Original

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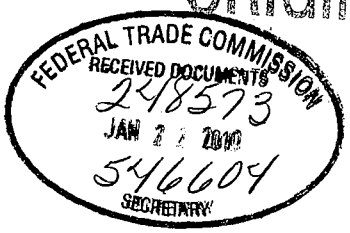
Jan. 20 , 2010

ORIGINAL



Honorable D. Michael Chappell
Chief Administrative Law Judge (Acting)
Federal Trade Commission
H113
600 Pennsylvania Ave, NW
Washington DC, 20580

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

Enclosed is My

REPLY TO COMPLAINT COUNSEL'S ANSWER TO RESPONDENT'S APPLICATION FOR AWARD OF ATTORNEY FEES AND EXPENSES UNDER RULE 3.83(c)

Your consideration will be greatly appreciated.

Respectively Submitted

William H. Isely William H. Isely Jan 20 , 2010

964 Walnut Creek Rd.
Franklin NC, 28734

828-369-7590 b.isely@ftpmailbox.com

Enclosed: 1) Reply to Complaint Counsel's Answer to Application for Award.....

cc Ms. Barbara E. Bolton
Complaint Counsel

Honorable Donald S. Clark
Secretary FTC

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 Rosc **PUBLIC**

In the Matter of **GEMTRONICS INC** **a corporation and,** **WILLIAM H. ISELY**	**DOCKET NO. 9330**

REPLY TO COMPLAINT COUNSEL'S ANSWER TO RESPONDENT'S APPLICATION FOR AWARD OF ATTORNEY FEES AND EXPENSES UNDER RULE 3.83(c)

Background

The **Decision** of the ALJ in favor of the Respondent by dismissal became final on November 9th, 2009.

The Respondent's Counsel filed an **Application for an Award of Fees and Other Expenses Pursuant to Commission Rule 3,83, et seq** on 2nd December 2009.

Respondent notified the Commission on December 22nd, 2009 that Matthew Van Horne, was **no longer his Attorney of record** and that Respondent would represent himself for the immediate future. Matthew Van Horn has sent his notice to the FTC..

Respondent supplied the Commission on December 23rd 2009 the promised **Supplement to Attorney's Fees and Expenses, Attachment C** of the **Request For Award** submitted December 2nd 2009.

Respondent submitted to the Commission on December 23rd 2009 a **Petition for Rulemaking On Maximum Rates for Attorney Fees Under Rule 3.81(g)**

Complaint Counsel submitted her **Answer in Opposition to**

Respondent's Application for Attorney's Fees and Expenses Under the Equal Access to Justice Act, served on the Respondent January, 7th , 2010

Respondent submitted a **Motion for the ALJ to Deny the Belated answer of the Complaint Counsel** on January 8th, 2010. This motion was withdrawn when The Commission's Secretary announced changes in scheduling which made the Complaint Counsel's submission to be done in a timely fashion. The reply is due Jan 22, 2010

Reply Summary.

Since the Respondent in his Application clearly showed that he prevailed and the case against him was dismissed and also that he was qualified financially, complaint counsel's main open avenue to prevent the award of attorney fees and expenses to the Respondent is to show that the original Complaint was substantially justified. Respondent will summarize what the Complaint counsel knew or should have known at the time she brought the complaint. The standard will be what a reasonable person would have done or not done in the same circumstances. The conclusions will be that under both the law and the facts the Complaint Counsel knew or should have known would have precluded a reasonable person from filing a complaint. The Respondent will counter the Complaint Counsel's claims that 1) the Commission's position was substantially justified[1], 2) Special circumstances make such an award unjust, 3) Respondent seeks awards for fees and expenses that are not allowed under EAJA

A. COMPLAINT COUNSEL'S APPROACH WAS NOT THAT OF A REASONABLE PERSON

First, Complaint Counsel's actions or lack of same in some instances, will be analyzed in general. Then they will be analyzed in detail in key situations she has covered in her Answer.

[1] Complaint Counsel observed that on page 5 of the Application the Respondent's Counsel stated that **"There was reasonable basis in law and fact for the Complaint Counsel's Complaint."** This statement only existed in the final draft of the Application which was not presented to the Respondent for review. When read in context, this statement would be seen to be a continuation of Respondent Counsel's historical summation of Complaint Counsel's position in the case, started in the thirteen previous lines of text. At no time did the Respondent or his Counsel hold the view that there was a reasonable basis in law and in fact for the Complaint Counsel's Complaint.

1. Flawed Jurisdictional Claim.

In justifying the bringing of her complaint, the Complaint Counsel quotes in her Proposed Conclusions of Law item 1, the authorizing document of the Federal Trade Commission, and gives a short quote, summarizing the FTC's authority to regulate commerce as "National wide advertising, marketing, or sales activity". . Evidence the Complaint Counsel had on or before the complaint was brought was that www.agaricus.net was owned and operated by a foreign company. A reasonable person would have recognized that there are sovereign boundaries in the cyber world as there are in the physical world, making activity on that website international in scope and outside the normal jurisdiction of the FTC which is national. A reasonable person would have investigated how the internet is controlled and organized and also discovered the US Safe Web Act as the means intended for FTC utilization in international situations where through improper international trade practices US citizens are being abused.

The Complaint Counsel did briefly recognize the international character of her problem when the warning letter[2] was sent to www.agaricus.net in Oct of 2007 where the last sentence read, "**If you are not located in the United States, we have referred the claims on your website to the consumer protection enforcement agency that has jurisdiction in your locale.**" There is no evidence in the record, however, that the Complaint Counsel made any effort to determine what foreign agency had jurisdiction over www.agaricus.net . When she could not locate any assets of George Otto in the United States[3], she did what no reasonable person would have done, created a respondent where she had jurisdiction in the US. She switched to the Respondent[4] in December 2007. Any

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[2] FTC warning letter dated October 23, 2007 sent to www.agaricus.net (FTC 00195-00197)

[3] Trial Record – Liggins (TR 125--3 > 20, TR 74—6 > 19, TR 177, TR 178, TR 179.

[4] Trial Record – Liggins (TR 47—14 > 22.

reasonable person making even a simple evaluation of the available information contained on the website and from the product label[5] obtained in a sample purchase, and even a phone call to the Takesun telephone number listed with a Brazian country code[6] of 55, would have determined it was a foreign website and acted accordingly

Because of these two significant differences from any case law cited, a reasonable person, investigating Respondent's case, would have performed further investigations, and, finding the Respondent very unlikely to be controlling the foreign website, would not have proceeded to bring the complaint as the Complaint Counsel did.

2. Complaint Counsel Cited Inappropriate Case Law

The power in the successful use of case law to win cases is to find a very similar case where the outcome was satisfactory for the searcher's needs

The case law cited by the Complaint Counsel differed from the Respondent's case in very significant ways, making them inapplicable. First, the websites in the cited cases were not foreign owned and located like www.agaricus.net Therefore the Complaint Counsel could not use subpoena power to validate any information displayed on www.agaricus.net and would know that such information would remain hearsay. In the cited cases, which were domestic, issues of jurisdiction did not arise as the law giving the FTC regulatory power was clearly crafted for national cases only. A reasonable person searching for applicable case law fitting the Respondents case would have been limited to candidate cases where websites were owned and located abroad. Had any been found, which likely would be rare, it would have been obvious to any reasonable person that the way to proceed towards a successful outcome would have to be quite different from the traditional approach of filing a complaint under title 15 and then taking assets if necessary to compel a settlement.

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[5] Subject Product Label (JX 55) Details are clearer on an actual bottle of which the FTC investigator had one.

[6]Home page of www.agaricus.net showing Brazilian telephone number for Takesun, country code 55 (JX 25)

. Second, the ownership and control of the candidate websites would not generally be an issue for domestically owned and operated businesses. With few exceptions, a domestic business and website would be closely related if not owned outright by the same management, One might rent services from the other, but a relationship of mutual benefit would be clearly present through which liability could be traced, In the case of the Respondent, he had no significant relationship with the retail website www.agaricuis.net, but merely imported his products at wholesale from the same management who was involved in a number of businesses of which www.agaricus.net was a minor aspect. No case law was cited with this kind of relationship.

Because of these two significant differences from any case law cited, a reasonable person, investigating Respondent's case, would have performed further investigations and, finding the Respondent not liable, as was eventually determined at trial, would not have proceeded to bring the complaint.

3. Before Bringing the Complaint the Complaint Counsel knew another party, George Otto, was the person responsible for the actions objected to associated with website www.agaricus.net.

From the testimony of the chief investigator , Liggins, it was learned that the case was first opened by the FDA and that the early information about www.agaricus.net was collected by the FDA and then passed on to the FTC. From August 2007 into December, George Otto[7] was the target in the www.agaricus.net investigation. Apparently the FDA information was used in composing the warning email[8] sent to the website www.agaricus.net. Oct. 23, 2007 and in searching for assets that George Otto might have in the US. Information gathered by Liggins

[7] Investigation of G. Otto commenced with information from the FDA – (TR 92—5, 6, 7)

[8]FTC warning email sent to www.agaricus.net Oct 23,2007 – (FTC 00195. 00196, 00197)

was dated in late December 2007 and January 2008[9]. The Respondent was not mentioned in the October warning email. The WHOIS information gathered by Liggins, while showing that the respondent might be involved in some way, showed that registration of the website was done by email by gotto@takesun.com,[10]. Takesun do Brasil was the company shown on the website as the supplier of RAAX11, the product in contention, The WHOIS information contained a disclaimer statement that its information might not be accurate or complete. This initial investigation into George Otto was concealed from the Respondent even though this type of information was requested in discovery[11].

In the one and only phone call between the Respondent and the Complaint Counsel, the Respondent was forthright that he had no control of the website www.agaricus.net nor was he aware that his name had been used in its registration along with George Otto, or as a general contact point of inquiry.

In the following month the Respondent's Counsel obtained a letter[12], which was forwarded to the Complaint Counsel, from the domain registrar company, DOMAINDISCOVER, showing no ownership or control of website www.agaricus.net was or had been in the hands of the Respondent. The Complaint Counsel did not demonstrate in trial that she understood procedures used in website management and continued to argue that the WHOIS information was valid and ignored the DOMAINDISCOVER report, She did not demonstrate that she had learned that for a person to control a website that person must have both an account name and

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[9]Start of Liggins searches to be added to the FDA information – (TR 47 – 18, 19, 20, 21, 22)

[10] WHOIS information on www.agaricus.net shows registration done from address gotto@takesun.com (JX 16)

[11] Respondent Counsel's Interrogatories and request for documents among other things specifically covered the prior investigation of George Otto. Information of this investigation was not produced. Wording in two sections that was ignored by the Complaint Counsel clearly required her to divulge this information

" 2. Identify to the Counsel for Respondents the existence of any evidence which tends or may tend to negate the guilt of the Respondents, mitigate the degree of the offenses set forth in the Complaint herein, or reduce the requested penalty and/or punishment.

3. Identify to Counsel for Respondents any and all exculpatory and impeaching evidence or Information. "

[12] DOMAINDISCOVER letter on www.agaricus.net ownership information obtained by Respondent's Counsel. and provided to the Complaint Counsel (JX66)

password[13]. She had no information whatever, including from WHOIS, that the Respondent had either, both required to control the website. Her chief investigator, Liggins, must also have known at the time, because later he testified that he was very conversant with the control procedures, having hands-on experience managing his own website[14]. A reasonable person having such experience on their staff would have acquainted themselves in the control and management of websites, a subject at the heart of this case.

No evidence exists in the record as to why or who decided to switch the respondent from George Otto to the present Respondent, except for the one statement given by Liggins in the trial, that he was unable to locate any assets of George Otto in the United States, and so George Otto was dropped. The Complaint Counsel and her chief investigator spent five months investigating George Otto and learned less that they were willing to report than a reasonable person should be able to find in an afternoon. Apparently the goal of the Complaint Counsel was to collect assets rather than to provide justice, so a case was crafted against someone with assets in the United States and information about George Otto was conveniently forgotten.

Faced with the mounting evidence that the actions in the Complaint were performed by someone other than the Respondent, no reasonable person would have brought the Complaint or as a minimum would have at least modified it to reflect the actual facts uncovered, but neither of these actions were taken by the Complaint Counsel. In the central issue of the case, who controlled the website www.agaricus.net , the Complaint Counsel took no interest beyond the one page of hearsay from WHOIS, FTC 00157-00158. In her answer she did not even try to counter the registrar, DOMAINDISCOVER, in their letter regarding George Otto's ownership.

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[13] Liggins Testimony in Trial – (TR 133, 134)

[14] Liggins Testimony in Trial about his expertise, including knowledge of website ownership, registration. (TR 122)

4. The Complaint Counsel was Constrained to Severely Limit Resources She Expended

The Respondent has great compassion for the counsels that work at the FTC. The emphasis appears to be on producing settlements which covers more cases than litigation could with a given resource base. In the cancer sweep, for example, less than 4% of the cases ended up in protracted litigation. With such a small ratio, it is not surprising that there are almost no resources allotted to gathering evidence of sufficient quality to support actual litigation. On questioning by the ALJ in the trial of the Respondent, the chief investigator, Liggins, responded that his investigation was resource limited[15] and he hadn't made even basic phone inquiries because of that limitation. The result is that the complaints are hastily produced with just enough quality to force the vast majority of small home businesses, who couldn't afford litigation, into settlement on the FTC terms. The first complaint, brought against the Respondent was out of the Atlanta office,. Even though he was convinced he had a winning case if he could stay the course, the Respondent would probably have settled if he had not been required to sign a letter with the made up letterhead of **Gemtronics, Inc./www.agaricus.net** and sign for both[16]. When pointed out by the Respondent's Counsel that signing such a document might be a criminal act, the Complaint Counsel respomded in a casual way indicating it was of no importance. As a result of essentially no investigation, other than the expert witnesses whose issues never came into play, the Complaint Counsel was left with trying to make a case, based on the original complaint which was mostly hearsay, suppositions, and guilt by association. A reasonable person would not accept cases where they did not have enough resources to fulfill their legal duty to make a thorough investigation to establish the facts before bringing a complaint.

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[15] Liggins testimony in trial – Resources were limited and curtailed his investigation (TR 161)

[16] Proposed letter to be included in Order for Respondents to sign in any offered settlement. This copy taken from the Order attached to the Complaint Counsel's Request for Summary Judgment on Record (Attachment A of this reply as well as the Order.)

5. Simplifying a Complex Case Leads to Confusion.

Both Counsels, in order to get their minds around the case with the expenditure of limited time, oversimplified, leading to confusion all around. Although the subject product RAAX11 was only sold for four years, for background information, things that occurred in the previous 4 years were also brought in. The action took place on several websites, each with "Agaricus" in the name, and were easily and often confused, even with www.agaricus.com , a Japanese website unrelated to the case. These websites changed with time as did the organization of the Respondent's business and his relationship to Takesun, his wholesale supplier from whom he imported his products Also changing were Takesun's shopping carts, of which there were at least two in English at any one time on www.agaricus.net . So to use generalities to describe the dynamics occurring over an eight year period could only lead to confusion. This over simplification led to some apparent inconsistencies which the Complaint Counsel represented as untruthfulness on the part of Respondent. A case in point was the date given for an email exchange with George Otto being on different dates, a point never resolved on the record. In actuality there were several emails in evidence. One on March 28, 2008 was from G. Otto[17] to the Respondent explaining the name mix-up in reregistration of websites. The second was from the Respondent[18] to G. Otto to persuade the website registrar to send a letter to all concerned giving the website ownership information. A reasonable person would have recognized from the onset that they did not have the resources to understand the case well enough to reach a successful outcome, and would not have brought a complaint in the first place.

[17] Email -- Takesun to Respondent (JX 71)

[18] Email -- Respondent to Takesun (JX 72)

6. Perils of Cyberspace "Evidence"

A reasonable person involved in the judicial system would be wary of internet information, particularly from foreign websites. Liggins testified, and made a good case, that it is possible to maintain custodial control of an image that has been captured from a website[19].The **message** conveyed by the image is an entirely different matter and must be treated as is other media, such as print, basically as hearsay.. Many sites, such as the WHOIS site brought into the case by the Complaint Counsel, have deliberate disclaimers in an attempt to avoid any responsibility for the meaning of the content of their websites[20]. No doubt some websites provide valuable leads which can help uncover more substantial evidence, but stand alone, meaning conveyed by a website is suspect. From a legal point, using information from a foreign website is much worse because in normal cases the authors are forever untouchable for testifying or purposes of cross-examination. Some individuals even change their location from one country to another. Registrars and hosts are known for offering cover for small additional fees which may make penetration to the source nearly impossible,

The worst use of a website, which the Complaint Counsel made, a reasonable person would avoid at all costs because it is full of hidden traps. The problem begins by charging a foreign website with misrepresentation, fraud, other misdeeds, and bringing in expert witnesses to help thoroughly discredit the website. The fatal flaw is then to bring in other information from the same website as factual to help make the case. When it is a foreign website, the investigator will probably be unable to subpoena the author as a means of authenticating the information planned to be used as evidence. Having thoroughly discredited the website, the information brought in as factual may be treated as worse than hearsay by any responsible authority. A reasonable person would see this quagmire before getting into it and avoid it at all cost. A

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[19] Liggins describes custodial control of website information (TR 49, 50)

[20] Typical disclaimer as posted on WHOIS website. (JX 19)

further trap of this process is when something is presented, found on the discredited website, and used as evidence without knowing if it is true or not, and the opposition has independent, verifiable, evidence that it is untrue, the credibility of the investigator is compromised after it happens just a few of times. Examples in the case where the Complaint Counsel lost her credulity are:

a. Claiming that the Respondent controlled www.Agaricus.net based on the WHOIS hearsay in the face of Valasco and her own Investigator, Liggins, testimony to the contrary. This was the turning point in the case which confirmed what the Complaint Counsel already knew..

b. Claiming that the Respondent was the only source of RAAX11 in the US, based on such a statement on a www.agaricus.net web page where other pages on the same website listed two others the Respondent also knew about, and the ALJ noticed Green Pharmacy also as being a supplier[21].

c. Claiming, based on a further page, that if you called Bill Isely that he would tell you about a cancer study in the US. using Takesun products, a study Bill Isely did not know about and doesn't believe existed.

d. Using www.agaricus.net shopping cart receipt information for a sale to Liggins which showed that the payment had been made to three different accounts, thus being self contradictory[22].

B. REPY TO SPECIFIC ALLEGATIONS IN THE COMPLAINT COUNSEL'S ANSWER

The Complaint Counsel has made a number of untrue allegations in her Answer, In the background summary she greatly oversimplified in trying to show she was justified in bringing

[21] Interchange about other sources of RAAX11 including Green Pharmacy -- Questioning of Liggins, (TR 159. 160)

[22]Multiple payment statements giving three accounts, each supposedly charging for one sale (JX 50, JX 51, JX 52)

the complaint, leaving out critical details that point in a different direction, Reasonableness of an act is to be judged from the details not the generalitie

[II BACKGROUND (per Complaint Counsel)]

1. WHOIS Web page and www.Agaricus.net Info. (Second and third par. page 2) contested

Here she is referring to an earlier version of FTC 00156 and FTC 00157. apparently collected by the FDA along with various images from the website www.agaricus.net and states that it shows the Mr Isely and his company Gemtronics Inc.are the parties responsible for the marketing and sales of RAAX11 from the website. To dispose of Gemtronics Inc. immediately, the Complaint Counsel has not shown during the whole case one item of documentation involving the Corporate version of Gemtronics besides its registration as a corporation. When she sees Gemtronics she thinks and says Gemtronics Inc.

Respondent admits that his name appeared in some images from the website but the significance of their appearance is conjecture and assumption in both of which Complaint Counsel has indulged, Who put his name on the website and for what purpose is not addressed, only speculated upon, In his one telephone conversation with the Complaint Counsel, Respondent told her that he was not aware of his name being used either for registration of the website or marketing & advertising of RAAX11 on www.agaricus.net. This call took place six months before she brought the September 2008 complaint and during that 6 months she came with not one piece of independent verification that would support her conjectures and assumptions. Also her timeline doesn't hold up. She says she was investigating the Respondent and his company in July 2007, yet the warning letter sent to George Otto at www.agaricus.net was sent in October and at that time there was no mention of the Respondent In the letter.

The reporting on the WHOIS information for www.agarricus.net is also damaging to the Complaint Counsel. She omits to say that George Otto's name appeared on WHOIS with Isely's name or only George Otto's email address was used for the registration[23]. So why did the Complaint Counsel decide to go after Respondent Isely and not even mention George Otto? Finally the WHOIS image contained a disclaimer that information portrayed there could be inaccurate and out of date, certainly putting it into the class of hearsay. While the Complaint counsel has not admitted whether she knew that being a registrant does not give you control of a web site, her chief investigator knew it does not[24]. A reasonable person when confronted with such a mass of conflicting data would conclude that he or she had not yet done a thorough enough investigation needed before bringing a complaint.

Again a major omission by the Complaint Counsel in describing the two sample shipments delivered by the Respondent was that they were bought on George Otto's shopping cart, the payments went to his accounts, and Respondent acted only as the drop-shipper, hardly in the role of marketing and sales. A reasonable person at this point would have returned her interest to George Otto.

"Appearance of compelling evidence" is hardly a description of what the Complaint Counsel had in March 2008. She had a multi-national company centered and producing products in Brazil, operating at least 12 web sites selling RAAX11 in six languages world wide with business operations in at least Brazil, Germany and Portugal. There were independent websites selling RAAX11 retail in the US, at least one of which, Respondent's, was importing products on a wholesale basis from Brazil, which included RAAX11. While Respondent's name had been used on one of the websites, www.agaricus.net without his permission, no reasonable person would believe that an 83 year old retiree, who only speaks one language, not Portuguese which is done where www.agaricus.net is located, would be the person responsible for the material on

[23] WHOIS information on www.agaricus.net (JX 16)
[24] Managing his own website, Liggins knew most everything there is to know about ownership of websites (TR 133)

the website without some independent verification. Further investigation would have found a retired mountain man whose capability with a computer did not go much beyond sending email and surfing the world wide web. The Respondent has been on the world-wide-web enough to know that there is a lot of hearsay out there.

2. Problems of Negotiating and Providing Information were of the FTC's Own Making. (Bottom of page 2, top of page 3) Contested

That the negotiations towards a settlement may have been unduly protracted will be shown to be the result of actions taken by the Complaint Counsel, not the Respondent.

Towards the end of 2007, the Complaint counsel was faced with a serious problem that might impinge on her career ambitions. Going after George Otto was going to result in a dry hole. He was beyond her reach in Brazil. Even though all credible evidence pointed to him, he was outside the jurisdiction of the FTC and did not even answer a warning letter[25]. A reasonable person would have recognized that you can't catch them all, particularly those fish that are not swimming in your river. But maybe there was still a chance to retrieve some of the time and resources invested so far. By some quirk of circumstances, the Complaint Counsel never learned why, the name of a US resident appeared in a number of places associated with www.agaricus.net, and a weak circumstantial case might be built against him, using hearsay material as evidence such as the WHOIS results[26]. Considering the FTC funds already expended, it was worth a try, The Complaint Counsel never intended to get to trial, but to win a favorable settlement through the financial pressures the government could bring to bear against a small, home-based business. The goal of the Complaint Counsel was to end up with material that could be used in the cancer sweep campaign, and also some assets.. While an admission

[25] FTC warning letter to www.agaricus.net (FTC 00195, 00196, 00197)

[26] WHOIS results on www.agaricus.net (JX17)

of liability would not normally be part of a settlement, the Complaint Counsel arrived at the brilliant idea of burying the admission of liability in the required letter the respondent would have to send to all his past customers. The letter was also intended to implicate the shell corporation against which she hadn't found any evidence. Finding a Corporation liable would be a bonus.

Her draft letter has been unacceptable since the Sept.18 complaint, TR 7, and was the same as the draft letter shown in attachment A., which was part of the Complaint Counsel's submission for Summary Judgment proposed order, also in the record. Notice that the Respondent was required to create a new letterhead, **Gemtronics, Inc/www.agaricus.net** and also sign for that fictitious organization. With one signature the Complaint Counsel would have an admission that all the fictitious claims in her complaint were admitted by the Respondent by his saying that he was part of some non-existent organization that combined www.agaricus.net with his shell corporation and was responsible for the advertising and management of George Otto's website. Respondent recognized the Complaint Counsel's strategy and instructed his counsel to inform the Complaint Counsel that no settlement was possible without removing this fraudulent aspect of the settlement. If Liggins looked for **Gemtronics, Inc./www.agaricus.net,** he didn't report doing so in the trial. Also he didn't report finding any combined organization .

The Complaint Counsel over time in negotiations indicated she could modify her settlement terms and, when it appeared that she would modify the letter, was able to extract financial information from the Respondent about his retail operations and the number of bottles sold. With that information in hand, the Complaint Counsel modified the format of the draft letter to temporarily change the letterhead to "Gemtronics" in the offer she made in a proposed agreement and concent order of 1-7-09-2009. However the Respondent was still required to sign for the composite organization that included Gemtronics, Inc., with www.agaricus.,net. The letter reverted to the previous form of attachment A by the time of the Summary Judgment. So negotiations were stalled, and eventually unsuccessful, not due to any act of the

Respondent, but due to the insistence of the Complaint Counsel that the **Respondent commit an unlawful act.**

The Complaint Counsel's demands for all of Respondent's business records was overbroad and burdensome, particularly on a part-time small home business. Copying everything was logistically impossible. Sending the originals would have made it impossible for the Respondent to defend himself. Most of the emails had been purged or had been on other computers that had been retired and were no longer operational. Respondent's records concerned only two aspects, his wholesale purchases from Takesun and his retail business. Such transactions did not pass through any of Takesun's websites. 95% of Respondent's retail business, was not transacted on any website, including his own, our-agaricus.com. People who have run a one-person, part time, business would realize that there is little time for anything but the bare bone records .. A one-person business can be quite simple with no employees and no advertising There was another reason to resist producing all of his documents as was asked by the Complaint counsel.

On the advice of Counsel, it was decided that the only records that the FTC had any right to were the ones that concerned the Complaint that had been brought. This position was conveyed to the Complaint Counsel in the document produced by the Respondent's Counsel of Feb 3, '09, Respondent's Counsel Responses to Complaint Counsel's First Request for Documentary Materials and Tanguble Things...." Promised document delivery to the Complaint Counsel would be subject to this limitation on review of their content..

The Complaint Counsel's real frustration results from the Respondent not providing any information about the imaginary **Gemtronics, Inc/www.agaricus.net**, or an organization with the same function under another name, an organization that had to exist if the Complaint Counsel was to prevail in her theory of the case, that Respondent was a member of George Otto's team. In legal cases, wishing alone does not make it so. The bottom line on the "withheld information" is that it only existed in the imagination of the Complaint Counsel, and there was

little to give her. What she didn't get were the import invoices, import shipping records, the sales invoices, customer list and the periodic stock inventories, Getting any or all of these records would have no impact on the outcome in the case and were not involved in the world of the Complaint. A reasonable person learns to distinguish between reality and imagination.

3. Respondent's Apparent Ability to Control www.agaricus.net (middle of page 3)

Contested by Respondent.

This is a statement of an assumption, one assumption to explain the observed facts.. The observed facts are that some time after Respondent found out George had used the Respondent's name improperly, the name disappeared from www.agaricus.net , The Respondent says he complained to George Otto about the misuse of his name by email and implied he might take legal action if the misuse continued. A more precise statement that does not give broad powers to the Respondent would be one that a reasonable person might make, "Respondent had some influence with George Otto who controlled his own website"

Otto, by return email, explained the registration involved an accident due to the nature of the operation of the registration process which was explained by Vallasco in his deposition[27]. Otto said he was renewing registration of a number of websites, and selected the wrong option in the process, so that information on one website was transferred to the others. Before the Complaint Counsel brought the complaint, she had the May '08 letter[28] from Pablo Valasco, so it was no longer necessary for her to speculate, she knew it was controlled by George Otto.

Otto is silent about the other uses of Respondent's name, probably wishing not to reveal any information that would help the Respondent with a stolen identity suit, which the Respondent

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[27] Control of domain registering – Pablo Valasco deposition (JX 4 pages 17 & 18)

[28] Letter from Pablo Valasco giving ownership and registration information on www.agaricus.net (JX 66)

told Otto he was considering. Moving into the world of speculation with the Complaint Counsel, there are other speculations which are much more likely than hers to be true.

#1. Otto probably removed Respondent's name wherever it occurred to reduce his risk in any identity suit. Explaining the temporary cession of sales on www.agaricus.net in American dollars is also easy to speculate on. Otto had been told by the Respondent that the FTC's objective, as it had been stated to him, was that they wanted the website closed down. Knowing the FTC had no authority over him, George Otto had no intention of doing that. However the Respondent was a valued customer of 8 years and Otto decided to make a small gesture. It would be a small financial loss to forego US retail sales for a while if he could get Isely back as a large wholesale customer after the FTC business blew over. Due to foreign retail shipping costs, US homeland security regulations, and lack of a US customer base, his own retail sales to the US were more trouble than they were worth, and in the long-term it would be more profitable to get back the Respondent's business.

2 Another viable assumption relates to George Otto's self taught English, which was the poorest of the five languages he claimed to be able to speak. His spoken English was harder to understand than what he could write. The Respondent was in the habit of only using email to communicate with him. He had no doubt found that he did not successfully answer prospective customer's phoned questions with facility or to their satisfaction. The solution for him was two-fold, The first was to maintain an email forum where he could answer questions in writing. The second was to post Respondent's name as a resource to answer questions by phone. A support for this assumption was that the Respondent's name was generally posted only as a source of information, but not to make RAAX11 sales. That nobody called the Respondent is testimony to a change in lifestyle with the coming of the internet. People in the US avoid calling now-a-days, particularly internationally, and instead send emails.

Any reasonable person possessing the knowledge the Complaint Counsel had would have seen that picking the explanation she did had no supportive, verifiable evidence, and from among any number that could be imagined, was not a reasonable way to prevail in a trial. It might have been reasonable if the goal was just to force a settlement, so a possible scenario was needed that was not required to pass inspection and only require a minimum of resources.

Describing the role Respondent had in the undercover purchases as "fulfilled the orders" is highly misleading. The Respondent was not involved in the purchases. The purchases were made on the www.agaricus.net regular shopping cart and the payments were made to George Otto[29]. The respondent only made the delivery, which could have been done by any other seller of RAAX11 in the US who had it in stock. When Liggins tried to use his credit card, there was no way Respondent could take a credit card on www.agaricus.net .[30]

The choice of the words "looked like" to describe how the Respondent controlled www.agaricus.net is very revealing of the Complaint Counsel's standard of proof. To her all you need to bring a complaint is what is in the mind of a beholder. A reasonable person, however, has the standard of requiring verifiable evidence, sufficient to convince others.

The phrase "Respondents' insistence that the website's outrageous cancer claims for RAAX11 were substantiated" has not been seen before by the Respondent. If something is being referred to that occurred in negotiations between counsels, Respondent in not aware of it and it is not in his records to his knowledge. Respondent's counsel was provided with articles from various research organizations to support the scientific claims made in the respondent's brochure, but not with regard to healing or cures using RAAX11 as seen on www.agaricus.net [31]

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[29] Payments for sample orders were paid by Pay Pal to George Otto Accounts - payment statements (JX 43 & 44)

[30] Credit cards could not be used to make purchases from Respondent at www,agaricus.net (TR217: 14 > 19)

[31] Respondent discussed this scientific information that was provided to show the Complaint Counsel that the information he had on his brochure was supported by scientific institutions (JX67)

4. Respondent had withheld numerous business documents (first par, Page 4) Contested

This is a repeat of what was claimed in 2. above except the time referred is moved to during the trial and deserves the same answer. Respondent did provide further information but his basic position remained the same. Only information that pertains to the Complaint was rightly owed to the FTC. Since complaint Counsel does not specify what information she was deprived of it is hard to comment how it might or might not have effected the outcome of the trial. It sounds more like an excuse for not having prevailed.

5. III THE COMMISSION'S POSITION IN THE PROCEEDING WAS SUBSTANTIALLY JUSTIFIED (Middle of Page 4) is challenged by the Respondent

Respondent's position is that the Commission's position was not substantially Justified as was forcefully argued by Respondent's Counsel in his submission, **Application for an award of Attorney fees and Expenses**. See footnote 1 on page 3 for further commentary. Since everything substantial that was disclosed in the trial was already known to Complaint Counsel when she brought the Complaint, a similar decision should be expected at this juncture as at the outcome of the trial. From her investigations in 2007, She already knew, and tried to conceal that knowledge, that George Otto was the principal involved with www.agaricus.net.[32] From her close association with her principal investigator, she should have learned, and if she didn't, it was a case of intentional ignorance, how websites are managed and controlled. She was presented with a letter, before she brought the complaint, from DOMAINDISCOVER, the registrar of the website, www.agaricus.net , that the assertions she was making based on her WHOIS hearsay were totally incorrect[33]. That it was not presented in the form of a deposition[34]

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[32] FTC warning letter to www.agaricus.net (FTC 00195 > 000197)

[33] Pablo Valasco letter from DOMAINDISCOVER in May of 2008 (JX 66)

[34] Pablo Valasco deposition (JX 4)

until later did not change the validity of the information. In her one telephone conversation with the Respondent[35] she was given his true relationship with Takesun as one of being a wholesale buyer/importer purchasing from producer/exporter. This she had the opportunity to confirm in the next months before bringing the Complaint, but never did.

6. Legal Standard for Substantially Justified. (middle of page 5 through page 6)

Respondent agrees substantially with this section which says in simple words **what a reasonable person would do presented with the same information**. By implication it also includes what a reasonable person would not do. When applying this standard one must also include the objective of the reasonable person which may not be stated but assumed. In the case of an ethical prosecutor, the objective must be to secure justice wherever the evidence leads. If an unspoken objective is to secure maximum assets for the government instead, a "reasonable person" might behave very differently. This whole Reply is focused on the premise that the Complaint Counsel did not act as a reasonable person in the role of a proper prosecutor at the time she brought the complaint. It also assumes a reasonable person would not act when the situation is uncertain but would require more investigation to get to the true facts of the situation before acting..

7. The Commission had a Reasonable Basis in Bringing the Complaint and Pursuing the Litigation (top of page 7) is challenged by the Respondent.

The Respondent did not contest the Commission;s allegations about the cancer related advertising for RAAX11 since the claims were not his and appeared on a website he did not control[36]. The only fact shown by the Complaint Counsel is that Respondent was able to get the

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[35] Telecon between Respondent and Complaint Counsel March 28m 2008, Respondent's deposition (JX 12-49)
[36] Pablo Valasco letter (JX66 also FTC 000358)

unauthorized use of his name discontinued. Any liability of Respondent that was claimed was imaginary as Respondent's Counsel quickly provided the Complaint Counsel with a statement from the registrar company of www.agaricus.net that the Respondent was not the owner of the website at that time or before, back to the time of the first registration of the website in 1998.

No sensible relief was ever proposed by the Complaint Counsel as she always required the signing by the Respondent of a letter which would in effect have been a forgery in its creation and fraud in its use when sent to Respondent's past customers. The letter usually had a letter-head with both Gemtronics Inc and www.agaricus.net combined as if it were one company, and always had the respondent Respondent signing for the combination. An image of the required letter is Attachment A as it was presented in the proposed order, which was part of the Complaint Counsel's request for summary judgment.

Complaint Counsel's repetition of her expert witnesses findings here are not germane at this point, since even when she brought the complaint she knew the Respondent was not responsible for the display on www.agaricus.net

8,,,,,Mr. Isely was the only source listed on the website for product information and ordering from the US (middle of page 8) contested by Respondent

The images of www.agaricus,net captured by the FTC chief investigator, Liggins, in the Winter of 2007-2008 showed other sources in the United States for RAAX11. One, Green Pharmacy,[37] was noticed by the ALJ while he was questioning Liggins about the images in trial.

9, Gemtronics Not only Repeated the Cancer Claims for RAAX11 found on the website (page 9 first para) contested by Respondent

[37] Interchange in trial about Green Pharmacy, another retailer of RAAX11 in the US (TR 159, 160)

No cancer claims for RAAX11 were with the material included in the drop shipments made by the Respondent, shown to her is a letter[38] sent to her before she brought the complaint. This lack of Respondent advertising RAAX11 as a cancer cure was also noted by the ALJ during the trial when he[39] examined the evidence.

10. Change in Website proves Isely controls it (page 9, top of page 10) Contested

As Respondent has said before, when Complaint Counsel remarked on this topic, he had some influence on George Otto through the means of a potential lawsuit for identity theft. That George Otto saw fit to reduce his exposure to a law suit in no way is evidence that the Respondent controlled what George Otto put on his website, Respondent's name was removed by George Otto in personal self interest, a far cry from Respondent controlling the whole thing.

11. If Prosecuted, Mr. Isely is Prepared To introduce the Referenced Studies (page 10, first par) Contested

This item[40] of Respondent's Counsel is twisted in its recounting by the Complaint Counsel. The referenced studies were with regard to the properties of the ingredients in RAAX11, studied by US research organizations and briefly mentioned in Respondent's brochure and on www.our-agaricus.com in a similar form. These properties are not the healings and cures found on www.agaricus.net, but results found in test tubes and Petrie dishes by researchers.

12 Respondents did not provide Complaint Counsel with any valid evidence to confirm that they did not control the contents of the website (page 10, para 2) denied

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[38] Respondent Counsel's letter of May 15, 2008 (JX 67)

[39] ALJ notices Green Pharmacy (TR 159—15 > 18)

[40] Respondent Counsel's letter of May 15, 20088 (JX 67)

Complaint counsel was provided with the letter[41] from the registrar DISCOVERDOMAIN on May 8 showing no control by the Respondent. In his phone conversation with the Complaint Counsel March 28, he had also so informed her. In the words used in the above quote from the Counsel's answer, even now she shows her mindset, which is that a person is liable until he proves otherwise. This was the same mindset she had with the Respondent in the phone call.

13. **Further, Respondents did not deny that (he? they?) sold RAAX11 on the website (page 10, second para)** Faulted for over-simplification, Which website? Yes and No. He (not they) sold RAAX11 on www.our-agaricus.com he didn't sell RAAX11 on www.agaricus.net .

14. **Requests to Respondents for Additional Information were Ignored, (Page 10)**

Respondent had provided all the information he had that involved the Complaint which was very little, since the Complaint involved acts done by George Otto, not the Respondent.

15. **Respondents Ceased all Further Communications With Complaint Counsel (bottom of page 10) Not true. Respondent was waiting for a reasonable offer.**

Respondent had made it clear to his counsel that he would not negotiate a settlement with the forgery/fraud letterhead and signature letter as part of the settlement. Apparently the Complaint Counsel felt the Respondent was just stalling. The Respondent had drawn the line at committing an unlawfull act and was waiting for the Complaint Counsel recognize it.

16. **Based on the Available Evidence, Complaint Counsel had a Reasonable Basis to Believe (page 10, end of second par) untrue**

[41]Letter from Pablo Valasco of DOMAINDISCOIVER on ownership of www.agaricus.net (J66)

The Complaint Counsel had no evidence to proceed against the Respondent, only hearsay from a foreign website, She did have evidence against George Otto from 5 months of investigation of www.agaricus.net which she chose to conceal. The DOMAINDISCOVER Information she was given in May 2008 was solid evidence against George Otto. She had been given a letter[42] from G. Otto stating that he had always been the owner of www.agaricus.net. She had an alternative to pursue George Otto by means of the US Safe Web ACT but did not choose it because George Otto had no assets[43] in the US that could be attached. Again her mindset gives away her internal orientation, that she is justified in acting on belief not fact.

17. Settlement and Discovery Thwarted by Respondents. (page 11, first paragraph) Untrue

Complaint Counsel made no honest efforts to settle with the Respondent since she was not reasonable on the letter issue. The signing of a fraudulent letter was proffered throughout, The discovery issue was again a problem she caused as information she was looking for to tie the Respondent to www.agaricus.net did not exist.

18. Hindered Complaint Counsel's Pursuit of Information (page 11, 2nd para) not true

The Respondent admits that he was not easily available because of the conflicting needs of his ailing wife who has symptoms of memory loss and digestive problems such that she couldn't be left alone for significant periods of time. However when particular times for the deposition were set, it was first one counsel and then the other who cancelled and required rescheduling. The Respondent did resist turning over his customer list and their purchases as that information did not pertain to the complaint and his customers expected that their privacy would be respected.

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[42] Letter from George abut ownership of www.agaricus.net (JX 71)

[43] Trial testimony of Liggins that he could not locate assets of G. Otto in the US. (TR 177)

He however provided the number of RAAX11 bottles sold and the sales $'s they represented. Respondent might have been more responsive to discovery requests which were outside the issues of the Complaint if a reasonable explanation for the request was given. The Respondent did not intend to cooperate in a general fishing trip to find whatever might turn up. This attitude of the Respondent became more firm as it became more certain that the Complaint Counsel had no intention of modifying her position about the letter that was to be part of the Proposed Order.

19. Years of Respondents' Business Transactions and Communications Held Back (top of page 12) Materials held back was not associated with the complaint.

Material not given to the FTC was associated with his importing business and his retail business, neither related to the Complaint which was concerned with advertising on. www.agaricus.net These records were hard copies and over 8 years there were quite a few. For reasons discussed earlier, email records were generally purged after six 6 months, although after the Respondent received his first FTC contact he kept them longer, mainly communications with his attorney. There were really no records associated with the subject of the Complaint until the Atlanta version of the complaint was served in March, 2008.

20. Reasonable basis for Bringing the Case (summary P 12 , second Para) Contested

Complaint Counsel is summarizing her position that she claims justifies bringing the action against the Respondents, reasons that have already been refuted in detail. Because she has In her answer made such a big issue of the Respondent's inability to settle, it appears appropriate to reproduce a draft letter the Respondent objected to. For ease of electronic transmission, this copy of the letter in the Reply has been retyped, but originals exist in the record, attached to any of the proposed settlements brought by the Complaint Counsel. (The attachment at the end of this submission in the hard copies is an actual copy, not retyped)

ATTACHMENT A

LETTER TO BE SENT BY FIRST CLASS MAIL

(To be printed on letterhead of Gemtronics, Inc./www.agaricus.net)

To Whom it may concern: Date

Our records show that you bought RAAX11 from our website agaricus.net. We are writing to tell you that the Federal Trade Commission ("FTC") has found that our advertising claims for these products were false or unsubstantiated, and has issued an Order prohibiting us from making these claims in the future. The Order entered against us also requires that we send you the following information about the scientific evidence on these products.

No scientific research has been done concerning the product RAAX11 as a preventive, treatment, or cure for cancer in humans. Very little scientific research has been done concerning either of the ingredients in RAAX11, *chrysobalanus Icaco* extract and *Agaricus blazei Murill* mushroom extract, as a preventative, treatment, or cure for cancer in humans. The scientific studies that have been done do not demonstrate that RAAX11, or the ingredients in RAAX!!, are effective when used as a treatment for cancer.

It is very important that you talk to your doctor or health care provider before using *any* alternative or herbal products, including RAAX11. Speaking with your doctor is important to make sure that all aspects of your medical treatment work together. Things that seem safe, such as certain foods, herbs, or pills, may interfere or effect your cancer or other medical treatment, or other medicines you might be taking. Some herbs or other complementary or alternative treatments 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 very important that you talk to your doctor or health care provider before you decide to take any alternative or herbal product, including RAAX11, instead of taking conventional cancer treatments that have been scientifically proven to be safe and effective in humans.

If you would like further information about complementary and alternative treatments for cancer, the following Internet web sites may be helpful.

1. The National Cancer Institute. www.cancer.gov/cancertopics/pdq;
2. The National Center for Complementary and Alternative Medicines: www.nccam.nih.gov

You also can contact the National Cancer Institute's Cancer Information Service at 1-800-4-CANCER or 1-800-422-6237.

Sincerely,

William H. "Bill": Isely
Gemtronics, Inc./www.agaricus.net

Complying with the Complaint Counsel's demands to send the above letter would have meant that the Respondent represented that a fictitious entity existed by the name of **Gemtronics, Inc./www.agaricus.net**. That this fictitious entity had sold the addressee of the letter, RAAX11, from a website it did not control, agaricus.net, and that Respondent had authority over the combined organization, and by implication over. www.agaricus.net.

A reasonable person would not have brought a complaint against the Respondent based on hearsay found on a foreign website she was simultaneously discrediting, supported only by her unsubstantiated beliefs to explain uncertainties she did not make the effort to clarify. This was particularly unreasonable when she had investigated George Otto for the same complaint for five months where there was substantiated evidence that he was the individual involved. She then blames the Respondent for delaying proceedings by resisting her attempts to get him to commit an unlawful act by creating a false document. Further, she blamed him for delaying the process of discovery for not producing documents that did not exist, documents she hoped would tie the Respondent to the website www.agaricus.net as its manager and controller.

She came forward with nothing new between the time she brought the Complaint and the time the ALJ rendered his decision, so what the ALJ found essentially represents what she knew at the time she brought the Complaint. A Summary the ALJ Stated in his decision is::

"

1. Applicable Case Law Does Not Support a Finding of Liability on the Facts of this case.

2. Summary of Evidence

This case relies upon circumstantial evidence and negative inferences drawn from documents that "identify" Isely in connection with the www.agaricus.net website and from Isely's business relationship with Takesun do Basil as an importer and retailer of Takesun products, Credible testimony explains the documents upon which Complaint Counsel relies and rebuts the inferences Complaint Counsel urges. This explanatory and rebuttal evidence stands uncontradicted by Complaint Counsel. On the facts as demonstrated in the record, as opposed to the facts as asserted by Complaint Counsel, applicable law does not permit a conclusion that either charged Respondent is liable for "disseminating" or "causing to be disseminated" the Challenged Advertisements on the www.agaricus.net website, Accordingly, the Complaint must be dismissed. "

21. Respondent's Actions During the Proceedings make an Award Unjust (Bottom of 12, top of 15) Contested by Respondent.

Under 15 above Respondent has shown that delays in trying to achieve a settlement with the Respondent was caused by the Complaint Counsel in her insistence that in so doing the Respondent would be required to commit forgery, fraud or both by agreeing to the draft letter the Complaint Counsel insisted the Respondent sign. Delays in taking his deposition were not caused by the Respondent, rather one rescheduling each were due to the respective counsels.

Under 19 above Respondent has shown that he did not hold back documents that the Complaint Counsel was justified in receiving. In his summary the ALJ found that the business the Respondent was engaged in was "An importer and retailer of Takesun Products". These areas of business were outside of the Complaint, which would have the Respondent also engaged in the business of managing the website www.agaricus.net. Since there was no such third side to the Respondent's business, there were no documents of the type the Complaint Counsel wanted him to provide.

Complaint Counsel's naming the Corporation version of Gemtronics as a Respondent was unjustified. On numerous occasions she was informed that it was a corporation that had never been activated, included in her first and only phone conversation with the Respondent. Besides registration, the only single documentation of the Corporation was the editting error made in the Respondent Counsel's office, listing the Corporate version as having registered Respondent's house as a FDA warehouse (3 years before the Corporation was created). The Respondent was not given an opportunity to review the final version of the interrogatories in which this occurred and has the original that was supplied to his counsel which shows the unincorporated version, This mistake was corrected during his trial[44],

That the use of the name "Gemtronics" implied that the Corporation version was active

[44] Discussion of correcting the registration information with the FDA contained in the Trial (TR 216, 217)

shows a gross lack of information by the Complaint Counsel regarding business practices. Businesses most often start as unincorporated entities and later, when they are successful, go Into Corporate status, using the same root name for continuity of identification. That Liggins could find nothing but the registration in his search on Gemtronics Inc. should have warned the Complaint Counsel of the likely dormant status of the Corporate version. "Inc" is more significant in its use that "Ms."..There are legal penalties for a company to use one form when its status is the other. Dissolving the Corporation because of the litigation would serve no particular purpose that the Respondent can imagine, but likely would have caused the Complaint Counsel to claim that something was being hidden. That the FDA and the FTC addressed letters, JX 64 and JX 65, to the Corporate version is no evidence that the Respondent was using it. That Gemtronics had been registered with North Carolina for the purposes of collecting Sales Taxes seemed to be all that North Carolina required as far as registration was concerned.

Respondent has shown that all of Complaint Counsel's arguments that an award under EAJA would be unjust are groundless and the award process should proceed.

22. Respondents Seek An Award of Fees and Expenses Not Allowable Under EAJA (Page 15, second par) contested by Respondent.

Respondent's reading of EAJA, 28 USC 2412, indicates that the Congress' original intent was to provide an even playing field for individuals and small businesses in litigation with agencies of the Federal Government by means of obtaining awards. They shall "be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation." The key intent of the Congress was to make the prevailing party whole with regard to the costs that he had been caused to bear by reason of the litigation. Since the original passage of the EAJA the various Agencies and Commissions of the Federal Government have, using

taxpayer funds, aggressively in the courts over time, whittled down the awards that are given, in practice thwarting the original Intent of the Congress to maintain the level playing field,

In the Respondent's **Application for Award of Attorney Fees and Expenses** in Combination with his **Petition to The Commission for Rulemaking on Maximum Rates for Attorney Fees** the Respondent has sought only the costs he has incurred as a result of the legal action brought against him which was unjustified, It is requested that the original intent of the Congress be honored as contrasted to what might be awarded by following rules and case examples. These were enacted to thwart the intent of the Congress and reduce the value of EAJA in preventing future government abuse of which this case is an extreme example. The argument that doing so would weaken the ability of the various governmental Agencies and Commissions to fulfill their proper roles is absurd when considering the few cases where awards have been made at all and the yearly pittance that the government expends on such awards.

The Respondent will deal with the Complaint Counsel's Award objections in her order below:

23. Respondents Seek An Award of Fees and Expenses Not Allowed Under EAJA (page 15, Second Par.) Respondent Contests

That Complaint Counsel objects to various categories of awards which Respondent claims is incompatible with the overall doctrine of making the respondent whole for expenses incurred by unjustifiable actions of the government. Not to do so would leave no mechanism in place to prevent unchecked abuse of power by the various agencies and commissions as has happened to the Respondent in this case.

24. Fees and Expenses Incurred Prior to Issuance of the Complaint are not Allowable Under EAJA (Page 15, third para, and page 16)) Respondents contests.

A reading of EAJA does not show that the Congress intended to limit re-imbursement to only those expenses incurred after some specific action of an Agency or Commission. As long as the adverse action was taken as the result of an authorized official, the government should be held accountable for its actions. Otherwise abuse of power may be deliberately endorsed to coerce settlements without any exposure of the government for its actions. In the Respondent's case, a proposed complaint was drafted on March 25 of 2008 and served on him citing authority of the FTC's Bureau of Consumer Protection and stating that if a settlement was not reached in a few weeks that action would be brought against the Respondent in Federal Court. Just to enter into negotiations for a settlement demanded by the FTC, the Respondent had to engage legal services. The Bureau of Consumer Protection was no doubt acting under the approval of the Commission Board so that their action constructively became that of the Board's. To not hold FTC staff responsible for their actions allows staff members to act in a rogue fashion with no accountability. Respondent should be reimbursed for his legal expenses that occurred prior to the second complaint that was filed September 18, 2008. Therefore the amount calculated by the Complaint Counsel that the Respondent incurred in this period, $5,632.61 should not be deducted from the Respondent's claim.

25..Respondents are not Entitled to Enhanced Attorney's Fees (Pages 17 and 18)

Respondent contests

Besides the Application for Award submitted Dec 2 , the Respondent requests that at the same time his Petition for Rulemaking on Maximum Attorney Fees be considered which would then reflect the reimbursement rate requested of $225 per hour from September 18, 2008 forward. From the reading of EAJA, it is clear that 30 years ago a cap of $75 per hour was imposed. After 15 years it was raised to $125 per hour by the Congress in recognition of the steadily rising hourly rate of attorneys. The Congress also inserted a cost of living clause and

special circumstances clause, presumably so that they would be used by the various Agencies and Commissions to assure fairness in awards made under different circumstances. Respondent, In his petition to the Commission outlined why both cost of living and special circumstances should apply in his case and which is reproduced immediately below..

" Attorney fees charged the respondent at $200 per hour through Aug 2008 and at $225 per hour subsequently are requested to be approved by the commission for reasons of both availability and cost of living.

An examination of 5 U.S.C.504(b)(1)(A) may yield some clues as to why Congress enacted the provision giving the Commission discresion in allowing Attorney fees in excess of the stated maximum levels. As a general principle to make a prevailing respondent whole it says "Awards will be based on rates customarily charged by persons engaged in the business of acting as attorney's, ..."

To avoid abuse, a cap was first established in 1981 at $75 per hour and as inflation took its toll in 1995 it was raised to $125, leaving the evaluation of future increased costs to the discretion of the Commission, along with a recognition that different cases and circumstances may require a higher quality of attorney, again left to the Commission. There is no indication that Congress intended the Equal Access to Justice Act to be used to create paupers of respondents brought into litigation through no fault of their own, either through the action of prosecutors acting willfully without cause, or on the basis of superficial, inaccurate investigations. This case is certainly one where the Commission should exercise its discresion in awarding higher attorney fees on both the basis of availability and cost of living. To not do so would leave the Respondent and his ailing wife, both navy veterans of WWII, stripped of their liquid savings and forced to consider selling their home to have a cushion of liquid assets in the event of any emergencies.

Cost of Living

"Cost of Living" is a general term and on a little reflection, Congress was likely thinking of Attorney fees, not a market basket of groceries when they raised the cap to $125. Otherwise Congress would likely have tied the rate to the CPI-U Index without leaving it to the Commission's discretion. In the decade or more past, the growth of Attorney fees has outstripped the CPI-index by about 2 per cent. per year. The Lawyer Magazine conducted a

survey of Attorney fees of representative law firms in the years 2003 through 2007 and found yearly increases to be over 5% per year. The Respondent made a search on the world wide web and found current Attorney fees in Raleigh to range from $175 to $265. He was charged $400 an hour in Raleigh in 2006 for legal services in regard to estate planning.

Assuming when Congress established the $125 cap effective in 1995 and that since that time the yearly rate of change of legal fees has been at +5%, one can calculate what the current rate would be by multiplying the previous year's rate by the factor 1.05.for each year, Going through this process yields an hourly rate by the year 2008 of $235.74. Taking a conservative view that in the years before the Lawyer Magazine made its survey that the actual increase of Attorney fees was half way between 5 % and the CPU-I index , then the hourly rate by 2008 would have increased only to $218. and to $229 by 2009. So on the increase of Attorney fees alone, the rates charged the Respondent by his counsel should be awarded.

Availability of Qualified Attorney.

Availability of a qualified attorney was a significant problem for the respondent.

Obviously the attorney would need to have experience at the Federal level and this eliminated from the start most local attorneys where the large part of their practices was Real Estate. Looking ahead to the type of case that would evolve, experience with the internet world-wide-web would be essential. Such attorneys seemed to be quite rare in private practice this side of San Francisco. Location was also critical due to the Respondent's ailing wife needing daily, personal care, given by a family member. The respondent had to stay at home or temporarily move to his oldest son's home in Raleigh, when having a consultation,. if a Raleigh attorney could be selected. Also an attorney available immediately was essential, since the complaint counsel was demanding the immediate naming of an attorney with whom she wanted to begin negotiations for a settlement. She said if an attorney was not available within two weeks of the serving of the proposed complaint, she would file it in Bryson City District Court.

As it was, no one could be found meeting all the requirements, even after contacting the NC Bar Association. An attorney from Asheville, within commuting distance from Franklin, was considered qualified except he was in the middle of a significant case and was not available for some indefinite time. When Matt Van Horn was proposed and agreed to educate himself on the aspects of the internet world-wide-web that would be involved in the case, there was no other choice. His hourly rate seemed reasonable, being in the mid range for Raleigh attorneys.

The extreme shortage of internet knowledgeable attorneys should be recognized by the Commission as a specialty deserving recognition by the Commission for approval of higher hourly rates. It would seem that the legal world has some catch-up to do with the internet as most attorneys began their practices before the internet came into widespread use. Even the Complaint Counsel, who in her cases must frequently become involved with the internet, did not demonstrate during trial the basic knowledge of web site ownership and control, which was known to her chief investigator only from his hands-on experience of being an owner of a web site."

The Complaint Counsel is not compelling in her argument to quote Pierce and Underwood in a matter involving cost of living changes since it is decades old and the maximum rate has been raised since this case was heard. The Respondent chooses to quote a case in US District Court, Southern District of Texas, Galveston Division, Civil Action G-07-308 in Cecil Osakwe Vs Department Of Homeland Security. Cecil Osakwe prevailed and received an increased award for attorney fees on the basis of cost of living increases in the Houston area from the date EAJA was last amended, April 1996 to Dec 2007, the date of the award. Respondent feels a fairer basis would be the increase in the Attorney rates over time rather than based on the Cost of Living Index. Attorney fees are the commodity being priced.

As in the Petition to the Commission, the Respondent also requests increased attorney fees in that a successful attorney in the Respondent's case needed special skills, a special factor, which qualify as special circumstances, in this case a detailed knowledge of internet website management and ownership. The Respondent's attorney clearly demonstrated a special factor in both his questioning of the website registrar supervisor, Pablo Valasco, and the FTC's chief investigator, Liggins. His unusual knowledge of the internet was responsible for his asking the right questions that clearly established the fact that the Respondent was not the owner /manager of subject website, www.aaricus.net , which fact was the deciding issue in the case.

That significantly increased awards are being allowed for special skills is attested to by the recent case in the Connecticut District Court, Connecticut State Department of Social Services, Et Al Vs Tommy Thompson, Civil Action No. 3-909 CV 2020(SRU) An attorney with special medical skills in a Medicare case was awarded fees at a rate of $325/hr.

In conclusion the Respondent claims attorney fees and attorney expenses at full value.

26 Respondents Seek Unreasonable and Non-Compensatable Fees and Expenses

Fees Unsupported by Adequate Documentation (pp 19, 20, 21) Respondent contests

Complaint counsel's opposition to the charges billed by Respondent's Counsel are unfounded. She says the hours and rates are unreasonable and expenses undocumented which represents her judgment. The rule 3.83 does not specify an accounting standard to be followed in submitting costs but allows the ALJ to request more information when he feels the submittal is inadequate or alternately he can disqualify certain items. Complaint Counsel's analysis appears to be very superficial. As an example she says on page 21 that two entries that have similar descriptives are duplicates when in actuality they are for different lengths of time and occurred on different days. As an overall check of the reasonableness of the billings, when the hours charged over a period of time are compared with the activity on the case over the same period, there is a good correlation as seen by inspecting figure 1, on page. 39.

The Respondent's attorney signed the Application which included all of his billed fees and expenses through late November. Further expenses were submitted in the supplement the Respondent sent the Commission Dec. 23, 2009. Final expenses are in this filing under sttachment C*. Respondent's attorney is qualified to practice in Federal Courts, and the Respondent assumes he is familiar with the standards required. The supplement also included the costs of three proceeding transcripts for which Respondent has received an email receipt submitted as Attachment B.

Complaint Counsel has argued on the basis of small points and apparent discrepancies that the Award request is unreasonable. Respondent has agreed on one point that there were duplications that came about as the result of his Counsel's withdrawal, but the duplications have been removed from the request as represented in this reply. Complaint counsel has not attacked the total amount requested for attorney fees and expenses which is likely quite modest when compared to similar litigations running for periods of 20 months. This has been a complicated case with the case files stretching three feet wide when stored in a bookcase.

In viewing Fig 1, it is easy to appreciate the balance of costs as identified with the various stages of the proceedings and see that they are quite reasonable A judgment on the request should be made on the request as a whole and not a detailed analysis of each of the 396 time charge items of the Respondent Counsel's accounting rather than breaking it down further as the Complaint Counsel would have it.

As to his own expenses, the Respondent submitted as part of the Application a notarized statement as to his best knowledge the expenses he submitted as attachment D were correct.

Update of Attorney fees and expenses billed by Respondent's Counsel.

Submitted on Dec. 2, 2009 with Application for award		89.330.19
Update based on three billings covering Nov. and Dec. with duplications of approximately $792 removed	additions to Nov.	5,345.22[45]
	Dec,	2,727.89

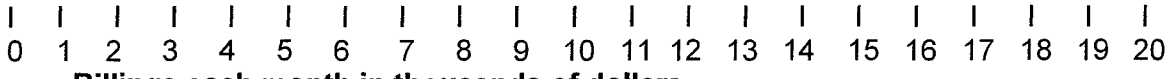
Adjusted grand total Respondent is seeking in attorney fees & expenses is $97,403.30

[45] Do to various disruptions the Respondent was sent 3 billings for Nov. & Dec. The first was sent to FTC with the Application on Dec. 2, The second was sent as the Supplement to Attachment C on Dec. 23. Between the first and second there were 9 duplications for $792 which have been removed from the Award Claim. The third bill for part of December has no duplications and is attached to this filing as C star. Bills for record/transcripts were part of the November billing and are shown as Attachment B. of this filing and are part of the $5,345.22 for November.

Fig 1. Billings Each Month Correlate Well With Tasks Performed.

Respondent Counsel's monthly invoiced Legal fees and Expenses

month	billed fees & expenses	Highlights of Work performed & Supported
April 2008	$2,940	Familiarization, opened negotiations with CC ,
May 2008	1,452.61	reviewed Fed. Regulations, Email, Phone, and letters to CC
June 2008	820	Coordination with client, communications with CC
July 2008	420	Reviewed and generated mail
Aug 2008		No activity, assumed FTC had dropped the case.
Oct. 2008	7,078.57	Answered Complaint, prepared for and attended hearing
Nov. 2008	1,369.60	Planned strategy, continued negotiations with CC
Dec, 2008	5,029.62	Coordinated discovery, witness list, settlement with CC
Jan. 2009	5,863.23	Discovery responses, deposition preparation of Isely & Pablo
Feb. 2009	5,680.23	Response to discovery, research on Summary. Decision.,Depositions
Mar 2009	7,430.81	Reviewed interrogatories, depositions, prepared Summary Decision.
Apr, 2009	3,996.00	Reviewed proposed consent orders, settlement negotiations
May 2009	6,338.15	Settlement negotiations continued but proved unfruitful
June 2009	19,770.61	Prepared for and took part in trial at FTC Hdqts in Washington
July 2009	11,438.91	Prepared post-trial documents and closing arguments, trip to Wash.
Aug. 2009	7,030.68	Prepared replies to C. C,'s post trial documents
Sep. 2009	0.00	No activity
Oct. 2009	507.68	Research on rule 3.81, coordination with customer
Nov, 2009	6.169.22	Work preparing Award Application
Dec 2009	2,727.89	Completed and submitted Award Application



Billings each month in thousands of dollars.

27. Fees for Activities Beyond the Scope of the Proceedings (top of page 22) Contested

These were phone calls to prospective witnesses followed by phone calls between the Respondent and his attorney to discuss the advisability of calling these two, Phillip Campbell of the FDA, and a reporter for the Macon County News, Franklin, NC. These were proper activities for Respondent's Counsel in support of the case and should be allowed.

28 Fees For Clerical and Secretarial Tasks (Bottom of page 22) Contested

. That the paralegal is charging for clerical work is baseless. When the Respondent visited his attorney's office, clerical help was in evidence. In his interface with the Paralegal, it is obvious she is a very experienced professional and that she does more of the attorney's work than would happen in most offices, thus saving the Respondent, and eventually the government, hours that would otherwise be charged at the full attorney rate.

The Complaint Counsel is much confused in her mind in this section taking up the costs that the Respondent had of his own, $42,902.17, as if they were clerical costs that had been billed through his attorney.

30. Business Losses and Personal Expenses (page 24, top of page 25) Respondent contests.

Again Respondent reverts to the Congress's intent in the drafting of CAJA with the intent of making the respondent whole, in other words to bring him to the financial condition he was in before being charged without justification, other things being equal. A careful examination of the last sentence of **CAJA (a)(1)** reads **"A judgment for costs when taxed against the United States shall in amount established by statue, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation."** English grammar would indicate the phrase "in the litigation" is a modifier of

"party", identifying which party, not which costs. The party is the Respondent. A proper interpretation of the statement as it stands as to the intent of the Congress is that all costs incurred by the Respondent that were the result of the litigation are fair game.

The costs the Respondent personally incurred, through no fault of his own were $42,902.17, as broken down in the Application for Award, attachment D, are straightforward. They would not have been incurred except for the FTC's negative publicity and litigation,

The partial cost of running his own home office to support his attorney	$1,246.23
The trip expenses to Travel to Washington DC to testify at his trial	$1,163.83
Interest on money borrowed to partially finance his legal expenses	$3,590.00
(Respondents net worth statement shows he had no debt before Jan 1, 2009)	
Estimated value of his business that was **destroyed by the adverse publicity** given to it by the FTC cancer sweep program. Value is calculated at total net profits for a period of 5 years. A sale at this price would have yielded a buyer a 20% profit/yr.	36.902.11
Total Costs incurred by the Respondent, excluding attorney fees & expenses solely as the result of the FTC unjustified litigation	**$42,902.17**

31. Fees and Expenses Incurred as a Result of Respondents' Undue Delay and Withholding of Documents in Protracting Final Resolution of the Matter Should Be Denied (page 25 and 26) Respondent protests

As detailed in 2. above, the **undue delay** and **withholding documents** were caused by actions taken by the Complaint Counsel not the Respondent or his counsel. In seeming to negotiate for a settlement, the Complaint counsel insisted that the Respondent sign a letter to his customers which represented a ficticious company that combined Gemtrnics Inc with the

website www.agaricus and in most cases required him to forge a letterhead which was a name that combined Gemtronics, Inc, with www.agaricus.net. The Respondent baulked at signing such a letter which he considered would be fraudulent and put him at great risk. The Complaint Counsel; continued to insist, even in the last attempts to negotiate at the time of the Summary Judgment.

Respondents documents almost exclusively pertained to his importing business and his retail business, neither of which were involved in the complaint. The Complaint Counsel imagined there must exist many documents involving the Respondent participating in marketing, sales and advertising on www.agaricus.net. No such documents were produced since they did not exist. Respondent rightly resisted a fishing expedition to turn over all of his documents to the Complaint Counsel that were not part of the complaint.

So these two problems cited by the Complaint Counsel were of her own making and no penalty should be assessed against the Respondent.

32. CONCLUSIONS Of the Complaint Counsel (Page 27) Respondent Contests

None of the conclusions of the Complaint Counsel are valid. The Commission had no justification to bring the Complaint as the Complaint Counsel knew in 2007 that George Otto was the individual responsible for the website, www.agaricus.net and had it further confirmed in the spring of 2008. The protraction of the proceedings was caused by the Complaint Counsel insisting that the Respondent fraud in producng a false document as part of a settlement. Respondent did not withhold any documents requested by the Complaint Counsel that she had a right to possess or which he couldn't since they did not exist. All the costs that the actions of the Complaint Counsel caused the Respondent to incur, and which she would have him denied in the Award, are ones that the Congress intended to be payable when it established EAJA.

ATTACHMENT C-2

Date	Work Performed	Time	Amount
12/14/2009	Reviewed Notice from Donald Clark regarding Date that Initial Decision will become Final Decision. Reviewed e-mail from Bill Isely. (MVH)	0.30 hr.	$ 67.50
	SUB-TOTAL:		**$ 386.50**

Costs:

Postage	$ 1.32
Copies (4 @ .25)	$ 1.00
UPS Charges	$ 11.07
SUB-TOTAL:	**$ 13.39**
TOTAL AMOUNT DUE:	**$ 399.89**

BILLABLE TIME:

Attorney	**MVH**	**$225.00 per hour**
Paralegal	**LR**	**$110.00 per hour**

FINAL ACCOUNTING OF CLIENT TRUST FUND

TRUST ACCOUNT BALANCE: $ -0-

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this

Reply to Complaint Counsel's Answer to Respondent's Application for Award of Attorney Fees and Expenses Under EAJA per Rule 3.83(c)

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 to

Honorable D. Michael Chappell
Chief Administrative Law Judge (Acting)
Federal Trade Commission, H113
600 Pennsylvania Ave., NW
Washington, D.C. 20580

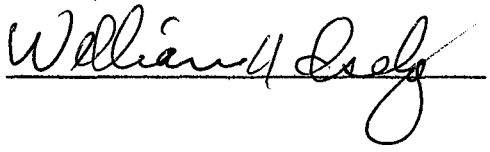
The original and one (1) paper copy via United States mail delivery and one (1) electronic copy via e-mail:

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 20 day of January, 2010.



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