

ORIGINAL



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June 11, 2009

Honorable Donald S. Clark
Secretary
Federal Trade Commission
H135
600 Pennsylvania Ave., NW
Washington, D.C. 20580

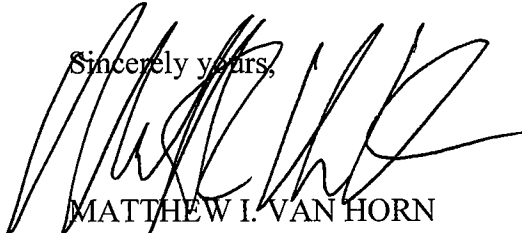
Re: Gemtronics, Inc. and William H. Isely, FTC Docket No. 9330

Dear Mr. Clark:

Enclosed herewith please find the original and one copy of Respondents' Counsel's Pretrial Brief in the above referenced matter. Would you be kind enough to please file the same.

Your cooperation will be appreciated.

Sincerely yours,



MATTHEW I. VAN HORN

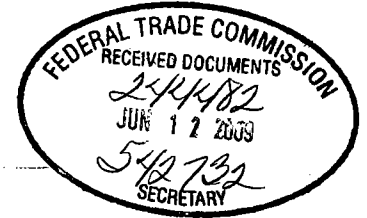
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Enclosures:
As Stated

ORIGINAL

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

COMMISSIONERS: William E. Kovacic, Chairman
Pamela Jones Harbour
Jon Leibowitz
J. Thomas Rosch



PUBLIC

In the Matter of

**GEMTRONICS, INC.,
a corporation, and**

**WILLIAM H. ISELY,
individually and as the owner
of Gemtronics, Inc.**

DOCKET NO. 9330

RESPONDENTS' COUNSEL'S PRETRIAL BRIEF

I. Introduction

At trial, Respondents' Counsel will introduce evidence identified in Counsel's Proposed Findings of Fact. Counsel's Proposed Findings of Fact are filed simultaneously herewith and are incorporated herein by reference.

The Complaint in this action contends that Respondents Gemtronics, Inc. and William H. Isely violated Sections 5(a) and 12 of the Federal Trade Commission Act ("FTC Act") by making false and unsubstantiated claims for the herbal product RAAX11. Complaint Counsel's sole basis for this contention is that "the Respondents disseminated or caused to be disseminated advertisements for RAAX11 through the internet website, www.agaricus.net." See Complaint ¶ 5.

Now being faced with the reality that the Respondents do not own nor control www.agaricus.net and that www.agaricus.net is owned and controlled by a Brazilian company,

Takesun do Brazil, Complaint Counsel's current theories of liability seem distant from its original intent, which was to protect vulnerable cancer patients from ruthless scam artists. Instead of utilizing the prosecutorial powers afforded under the United States Safe Web Act to pursue the owner of www.agaricus.net, an entity at the apex of the offending industry, the FTC has capriciously pursued Respondent William H. Isely with no regard for adding value to the public policy of its cancer sweep. In other words, the FTC has apparently ignored the fact that this case is a garden variety U.S. Safe Web Act case, and instead is attempting to kill a mouse with a missile.

Even more incredible, the FTC has aggressively pursued the only individual, Respondent Isely, with valuable knowledge about the owner of www.agaricus.net and his foreign companies that manufacture and globally market the alleged offending products. Since the FTC first engaged Respondent Isely and after Mr. Isely learned that his identity had been utilized in a manner without his consent by Takesun do Brazil, Mr. Isely closed his business of selling herbal vitamin supplements. Mr. Isely candidly and continuously informed the FTC of his efforts to thwart Takesun do Brasil's misuse of his identity; simultaneously supplying information to the FTC about Takesun do Brasil's identity. The facts provided by Mr. Isely to the FTC from the beginning of this case have been confirmed through the discovery process. Now, the FTC is attempting to use the results of Mr. Isely's process of exposing Takesun do Brasil as a sword against Mr. Isely.

Even under the liberal rules of notice pleading, the theories of liability to be presented at trial are outside the scope of the sole basis for liability in the Complaint: that "the Respondents disseminated or caused to be disseminated advertisements for RAAX11 through the internet website, www.agaricus.net." As such, even if Complaint Counsel is afforded the opportunity to present new bases for liability, based on the present facts and available authority, Complaint

Counsel can not meet its burden of proving that Respondents violated Sections 5(a) and 12 of the Federal Trade Commission.

Moreover, the evidence to be presented at trial warrants a dismissal of the Complaint in equity based on the fact that no possible public interest is served by prosecuting (i) the Respondent Gemtronics, Inc. in that it is an empty corporate shell and has never been activated or committed any act; or (ii) Respondent Isely who has retired and had virtually no part or knowledge of the subject advertising or dissemination thereof. *FTC v. Rhodes Pharmacal Co.*, 191 F.2d 744, 747 (7th Cir. 1951) (describing the broad discretion of the Commission to dismiss Complaint against Respondents whose acts and involvement with the offending advertisement were uncritical and the resulting harm of their acts *de minimis* and insufficient to support an inference that there was a substantial danger that future advertisements by Respondents for the offending product would be deceptive).

II. Respondents Have Not Violated Sections 5 or 12 of the FTC ACT

A. Respondent Isely Never Disseminated or Caused to be Disseminated Any Alleged Offending Advertisements for the RAAX11 through the internet website www.agaricus.net

Complaint Counsel cannot meet its burden that the Respondent Isley disseminated or caused to be disseminated any of the challenged advertisements through the website www.agaricus.net, the *only* basis of liability asserted in the FTC's Complaint. Faced with the information that the alleged offending website, www.agaricus.net, is owned and that its content is controlled by a Brazilian Company, Takesun do Brazil, Complaint Counsel has now, on the eve of trial, chosen an alternative argument----that Mr. Isley "played an integral part" in the website www.agaricus.com.

Asserting this revised theory of liability, Complaint Counsel makes numerous unsupported claims. A voluminous number of alleged facts offered to support the new theories

of liability in Complain Counsel's Pre-Trial Brief appear at first glance to suggest Respondents' involvement with www.agaricus.net. The statements are either (i) phrases or single words quoted from web pages from www.agaricus.net and other websites or, (ii) receipts and other web generated documents memorializing the under cover purchases made by FTC agents. Notably, the statements were not presented as undisputed facts in support of Complaint Counsel's Motion for Summary Decision and no testimony has yet been offered to substantiate their implication.

Moreover, unsupported and premature inferences and conclusions are drawn from the statements. For instance, Complaint Counsel attempts to connect the number of sales of the product RAAX11 by Mr. Isely via his mail order business to the website www.agaricus.net. However, there is no evidence supporting a nexus between the amount of bottles of RAAX11 sold by Respondent Isely and the alleged offending advertisements disseminated on www.agaricus.com. Testimony at trial will help resolve the accuracy of Complaint Counsel's allegations.

The activities by Takesun do Brasil, the owner of www.agaricus.net, in the arena of internet advertising do not necessarily fit easily into the traditional concept of "dissemination". *FTC v. Seismic Entertainment Productions, Inc.*, 2004 U.S. Dist. LEXIS 22788 (October 21, 2004). Moreover, there are few FTC cases which define "disseminated or caused to be disseminated."¹ However, those cases that do address the issue demonstrate that the evidence here does not show that Respondents "disseminated or caused to be disseminated" the representations at issue, which are those representations and statements displayed on www.agaricus.net.

In *Meuller v. United States*, the Court defined "disseminated or caused to be disseminated" from the FTC Act where an individual was charged violating a cease and desist

¹ Likewise, Black's Dictionary does not define the term. However, Webster's Dictionary defines the term as "1. To scatter widely, as in sowing a seed. 2. To spread abroad; promulgate."

order when newspapers containing his advertisement crossed state lines, thereby triggering the interstate commerce requirement. 262 F.2d 443, 446 (5th Cir. 1958). Mr. Mueller had prepared the advertisement and published it in the newspapers. *Id.* His defense was that he had no knowledge that the newspaper company would sell the papers across state lines and that he did not intend for the advertisement to leave his home state. *Id.* The Court found that his lack of intent to cause his advertisement to cross state lines was not a defense.

Under the logic of the Court in *Meuller*, Mr. Isley would not be found to have disseminated or caused to be disseminate any advertisements through www.agaricus.net. 262 F.2d 443, 446 (5th Cir. 1958) (citing *Shafe v. FTC*, 256 F.2d 661, 664 (6th Cir. 1956) (Ruling consistent with *Meuller* under similar facts regarding newspaper advertisements crossing state lines). The *Meuller* Defendant paid to introduce an advertisement he created into commerce, vis-à-vis into the possession of a third party newspaper company, and his acts contributed greatly to the violation. Here, Isely did not create any advertisement or pay to have any information placed on www.agaricus.net. Moreover, even though Mr. Isely's identity was used for certain purposes by the owner of www.agaricus.net without the consent of Mr. Isely, his name was not used in a deceptive manner.

Also, in *Meuller and Shafe*, the Defendants *did* intend to disseminate the subject advertisements and the issue was to what scope, extent and degree the Defendants intended to disseminate the advertisements. Here, Mr. Isely never created any advertisement to be disseminated on www.agaricus.net.

Complaint Counsel contends that Mr. Isley is liable under *Standard Oil Co. v. FTC*, where the Court found that an advertising agency was liable where it was an active participant in the offending advertisement. 84 F.T.C. 1401, 1475 (1974), *aff'd and modified*, 577 F.2d. 653 (9th Cir. 1978). The advertising agency was enjoined to further advertise for the product sold by

the offending manufacture where it was found that the advertising agency wrote and edited the text of the advertisement and created the graphics for the advertisement and selected the appropriate audience for which the advertisement would be directed. 84 F.T.C. 1401, 1475 (1974), *aff'd and modified*, 577 F.2d. 653, 659 (9th Cir. 1978). Here, Mr. Isely did not write, edit or otherwise create any advertisement shown on www.agaricus.net. Likewise, Mr. Isely had no ability to control what was placed on www.agaricus.net, because he had no access to control its content. Thus, Mr. Isely is not liable under Complaint Counsel's contention that Mr. Isely was somehow acting as an agent for the owner of www.agaricus.net.

Like the Court in *Standard Oil*, the Courts in *Porter & Dietsch, Inc. v. FTC* and *Colgate-Palmolive Co.* determined that F.T.C.'s cease and desist orders were overbroad with respect to the advertising agents. 605 F.2d 294, (7th Cir. 1979), *cert. denied*, 445 U.S. 950; 59 F.T.C 1452 (1961), order set aside on other grounds, 310 F. 2d 89 (1st Cir. 1962). The Court's logic in *Porter & Dietsch, Inc. v. FTC* also supports the notion that Mr. Isely alleges acts do not amount to the fact that he "disseminated or caused to be disseminated" advertisements on www.agaricus.net. 605 F.2d 294, (7th Cir. 1979), *cert. denied*, 445 U.S. 950. In *Porter*, a retailer appealed a trial court's order that the retailer should be enjoined from advertising *any* diet products, even those products *not* provided by the Defendant manufacturer who supplied the offending products to the retailer, despite the retailer's lack of any knowledge as to the advertisement. *Id.* The *Porter* Court amended the trial court's order to find that the retailer should only be precluded from advertising the offending manufacturer's advertised diet product and not *all* diet products. The logic of the *Porter* Court's decision to amend the trial court's order is particularly applicable to this action.

Complaint Counsel lastly attempts to argue that Mr. Isely violated Sections 5 and 12 of the FTC Act because he somehow participated in a fraud with the owner of www.agaricus.net,

again a basis for liability not found in the Complaint. Complaint Counsel cites two cases for the proposition that Mr. Isely did not act within his authority to prevent or stop an alleged fraud committed by the owner of www.agaricus.net. See *FTC v. Atlantex Associates*, 1987-2 Trade Cas. (CCH) ¶ 67,788 (S.D. Fla. 1987) and *FTC v. Int'l Diamond*, 1983-2 Trade Cases (CCH) ¶ 65,725 (N.D. Cal. 1983). The individuals found liable in the cases cited by Complaint counsel were actively involved as owners of the corporate defendants and had actual authority to govern the acts and omissions of the corporations. *Id.* Here, it has never been alleged by Complaint Counsel and nor is it the case that Mr. Isely has any authority or ownership rights in the company Takesun do Brasil and its operations. Presently, Takesun do Brasil continues to disseminate advertisements and statements on www.agaricus.net that the FTC would content are in violation of Sections 5 and 12 of the FTC Act. However, Mr. Isley can not alter the content of these advertisements any more than the FTC can alter these advertisements. Mr. Isely was able to remove have his name removed from ww.agaricus.net once upon realizing it was being used without his permission.

In summary, Complaint Counsel's contentions in support of its case are based on faulty premises. Complaint Counsel's first premise is that Respondent Isely is not to be believed and that despite the direct evidence showing he had no ownership of or control over the website www.agaricus.net, Mr. Isely must be lying when he says he did not disseminate or caused information to be disseminated on www.agaricus.com. On the other hand, Complaint Counsel uses Mr. Isely's candor to discredit him. The FTC attempts uses his demands to remove the unauthorized use of name from the domain registration for www.agaricus.com as evidence of a level of association with the owner of website rising to the level of disseminating or causing information to be disseminated on www.agaricus.net.

B. Respondent Gemtronics, Inc. is Not Liable as a Matter of Law Because It Always Has Been an Empty Corporate Shell with No Ability To Act

The corporate Respondent Gemtronics, Inc. is an inactive corporate shell that Respondent Isely formed under North Carolina law during the year 2006. However, the entity Gemtronics, Inc. never obtained a federal tax identification number, issued shares of stock, appointed a board of directors or elected officers. It has never conducted business or possessed a bank account or received designation as class s-corporation or class c-corporation.

It has never observed corporate formalities such as keeping minutes or filing Annual Reports with the Secretary of State of North Carolina. As such, it soon will likely be administratively dissolved by the North Carolina Secretary of State office. Here, the proper party is Respondent Mr. Isely, individually, and doing business as "Gemtronics".

Complaint Counsel is seeking an order against Gemtronics, Inc. However, carrying the Complaint Counsel's request to its ultimate conclusion, the Respondent Gemtronics, Inc. is not legally capable of abiding by or, for that matter, violating a court order. The only imaginable "penalty" that could be issued against an empty corporate entity is for the North Carolina Secretary of State's Office or a Court to order that the corporate entity be administratively dissolved. As such, Gemtronics, Inc. should be dismissed from this action.

C. Respondent Isely can not be liable for acts by Gemtronics, Inc. because Respondent Isely has never been an owner, Manager or shareholder or Gemtronics, Inc.

Lacking sufficient evidence that Respondent Isely disseminated the alleged offending advertisements, Complaint Counsel is attempting to establish that Respondent Isely should be liable for the acts and omissions of the corporate Respondent Gemtronics, Inc. as Gemtronics, Inc.'s "owner". In effect, Complaint Counsel is arguing the equitable remedy of piercing Gemtronics, Inc.'s "corporate veil" to transfer Gemtronics, Inc.'s liability to Mr. Isely. The

glaring problem with Complaint Counsel's argument is, however, that piercing Gemtronics, Inc.'s corporate veil would lack any legal effect as there are no shareholders to reach.

Complaint Counsel cites several cases where Courts and the Commission have found an individual liable for violations of Section 5 and 12 of the FTC Act by a corporate entity. These opinions cited by Complaint Counsel turn on two factors: (i) the evidence demonstrating the level of the individual's personal participation and influence over the activities of the company and, (ii) to what extent an order must be entered against an individual to ensure that effective and enforceable relief is issued by the Commission. In all of Complaint Counsel's cases the individual was an owner or shareholder and/or possessed direct influence over the corporate entity, and was attempting to avoid individual liability with the corporate shield. Likewise, in the cases cited by Complaint Counsel the order by the Commission would be futile against only the corporate entities, without also entering the order against the individuals.

Here, Mr. Isely is not a shareholder or owner of Gemtronics, Inc. and Gemtronics, Inc. never materialized beyond a shell. Mr. Isely acted individually through the assumed name "Gemtronics". Though Complaint Counsel was been informed of this ownership structure since before filing the Complaint, Mr. Isely was not named properly as "William H. Isely individually and doing business as 'Gemtronics'". Informing the FTC of his sole proprietorship and not attempting to hide behind the corporate shell is another example of Mr. Isely's candor throughout this process.

III. Respondents Are Entitled To An Award of Attorney's Fees and Costs Under Rule 3.81 of the Commission's Rules of Practice

The evidence shows that Complaint Counsel possessed direct knowledge at the commencement of this action or shortly thereafter that allegations in the Complaint were false. However, Complaint Counsel failed to stipulate or resolve the allegations, instead creating unnecessary, expensive and time consuming litigation. Complaint Counsel possessed direct

knowledge of the following information at the commencement of this action, including but not limited to:

- (i) That the Respondents were not the legal owners of and did not control the content of the website www.agaricus.com; and
- (ii) That Respondent Gemtronics, Inc. is a legal name of a corporation and not the assumed name “Gemtronics” for Respondent Isely’s sole proprietorship.

The Complaint alleges that the Respondents owned www.agaricus.net and Complaint Counsel has continued to identify the website as “Respondents’ website” through all documents filed with the Court. Complaint Counsel has ignored direct evidence refuting the allegation. The direct evidence includes sworn testimony and documents produced by an officer of the web hosting company that maintains www.agaricus.net. Now, Complaint Counsel’s Pre-Trial Brief presents new theories of liability that are no longer based on the issue of whether Respondents were legal owners of or controlled www.agaricus.net.

The Complaint also alleges that Respondent Gemtronics, Inc. is an active company and alleges that Respondent Isely is the owner of Gemtronics, Inc. However, for more than one year, Complaint Counsel has refused to acknowledge direct evidence that Gemtronics, Inc. and “Gemtronics” are legally independent of each other. This undisputed issue has been litigated and has consumed hours of time; but is a matter of virtually no significance with respect to the liability of either Respondent.

Respondents’ Counsel appreciates that the underlying merits of this action are the primary subject of the trial. However, the Respondent’s lack of culpability is even more evident when the nature of how this case was prosecuted is observed against the notion that the FTC assumes the role of prosecutor seeking justice and not as an opponent in a civil action. There is a line where zealous representation becomes intentional acts to create vexatious litigation to

prejudice an adversary. Here, the evidence shows that Complaint Counsel's acts and omissions crossed that line and were intended to incite needless and vexatious litigation---successfully creating red herrings. Thus, Respondents are entitled to an award of attorney's fees and other expenses under Rule 3.81 of the Commissions Rules of Practice.

VI. Conclusion

The evidence presented at trial will show that the Respondents have not disseminated or caused to be disseminated any false or unsubstantiated claims for the product RAAX11 through the website www.agaricus.net, or otherwise. To that end, the evidence will show that the Respondents have not violated Sections 5 or 12 of the FTC Act, and that Respondent Isely is entitled to an award of attorney's fees and costs under Rule 3.81 of the Commissions Rules of Practice.

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By 

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Attorney for Respondents

This the 11th day of June, 2009.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this **RESPONDENTS'**
COUNSELS' PRE-TRIAL BRIEF in the above entitled action upon all other parties to this
cause by depositing a copy hereof in a postpaid wrapper in a post office or official depository
under the exclusive care and custody of the United States Postal Service, properly addressed to
the attorney or attorneys for the parties as listed below.

One (1) e-mail copy and two (2) paper copies served by United States mail delivery to:

Honorable D. Michael Chappell
Chief Administrative Law Judge (Acting)
Federal Trade Commission
H106
600 Pennsylvania Ave., NW
Washington, D.C. 20580

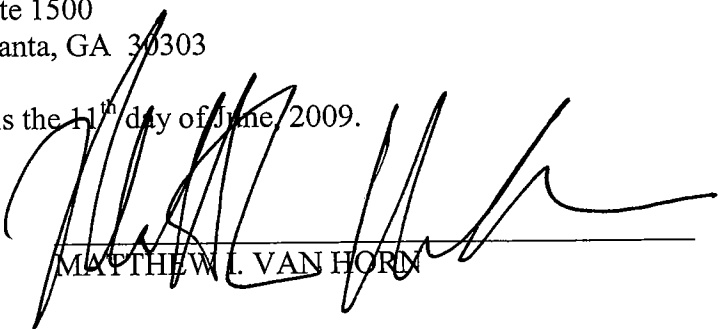
***The original and one (1) paper copy via United States mail delivery and one (1) electronic copy
via e-mail:***

Honorable Donald S. Clark
Secretary
Federal Trade Commission
H135
600 Pennsylvania Ave., NW
Washington, D.C. 20580

One (1) electronic copy via e-mail and one (1) paper copy via United States mail delivery to:

Ms. Barbara E. Bolton
Federal Trade Commission
225 Peachtree Street, N.E.
Suite 1500
Atlanta, GA 30303

This the 11th day of June, 2009.


MATTHEW L. VAN HORN