

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



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

PUBLIC

<p>In the Matter of</p> <p>GEMTRONICS, INC., a corporation, and</p> <p>WILLIAM H. ISELY, individually and as the owner of Gemtronics, Inc.</p>
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DOCKET NO. 9330

**RESPONDENTS' MOTION FOR SUMMARY DECISION
AND MEMORANDUM IN SUPPORT THEREOF**

Pursuant to Rule 3.24 of the Commission's Rules of Practice, Respondents GEMTRONICS, INC., and WILLIAM H. ISELY respectfully move for Summary Decision for the reasons set forth herein and based on the evidence in Respondents' Separate Statement of Material Facts as to Which there is no Genuine Dispute.

I. INTRODUCTION

Respondents move for Summary Decision, pursuant to Commission Rule of Practice 3.24, against Complaint Counsel and the Federal Trade Commission. The Complaint alleges that the Respondents violated Sections 5 and 12 of the Federal Trade Commission Act ("FTC Act")

in connection with marketing the product RAAX11, an alleged herbal “food” or “drug” product within the meaning of Sections 12 and 15 of the FTC Act.

Specifically, the Federal Trade Commission contends that the Respondents violated Sections 5(a) and 12 of the Federal Trade Commission Act because the Respondents disseminated or caused to be disseminated advertisements for RAAX11 through an Internet website, www.agaricus.net. To the contrary, the uncontroverted evidence in this case reveals that Respondents were not the owners of the alleged offending website and likewise had no ability to control the content of any advertisement or any other information disseminated through the alleged offending website. Accordingly, the Respondents’ respectfully request that the Presiding Law Judge grant summary decision against the Federal Trade Commission and dismiss Complaint Counsel’s Complaint.

II. STATEMENT OF FACTS

This action was brought under the Federal Trade Commissions’ initiative described as a “sweep to stop peddlers of bogus cancer cures.” In large part, the scams prosecuted by the Federal Trade Commission are heartless attempts to target vulnerable individuals seeking last resorts to cure their or their family members’ terminal illness. Individuals perpetuating such scams should be punished to the full extent of the law. Here, however, the Respondents are innocent of the allegations propounded against them. Likewise, they do not fit the description of targets intended to be prosecuted under the policy behind the FTC’s initiative. To that end, and based on the undisputed evidence, the Respondents respectfully request that the FTC’s Complaint against them be dismissed.

The individual Respondent William H. Isely is 83 years old and resides with his wife in Franklin, North Carolina. Since he retired from his formal occupation, Mr. Isley has run a small

natural vitamin supplement mail order business. Mr. Isely has operated out of his house as a sole proprietor with no employees. He has never manufactured any vitamins or herbal products. He started his business thirty years ago after he was diagnosed with prostate cancer and became interested in treating his condition with alternative natural measures in conjunction with conventional medical treatment. He was fortunate as his cancer entered remission. During the time period that gave rise to this action, Mr. Isely operated his business under the name Gemtronics. However, since the FTC proceeded with this action Mr. Isely has terminated his business.

The corporate Respondent Gemtronics, Inc. deserves little discussion. It is an inactive corporate shell that Respondent Isely formed under North Carolina law during the year 2003 with the intent to benefit from operating his business through a corporation. However, the entity Gemtronics, Inc. never obtained a federal tax identification number, issued shares of stock, appointed a board of directors or elected officers. It has never conducted business or possessed a bank account. It has never observed corporate formalities such as keeping minutes or filing Annual Reports with the Secretary of State of North Carolina. As such, it soon will likely be administratively dissolved by the North Carolina Secretary of State office. Here, the proper party is Respondent Mr. Isely, individually, and doing business as "Gemtronics".

The undisputed evidence shows that the FTC, with what appears to be good intentions, brought this Complaint under the incorrect premise that the Respondents owned and controlled the subject internet website, www.agaricus.net, through which arguably deceptive advertisements were disseminated to market an herbal product called RAAX11.¹ [See

¹ RAAX11 is a trademarked name for an herbal product derived from mushrooms grown and harvested in rainforest regions in Brazil. RAAX11 and similar mushroom derived products have been marketed and sold throughout the world as a supplement which allegedly aids in the prevention and cure of cancers---otherwise vastly improving the strength of one's immune system.

Complaint, ¶ 5, and Complaint exhibits A-D]. Here, the content of the alleged offending advertisements is not at issue. What is relevant is that the Respondents have never owned the subject website----more importantly, the Respondents have never possessed the authority or ability to control the content of the subject website. To that end, the Respondents have never disseminated any advertisements or any information through the subject website—the sole basis on which the FTC’s Complaint is based.

What the evidence shows and what the FTC now knows is that the subject website and several similar websites are owned and controlled from Europe by an individual named George K. Otto through at least two foreign companies, the more prevalent company being named Takesun do Brasil. Through his foreign companies and the alleged offending website, Mr. Otto markets and sells RAAX11 and other herbal supplements.²

Basic knowledge of how Mr. Otto and consumers, own and control the content of a domain or website, here the alleged offending website, is a requisite to understanding how Respondent Isely was mistaken as the disseminator of advertisements through the alleged offending website. An individual purchases and becomes the owner of a website through a website hosting company online or over the telephone. Payment is made via a credit card and the owner is provided or selects a PIN number and password with which the owner can access and alter administrative information for the website, such as contact information for the website which is accessible by the public. In addition, the PIN number and password allows the website owner to access and control the content of the website once it is set up and supported by a hosting company.

When the website is purchased and activated, several designations are required to be selected by the owner with respect to individuals or companies which will hold the titles of

² The United States trademark RAAX11 is owned by one of Mr. Otto’s foreign companies.

Registrant, Administrative Contact, and Technical Contact for the website. The owner inputs the names of individuals who will hold these titles and their respective contact information. The owner can essentially select any individual for these designations. The owner can select itself for these titles or choose third parties, notably with or without the consent of the third parties. It is important to note that the identity of the website owner---the individual who possesses the PIN number and password---can remain confidential, while those designated with the title of Registrant and others titles (and their contact information) are accessible to any third party online through the hosting company.³

In this case, without Mr. Isely's permission, Mr. Otto designated Mr. Isely as the Registrant contact and all other contacts for the subject website.⁴ Mr. Otto identified Mr. Isely by name and provided Mr. Isely's address and telephone number. However, Mr. Otto provided his own e-mail address as the email contact. Until he was informed by the FTC and FDA through this action, Respondent Isely had no knowledge he was identified as the Registrant and other titles for the alleged offending website. Initial communications by the FTC to the website owner were sent via email and presumably received by Mr. Otto. However, Mr. Isely never received communications from the FTC because correspondence from the FTC was sent only via email---to George Otto's email. Mr. Otto's likely intent in naming Mr. Isely as the contact person for the website was to hide Mr. Otto's identity. Further, Mr. Otto was no stranger to Mr. Isely as Mr. Isely had purchased product from Mr. Otto.

³ An analogue is a Registered Agent for a corporate entity formed under the laws of a state. States where corporate entities are formed require that the owner(s) and organizer(s) of the corporation identify a street address and individual who is the contact for the corporation for purposes of serving correspondence or legal documents. However, a Registered Agent is not required to have any ownership interest in the corporate entity or hold any offices in the company. For instance, law firms often act as the Registered Agent for a corporate client.

⁴ Interestingly, an officer for the web hosting company testified in his deposition that indeed an owner can identify any individual as a Registrant without the permission of the Registrant.

After it was brought to his attention by the FTC that he was identified with his name, address and telephone number as the Registrant and other contacts for the subject website, Mr. Isely took immediate steps to remove himself as the designee of the subject website. As he lacked the authority (PIN number and password) to access the control of the website, he contacted Mr. Otto and demanded that he be removed from the website. In addition, he contacted the web hosting company for the subject website and demanded that his information be removed. Mr. Isely concluded that it was Mr. Otto who had used Mr. Isely's identity without his consent because the contact email address was the email for Mr. Otto (gotto@takesun.com). Mr. Isely had a history of doing business with Mr. Otto and Takesun do Brasil through email and Mr. Otto's websites----never personally meeting Mr. Otto as he resides in Europe.

By way of background, in the year 2000, Mr. Isely learned about the RAAX11 product and similar products. Mr. Isely personally purchased and consumed RAAX11 in conjunction with other treatments to keep his cancer in remission. Mr. Isely experienced good results under this treatment and his cancer went into remission. The demand by consumers for RAAX11 increased. As such, Mr. Isely added it as a product to his business. To obtain the RAAX11 product, Mr. Isely began purchasing RAAX11 from Mr. Otto's company Takesun do Brasil and reselling it to his customers. Each purchase transaction was separately negotiated and not on an account. His purchases differed in quantity and he resold the product to his customers.

As he continued to purchase RAAX11 from Mr. Otto, Mr. Otto sought consent from Mr. Isely to use Mr. Isely's personal experience consuming RAAX11 as a testimony on Mr. Otto's website. Mr. Isely permitted Mr. Otto to use Mr. Isely's experience with RAAX11 on the condition that Mr. Otto not reveal Mr. Isely's true identity. Mr. Otto utilized Mr. Isely's testimony on the subject website and also provided Mr. Isely's telephone number on the subject

website. Isely immediately demanded that Mr. Otto remove any reference to Mr. Isely on the subject website when Mr. Isely learned of the FTC's involvement.

Since filing the Complaint, and identifying that Mr. Isely is not the owner of the subject website, the FTC has attempted to identify and focus on other circumstances where Isely has engaged with Mr. Otto (e.g. providing a testimonial, *supra.*). Moreover, after it learned that Isely lacked authority to control the content of the subject website, the FTC has changed its focus to results of under cover purchases of RAAX11 from Mr. Otto's website---in an attempt to tie Mr. Isley to the subject website and Mr. Otto's enterprise. To the extent any of the new allegations by the FTC (not alleged in the Complaint) connect Mr. Isely to Mr. Otto's enterprise, Mr. Isely's conduct is *de minimis* and public policy is not served by prosecuting Mr. Isely. The fact remains that Mr. Isely could not control the content of the alleged website---lacking authority equal to the ability to control the content of www.ftc.gov. As such, the FTC's Complaint should be dismissed.

III. SUMMARY DECISION STANDARD

Commission Rule of Practice 3.24(a)(2) provides that summary decision "shall be rendered . . . if the pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law." Rule 3.24(a)(3) provides that once a motion for summary decision is made and adequately supported, "a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial." *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Adikes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The provisions of FTC Rule 3.24 are virtually

identical to the provisions of Fed. R. Civ. P. 56, governing summary judgment in the federal courts. *Hearst Corp.*, 80 F.T.C. 1011, 1014 (1972).

The Supreme Court has elaborated on this standard, holding that where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving for summary judgment must satisfy the evidentiary burden that it would bear at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). If the moving party meets its burden, the opposing party must come forward with specific facts showing there is a genuine issue for trial. *See Matsushita*, 475 U.S. at 585-88. The opposing party must show more than a metaphysical doubt as to the material facts. *Id.* The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Liberty Lobby*, 477 U.S. at 247-48.

Also, whether a marketing practice complies with the laws or regulations enforced by the FTC is a question of law that can be resolved on summary decision. *See FTC v. Bonnie & Co. Fashions*, 1992-2 Trade Cases (CCH) ¶ 69,980 (D.N.J. 1992) (on summary judgment, court decided care label did not comply with Care Labeling Rule); *see also United States v. Union Circulation Co.*, 1982-83 Trade Cases (CCH) ¶ 65,052 at 70,862 (N.D. Ga. 1982) (on summary judgment, court found defendants' practices to violate the FTC's Cooling Off Rule), *citing United States v. Reader's Digest Ass'n*, 662 F.2d 955, 963 (3d Cir. 1981), *cert. denied*, 455 U.S. 908 (1982); *see also FTC v. U.S. Sales Corp.*, 785 F. Supp. 737 (N.D. Ill. 1992), *aff'd sub nom. FTC v. Vlahos*, 51 F.3d 275 (7th Cir.).

As such, there is no genuine issue as to any material fact that

Respondents could not make or disseminate the representations challenged in the complaint.

Thus, Respondents' are entitled to summary decision as a matter of law.

Since retiring from a lifetime career managing a defense contractor company hired by the United States to manufacture missiles, Respondent Isely has been in the natural vitamin business for approximately thirty years. During that time, he has never received a complaint from a customer—most of which he has developed personal relationships. Respondent Isely has always endeavored to provide truthful, accurate and complete information about the products he sells.

VI. CONCLUSION

Respondents' request for summary adjudication is warranted based on the fact that the Respondents did not disseminate or cause to be disseminated advertisements for RAAX11 through the alleged offending website----which is the FTC's sole alleged wrong doing and sole basis of the Complaint.

This action is ripe for adjudication. Discovery in this action has concluded and all material evidence is before the Court, excepting perhaps ascertaining the truth and veracity of the witnesses through testimony at trial (which has not been raised as an issue). As such, the significant expenses and costs of judicial resources associated with a trial can be avoided.

Rule 3.24(a)(2) of the Commission's Rules of Practice states that a party is entitled to summary decision if the "pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law." The uncontroverted record plainly demonstrates that Respondents have not violated Sections 5(a) and 12 of the FTC Act through any dissemination of false and unsubstantiated claims. Accordingly, the Respondents'

respectfully requests that the Presiding Law Judge grant summary decision against the Federal Trade Commission and dismiss Complaint Counsel's Complaint.

Respectfully Submitted:

THE LAW OFFICE OF
MATTHEW I. VAN HORN, PLLC

By 

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Counsel for Respondents

This the 13th day of March, 2009.

CERTIFICATE OF SERVICE

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

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

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

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

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

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

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

This the 13th day of March, 2009.


MATTHEW I. VAN HORN

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
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COMMISSIONERS: **William E. Kovacic, Chairman
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**RESPONDENTS' RULE 3.24 SEPARATE STATEMENT OF
MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Rule 3.24 of the Commission's Rules of Practice, and in support of their Motion for Summary Decision, Respondents GEMTRONICS, INC., and WILIAM H. ISELY, hereby submit their Statement of Material Facts as to which there is no Genuine Dispute.

A. Respondents Gemtronics, Inc. and William H. Isely

1. Respondent Gemtronics, Inc. was formed on September 20, 2006, by the Respondent William H. Isely. Gemtronics, Inc. has never had a shareholder, board members or an employee and has never been activated. Moreover, Gemtronics, Inc. has never engaged in any business or entered into any contracts. Gemtronics, Inc. has never obtained a federal tax identification number and has never filed taxes. Gemtronics, Inc. has since its inception always been an inactive corporate shell. [See Ex. A, Gemtronics, Inc. Answer to Interrogatory Nos. 1

