant in time – and concern technology, allegations, and business relationships that are so dissimilar to those relevant to the present matter[2] – that they are not at all "substantially related" to the current proceeding. Further, Intel has identified no basis for a reasonable person to question Commissioner Rosch's ability to be impartial in adjudicating this proceeding. Accordingly, we deny Intel's motion to disqualify Commissioner Rosch.[3]

Background:

Pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C.§ 45, the Federal Trade Commission issued a Complaint on December 16, 2009. The Complaint alleges that, since 1999, Intel has illegally used its dominant market position to stifle competition and strengthen its monopoly in the markets for Central Processing Units ("CPUs")[4] and to create a monopoly for

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[2] The present matter concerns conduct from 1999 to the present.

[3] Commissioner Rosch has declined to recuse himself from further participation in the Intel proceeding (Docket No. 9341). Commissioner Rosch's statement concerning Intel's disqualification motion is hereby placed on the public record as Attachment A to this opinion ("Statement").

[4] The Complaint describes a CPU as a type of microprocessor used in a computer system; that is, as an integrated circuit chip that is often described as the "brains" of a computer system. The Complaint alleges that the microprocessor performs the essential functions of processing system data and controlling other devices integral to the computer system. According to the Complaint, a CPU requires a chipset to communicate with other parts of the computer.

Intel in the markets for graphics processing units ("GPUs").[5] The Complaint alleges that Intel's primary competitors in the CPU markets include Advanced Micro Devices ("AMD") and Via Technologies ("Via"). Other key players allegedly include original equipment manufacturers ("OEMs") that use CPUs such as Hewlett-Packard/Compaq, Dell, IBM, Lenovo, Toshiba, Acer/Gateway, Sun, Sony, NEC, Apple, and Fujitsu. The Complaint alleges that Intel's primary competitors in the GPU markets include Nvidia and ATI, an affiliate of AMD.

The Complaint alleges, among other things, that Intel carried out an anticompetitive campaign using threats and rewards aimed at the world's largest OEMs to coerce them not to buy rival CPUs and used exclusive or restrictive dealing to prevent OEMs from marketing machines with rival CPUs. In addition, the Complaint alleges, Intel secretly redesigned key software, known as a compiler, in a way that deliberately stunted the performance of competitors' CPUs, and then told its customers and the public that software performed better on Intel's CPUs than on those of its rivals, failing to disclose that the difference was largely or entirely due to Intel's creation of a compiler designed to deceive consumers about competing products.

The Complaint also alleges that Intel's CPU dominance was threatened by the innovation of GPU manufacturers, prompting Intel to engage in similar unfair practices that will create a dangerous possibility that Intel will obtain a monopoly in the relevant GPU markets. For example, the Complaint alleges that Intel has, among other things: engaged in deceptive practices relating to competitors' efforts to enable their GPUs to interoperate with Intel's newest CPUs; adopted a new policy of denying interoperability for certain competitive GPUs; established

[5] The Complaint alleges that GPUs originated as specialized integrated circuits for the processing of computer graphics, but that as they have evolved, they have taken on greater functionality. The Complaint alleges that computers may achieve faster performance by offloading other computationally intensive needs from CPUs to GPUs.

various barriers to interoperability; degraded certain connections between GPUs and CPUs; made misleading statements to industry participants about the readiness of Intel's GPUs; and engaged in unlawful bundling or tying of Intel's GPUs with its CPUs, resulting in below-cost pricing of relevant products.

Intel now moves to disqualify Commissioner Rosch, stating that "Commissioner Rosch served as Intel's primary outside antitrust counsel from about 1987 until Intel decided to change antitrust counsel in mid-1993." Motion at 2. Intel claims that Commissioner Rosch's previous work as Intel's chief antitrust outside counsel – including in connection with a "similar investigation" by the FTC – is "substantially related" to the Intel matter presently before the Commission. *Id.* at 8.

Specifically, Intel asserts that Commissioner Rosch "obtained substantial confidential information by reason of his representation of Intel, including information regarding Intel's business practices, legal strategies, and approach to antitrust compliance." Murray Declaration, ¶ 12.[6] To support its disqualification motion, Intel has submitted several documents, of which the principal ones may be summarized as follows:[7]

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[6] Although Intel has not revealed specific confidences that were shared with then-Attorney Rosch (Murray Declaration, ¶ 4), in light of the nature of his former representation, we assume its claim is true with respect to the time period during which the former representation took place. Thus, given the limited disclosures made by Intel, our review is necessarily limited to a careful examination at the subject matter level of the scope of the former representation as it relates to the scope of the present Intel proceeding. As we explain below, we conclude, after taking a close look at Intel's submissions regarding the scope of Commissioner Rosch's previous representation, that there is no factual nexus between the matters in which Commissioner Rosch advised and the one presently before the Commission and whatever confidences were obtained are not relevant to the instant proceeding.

[7] Motion, Attachment 5 is not discussed here as it does nothing to support or negate Intel's arguments. A characterization of the FTC's previous investigation by an unnamed newspaper does little to validate the actual matters in dispute at the time. We believe a better source to assess the nature and scope of the

*** Motion, Attachment 1 [redacted]**[8]

*** Motion, Attachment 2 [redacted]**

*** Motion, Attachment 4 [redacted]**

Discussion:

For the reasons discussed below, we do not believe a reasonable person with knowledge of the relevant facts would question Commissioner Rosch's impartiality. Nor do we find any substantial relationship between the current case and the previous investigation. Finding no basis for recusal, we deny Intel's disqualification motion.

Legal Standard

Pursuant to FTC Rule 4.17, Intel's "motion shall be determined in accordance with legal standards applicable to the proceeding in which such motion is filed." 16. C.F.R.§ 4.17(c). Intel argues and Commissioner Rosch has stated his agreement that "Commissioners, acting as judges, are held to the recusal standards applicable to the federal judiciary." Motion at 6; Statement at 2. In general, we also agree.[9] Although Intel relies upon three different authorities, the federal judicial recusal

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previous proceeding is the investigative subpoena, which Intel has submitted as Attachment 3, which we discuss along with Attachment 6 at pp.7-8, *infra*.

[8] **[redacted]**

[9] We find one significant difference between judicial disqualification standards and agency disqualification standards to be noteworthy. Namely, the separation of functions provisions of the Administrative Procedure Act allow an agency or its members to vote on whether to initiate a case or proceeding after reviewing pertinent information. 5 U.S.C. § 554(d). Federal judges, in contrast, may not participate in a decision to initiate any case they may later decide.

standard, 18 U.S.C. § 455, is the relevant standard here.[10] That standard provides in relevant part:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
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> (b) He shall also disqualify himself in the following circumstances:
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> > (1)Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> >
> > (2) Where in private practice he served as lawyer in the matter in controversy. . . .

28 U.S.C. § 455.

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[10] As a Federal employee, Commissioner Rosch is subject to the "Standards of Ethical Conduct for Employees of the Executive Branch," 5 C.F.R. § 2635 ("Standards of Conduct"). *See also* FTC Rule 5.1, 16 C.F.R. § 5.1. We do not separately assess the impact of the Standards of Conduct because the reasonable person impartiality assessment therein mirrors what is contained in 28 U.S.C. 455(a). (The federal statute arguably raises the bar higher by requiring recusal unless the parties' consent is obtained and, unlike the Standards of Conduct, there is no provision for authorizing one's participation in certain circumstances. Because we have determined a reasonable person would not question Commissioner Rosch's ability to be impartial, we do not address whether his participation is otherwise appropriate under the Standards of Conduct.) Moreover, Intel's reliance upon Rule 3-310(E) of the California Rules of Professional Conduct is misguided. On its face, the rule bars attorneys from representing "adverse interests" and thus deals with attorney, not judicial, disqualification. Intel has not explained how or why providedarationalbasisforCongress, the FTC, or even the state of California may have intended intendingfor Rule 3-310(E) (or comparable state bar rules, generally) to apply in thisse circumstances, and we can perceive no such reason..

Application of Section 455(a)

We are principally concerned with the Section 455(a) basis for disqualification,[11] which arguably could be invoked if Commissioner Rosch served as counsel for Intel in connection with a *substantially related* matter.[12] As discussed below, we find no such substantial relationship. With no other viable potential impediments to his participation, we deny Intel's motion.

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[11] With respect to the Section 455(b)(1) basis for disqualification, Intel has failed to provide any evidence of personal bias or prejudice. It is not even clear that Intel intended to make such an allegation. Although it references case law on the subject, Intel has not provided any facts that might be in any way relevant to this issue. The theory that Commissioner Rosch may have personal knowledge of disputed evidentiary facts relevant to the present Intel proceeding is similarly unsupported. Commissioner Rosch denies having such knowledge. Statement at 7-8. Given the nature of the prior representation, Intel presumably shared confidential information with its attorney. Nonetheless, the key is whether and to what extent such information relates to the present proceeding. Consequently, Intel's concerns in this vein are addressed by our inquiry into whether the matters are substantially related. With respect to the Section 455(b)(2) basis for disqualification--as Intel itself concedes--the present matter before the Commission is not the *same* matter in which Commissioner Rosch represented Intel. *See, e.g.*, Motion at 8 (Commissioner Rosch served as lead outside counsel "in a similar [FTC] investigation"). The current Complaint concerns alleged practices that took place from 1999 to the present. Thus, the events which give rise to the present proceeding took place long after (that is, from 6 to 16 years after) Commissioner Rosch ceased to be Intel's chief antitrust outside counsel. Accordingly, recusal is not warranted under 28 U.S.C. § 455(b)(2).

[12] We note that, although the federal cases Commissioner Rosch discusses with respect to the Section 455(a) standard do not use the term "substantially related," *see* Statement 8-9, they do address whether the proceedings in question concern related matters. *See, e.g., Cippollone v. Liggett Group, Inc.*, 802 F.2d 658, 659 (3d Cir. 1986) (length of time between matters, difference in parties and legal issues presented, as well as lack of factual nexus between matters, serve as basis for determination that there was no reason to question the judge's impartiality); *Renteria v. Schellpeper*, 936 F.Supp. 691, 694 (D. Neb. 1996) (no reasonable basis to question impartiality absent a showing that "the earlier case was 'sufficiently related' to the 'issues in dispute' before the judge in the pending case").

In considering whether matters are substantially related for purposes of judicial recusal, courts have considered both the facts and the legal issues involved. "Initially, the trial judge must make a factual reconstruction of the scope of the prior legal representation." *Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d, 221, 225 (7th Cir. 1978). If there is a factual nexus, courts must consider "whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those [prior] matters." *Id.* If it is apparent such confidences were shared, the court must determine whether it "is relevant to the issues raised in the litigation pending against the former client." *Id.* If all three indicators are present, the matters are substantially related and essentially deemed the same for conflicts purposes, with doubts to "be resolved in favor of disqualification." *Id.*[13]

Our review of Intel's submissions in support of its motion demonstrates to us that Commissioner Rosch's participation in the prior Commission investigation was limited in scope to addressing the implications of specific licensing disputes and arrangements based on events that took place at various times between approximately 1983 and 1993.[14] These discrete matters are wholly unrelated to the present Intel proceeding, which concerns conduct since 1999. Intel has not demonstrated how the previous licensing disputes relate to the present proceeding beyond potential overlap in broad legal categories. Antitrust

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[13] The Federal agency ethics regulations provide similar guidance addressing when seemingly separate proceedings should be considered the same matter. *See, e.g.*, 5 C.F.R § 2641.201(h)(5) (factors to consider include whether there is a nexus between the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed); FTC Rule 4.1(b)(1), n.1, 16 C.F.R. § 4.1(b)(1), n.1.

[14] **[redacted]**

Instead, that letter indicates a certain skepticism towards allegations made by *AMD* that Intel should consider useful. In any event, as discussed *infra*, its context is limited to factual patterns not relevant to the present proceeding.

matters generally, and in technology industries specifically, often involve similar theories of wrongdoing, such as economic tying, applied to a variety of factual circumstances. However, prior familiarity with legal theories is not enough to disqualify Commissioner Rosch. *See Michael v. Intracorp., Inc.*, 179 F.3d 847 (10th Cir. 1999) (prior knowledge of the type of case or the defenses presented is insufficient to justify recusal). If recusal were automatically to follow such tangential commonalities, the Commission would be unable to rely upon experienced, well-informed professionals to decide complex matters. *See Cipollone*, 802 F.2d at 659-660 ("If Judges could be disqualified because their background in the practice of law gave them knowledge of the legal issues which might be presented in cases coming before them, then only the least-informed and worst-prepared lawyers could be appointed to the bench."). Further, there are significant differences in time. As stated above, the present Complaint concerns behavior from 1999 to the present, whereas the FTC's previous investigation in which Commissioner Rosch represented Intel principally focused on conduct that took place from 1985 through 1990. A closer examination of the relevant investigative subpoenas reveals a larger time gap with respect to certain issues. *See, e.g.*, Motion, Attachment 6, ¶ 3 **[redacted]** as compared to Motion, Attachment 3, ¶ 3 **[redacted]**.

Of course, there is commonality with respect to several interested parties–namely Intel, AMD, and the FTC. However, there are also important differences. For example, a number of CPU manufacturers have exited the marketplace over the last decade. Moreover, any common ground in terms of interested parties is negated by key differences in the products and allegations at issue. Although the term "microprocessor" was used by Intel then and now, we are not dealing with the same product. Information about a putative "television sets" market two decades ago would have little relevance to the competitive dynamics of the market for the products currently sitting (perhaps it is more accurate to say 'mounted') in American family rooms today, though the same words may be used to describe the products. Similarly, there is no *a priori* reason to believe that any

information Commissioner Rosch may have gained about the markets for the products at issue–in the matters on which he represented Intel–is relevant to the present matter, and we have searched the Motion in vain for evidence from which to infer such a relationship. Indeed, in the course of this proceeding, Intel has repeatedly asserted that the relevant technologies are constantly evolving. *See* Intel Submission to Commission at 4, 5, 7, 30, and 38 (Nov. 27, 2009). Further, in the sixteen years since Commissioner Rosch advised Intel, eight generations of Moore's law (the seminal statement on the evolution of computer chips) have passed. *See* Wikipedia, Moore's Law, http://www.en.wikipedia.org/wiki/Moore's_law#cite.[15] The eight iterations of Moore's law have produced microprocessors that are approximately 250 times more powerful, and in that time span, competitors and customers have emerged, have vanished, or have been unrecognizably transformed.[16]

Taking into account these differences, we find there is no pertinent nexus between the facts at issue in the prior representation and the present Intel matter. Thus, whatever confidences Commissioner Rosch may have obtained in the course of his prior representation, Intel has presented no evidence that they are relevant to the current proceeding. Furthermore, Intel was aware of its prior relationship with Commissioner Rosch when it first learned of the present matter at least 18 months ago, and nevertheless willingly chose to repeatedly interact with him and other FTC officials throughout the investigative phase without questioning Commissioner Rosch's involvement or

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[15] Moore's law, which states that the number of transistors that can be inexpensively placed on an integrated circuit has doubled approximately every two years, is of course named after Gordon Moore, a long-term executive at Intel.

[16] To take only a handful of examples of how these markets have changed, **[redacted]**. The products of these major mainframe manufacturers in the 1980s now exist only in virtual form on the website of the IPSJ Computer Museum. *See* http://www.museum.ipsj.or.jp/en/computer/main/0079.html and http://museum.ipsj.or.jp/en/computer/os/fujitsu/0013.html.

whether he might possess confidential information that should not be shared with the staff during the investigative phase. Statement 1, 9-10. As a consequence, it is highly doubtful that, in Intel's own view, Commissioner Rosch actually possesses any confidential information relevant to this matter.

Absent a factual nexus between the matters–and with no evidence of confidential information shared that would be relevant to the instant proceeding–we have determined that the matters in which Commissioner Rosch formerly represented Intel are not substantially related to the present proceeding. Accordingly, we have concluded that a reasonable person with knowledge of the relevant facts would not question Commissioner Rosch's ability to be impartial. Accordingly,

IT IS ORDERED THAT the motion of Intel seeking Commissioner Rosch's disqualification with respect to any adjudicative proceeding against Intel is denied.

By the Commission, Commissioner Kovacic recused, and Commissioner Rosch not participating.

ATTACHMENT A

STATEMENT OF COMMISSIONER J. THOMAS ROSCH ON RESPONDENT'S MOTION FOR DISQUALIFICATION [REDACTED PUBLIC VERSION]

Approximately 18 months ago, the Federal Trade Commission authorized the use of compulsory process to investigate the alleged conduct of Intel Corporation ("Intel") in the microprocessor markets. Since that time, this Commissioner met

with Intel officials on at least three occasions and spent hundreds of hours considering, among other things, the staff's theories, the applicable case law, and the underlying documents involved in this case in order to determine whether there was a "reason to believe" that a complaint should issue and on what bases. During that period, although it willingly provided the Commission numerous white papers and participated in nearly six hours of meetings with this Commissioner, Intel never suggested (nor did any other participant for that matter) that there was any basis for disqualification. Notwithstanding that fact, on the day before the Commission's final vote to pursue administrative litigation, Intel moved to disqualify this Commissioner pursuant to 16 C.F.R. § 4.17, "from participation in any adjudicative proceeding against Intel, including voting on whether to issue a complaint." (Mot. of Intel Corp. for Disqualification of Commissioner J. Thomas Rosch ("Mot.") at 2.)

Although Intel relies on three different authorities to try to make its case (the federal judicial recusal standard, the Office of Government Ethics regulations, and the California Rules of Professional Conduct), the crux of Intel's argument is that a reasonable person would conclude that, because this Commissioner served as Intel's primary outside antitrust counsel from 1987 until mid-1993 – including in conjunction with an FTC investigation opened in 1991 – this Commissioner cannot impartially consider whether Intel's alleged conduct since 1999 should create antitrust liability. Intel points to no confidential information that this Commissioner possesses from the 1987-1993 representation that is relevant to the Commission's recently issued complaint, which concerns alleged conduct from 1999 forward. Intel points to no public statements that this Commissioner has made that supply any evidence of prejudgment. And Intel does not and cannot show that the Commission's recently issued administrative complaint constitutes the same matter in controversy as the investigation that this Commissioner handled on Intel's behalf more than a decade and a half ago. For these

reasons and others discussed below, disqualification is not warranted.

DISQUALIFICATION IS NOT WARRANTED UNDER ANY OF THE GOVERNING STANDARDS

Intel argues that this Commissioner is subject to disqualification under three authorities: (1) the recusal standards "applicable to judges and FTC Commissioners alike;" (2) the Office of Government Ethics (OGE) regulations; and (3) Rule 3-310(E) of the California Rules of Professional Conduct. (Mot. at 2, 4-10.) None of these arguments supports disqualification of this Commissioner.

A. Federal Judicial Recusal Standard

Pursuant to Rule 4.17 of the Commission's Rules of Procedure, Intel's "motion shall be determined in accordance with legal standards applicable to the proceeding in which such motion is filed." 16 C.F.R. § 4.17(c). As Intel acknowledges, "Commissioners, acting as judges, are held to the recusal standards applicable to the federal judiciary." (Mot. at 6 (emphasis added).) Under that standard, set forth in 28 U.S.C. § 455 ("Disqualification of justice, judge, or magistrate"), disqualification is appropriate where (1) "in private practice he served as lawyer in the matter in controversy," 28 U.S.C. § 455(b)(2); (2) "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding," *id*. § 455(b)(1); or (3) his "impartiality might reasonably be questioned," id. § 455(a). None of those considerations supports disqualification on the facts here.

1. First, Intel does not assert that this Commissioner served as a lawyer "in the matter in controversy" here. *Id*. § 455(b)(2). That would be impossible because the Commission only opened its formal investigation into this matter in 2008 – nearly a decade and a half after Intel says this Commissioner stopped representing Intel. (Mot. at 2.) Moreover, the FTC staff's 1991 investigation,

upon which Intel principally relies (Mot. at 3, 8, 9; Murray Declaration ("Murray Decl.") ¶¶ 5-9, Attach. 1-5) and in which this Commissioner represented Intel, was a completely separate case from the case initiated by the current complaint. At issue in the investigation initiated in 1991 – nearly eighteen years ago – was whether Intel had illegally acquired monopoly power in the central processing unit ("CPU") markets. (See Mot. Attach. 5 (describing investigation as inquiry into whether Intel "broke any antitrust laws in becoming the dominant supplier of microprocessors").) That is a fundamentally different question from whether, as the current complaint now alleges, Intel has engaged in a course of conduct designed to (1) illegally maintain its monopoly power in those CPU markets, and (2) attempt to monopolize the graphics markets. *See* Administrative Complaint, *In the Matter of Intel Corp.*, FTC Docket No. 9341 (Dec. 16, 2009). This Commissioner's representation of Intel during the investigation initiated in 1991 had nothing to do with monopoly maintenance based on alleged conduct respecting microprocessors, which allegedly began in 1999, and that investigation did not involve the graphics markets alleged in the current complaint at all.

Beyond that, to this Commissioner's knowledge, Intel did not engage in [redacted] during this Commissioner's representation, and the motion does not contain any evidence that this Commissioner made representations to the Commission staff or anyone else about those practices. (Mot. at 2.) To be sure, when the FTC initiated its investigation in 1991, this Commissioner did attempt to define the relevant market for microprocessors in which Intel participated (id.) as a market in which numerous other microprocessor producers, including IBM and Sun participated. (Likewise, in the FTC's 1997 suit against Intel, Intel's then-counsel also defined the relevant market as one in which there were numerous participants beside Intel.) This Commissioner never, however, asserted that the market would remain as it was defined at that time. Similarly, in the investigation initiated in 1991, the Commission staff did inquire about "exclusive dealing"

and "bundling," including "economic tying," as well as whether Intel engaged in a refusal to license to AMD, but this Commissioner specifically told the Commission staff that antitrust liability would depend on the facts relevant to the particular practice at issue, not that those practices were either legal or illegal under all circumstances. (Compare Mot. at 2 with Attach. 1 at 3-9 and Attach. 4 at 3, 5.)

Moreover, even if the facts involved in the 1991 investigation and the current complaint were the same, the law governing those facts has not stood still. For example, the principal predatory pricing cases that Intel has thus far invoked in white papers and discussions preceding the current complaint, *Brooke Group v. Brown & Williamson Tobacco Corp*., 509 U.S. 209 (1993), and *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008), were not decided until after the 1991 investigation. Judge Wilken's decision suggesting a modification of predatory pricing standards in *Meijer, Inc. v. Abbott Labs*, 544 F. Supp. 2d 995 (N.D. Cal. 2008), likewise came at a later date. Additionally, since this Commissioner's representation of Intel ended, there have been several important decisions regarding loyalty discounts and economic tying. *See, e.g., Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (2000); *Masimo Corp. v. Tyco Health Care Group, L.P.*, 2009 U.S. App. LEXIS 23765 (9th Cir. Oct. 29, 2009); *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003). Finally, the courts have supplied important decisions regarding refusals to license and the implications of product design decisions. *See Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997); *C. R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340 (Fed. Cir. 1998). Thus, both the facts and the law applied to those facts have evolved during the ensuing period spanning more than a decade and a half.

Of course, the investigations initiated in 1991 and 2008 respectively were not without certain broad factual similarities: the Commission (as opposed to DOJ or private plaintiffs) initiated both investigations; Intel was the subject of both investigations; both investigations were based on alleged antitrust violations; and

both investigations involved markets related to the CPU industry (and the associated market definition questions). But simply because two cases have factual similarities at a high level of factual and/or legal generality does not mean that they qualify as the same "matter in controversy." If that were so, anytime a Commissioner provided counsel to a firm with monopoly power while in private practice, that firm could always invariably move to disqualify that Commissioner in a future investigation – even more than a decade and a half later – on the ground that the Commissioner was involved in a representation involving the same "matter in controversy." That is not the law.

Intel implies otherwise. It asserts that disqualification is appropriate because the current action is "substantially related" to this Commissioner's prior representation of Intel in conjunction with the Commission's 1991 investigation (Mot. 6-7, Attach. 1). Intel's claim that the disqualification of a federal judge should turn on a "substantially related" analysis is without any precedent. Indeed, after admitting that "Commissioners, acting as judges, are held to the recusal standards applicable to the federal judiciary," (Mot. at 6 (emphasis added)), Intel cites two state court decisions (from 1978 and 1992, respectively) that applied the "substantially related" analysis. (Mot. at 7 (citing *Rushing v. City of Georgiana*, 361 So.2d 11 (Ala. 1978) and *Davis v. Neshoba County General Hospital*, 611 So.2d 904 (Miss. 1992).) Intel's reliance on these state court decisions is not accidental: Intel does not cite a single federal case applying the "substantially related" standard to evaluate the disqualification of a federal judge or Commissioner because, as far as this Commissioner can ascertain, there are no such cases. *See generally River West, Inc. v. Nickel*, 188 Cal. App. 3d 1297, 1299, 1302 (Cal. Ct. App. 1987) (explaining that "substantial relationship" is a "legal point of significance in attorney disqualification" that is "used in identifying an impermissible conflict of interest in an attorney's representation of successive clients") (emphasis added).

In any event, as discussed above, for the same reasons that the 2009 complaint and the investigation initiated in 1991 do not present "the same matter in controversy," they cannot be said to be "substantially related": the two separate matters were based on different alleged conduct during different time periods and involved different theories of liability.

2. Second, along the same lines, this Commissioner does not have "personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1). As to "personal bias or prejudice," Intel contends that disqualification is warranted under *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970), because this Commissioner "has in some measure adjudged the facts" in advance of this case. (Mot. at 6.) However, in contrast to the prejudgment cases that Intel cites, Intel does not cite any evidence of prejudgment here.

In *Texaco, Inc. v. FTC*, 336 F.2d 754, 759 (D.C. Cir. 1964), *rev'd on other grounds*, 381 U.S. 739 (1965), for example, the D.C. Circuit held that then-Chairman Paul Rand Dixon was disqualified from participating in an appeal where he delivered a speech that said "[w]e are well aware of the practices that plague you . . . you know the practices – price fixing, price discrimination, . . . you know the companies" and named the respondents. *See also id*. at 760 ("In this case, a disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act."). Likewise, in *Cinderella Career & Finishing Schools*, the D.C. Circuit reached the same conclusion in light of a speech that Chairman Dixon gave during the pendency of another appeal before the Commission that, again, strongly implied that the respondent had engaged in the deception at issue in the appeal. 425 F.2d at 589-91 (finding that "Commissioner Dixon has exercised questionable discretion and very poor judgment indeed, in directing his shafts and squibs at a case awaiting his official action"). These cases do not help Intel. To the contrary, Intel asserts that prior to the current complaint this Commissioner had

argued that Intel's previous conduct was lawful. (Mot. at 3, Murray Decl. ¶¶ 5-11, Attach. 1-5.)

Nor does Intel adduce any evidence that this Commissioner has "personal knowledge of disputed evidentiary facts" concerning "this proceeding." 28 U.S.C. § 455(b)(1). Indeed, as previously noted, such knowledge would be impossible because the conduct that was the subject of the investigation initiated in 1991 is not the subject of the current complaint, which only goes back to 1999. This Commissioner has no knowledge – beyond what the staff has adduced during its Part 2 investigation and what Intel has asserted – about any of Intel's alleged conduct during the relevant time period. Indeed, it is ironic for Intel to claim that the facts relating to practices that were investigated a decade and a half ago (or the "confidential" information allegedly shared with this Commissioner at or about that time) are the same or even similar to the facts or other information relating to the practices alleged in the current complaint, given Intel's repeated assertions that the technology and products in these markets have constantly "evolved" over the years. (*See* Intel Submission to Commission at 4, 5, 7, 30 38 (Nov. 27, 2009).)

Moreover, even if this Commissioner had acquired personal knowledge of disputed evidentiary facts (which, again, he did not), numerous federal courts have held that the passage of a substantial period of time – here more than a decade and a half since his representation of Intel ended – if not determinative, militates against the disqualification of a federal judge. *See, e.g.*, *Cipollone v. Liggett Group, Inc.*, 802 F.2d 658, 659 (3d Cir. 1986) ("Even if American Tobacco Company were a party to [this] case, the long passage of time [9 years] since Judge Hunter's last representation of that Company requires the conclusion that no reasonable person could question his impartiality."); *Renteria v. Schellpeper*, 936 F. Supp. 691, 696-697 (D. Neb. 1996) (refusing to disqualify federal judge based on representation of parties in prior litigation where same claims were not involved and where the case at issue did not arise until "long after the judge left

private practice"). And with good reason: it would be unreasonable to conclude that a decade and a half after his representation of Intel ended, this Commissioner has retained any relevant confidential information in an industry as prone to innovation and research and development as this one.

Numerous other federal courts have likewise so held. *See Chitimacha Tribe of Louisiana v. Harry L. Laws Company, Inc.*, 690 F.2d 1157, 1166 (5th Cir. 1982) (recusal not warranted where judge had represented the defendant in unrelated matters at least six years earlier); *Jenkins v. Bordenkircher*, 611 F.2d 162, 165-67 (6th Cir. 1979) (recusal not required where trial judge had prosecuted defendant for several unrelated crimes during the period four to thirteen years prior to the time of trial); *Gravenmier v. United States*, 469 F.2d 66, 67 (9th Cir. 1972) (where trial judge was of counsel in prior prosecution six years before present unrelated prosecution, recusal not required); *Darlington v. Studebaker-Packard Corp.*, 261 F.2d 903, 906 (7th Cir. 1959) (recusal not warranted where trial judge had represented defendant in unrelated matters for a period of four to five years which ended three to four years before judge's decision); *Royal Air Maroc v. Servair, Inc.*, 603 F. Supp. 836 (S.D.N.Y. 1985) (prior representation by trial judge of defendant's parent corporation in unrelated matter twelve years earlier no basis for recusal). *Cf. Schurz Communs. v. FCC*, 982 F.2d 1057, 1061 (7th Cir. 1992) (Posner, J.) (noting that in ruling on a recusal motion based on the judge's involvement in a previous matter, "[t]he lapse of time is of course one factor").

3. Finally, because this Commissioner did not represent Intel in the same matter in controversy and has not otherwise retained relevant confidential information, there is no basis to conclude that this Commissioner's impartiality more generally can reasonably be questioned. Intel itself offers no other independent arguments regarding this Commissioner's impartiality. To the contrary, its past behavior speaks volumes. Indeed, the timing of this motion to disqualify establishes that Intel itself – arguably the "most interested" person – does not truly believe that

disqualification is proper. For nearly 18 months, Intel did not question the propriety of this Commissioner's participation (or the FTC's integrity if he were to participate), even though Intel was on notice of the FTC's investigation and this Commissioner's active participation. More specifically:

- Intel's CEO, its current General Counsel, as well as its lead outside counsel, all met with this Commissioner as a prospective decision-maker in this matter in mid-July of 2008. At no time during that meeting did any of the Intel people suggest that there was anything improper about this Commissioner's participation.

- Later, in May of 2009, Intel's lead outside counsel spoke with this Commissioner as a decision-maker in this matter. No suggestion was made during that conversation that there was anything improper about this Commissioner's participation.

- Recently, on December 3, Intel's current General Counsel and its lead outside counsel met again with this Commissioner as a prospective decision-maker, this time for about two hours. At that meeting, this Commissioner informed Intel that he had tentatively formed a "reason to believe" that a complaint should issue. Again, no suggestion was made that there was anything improper about this Commissioner's participation in this matter.

- Finally, it is this Commissioner's understanding that in the several days leading up to the Commission's decision to vote out a complaint, Intel's General Counsel had a number of conversations with the Chairman about this matter – including a conversation just a few hours before this motion was filed. At no time during those conversations did Intel ever suggest that this Commissioner's participation in the matter was in any way improper.

It was not until the day before the Commission issued the administrative complaint – more than 18 months after the Commission authorized the use of compulsory process – that Intel, having unsuccessfully rolled the dice that this Commissioner's participation would prevent the issuance of a complaint, moved to disqualify this Commissioner from participating.

The law is well established, however, that Intel cannot have its cake and eat it too. Motions to disqualify must be "filed with reasonable promptness after the ground for such a motion is ascertained." *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992); *see also Santiago v. Ford Motor Co.*, 206 F. Supp. 2d 294, 298 (D.P.R. 2002) ("Section 455(a) requires that a party raise the issue of disqualification of the judge at the earliest moment after acquiring knowledge of the facts providing a basis for disqualification."). This rule exists to prohibit parties from gaming the system. *Schurz Communs.*, 982 F.2d at 1060 (Posner, J.) ("Litigants cannot take the heads-I-win-tails-you-lose position of waiting to see whether they win and if they lose moving to disqualify a judge who voted against them."); *E. & J. Gallo Winery*, 967 F.2d at 1295 (noting that, although a judge has a self-enforcing duty to recuse himself, "it does not necessarily follow that a party having information that raises a possible ground for disqualification can wait until after an unfavorable judgment before bringing the information to the court's attention"). The Commission therefore "should be less inclined to grant a recusal when," as here, "the movant has waited until the last possible moment to bring up the recusal." *Santiago*, 206 F. Supp. 2d at 298.

For the foregoing reasons, the standards applicable to the disqualification of federal judges (and to FTC Commissioners) do not support disqualification here.

B. Office of Government Ethics Regulations

Intel also argues that the applicable OGE regulations, which the Commission's Rules of Practice incorporate by reference, 16 C.F.R. § 5.1, require this Commissioner's disqualification.

1. To begin with, those regulations apply the same "reasonable person" standard set forth in the body of law governing federal judicial disqualifications described above. See 5 C.F.R. § 2635.502(d) (requiring disqualification where an employee's participation in a particular matter "would raise a question in the mind of a reasonable person about his impartiality"). For the reasons discussed above, disqualification is not warranted.

2. Additionally, even if there were a basis to conclude that a reasonable person might question the Commissioner's impartiality, the OGE regulations establish that disqualification would nevertheless be improper for another reason. As Intel concedes, the OGE regulations specifically treat "the interest of the Government in the employee's participation" as a consideration that trumps even whether "a reasonable person may question the integrity of the agency's programs and operations." (Mot. at 4.) Given the circumstances in this case, this second consideration is also fatal to Intel's motion.

When former Chairman Majoras left the Commission in April 2008, the agency was left with just four Commissioners. Additionally, because Commissioner Kovacic recused himself from voting on the motion to issue the administrative complaint, the agency was left with just three participating Commissioners on this important matter. The disqualification of this Commissioner, based on his representation of Intel more than a decade and a half ago, not only would deprive the Commission of his expertise and experience in handling complex antitrust litigation, but would also leave the Commission with just two active Commissioners as decision-makers on this very important matter. Moreover, there is no guarantee that those two Commissioners would agree, thus creating the risk that the

Commission would be left with a 1-1 split on decisions that must be made at the Commission level. Not only would such an outcome be contrary to the public interest, but the result of having just two Commissioners (whether they agree or not) consider a matter of such importance far outweighs whatever impartiality Intel believes lingers here based on a representation that occurred a decade and a half ago.

The circumstances on the horizon will not necessarily improve in this regard. Commissioner Harbour's term expired in September 2009. For the time being, Commissioner Harbour has agreed to hold over until her successor is sworn in. Commissioner Harbour, however, is free to leave at any point regardless of whether her successor is sworn in. Moreover, although the President has nominated two new Commissioners and their hearings have taken place, it is unknown at this time (1) when their confirmations will take place, and (2) whether either of those Commissioners will have her own conflict (based on prior employment or financial assets) with this matter.

As the federal courts have recognized, these circumstances can and should factor into the calculus of whether the disqualification of a presidential appointee is appropriate. *See, e.g., Cheney v. United States Dist. Court*, 541 U.S. 913, 915-16 (2004) (Scalia, J., in chambers) (holding that doubts should not be resolved in favor of recusal where recusal would mean the Court would be functioning with fewer than all nine justices and where it would risk the possibility of a tie vote); *Center for Auto Safety v. FTC*, 586 F. Supp. 1245, 1250 (D.D.C. 1984) (noting, in the context of a regulatory commission, "if one member of such a commission is disqualified or recused, he cannot, under the law, be replaced, and the body may thus be left, as in this case, unable to make an effective decision by virtue of an even split" and that such a consideration should, in appropriate circumstances, bear on the disqualification analysis).

C. California Rules of Professional Conduct

Third and finally, Intel assert that Rule 3-310(E) of the California Rules of Professional Conduct (the bar to which this Commissioner is admitted) requires disqualification. This claim also fails for at least three different reasons.

1. First, the text of the Commission's Disqualification Rule provides that a motion to disqualify "shall be determined in accordance with legal standards applicable to the proceeding in which the motion was filed." 16 C.F.R. § 4.17(c). Intel does not cite (and, after much searching, this Commissioner has been unable to locate) any authority that supports Intel's claim that the standard for a motion to disqualify should be governed by state ethics rules. Instead, the federal common law, see, e.g., Cinderella Career & Finishing Schools, 425 F.2d at 591, and the text of the applicable federal regulations, see 16 C.F.R. § 5.1 (incorporating OGE regulations by reference), supply the sum total of the law that governs this motion. There is no authority to show that Congress or the FTC intended for the disqualification of Commissioners of federal agencies to turn on the varying state bar rules, state advisory opinions, and state common law – particularly given that membership in any state bar (or any legal training) is not even a prerequisite to serve as a Commissioner in the first place.

2. Second, California did not intend for Rule 3-310(E) to apply in these circumstances. To start with, the rule's text provides that a bar member "shall not, without the informed written consent of [a] former client, accept employment adverse to the . . . former client where, by reason of the representation of the . . . former client, the member has obtained confidential information material to the employment." CRPC 3-310(E). This Commissioner, of course, accepted his "employment" as a Commissioner before the compulsory process was authorized in this matter. It was therefore impossible for this Commissioner to obtain Intel's consent at that time. Even if such consent had been

possible to obtain, however, Rule 3-310(E) does not clearly contemplate such "consent" in a situation where, in adjudicative proceedings, the Commissioner does not represent anyone, but is instead an arbiter. Here, the drafters intended for the rule to apply to a practicing lawyer who takes on a "representation" "adverse to a former" client.

Any doubt as to whether the rule applies only to cases where an attorney takes on an adverse representation is resolved by the rule's heading, which is captioned: "avoiding the representation of adverse interests." CRPC 3-310(E). Consistent with the rule's text, nothing in that heading suggests that the rule was ever intended to apply to situations where a lawyer serves in a position akin to a federal judge and, therefore, is not "adverse" to either side. See Gonzales v. Super. Ct. of Los Angeles County, 3 Cal. 2d 260, 263 (Cal. 1935) ("It is an elementary rule of construction that chapter and section headings in the codes are entitled to considerable weight in interpreting the various sections and should be given effect according to their import, to the same extent as though they were included in the body of the law."). Indeed, Intel's citation to River West, 188 Cal. App. 3d at 1302-03 (Mot. at 9 n.4), underscores this point: that decision limits the rule that Intel invokes to "successive adverse representations."

In short, Intel concedes that trying to apply Rule 3-310(E) to this Commissioner in his role as a Federal Trade Commissioner is like trying to pound a round peg into a square hole; it does not fit. (Mot. at 8 ("[N]o one can know now whether [Commissioner Rosch's] consideration and decisions in this matter ultimately will be adverse . . . .") If the drafters of Rule 3-310(E) had intended for the rule to apply to the disqualification of federal officials sitting as judges, the rule would state as much. It does not. The mental gymnastics that are required to shoehorn California's ethics rule into the analysis of when disqualification is appropriate under Commission Rule 4.17 prove too much.

3. Third, even if Rule 3-310(E) did supply a basis for disqualification here, Intel cannot prevail on the merits. As a

threshold matter, this Commissioner must possess "confidential" information related to the merits of the pending case. Given that this Commissioner has not served as Intel's counsel for more than a decade and a half and Intel's own repeated descriptions about how quickly the technology and products are evolving, there is no reasonable basis to conclude that this Commissioner possesses any confidential information as Rule 3-310(E) contemplates.

CONCLUSION

For the foregoing reasons, this Commissioner declines to recuse himself from further participation in the Intel proceeding (Docket No. 9341).

DANIEL CHAPTER ONE
AND
JAMES FEIJO

Docket No. 9329 Order, January 25, 2010

Order denying respondents' request for reconsideration of the Final Order issued December 18, 2009 and modified Final Order.

ORDER RULING ON RESPONDENTS' PETITION FOR RECONSIDERATION OF FINAL ORDER

The Commission issued its Opinion and Final Order in this matter on December 18, 2009. Service of the Opinion and Final Order was completed on December 31, 2009, and the Final Order therefore would have become final and effective on March 4, 2010. 16 C.F.R. § 3.56(a); *accord* 15 U.S.C. § 45(g). On January 19, 2010, Daniel Chapter One and James Feijo (Respondents) filed a Petition for Reconsideration of Final Order (Petition). Respondents request the Commission to reconsider the Final Order on the ground that certain deadlines therein run from the date of service of the Final Order, and therefore could be interpreted to impose obligations on Respondents before the Final Order becomes final and effective in accordance with Section 5(g) of the FTC Act, 15 U.S.C § 45(g), and Commission Rule 3.56(a), 16 C.F.R. § 3.56(a). Respondents do not request reconsideration of the Opinion of the Commission. On January 25, 2010, Complaint Counsel filed an Opposition to Respondents' Petition.

The Commission has determined to deny the Petition because it does not comply with Commission Rule 3.55, 16 C.F.R. § 3.55; that is, it fails to raise any new questions "upon which the petitioner had no opportunity to argue before the Commission." The Order which the Chief Administrative Law Judge issued on August 5, 2009, as part of his Initial Decision, contains deadlines which similarly run from the date of service of the Order. Moreover, Paragraphs IV, VI, and IX of the Notice Order

contained in the Administrative Complaint issued in this matter on September 16, 2008 contain deadlines which similarly run from the date of service of the Order. While the Respondents thus have had a number of opportunities to raise the deadline issue in their briefs and argument before the Commission, they failed to do so. Furthermore, as Complaint Counsel point out, to the extent that Respondents were uncertain as to the date on which each of the initial time periods specified in the Final Order would begin, the email message sent to all counsel of record by the Secretary advised that – consistent with the Commission Rules and Section 45(g) of the FTC Act – all such time periods would begin on the first business day after March 4, 2010; that is, on March 5, 2010.

For these reasons, the Commission has determined to deny the Petition. The Commission has nevertheless determined to modify the Final Order in certain nonsubstantive respects to clarify that the time periods within which the Respondents will be required to take certain actions required by the Modified Final Order will begin no sooner than the date on which the Modified Final Order becomes final and effective; that is, on the sixtieth day after service of the Modified Final Order. Accordingly,

IT IS ORDERED THAT the Final Order issued by the Commission on December 18, 2009 be, and it hereby is, modified to read as shown in the attached Modified Final Order;

IT IS FURTHER ORDERED THAT the initial time periods prescribed by Commission Rules 3.55 and 3.56(d), 16 C.F.R. §§ 3.55, 3.56(d), will begin on the first business day after service of the Modified Final Order; and

IT IS FURTHER ORDERED that the Modified Final Order – as supported and explained by the Opinion of the Commission issued on December 18, 2009 – will become final and effective on the sixtieth day after the Modified Final Order is served, pursuant to Section 5(g) of the FTC Act, 15 U.S.C § 45(g), and Commission Rule 3.56(a), 16 C.F.R. § 3.56(a).

By the Commission.

MODIFIED FINAL ORDER

The Commission has heard this matter on the appeal of Respondents from the Initial Decision and on briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to enter the following order. Accordingly,

I.

IT IS HEREBY ORDERED that for purposes of this Order, the following definitions shall apply:

A. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

B. "Covered Product or Service" shall mean any dietary supplement, food, drug, or other health-related product, service, or program, including, but not limited to, BioShark, 7 Herb Formula, GDU, and BioMixx.

C. "Food" and "drug" shall mean "food" and "drug" as defined in Section 15 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 55.

D. "Advertisement" means any written or verbal statement, illustration, or depiction that is designed to effect a sale or to create interest in the purchasing of

goods or services, whether it appears in a book, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, packaging, package insert, label, film, slide, radio, television or cable television, video news release, audio program transmitted over a telephone system, infomercial, the Internet, e-mail, or in any other medium.

E. Unless otherwise specified, "Respondents" shall mean 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.

F. "Commerce" shall mean "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

G. "Endorsement" shall mean "endorsement" as defined in 16 C.F.R. § 255.0(b).

II.

IT IS HEREBY ORDERED that Respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of BioShark, 7 Herb Formula, GDU, and BioMixx, or any substantially similar health-related program, service, or product, or any other Covered Product or Service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of product or program names or endorsements, that such health-related program, service, product, or Covered Product or Service prevents, treats, or cures or assists in the prevention, treatment, or

cure of any type of tumor or cancer, including but not limited to representations that:

1. BioShark inhibits tumor growth;

2. BioShark is effective in the treatment of cancer;

3. 7 Herb Formula is effective in the treatment or cure of cancer;

4. 7 Herb Formula inhibits tumor formation;

5. GDU eliminates tumors;

6. GDU is effective in the treatment of cancer;

7. BioMixx is effective in the treatment of cancer; or

8. BioMixx heals the destructive effects of radiation or chemotherapy;

unless the representation is true, non-misleading, and, at the time it is made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that Respondents, directly or through any person, corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product or Service, in or affecting commerce, shall not make any representation, in any manner, directly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the efficacy, performance, or health-related benefits of any Covered Product or Service unless the representation is true, non-misleading, and, at the time it is made, Respondents possess

and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

IT IS FURTHER ORDERED that:

A. Nothing in this order shall prohibit Respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration; and

B. Nothing in this order shall prohibit Respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

V.

IT IS FURTHER ORDERED that:

A. Respondents shall, within seven (7) days after the final and effective date of this order, deliver to the Commission a list, in the form of a sworn affidavit, of all consumers who purchased BioShark, 7 Herb Formula, GDU, and/or BioMixx, on or after January 1, 2005 and until the date this order becomes final and effective. Such list shall include each consumer's name and address, the product(s) purchased, and, if available, the consumer's telephone number and email address;

B. Within forty-five (45) days after the final and effective date of this order, Respondents shall send by first class mail, postage prepaid, an exact copy of the notice attached as Attachment A to all persons identified in Part V.A., above. The face of the envelope containing the notice shall be an exact copy of Attachment B. The mailing shall not include any other documents; and

C. Except as provided in this order, Respondents, and their officers, agents, servants, employees, attorneys, and representatives shall not sell, rent, lease, transfer, or otherwise disclose the name, address, telephone number, credit card number, bank account number, e-mail address, or other identifying information of any person who paid any money to any Respondent, at any time and until the date this order becomes final and effective, in connection with the purchase of BioShark, 7 Herb Formula, GDU, and/or BioMixx. *Provided, however*, that Respondents may disclose such identifying information to the FTC pursuant to Part V.A., above, or any law enforcement agency, or as required by any law, regulation, or court order.

VI.

IT IS FURTHER ORDERED that for a period of five (5) years after the last date of dissemination of any representation covered by this order, Respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VII.

IT IS FURTHER ORDERED that Respondents shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the final and effective date of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VIII.

IT IS FURTHER ORDERED that Respondent Feijo, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include the individual Respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Paragraph shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

IX.

IT IS FURTHER ORDERED that Respondent DCO and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which Respondent DCO learns less than thirty (30) days prior to the date such action is to take place, Respondent DCO shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Paragraph shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

X.

IT IS FURTHER ORDERED that Respondents shall, within sixty (60) days after the final and effective date of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XI.

IT IS FURTHER ORDERED that this order will terminate on January 25, 2030, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes

later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) years;

B. This order's application to any Respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the Respondents did not violate any provision of this order, and the dismissal is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ATTACHMENT A

LETTER TO BE SENT BY FIRST CLASS MAIL

[To be printed on letterhead of Daniel Chapter One]

[Name and address of recipient] [Date]

Dear [Recipient]:

Our records show that you bought [**names of products**] from our website [**name of website**] or through a call center using our toll-free number. We are writing to tell you that the Federal Trade Commission ("FTC") has found our advertising claims for these products to be deceptive because they were not substantiated by competent and reliable scientific evidence, and the FTC has issued an Order prohibiting us from making these claims in the future.

The Order entered against us by the FTC requires that we send you the following information from the FTC about the scientific evidence on these products:

> Competent and reliable scientific evidence does not demonstrate that any of the ingredients in BioShark, 7 Herb Formula, GDU or BioMixx, are effective when used for prevention, treatment or cure of cancer.
>
> It is important that you talk to your doctor or health care provider before using any herbal product in order to ensure that all aspects of your medical treatment work together. Some herbal products may interfere or affect your cancer or other medical treatment, may keep your medicines from doing what they are supposed to do, or could be harmful when taken with other medicines, or in high doses. It is also important that you talk to your doctor or health care provider before you decide to take any herbal product instead of taking cancer treatments that have been scientifically proven to be safe and effective in humans.

Sincerely,

ATTACHMENT B

Daniel Chapter One
1028 East Main Road
Portsmouth, Rhode Island, 02871

[name and address of purchaser]

GOVERNMENT ORDERED NOTICE

Interlocutory Orders, etc.

POLYPORE INTERNATIONAL, INC.

Docket No. 9327 Order, March 19, 2010

Order granting respondent's request for additional time to file an appeal brief.

ORDER ON RESPONDENT'S MOTION FOR EXTENSION OF TIME TO FILE APPEAL BRIEF

Respondent Polypore International, Inc. has filed a Motion for Extension of Time to File an Appeal Brief in which it requests an additional twenty-one days to file its appeal brief to the Commission. Complaint Counsel oppose the motion. For the reasons described below, the Commission grants the parties an additional seven days to file their respective appeal and answering briefs.

Commission Rule 3.52(b), 16 C.F.R. § 3.52(b),[1] gives parties thirty days after service of an Initial Decision to file an appeal brief to the Commission. The time periods prescribed by the Commission Rules of Practice ordinarily should afford parties to FTC proceedings sufficient time to file pleadings and briefs of sufficient quality and detail to aid in the preparation of Commission opinions and orders. Absent a Commission order granting an extension of time to the parties in this case, Respondent's appeal brief would be due on April 9, 2010.

Respondent has requested that its time to file an appeal brief be extended twenty-one days and for Complaint Counsel's time to file an answering brief likewise be extended an additional twenty-one days. Respondent seeks additional time "due to the

[1] On May 1, 2009, the Commission published several amendments to its Rules of Practice designed to expedite the Part 3 litigation process. *See* 74 Fed. Reg. 20205. These rules govern all proceedings initiated on or after May 1, 2009. *See id.*; *see also* 74 Fed. Reg. 1804 (establishing interim final rules for actions commenced after January 13, 2009). Because the complaint in this matter was issued on September 10, 2008, the Rules of Practice in effect prior to the amendments govern this proceeding.

complexity of this matter, the length of trial, the size of the corresponding record, and the length of the initial decision." (Motion ¶ 9.) Respondent notes that it will be challenging findings in four product markets, the remedy, and "certain procedural and evidentiary rulings." (*Id*. ¶ 10.) Respondent also points out that the Initial Decision is 376 pages long with 1,289 factual findings, and that the month-long trial generated approximately 2,100 exhibits and 6,000 pages of transcript.

Under these circumstances, the Commission is willing to grant Respondent additional time to prepare its appeal brief. Respondent's request for a twenty-one day extension, however, appears excessive. Respondent has already received more than two weeks of extra time to prepare its appeal brief because of delays in generating the public version of the Initial Decision.[2] In addition, the case will be less complex on appeal as a result of Complaint Counsel not appealing the ALJ's dismissal of the monopolization count and Respondent not appealing the ALJ's finding that its non-compete agreement is illegal. Finally, the Commission is mindful that in any litigation involving a consummated merger, unnecessary procedural delays may increase the risk of ongoing injury to consumers and competition. Accordingly,

IT IS ORDERED THAT Respondent shall file its appeal brief on or before April 16, 2010 and that Respondent's appeal shall be deemed perfected for purposes of Rule 3.51(a), 16 C.F.R. § 3.51(a), if Respondent files its appeal brief by that date;

IT IS FURTHER ORDERED THAT Complaint Counsel shall file their answering brief on or before May 24, 2010; and

[2] The ALJ issued and the parties received the *in camera* version of the Initial Decision on February 22, 2010. The redacted public version of the Initial Decision was formally served on Respondent on March 10, 2010.

IT IS FURTHER ORDERED THAT Respondent shall file its reply brief within seven days after service of Complaint Counsel'sanswering brief.

By the Commission.

Interlocutory Orders, etc.

DANIEL CHAPTER ONE
AND
JAMES FEIJO

Docket No. 9329 Order, March 22, 2010

Order denying respondents' request for a stay of the modified Final Order issued January 25, 2010.

ORDER DENYING RESPONDENTS' APPLICATION FOR STAY OF MODIFIED FINAL ORDER PENDING PETITION FOR REVIEW

The Commission issued its Opinion on December 18, 2009 ("Opinion") and its Modified Final Order ("Order") on January 25, 2010.[1] The Commission's Order was served on Respondents Daniel Chapter One ("DCO") and James Feijo (collectively "Respondents") and counsel by February 1, 2010. Respondents' compliance is required no later than 60 days after service of the Order; that is, by April 2, 2010. 15 U.S.C. § 45(g)(2).

On February 25, 2010, pursuant to Rule 3.56 of the Commission's Rules of Practice, 16 C.F.R. § 3.56, Respondents moved for a stay of the Order until the later of the following: (1) the expiration of the time for filing a petition for review of the Order in a United States Court of Appeals; (2) the issuance of a final order regarding Respondents' petition for review; (3) the denial of a petition for panel rehearing; (4) the denial of a petition

[1] Citation references to the materials are abbreviated as follows:

"Op." refers to the Opinion of the Commission issued on December 18, 2009;

"Order" refers to the Modified Final Order issued on January 25, 2010; and

"R. Mem." refers to Respondents' Memorandum in Support of Respondents' Application for Stay, filed on February 25, 2010.

for rehearing *en banc*, or the expiration of the time for filing such petitions for rehearing; or (5) the denial of a petition for certiorari in the United States Supreme Court, or the expiration of time to file such petition.

Respondents have failed, however, to justify such relief is warranted. All factors for granting a stay weigh against granting the motion. Respondents have shown neither a likelihood of success on the merits on appeal, nor that they will suffer irreparable harm absent the requested relief. Moreover, given that other parties will be harmed if the stay is granted, it is not in the public interest to grant Respondents' motion. Accordingly, the Commission denies the motion.

Background

Respondents, DCO, a corporation sole organized under the laws of the State of Washington, and its overseer and trustee, James Feijo, advertise and sell four DCO products to the public – Bioshark, 7 Herb Formula, GDU, and BioMixx ("Challenged Products").[2] Respondents claim the Challenged Products can prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy. Respondents made these claims during their radio shows, over the internet, and through print media. Respondents' sales of the Challenged Products constitute 20 or 30 percent of the approximately $2 million in annual sales of DCO products for the years 2006, 2007, and 2008.

The Commission's Opinion considered the record and arguments of counsel. The Commission analyzed whether the FTC has jurisdiction over Respondents; the claims Respondents made within their advertisements; whether Respondents' claims were properly substantiated; and Respondents' defenses and

[2] DCO currently sells 150 to 200 products, including the four products challenged in the Complaint.

constitutional arguments. After finding the Commission has jurisdiction over Respondents and considering the record evidence presented by both parties, we concluded that Respondents did not have competent or reliable evidence to substantiate their claims that the Challenged Products treat, cure or prevent cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy.

Accordingly, the Commission issued a cease-and-desist Order against Respondents. Among other requirements, Respondents may make efficacy claims for products they sell only so long as the representations are true, non-misleading, and, at the time they are made, Respondents possess and rely on competent and reliable scientific evidence to substantiate their claims. The Order limits what they may say relating to the sale of certain products, but it does not otherwise limit their speech or religious practices. The Order also requires Respondents to send to all consumers who have bought the Challenged Products a letter notifying them the FTC found DCO's advertising claims for the Challenged Products to be deceptive because they were not substantiated by competent and reliable scientific evidence, and that the FTC has issued an Order prohibiting Respondents from making the claims in the future.

Before us now is Respondents' Application for Stay of Modified Final Order Pending Judicial Review.

Applicable Standard

Section 5(g) of the Federal Trade Commission Act provides that Commission cease and desist orders (except divestiture orders) take effect "upon the sixtieth day after such order is served," unless "stayed, in whole or in part and subject to such conditions as may be appropriate, by ... the Commission" or "an appropriate court of appeals of the United States." 15 U.S.C. § 45(g)(2); *see also* 16 C.F.R. § 3.56(a). A party seeking a stay must first apply for such relief to the Commission, 15 U.S.C. §

45(g)(2)(A), (B)(ii). Pursuant to Rule 3.56(c) of the Commission's Rules of Practice, an application for a stay must address the following four factors: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) why the stay is in the public interest. 16 C.F.R. § 3.56(c); *see, e.g., In the Matter of Toys "R" Us, Inc.*, 126 F.T.C. 695, 696 (1998). We consider these factors below.

Analysis

1. Likelihood of Respondents' Success on Appeal

Respondents correctly note that in assessing the likelihood of their success on the merits on appeal, the Commission need not "harbor doubt about its decision in order to grant the stay." *In the Matter of California Dental Ass'n*, 1996 FTC LEXIS 277, at *10 (May 22, 1996). Respondents also correctly state they may satisfy the "'merits' factor if their argument on at least one claim is 'substantial' – so long as the other three factors weigh in their favor." R. Mem. at 1 (*citations omitted*). Finally, if the equities decidedly tip in favor of the Respondents it is enough that they "raise questions sufficiently serious and substantial to constitute 'fair ground for litigation.'" R. Mem. at 1-2 (*citations omitted*). Respondents' arguments, however, merely disagree with the Opinion of the Commission and raise no serious or substantial questions on the merits; disagreement does not establish a likelihood of success on appeal.

a. Jurisdiction

Respondents argue that the Commission does not have jurisdiction because DCO is a corporation sole operating under the laws of Washington, and as such is dedicated to religious, nonprofit purposes. They assert the Commission misapplied *Community Blood Bank of Kansas City Area, Inc. v. FTC,* 405

F.2d 1011 (8th Cir. 1969) when it found DCO's members derived a profit from DCO's activities. Respondents raised these arguments on appeal to the Commission and the Commission rejected them. *See* Op. at 6-8 (summarizing Respondents' same jurisdictional arguments).[3] As we stated in *North Texas Specialty Physicians*, Docket No. 9312 (Jan. 20, 2006), merely repeating arguments the Commission rejected before does not provide the Commission with "sufficient reason to question its prior decision or any of the bases for it, and Respondent[s'] renewal of its legal arguments, without more, is insufficient to justify granting a stay." *Id*. at 3 (*citations omitted*).

The Commission does not question the seriousness of Respondents' religious beliefs, but controlling authorities refute their legal arguments. *California Dental Ass'n v. FTC*, 526 U.S. 756, 766-67 (1999) and *Community Blood Bank,* 405 2d at 1022, both hold the Commission's jurisdiction extends to a corporation organized to carry on business for its own profit or that of its members. The record here establishes that DCO carries on a business that inures to the economic benefit of Respondent James Feijo, its sole overseer and trustee of DCO's assets. DCO sells its products through publications, a call center, radio shows, and over the Internet. In addition, a number of retail stores and chiropractic centers in various states sell DCO products. Any consumer may purchase DCO's products. James Feijo's wife, Patricia Feijo, is a signatory to DCO's bank accounts and had check writing authority. DCO's revenue covered all of the Feijos' living expenses including two houses, cars, pool and gardening expenses, tennis and golf club expenses, and expenditures on retail items and restaurant bills. The evidence supports a finding

[3] The Commission's factual findings must be accepted if they are supported by relevant evidence sufficient so that a reasonable mind might agree with the conclusions. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986). *See also* Section 5(c) of the Act, 15 U.S.C. § 45(c), which provides that "(t)he findings of the Commission as to the facts, if supported by evidence, shall be conclusive" upon review in the Court of Appeals.

that DCO was engaged in commercial activities and that the beneficiary of DCO's profit was James Feijo. Op. at 7, 8.

b. Substantiation

Respondents also question the propriety of the FTC's substantiation doctrine. They argue that the reasonable basis theory creates presumptions that violate both Sections 5 and 12 of the FTC Act, as well as the First Amendment commercial speech doctrine. Respondents raised these same arguments below and we continue to find them without merit.

Longstanding case law has consistently held that advertising claims can be found deceptive under Sections 5 and 12 of the FTC Act if they are shown either to be false or to lack a reasonable basis substantiating the claims made in the advertisement. *See, e.g.*, *FTC v. National Urological Group*, 645 F. Supp. 2d 1167 (N.D. Ga. 2008), *aff'd*, 2009 U.S. App. LEXIS 27388 (11th Cir. 2009); *FTC v. Pantron I*, 33 F.3d 1088, 1096 n.23 (9th Cir. 1994); *In the Matter of Thompson Med. Co.*, 104 F.T.C. 648, 818-19 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986). Under the reasonable basis standard, claims about a product's attributes, performance or efficacy carry with them the express or implied representation that the advertiser possessed a reasonable basis substantiating the claims at the time they were made. *See Thompson*, 104 F.T.C. 648, at 813; *FTC v. Direct Mktg. Concepts*, 569 F. Supp. 2d 285, 298 (D. Mass. 2008); *In the Matter of Kroger Co.*, Docket No. C-9102, 1978 FTC LEXIS 332, at *15 (May 17, 1978). Although Respondents may not like the case law, they cannot dispute that courts continue to hold the FTC may show a respondent made deceptive claims if it did not have a reasonable basis for their advertisements. Applying that standard in the matter before us now and after reviewing the evidence, the Administrative Law Judge ("ALJ") and the Commission found Respondents did not possess any adequate substantiation for their health-related efficacy claims.

Respondents assert the ALJ and the Commission misapplied the FTC Guide, *Dietary Supplements: An Advertising Guide for Industry*, ("Guide") contending that the ALJ and the Commission applied the Guide as a fixed rule of law rather than a flexible standard. The standard's flexibility, however, lies in its tailoring the level of substantiation required to the nature of the product claims at issue. Here, Respondents claimed that the Challenged Products could prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy. As the Guide itself notes, such claims about efficacy typically should be supported with competent and reliable scientific evidence. *See* Guide at 9. Further, case law supports holding the Respondents to a competent and reliable scientific standard for the efficacy claims they made. *See FTC v. Natural Solution, Inc*., No. CV 06-6112-JFW, 2007 U.S. Dist. LEXIS 60783, at *11-12 (C.D. Cal. Aug. 7, 2007); *Nat'l Urological Group*, 645 F. Supp. 2d at 1189; *Direct Mktg.*, 569 F. Supp. 2d at 300, 303; *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 961 (N.D. Ill. 2006), *aff'd*, 512 F. 3d 858 (7th Cir. 2008). Finally, the ALJ and the Commission relied on expert testimony to determine what competent and reliable scientific evidence would adequately substantiate Respondents' claims.

c. First Amendment Arguments

Respondents argue the Commission's Opinion and Order unconstitutionally deprives them of free exercise of religion and freedom of speech, denies Respondents' liberty and property without due process, and erroneously dismissed their Religious Freedom Restoration Act Claim. Respondents' arguments are without merit.

The evidence established the primary purpose and effect of the speech at issue here – Respondents' representations relating to the Challenged Products – was to sell those products, not to solicit charitable contributions. Op. at 13. Such commercial speech is accorded less protection than other constitutionally protected forms of speech. *See Central Hudson Gas & Elec. Corp. v. Pub.*

Serv. Comm'n of N.Y., 447 U.S. 557, 562-63 (1980). Specifically, misleading or deceptive commercial speech is afforded no protection under the First Amendment. *See, e.g., Cent. Hudson*, 447 U.S. 557; *Edenfield v. Fane*, 507 U.S. 761 (1993); and *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999). Respondents' claims about the efficacy of the Challenged Products were not substantiated and were, therefore, deceptive. Op. at 11, 14.

Respondents argue their due process rights were violated because two of the sitting Commissioners pre-judged the matter. Respondents point to a speech made by Commissioner Rosch in 2008[4] and Commissioner Harbour's statements during oral argument. Respondents' reliance on *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970) is misplaced. In that case, the court noted that the statements relied on to show prejudgment were made while the appeal was pending before the Commission; here Commissioner Rosch made these general statements about a "bogus cancer cure" sweep as only a small part of a larger speech on self-regulation. Commissioner Rosch delivered this speech almost a full year before Respondents had even filed their appeal in this case, before evidence was entered in the matter, and before the ALJ issued his Initial Decision (August 2009). Further, if Respondents had wanted to disqualify Commissioner Rosch, they should have sought his disqualification before now by the filing "of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee." 5 U.S.C. § 556(b). They have never made such a filing.

Nor is there any merit to Respondent's arguments based on Commissioner Harbour's comments during the oral argument before the Commission. Like any appellate tribunal, the Commission may properly probe and even challenge the positions

[4] J. Thomas Rosch, *Self-Regulation And Consumer Protection: A Complement To Federal Law Enforcement*, before the 2008 National Advertising Division Annual Conference, at 16-17 (Sept. 23, 2008).

being argued to it, as well as the practical ramifications of its ruling. In the present case, for example, there is no impropriety in inquiring into the potential that the continued sale of "cancer cures" whose efficacy is unsubstantiated could harm consumers who might turn to such products in place of other medical treatment. In any event, none of the statements to which Respondents refer could lead "a disinterested observer [to] conclude that (a commissioner) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959) (describing the grounds for disqualification). Moreover, there was ample evidence in the record to support the Commission's decision in this matter.

Respondents' final two arguments supporting their assertion that they are likely to succeed on the merits are that the FTC erroneously dismissed the Respondents' Religious Freedom Restoration Act claim ("RFRA") and that the FTC is forcing the Respondents to send a letter to consumers to which Respondents object for moral, ethical, and religious reasons. Respondents' arguments again misapply the law to the facts in this matter. RFRA applies when the government substantially burdens a person's exercise of religion. The case upon which Respondents rely is *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). In that case, the use of a hallucinogenic tea was central to the entity's core beliefs, the tea was not sold or otherwise provided to non-believers, and the tea was only used during the sacramental rite of communion. Nothing in the record before us reveals similar facts. DCO was engaged in commercial activity by selling the Challenged Products and DCO engaged in deception to make those sales. DCO's sales were not dependent upon a consumer's belief system or whether they had any religious affiliation at all. DCO sold their products completely outside of any religious ceremony or sacrament.

The Commission has not burdened Respondents' exercise of religion; it has only limited how DCO can sell its products. The Commission found the Respondents violated Section 5 of the FTC Act, which provides the Commission with the authority to fashion an order requiring respondents to cease and desist from such acts and practices. *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957). The Commission took great care in issuing the Order in this matter and making it clear that the letter informing consumers of the FTC's Opinion and Order plainly state it is the FTC's Order that requires Respondents to transmit the information. The Order does not require that Respondents profess to agree with the FTC or that Respondents modify their religious ministry in any way.

2. Irreparable Injury

Respondents argue that compliance with the Order "would be nearly fatal to the DCO ministry, imposing incalculable losses that can neither be accurately measured nor compensated, and causing serious harm to its 'good will.'" R. Mem. at 23. Respondents base this argument on the provisions of Paragraphs II and III which prohibit Respondents from making any representation about the efficacy of any of their products "unless the representation is true, non-misleading, and, at the time it is made, [DCO] possess[es] and rel[ies] upon competent and reliable scientific evidence that substantiate[s]" their claims. R. Mem. at 25 (*quoting* Paragraph III of the Order). These limitations, Respondents argue, will prevent them from selling any of their products, essentially shut down DCO, and injure the business's goodwill with its steady customers.[5]

Respondents may not recognize it, but the Commission's Order merely requires Respondents to follow the law. Paragraphs II and III of the Order cover both the Challenged Products as well as other products sold by Respondents and permit Respondents to

[5] We accept Respondents' Declarations submitted for the purposes of supporting their irreparable harm argument, but do not find they are sufficient to meet their burden of showing irreparable injury.

make efficacy claims relating to those products so long as the representations are true, non-misleading, and substantiated. Op. at 24. "In other words, Respondents are only obliged to do that which the case law under Sections 5 and 12 of the FTC Act has defined as necessary to avoid deception." *Id.* The Commission would be hard pressed to find that irreparable injury results from an Order requiring marketers of health-related programs to make only true, substantiated representations about the products they are selling, especially after finding those marketers engaged in deceptive advertising for untested cancer cures. The Order has been tailored narrowly to apply only to their commercial advertising and only to the type of speech that has been found to be deceptive; the Order does not otherwise reach into Respondents' religious speech or practices.

Paragraph V of the Order requires Respondents to send a letter to their customers notifying them of the Commission's Opinion and Order and the findings therein. Respondents assert they will be irreparably harmed if they are compelled to send this letter on their letterhead to certain customers because such a requirement will violate their First Amendment freedoms of speech and religion. Respondents note, however, that if the government can demonstrate "that its mandate is 'a narrowly tailored means of serving a compelling state interest,'" then a speaker can be required to make disclosures. R. Mem. at 22 (*quoting Pacific Gas & Electric Co. v. Cal. P.U.C.*, 475 U.S. 1, 19 (1986)). The compelling interest here is protecting cancer patients from deceptive advertising claims. The required letter is carefully limited to address only the issues in this matter. In particular, the letter is to be sent only to Respondents' customers who purchased the four Challenged Products; it is drafted to show that the FTC found DCO's advertising claims for those products to be deceptive and that the information about the scientific evidence relating to the products is from the FTC; and it is not drafted to force Respondents to say they agree with the FTC's findings. The letter does not mention Respondents' religious beliefs or teachings. The letter does not compel Respondents to state they

have repudiated their faith or endorsed the FTC's Opinion. The letter is narrowly crafted to inform consumers about the FTC's Opinion and Order.

3. Degree of Injury to Other Parties and the Public Interest

The final remaining questions are whether a stay would harm other parties and whether it is in the public interest. *In the Matter of California Dental Ass'n*, 1996 FTC LEXIS 277, at *7-8. These two factors are stated separately, but the FTC considers them together because Complaint Counsel is responsible for representing the public interest by enforcing the law. *See Id.* at *8.

Respondents argue that a stay would not harm any party because they assert there is no evidence that any consumer was economically harmed or misled by Respondents' representations, and that there is no evidence in the record that the four Challenged Products have actually harmed anyone's medical or cancer treatment.

Respondents' argument ignores all the record evidence showing that Respondents engaged in deceptive advertising. And while Respondents may not believe that deception constitutes a "bona fide injury to any consumer," the Commission does. Consumers are harmed when they purchase products that are marketed to prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy, 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. This harm comes from consumers risking their health to potential side effects and harmful interactions between Respondents' products and other therapies. These harms are real and they are substantial. Because of the nature of the harm, issuing a stay is not in the public interest.

Conclusion

Taking all of these factors into consideration, the Commission has determined that a stay is inappropriate. Respondents are unlikely to succeed on the merits and in the Commission's judgment the potential harm to consumers from granting a stay substantially outweighs the potential harm to Respondents from denying the request for a stay. We find that DCO and James Feijo have not met their burden for showing a stay of the Modified Final Order pending judicial review is warranted. Accordingly,

IT IS ORDERED THAT the Respondents' Application for Stay of Modified Final Order Pending Judicial Review is **DENIED**.

By the Commission.

Interlocutory Orders, etc.

CARILION CLINIC

Docket No. 9338 Order, March 26, 2010

Order approving respondent's application for Commission approval of proposed divestiture of the Center for Surgical Excellence, in accordance with the Commission's order.

LETTER APPROVING APPLICATION FOR DIVESTITURE OF ASSETS

Dear Mr. Lutes:

This letter responds to the January 19, 2010, Application for Approval of Divestiture of the Center for Surgical Excellence ("Application") requesting that the Commission approve Carilion Clinic's ("Carilion") divestiture of the Center for Surgical Excellence ("CSE") to Fairlawn Surgery Center, LLC ("Fairlawn") pursuant to the order in this matter. The Application was placed on the public record for comments for thirty days, until February 18, 2010, and two comments were received.

After consideration of the proposed transaction as set forth in the Application and supplemental documents, as well as other available information, the Commission has determined to approve the divestiture of CSE to Fairlawn. In according its approval, the Commission has relied upon the information submitted and representations made in connection with Carilion's Application, and has assumed them to be accurate and complete.

By direction of the Commission

Interlocutory Orders, etc.

DANIEL CHAPTER ONE
AND
JAMES FEIJO

Docket No. 9329 *Order, April 26, 2010*

Order denying respondents' request for a an extension of time to comply with Paragraph V. A of the Modified Final Order issued January 25, 2010.

ORDER

On April 13, 2010, pursuant to Commission Rule 3.22, Counsel for the Respondents filed a Motion For Extension of Time to Fully Comply With Paragraph V.A of Modified Final Order ('Motion"). The Motion requests that the Commission extend by fourteen days the time within which Respondents must fully comply with Paragraph V.A of the Modified Final Order issued by the Commission on January 25, 2010. The Modified Final Order became effective on April 2, 2010. Paragraph V.A of the Modified Final Order therefore required the Respondents to produce, by April 13, 2010, a list of all consumers who purchased – from January 1, 2005 through April 2, 2010 – one or more of the four Challenged Products from the Respondents. Respondents' Motion states that the Respondents have partially complied with this provision of the Modified Final Order.

On April 15, 2010, Complaint Counsel filed a Response to Respondents' Motion stating that the Motion was procedurally flawed in that it "is incorrectly styled as a motion for an extension pursuant to Commission Rule of Practice 3.22, rather than as a motion to modify the requirements of the Modified Final Order pursuant to Rule 2.51." Complaint Counsel state that as a consequence, the Respondents failed to provide, pursuant to Commission Rule 2.51(b), the required affidavit demonstrating in detail, *inter alia*, changed conditions of law or fact. Nonetheless, Complaint Counsel do not object to a brief extension as long as

none of the other requirements or deadlines in the Modified Final Order are changed or extended.

The Commission has jurisdiction to determine whether to reopen the proceeding and modify the order. 16 C.F.R. § 3.72(a). The Commission has determined, however, that the Respondents have not provided the justification under the Commission Rules required to support granting the Motion. The Commission has therefore determined to deny the Respondents' Motion. However, the Commission has determined in its discretion to take no action to seek relief for Respondents' failure to comply by April 13, 2010 with Paragraph V.A, as long as Respondents fully comply with that provision on or before April 27, 2010. Accordingly,

IT IS ORDERED that Respondents' Motion For Extension of Time to Fully Comply With Paragraph V.A of Modified Final Order be, and it hereby is, denied.

By the Commission.

Interlocutory Orders, etc.

DANIEL CHAPTER ONE
AND
JAMES FEIJO

Docket No. 9329 *Order, May 6, 2010*

Order granting the joint motion to correct the transcript of the oral argument.

ORDER GRANTING JOINT MOTION TO CORRECT
TRANSCRIPT OF ORAL ARGUMENT

Respondents and Complaint Counsel in this matter have filed a Joint Motion To Correct the December 3, 2009 Oral Argument Transcript. The Commission has determined to grant the Joint Motion, and to effect some additional corrections of typographical errors in the Oral Argument Transcript. Accordingly,

IT IS ORDERED THAT the Oral Argument Transcript be, and it hereby is, modified to effect the correction of typographical errors, and to read as shown in the attached corrected copy.

By the Commission.

GEMTRONICS, INC.
AND
WILLIAM H. ISELY

Docket No. 9330 Order, May 12, 2010

Order granting the respondents' motion for an extension of time in which to file an appeal brief until June 12, 2010.

ORDER GRANTING RESPONDENTS' MOTION FOR EXTENSION OF TIME TO FILE APPEAL BRIEF

On April 27, 2010, the Chief Administrative Law Judge issued an Initial Decision and Order Denying Respondents' Application For An Award of Attorney Fees and Other Expenses ("Initial Decision") in this matter. The Initial Decision was served on Respondents on May 3, 2010, and on May 5, 2010, Respondents timely filed a Notice of Appeal, pursuant to Commission Rule 3.83(h), 16 C.F.R. § 3.83(h), advising that they would appeal the Initial Decision. On May 10, 2010, Respondents filed a Motion requesting an extension of the deadline for filing their appeal brief until June 12, 2010. Complaint Counsel do not oppose the motion.

The Commission Rules applicable to this proceeding give the parties thirty days after service of the Initial Decision within which to perfect an appeal by filing an appeal brief before the Commission.[1] The time periods prescribed by the Commission Rules ordinarily should afford parties to Commission proceedings

[1] On May 1, 2009, the Commission published several amendments to its Rules of Practice designed to expedite the Part 3 litigation process. *See* 74 Fed. Reg. 20205. These rules govern all proceedings initiated on or after May 1, 2009. *See id.*; *see also* 74 Fed. Reg. 1804 (January 13, 2009) (establishing interim final rules for actions commenced after January 13, 2009). However, "[t]he rules that were in effect before January 13, 2009 . . . govern all . . . Commission adjudicatory proceedings [pending on January 13, 2009]."). 74 Fed. Reg. 1804. Because this matter was already pending on January 13, 2009, the Rules of Practice in effect prior to the amendments govern this proceeding.

sufficient time to file pleadings and briefs of sufficient quality and detail to aid in the preparation of Commission opinions and orders. In this instance, however, Respondent William Isely states in the Respondents' Motion that more time is necessary due to pressing personal issues, including in particular the need to care for his ailing wife, and the Commission is persuaded that these circumstances warrant granting the Motion. Because June 12, 2010, falls on a Saturday, the Commission has determined to extend the time for the Respondents to file their appeal brief until June 14, 2010. Accordingly,

IT IS ORDERED THAT Respondents shall file their appeal brief on or before June 14, 2010, and that Respondents' appeal shall be deemed perfected for purposes of Rule 3.52(b)(2), 16 C.F.R. § 3.52(b)(2), if Respondents file their appeal brief by that date;

IT IS FURTHER ORDERED THAT Complaint Counsel shall file their answering brief on or before July 26, 2010; and

IT IS FURTHER ORDERED THAT Respondents shall file their reply brief on or before August 4, 2010.

By the Commission.

GEMTRONICS, INC.
AND
WILLIAM H. ISELY

Docket No. 9330 Order, June 16, 2010

Order granting S.M. Oliva's motion for leave to file a brief *amicus curiae* in support of Respondents William Isely and Gemtronics in this matter.

ORDER GRANTING MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

On June 7, 2010, S.M. Oliva filed a timely motion for leave to file a brief *amicus curiae* in support of Respondents William Isely and Gemtronics in this matter, and attached a copy of the brief that he proposes to file. Neither Respondents nor Complaint Counsel filed an opposition to the motion.

Pursuant to Commission Rule 3.52(j), 16 C.F.R. § 3.52(j), the Commission has determined to grant the motion. Accordingly,

IT IS ORDERED THAT the motion of S.M. Oliva for leave to file a brief *amicus curiae* in this matter be, and it hereby is, **GRANTED**.

By the Commission.

Interlocutory Orders, etc

WHOLE FOODS MARKET, INC.

Docket No. 9324 Order, June 18, 2010

Order approving respondent's application for Commission approval of proposed divestitures to in accordance with the Commission's order.

LETTER APPROVING APPLICATION FOR DIVESTITURE OF ASSETS

Dear Mr. Morris:

This is in response to the Petition for Approval of Proposed Divestiture to A-M Holdings, LLC which you filed on February 23, 2010 ("A-M Petition"), the Petition for Approval of Proposed Divestiture to Healthy Investments, LLC which you filed on February 23, 2010 ("Healthy Investments Petition"), the Petition for Approval of Proposed Divestiture to Trader Joe's East, Inc. which you filed on March 4, 2010 ("Trader Joe's Petition"), the Petition for Approval of Proposed Divestiture to Luberski, Inc. which you filed on March 8, 2010 ("Luberski Petition"), and the Petition for Approval of Proposed Divestiture to Topco Associates LLC which you filed on March 8, 2010 ("Topco Petition") pursuant to the Order in Docket N. 9324 ("Order"). Each of the Petitions was subject to a thirty day public comment period. Public comments were filed with regard to the Trader Joe's Petition and the A-M Petition.

The Commission has determined to approve the A-M Petition, the Healthy Investments Petition, the Trader Joe's Petition, and the Luberski Petition, and to deny the Topco Petition.

A-M Holdings, LLC ("A-M") and Healthy Investments, LLC ("Healthy Investments") each intend to acquire a currently operating store from Whole Foods and operate a premium natural and organic supermarket at the location. They each have demonstrated the financial resources needed to acquire and

operate the store in a viable manner. Divestiture to A-M and Healthy Investments is consistent with the purposes of the Order.

Trader Joe's East, Inc. ("Trader Joe's") intends to acquire a closed store location from Whole Foods. Whole Foods closed this location prior to the entry of the Order and has not operated a premium natural and organic supermarket at the location since the Order was entered. Under the Order, if the Commission does not approve the Trader Joe's Petition, no divestiture of this location will occur. Although Trader Joe's does not compete directly with Whole Foods in the premium natural and organic supermarket market, it does provide some level of competition to Whole Foods. Because the store location is currently closed, and is thus not competing in the market, the Commission has determined that approving the Trader Joe's Petition would better serve the purposes of the Order than having the location remain closed.

The A-M Petition and the Topco Petition each involve, in part, the acquisition of the rights to the "Alfalfa's" name and associated intellectual property. A-M also proposes to acquire the store at 1651 Broadway in Boulder, Colorado. That store currently operates under the "Alfalfa's" name. A-M proposes to continue to operate the store under the "Alfalfa's" name by acquiring the rights to the name as well as the store location. Topco Associates LLC ("Topco") does not propose to acquire any store locations in addition to the intellectual property it proposes to acquire. Topco proposes to use the "Alfalfa's" intellectual property to allow its member-owners to brand the natural and organic sections of their stores with the intellectual property, allowing its member-owners to create Alfalfa's cafes in their stores, and creating a group of products branded using the Alfalfa's intellectual property. Topco Petition at 3. Paragraph II.I. of the Order states "The purpose of the divestiture of the Assets To Be Divested is to ensure the viable and competitive operation of the Assets To Be Divested in the same business and in the same manner in which the Assets To Be Divested were engaged at the time of the announcement of the proposed acquisition of Wild Oats by Whole Foods and to remedy

the lessening of competition alleged in the Commission's complaint." The Complaint alleged that the acquisition lessened competition in the operation of premium natural and organic supermarkets. The Commission has determined that the A-M Petition better satisfies the purposes of the divestiture than does the Topco Petition with regard to the "Alfalfa's" intellectual property. A-M intends to use the "Alfalfa's" intellectual property in the operation of a premium natural and organic supermarket. It will also use the intellectual property in the same manner as it was used at the time of the announcement of the proposed acquisition. Topco does not intend to use the "Alfalfa's" intellectual property in the operation of premium natural and organic supermarkets. It also does not intend to use the intellectual property in the same manner as it was used at the time of the announcement of the proposed acquisition. Accordingly, the Topco Petition does not satisfy the purposes of the divestiture of the "Alfalfa's" intellectual property. Therefore, the Commission has determined to approve the A-M Petition and to deny the Topco Petition as to the "Alfalfa's" intellectual property.

The Luberski Petition and the Topco Petition each involve, in part, the acquisition of the "Wild Oats" name and associated intellectual property. Luberski, Inc. ("Luberski") intends to develop and supply a Wild Oats labeled brand of natural and organic packaged food products. Luberski Petition at 2. Luberski also intends to use the Wild Oats intellectual property to open Wild Oats stores by licensing the name to developers. Letter from Charles F. Rule, Esq., to Kenneth A. Libby, Esq., April 19, 2010, at 4. Topco proposes to use the Wild Oats intellectual property to allow its member-owners to brand the natural and organic sections of their stores with the intellectual property, allowing its member-owners to create Wild Oats's cafes in their stores, and creating a group of products branded using the Wild Oats intellectual property. Topco Petition at 3. At the time of the announcement of the proposed acquisition, the "Wild Oats" intellectual property was used on products sold to third party retailers and as the name of stores. It was not used as the name of the natural and organic

sections of other stores or as the name of cafes in other stores. Topco also has not shown how its proposed use of the "Wild Oats" intellectual property will remedy the lessening of competition alleged in the Commission's complaint. The Commission has determined that Luberski's proposed use of the "Wild Oats" intellectual property better satisfies the purposes of the divestiture than does Topco's proposed use of the "Wild Oats" intellectual property. Therefore, the Commission has determined to approve the Luberski Petition and to deny the Topco Petition as to the "Wild Oats" intellectual property.

In granting its approval, the Commission relied on the information you submitted and the information submitted by the proposed acquirers and assumed it to be accurate and complete.

By direction of the Commission, Commissioner Ramirez and Commissioner Brill not participating.

INTEL CORPORATION

Docket No. 9341. Order, June 21, 2010

Order withdrawing the matter from adjudication to allow the Commission to consider a proposed consent agreement.

ORDER WITHDRAWING MATTER FROM ADJUDICATION FOR THE PURPOSE OF CONSIDERING A PROPOSED CONSENT AGREEMENT

Complaint Counsel and Respondent having jointly moved that this matter be withdrawn from adjudication to enable the Commission to consider a proposed Consent Agreement; and

Complaint Counsel and Respondent having submitted a proposed Consent Agreement containing a proposed Decision and Order, executed by the Respondent and by Complaint Counsel and approved by the Director of the Bureau of Competition which, if accepted by the Commission, would resolve this matter in its entirety;

IT IS ORDERED, pursuant to Rule 3.25(c) of the Commission Rules of Practice, 16 C. F.R. § 3.25(c) (2010), that this matter in its entirety be, and it hereby is, withdrawn from adjudication until 12:01 a.m. on Friday, July 23, 2010, and that all proceedings before the Administrative Law Judge are hereby stayed during that time as the Commission evaluates the proposed Consent Agreement, pursuant to Rule 3.25(f), 16 C. F.R. § 3.25(f); and

IT IS FURTHER ORDERED, pursuant to Rule 3.25(b) of the Commission Rules of Practice, 16 C.F.R. § 3.25(b), that the proposed Consent Agreement shall not be placed on the public record unless and until it is accepted by the Commission.

By the Commission.