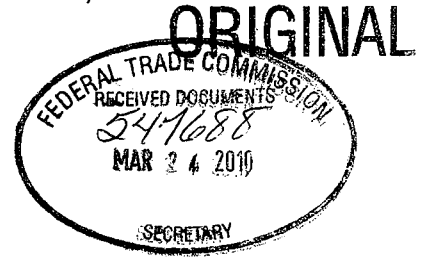


original

William H. Isely, Respondent
964 Walnut Creek Rd.
Franklin, NC, 28734

b.isely@ftpmailbox.com
Tel/FAX 828-369-7590
March 23 , 2010

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

RESPONDENT'S STATUS REPORT AND AWARD BRIEF UNDER THE EQUAL ACCESS TO JUSTICE ACT

Your consideration will be greatly appreciated.

Respectively Submitted

William H. Isely William H. Isely March 23 , 2010

964 Walnut Creek Rd.
Franklin NC, 28734

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

Enclosed:

RESPONDENT'S STATUS REPORT AND AWARD BRIEF UNDER THE EQUAL ACCESS TO JUSTICE ACT

cc Ms. Barbara E. Bolton
Complaint Counsel

Honorable Donald S. Clark
Secretary FTC

**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

RESPONDENT'S STATUS REPORT AND AWARD BRIEF UNDER THE EQUAL ACCESS TO JUSTICE ACT

Background

In the award process the ALJ issued a **REVISED ORDER FOR FURTHER PROCEEDINGS ON RESPONDENT'S APPLICATION FOR AWARD OF ATTORNEY FEES AND OTHER EXPENSES** on Feb. 19, 2010, establishing a status hearing regarding the Application by telephone conference to take Place March 2, 2010 at 2:00 p.m. At said hearing the parties were directed to engage in negotiations in an attempt to settle on a fee amount to be agreed to and report back to the ALJ no later than March 24, 2010. Said negotiations having failed to reach an agreement, herein is **RESPONDENT'S STATUS REPORT AND AWARD BRIEF UNDER THE EQUAL ACCESS TO JUSTICE ACT**

Respondent's Negotiations Status Report

The Complaint Counsel and Respondent held Telephone conversations on March 15 and 16,

reviewing Respondent's Application as amended as well as Complaint Counsel's answer as amended including the amendment of Feb. 3, 2010. Complaint Counsel stated that she was not authorized to consider Attorney Fees and Expenses billed prior to September 16, 2008, nor Respondent's personal expenses, and Respondent stated he would consider pursuing those separately. The negotiations then continued, focusing on the Attorney Fees and Expenses billed after September 16, 2008.

It was agreed that the total amount billed was \$97,010

That the cost of the hours at the reduced cap rate were \$61,575

That the billed expenses were 7,000

total \$68,575

Total reduced by hours and expenses billed before September 16, 2008 was \$ 64,977

After much discussion the Respondent proposed to settle based on reductions in a number of areas, but that if it went to the ALJ that he would reintroduce his claims for expenditures before September 2008 and his personal expenses. Reductions offered:

5% of Paralegal hours were conceded as clerical tasks \$903

Reductions due to block billings \$1,751.83

Reductions due to vague subjects \$1,613.04

Total reductions in Attorney and Paralegal -- \$4,267.87

Expenses were reduced by elimination of all attorney travel expenses

For which no receipts had been supplied except mileage, Copies

were reduced to 20 cents each, Fax's to 30 cents each, -- \$652.28

Net claim by Respondent offered for settlement at the time \$60,050.85

Complaint Counsel's counter offer was presented as follows:

All items objected to in her Attachment A in her second amendment were deducted in full and, if there were multiple objections to a given entry, it was deducted multiple times. As a result the amount to be deducted from the billings exceeded the billings by approximately 50%. If not further modified the Respondent was left owing the FTC perhaps \$45,000. Recognizing this was unrealistic, the Complaint Counsel admitted she might reduce the total of her objections by some 50%, resulting in a net offer to the Respondent of an amount in the neighborhood of \$25,000. The Respondent rejected the Complaint Counsel's approach and stated he felt the ALJ would take a more realistic view. It was agreed that the Complaint Counsel would recon tact the Respondent on March 22, 2008, but she did not do so.

The Respondent feels that the mental blockage of the Complaint Counsel is what prevented realistic negotiations. This attitude, which she expressed several times, was that she should have won the case if she had received the discovery she had asked for. She apparently has not accepted the reality that the requested discovery did not exist, that she lost the case, and needs to deal with the situation she is left with realistically.

Respondent's Award Brief -- Summary

With no settlement possible with the Complaint Counsel, the following is a **summary** of what the Respondent requests for the ALJ's consideration.

The amount offered the Complaint Counsel for Attorney Fees and expenses	\$60,050.85
The Attorney Fees (cap rate) and his expenses prior to September 16 , 2008	+\$3,518
Respondent's office expenses and travel to Washington	+\$2,409.06
	<hr/>
Total award requested	= \$65,977.91

Respondent's Award Brief – Discussion

1. Attorney Fees and Expenses after September 16, 2008. These are the same as was offered to the Complaint Counsel after reductions for some of her objections. No reductions are included for the Complaint Counsel's allegations that the Respondent's actions delayed proceedings by not producing discovery. It had been shown in the trial that the discovery requested pertaining to the Complaint did not exist since the Respondent had not performed the actions alleged in the Complaint. The only records the Respondent possessed pertained to his retail and importing businesses.

Complaint Counsel has stated that the Attorney Fees and Expenses are excessive in general without offering a standard or amounts from other cases for comparison. For an objective comparison the Respondent requests the ALJ to order the Complaint Counsel to reveal the total costs the FTC has expended in pursuing this case, including the costs expended by the Atlanta office prior to September 16, 2008.

Respondent did not agree that email usage in his case was excessive. To coordinate the knowledge of what had happened in his case over an 8 year time period was complex. With his the attorney being in Raleigh made many emails for communications essential.

2. Attorney Fees and Expenses prior to September 16, 2008. While these costs would normally not be allowed, the Respondent requests that the ALJ consider that the case was initiated under unusual circumstances which justify ruling that the judicial process began with the actions taken by the Atlanta office no later than April 2, 2008.

When the Respondent was first contacted by the Complaint Counsel she represented that she was authorized to negotiate a lesser settlement than was in the complaint issued from the Atlanta office, with Judicial action to be brought in the Bryson City District Court. She gave a two-week deadline for the submission of Respondent's financial and other information and for the naming of an attorney with whom she could start negotiations. This

was all done without a warning letter to the Respondent which he has since found out is regular, required practice for the FTC. To be able to negotiate in behalf of the FTC, Complaint Counsel would have had to have approval from the FTC management and naturally the Respondent and his attorney believed her. During the negotiations with her, just now broken off, she admitted she did not have approval to start negotiations of the Atlanta effort. She had additionally charged the Respondent, which he never knew about, for not answering the warning letter sent by email to www.agaricus.net presumably using the gotto@takesun.com address she got from the WHOIS information. In any event the Complaint Counsel led the Respondent to believe she was authorized to act and that should constructively be used to establish April 2 as the date Judicial proceedings commenced. If that is not recognized then, since the Atlanta action was never closed, it means two proceedings were in process simultaneously against the Respondent from two different FTC offices. With minor corrections, the complaints were the same and should be treated as one action.

3, Respondent's office expenses and travel to Washington. These were personal expenses he was forced to expend in order to mount his defense. The Complaint Counsel has argued these expenses should not be allowed because of the wording she quotes from the **EAJA**.

EAJA provides for an allowance of "expenses incurred" and defines the term to include "the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project . . . and reasonable attorney or agent fees."

To be included, an item becomes a component part of the whole, but does not exclude other components not listed. If the listed components were meant to be exclusive then the phrase would have been "only include". While common practice may be to only include expenses of the attorney, the Respondent's necessary expenses are **expenses incurred** as well.

Those listed were by way of example, rather than exclusive. In a reading of **EAJA**

it is clear that the Authors in discussing expenses were concerned with expenses of the Respondent whether they were experienced directly or passed through from an Attorney.

4. Other Factors Respondent Proposes Be Considered In Reaching An Award Amount

These factors have been discussed in more detail is Respondent's previous motions regarding the Award including footnote references. Most of the events in which the Respondent claims improper conduct by the Complaint Counsel were in the time period when her role was that of an investigator and would not have given her full immunity from liability for her actions..

a. From the Fall of 2007, the Complaint Counsel Knew G. Otto managed the Website

Liggins testified at trial that he began investigating www.agaricus.net in August of 2007 and identified G Otto as the person associated with the website because he also testified he searched data bases in the US to find his assets and gave up on G. Otto, not because he was found not liable, but because he could find no assets. Before that time in Late October, however, the Complaint Counsel had sent G Otto a warning letter addressed to the website, Examination of website images, put into evidence, showed the website to be a foreign one. located in Brazil with the name of Takesun do Brasil.

Labels on the sample products bought showed a Brazilian origin and the payments for their purchases were made to various Takesun Pay Pal accounts. While the Respondent made the deliveries, this was not evidence he was responsible for the advertising on the website.

While the WHOIS information showed a connection to the Respondent, it also showed a connection to G, Otto, and only his email had been used to make the website entries.. Liggins, who manages his own website, testified that the information shown on WHOIS did not disclose who had control of the website, which is accomplished with an account

name and password. He admitted he made no attempt to contact the website registrar, DOMAINDISCOVER, for the manager information. This information was obtained by the Respondent's attorney in the form of a letter in May of 2008 and furnished to the Complaint Counsel before she brought the Complaint on September 16, 2008, showing G. Otto Kather and his company, Takesun do Brazil, to be the owners of www.agaricus.com .

b. The Complaint Was an Improper Vehicle for the FTC to Deal with www.agaricus.net

The Complaint Counsel from her early investigations of www.agaricus.net and G Otto in the latter half of 2007, knew it was likely a foreign website as was implied in her warning letter ending with the sentence"

"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."

Before taking any further action, a reasonable person would have investigated further to determine if the FTC even had jurisdiction. To a reasonable person there should have been no doubt it was foreign, just by looking at the website images. The reason this further investigation was crucial is that a foreign website involves foreign commerce and the FTC is prohibited by statute from regulating foreign commerce. A reasonable person identifying www.agaricus.net , as foreign, if felt justified, would have continued the pursuit of the website through the protocols of the **US SAFE WEB ACT**. In defense of the Complaint Counsel's behavior, her attorney states that the full Commission approved the Complaint but the record does not show that the Commission was informed either of the foreign ownership of the website or that a lengthy investigation of the website had been performed where the only substantiated evidence showed G. Otto of Brazil to be the owner/operator but he was abandoned because no assets of his could be located.

By filing the Complaint instead going with the **US SAFE WEB ACT** the Complaint Counsel still had the potential to secure assets, but caused the Respondent great unjustified expense.

The consequences from the government's viewpoint are equally severe. The Complaint Counsel expended Federal Government resources on a venture not authorized by the Congress, and in fact prohibited by statute, with little possibility of gaining anything.

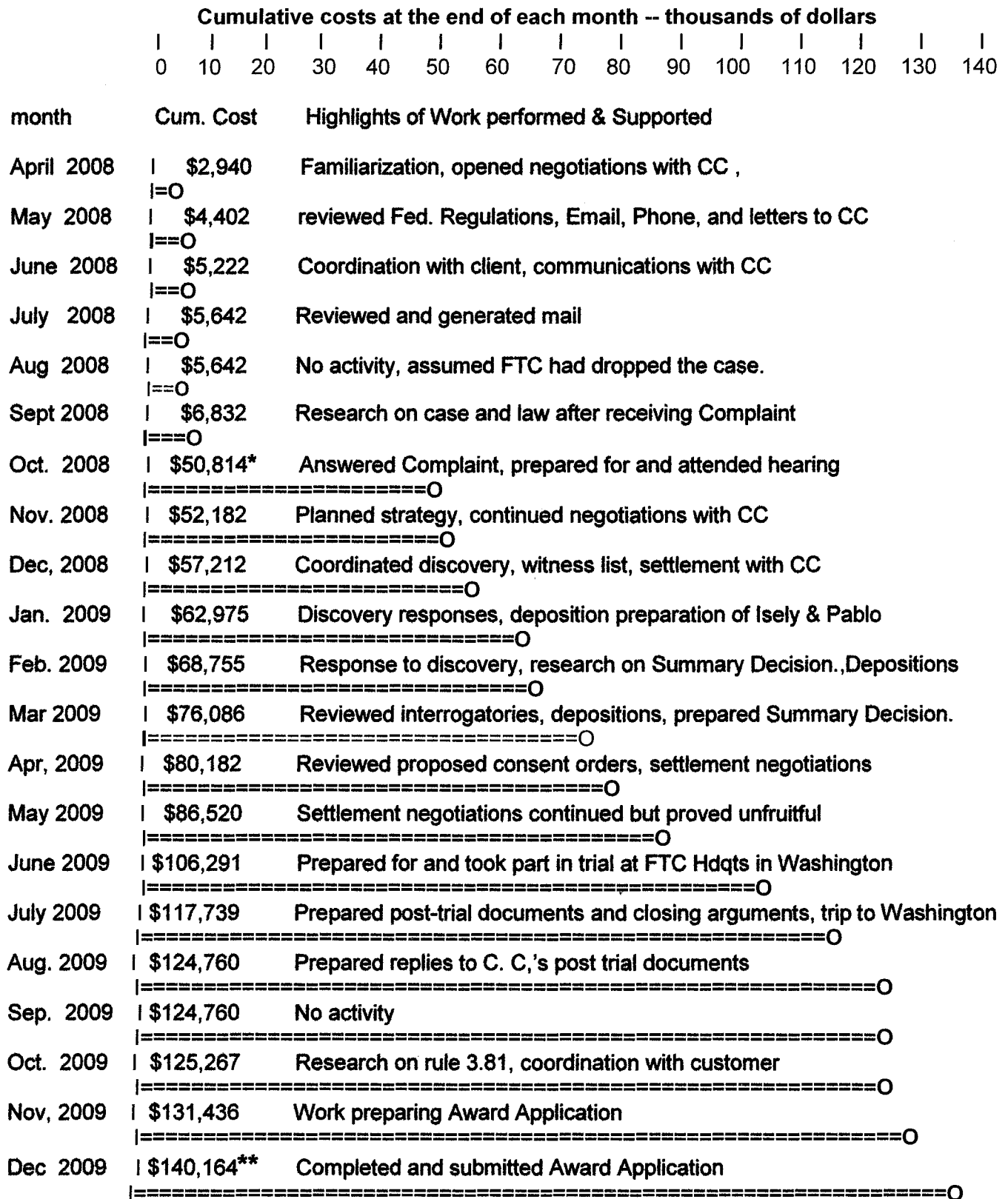
c. Neither Respondent's Discovery or Negotiating Delayed or Obstructed Proceedings.

If anything, it was the actions of the Complaint Counsel that caused delays in discovery in her demanding discovery that did not exist and then claiming their lack of delivery as a delay on the part of the Respondent. Respondent refused to settle when he was required to sign a letter that contained lies known to both the Respondent and the Complaint Counsel. Respondent has filed a complaint about this action. In her defense her Defense Attorney has stated that her actions in this matter were quite acceptable since the signing of the letter containing the lies was not to be done under oath. This does not seem to reach the level of the standard that puts an obligation on the Prosecuting Attorney to seek justice above all. Her defense attorney says the Respondent was given the opportunity to make corrections to the letter. The Respondent did draft suggested changes to the letter but they were never seriously considered and he never was offered a draft that was truthful.

d. The Past Investigation of G. Otto was Concealed at the Start and later in Discovery

Had the investigation of G. Otto as the likely person liable for the advertising on the website www.agaricus.net been disclosed at the start of the proceedings or even after the Complaint had been brought, Respondent's Counsel would have promptly brought a motion for dismissal with a high likelihood of a successful outcome. At that time had the disclosure of the G. Otto investigation been made, nearly everything that came out in the trial would have been known. Inspection of Fig 2 showing Respondent's cumulative costs plotted against time, shows that with a dismissal at an early date, his costs for being unjustly brought into court would have been limited to \$7,000 instead of what he has actually experienced, over \$140,000, a result due to Complaint Counsel's concealing the investigation of G. Otto in 2007.

Fig 2, Respondent's Cumulative Costs – Support of Settlement Discussions



* Loss of Business added on Oct 15, 2008 X Estimated debt when Application was submitted

** Respondent's expenses added on Dec 1, 2009

Respectfully Submitted:

GEMTRONICS, INC &

WILLIAM H. ISELY, Respondents

By William H. Isely This 23rd day of March, 2010

964 Walnut Creek Rd.
Franklin, NC, 28734

Respondent Isely certifies that to his best knowledge all the information contained in this document is correct and truthful.

CERTIFICATE OF SERVICE

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

RESPONDENT'S STATUS REPORT AND AWARD BRIEF UNDER THE EQUAL ACCESS TO JUSTICE ACT

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

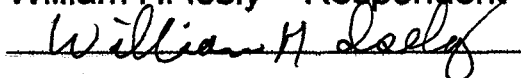
The original and one (1) paper copy via United States mail delivery and one (1) electronic copy via e-mail:

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-
FTC, .. Suite 1500
225 Peachtree Street, N.E
Atlanta, GA 30303

William H. Isely – Respondent



This 23rd of March. 2010