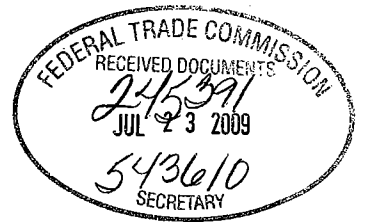


ORIGINAL



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

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

PUBLIC

In the Matter of

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

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

DOCKET NO. 9330

RESPONDENTS' POST-TRIAL BRIEF

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**I. INTRODUCTION, SUMMARY OF THE ARGUMENT AND THEORIES
ADVANCED BY COMPLAINT COUNSEL.**

This case arises out of the sale of an herbal product, RAAX11. The sale of RAAX11 by Isely or any other person was perfectly legal and the Complaint does not claim to the contrary. The Complaint in this case contends that Respondents Gemtronics, Inc. and William H. Isely violated Sections 5(a) and 12 of the Federal Trade Commission Act (“FTC Act”) by making false and unsubstantiated claims for the herbal product RAAX11.

Complaint Counsel’s sole basis for this contention is that “the Respondents disseminated or caused to be disseminated advertisements for RAAX11 through the internet website, www.agaricus.net.”¹ To prove its case, Complaint Counsel must prove by a preponderance of the evidence that Respondents are the individuals who actually disseminated the alleged offending advertisements through the website [agaricus.net](http://www.agaricus.net).

This case has been marked by continuing shifts in the various theories that Complaint Counsel has advanced. Complaint Counsel brought this case under the assumption that the “Registrant” of a website is the owner and controller of the website. Similarly, Complaint Counsel named Respondent Gemtronics, Inc. as a party under the assumption that a “registered agent” of a corporation is also a shareholder, officer, director or manager of a corporation.

Both assumptions were wrong and could have been corrected with very little effort. In fact, the undersigned and Respondents provided information to Complaint Counsel well before the Complaint was issued that showed Complaint Counsel that the said assumptions were false or at least warranted further investigation. Now, Complaint Counsel is attempting to find Respondents liable under theories which barely resemble the allegations in the Complaint.

¹ The alleged offending advertisements are attached as Exhibits “A” through “D” to the Complaint.

Assuming the evidence supporting the new theories was admissible for the truth it asserts, Complaint Counsel does not meet the burden of proving its case by a preponderance of the evidence.

II. COMPLAINT COUNSEL'S COMPLAINT WAS BROUGHT BASED ON INFORMATION KNOWN TO BE UNRELIABLE OR FALSE WHEN THE COMPLAINT WAS ISSUED.

A. Before the Complaint was Issued and Served on the Respondents.

On March 25, 2008, Complaint Counsel sent a demand letter and a copy of the Complaint to Respondent Isely. (JX 64). Complaint Counsel's letter requested that Isely and Gemtronics, Inc. enter into a settlement with the FTC "regarding Internet advertising for the product RAAX11 on the website www.agaricus.net." (JX 64). Approximately six weeks later, on May 6, 2008, more than three months before the Complaint was filed, the undersigned sent a letter to Complaint Counsel providing direct evidence to Complaint Counsel that the Respondents were not the owners of agaricus.net and that they did not possess the ability to control the content disseminated through agaricus.net. (JX 66; JX 7). Consequently, they could not enter into a settlement to agree to change the content of the website agaricus.net. (JX 66; JX 7).

Enclosed with the undersigned's May 6, 2008, letter to Complaint Counsel was a document provided by DomainDiscovery, the domain registry company for agaricus.net, that showed that the Respondents in fact did not own or have the ability to control the content of agaricus.net. (JX 66; JX 5). Indeed, the document from DomainDiscovery showed that a company from Brazil and a man named George Otto possessed the ability to alter the identity of the contact persons for agaricus.net and control the content of agaricus.net. (JX 66; JX 5).

In addition, the undersigned's May 6, 2008, letter informed Complaint Counsel that Isely's name and contact information had been used without his permission as the "Registrant"

of agaricus.net and within web pages of agaricus.net and that Isely could not enter into a settlement on behalf of agaricus.net because he lacked any ownership rights in or control over the contents of agaricus.net. (JX 66; JX 5).

Despite possessing this information from DomainDiscovery which at least confirmed that the Respondents were not the owners of agaricus.net, on September 18, 2009, Complaint Counsel issued and served the same Complaint against the Respondents that it originally mailed on Respondents on May 6, 2008. (JX 66; JX 5). In fact, despite possessing the information from DomainDiscovery which showed that Isely was no longer the “Registrant” for the agaricus.net and that agaricus.net was controlled by Takesun do Brasil and a man named George Otto, Complaint Counsel’s investigator, Michael Liggins, was never instructed to contact DomainDiscovery. (Liggins, Tr. 124). Moreover, with this information, Complaint Counsel never instructed investigator Liggins to conduct a comprehensive investigation into the foreign corporate entity or G. Otto. (Liggins, Tr. 161). In fairness to inspector Liggins, he testified that he could have done a better job investigating provided he had been given sufficient resources. (Liggins, Tr. 161).

B. After the Complaint was Issued and Served on Respondents.

In December, 2008, Complaint Counsel was asked through Respondents’ Interrogatory No. 16 to identify all evidence in support of paragraph 5 of the Complaint which states that “Respondents disseminated or caused to be disseminated advertisements for RAAX11 through an internet website, www.agaricus.net, including, but not limited to, the attached Exhibits A through D”. (JX 11 at 6-8; JX 7 at 2).

In response to Respondents’ Interrogatory No. 16, Complaint Counsel provided the following response:

Publicly available information, already in the possession of Respondents, includes corporate filings with the North Carolina Secretary of State showing that in 2006, Respondent Isely incorporated Gemtronics, Inc., with its principal place of business at 964 Walnut Creek Road, Franklin, North Carolina 28734, and that Respondent Isely is its registered agent. Publicly available information from the Macon County Register of Deeds shows Respondent Isely is the owner of the property located at 964 Walnut Creek Road, Franklin, North Carolina, 28734. (JX 11 at 7).

In response to two separate undercover purchases of the product RAXX11 from the website www.agaricus.net, Respondents mailed product literature, and the product RAXX11 to the FTC's undercover mailboxes. Complaint Counsel further states that publicly available information on WHOIS domain registration for the domain [agaricus.net](http://www.agaricus.net) listed Respondent Isely as the domain's registrar and the administrative and technical contact. Further, Respondent Isely's name, as well as his telephone and fax numbers appeared on various web pages of the website www.agaricus.net. (JX 11 at 8).

Complaint Counsel answered Respondents' Interrogatory No. 16 with full knowledge of all the facts and evidence it presented at trial, including the results of the investigation of Liggins and the results of the undercover purchases from the website [agaricus.net](http://www.agaricus.net). Complaint Counsel's answer to Respondents' Interrogatory No. 16 summarizes and underscores what little and unreliable evidence Complaint Counsel has relied upon and has possessed in support of the Complaint.

Moreover, it demonstrates that Complaint Counsel has relied completely upon the search results from WHOIS to support its theory of liability. (JX 16). Faced with the reality that the information in WHOIS was inaccurate at best, Complaint Counsel has attempted to prove its case through literature mailed by Respondent Isely with RAAX11 product purchased by FTC undercover agents through [agaricus.net](http://www.agaricus.net). Under this new theory, Complaint Counsel still fails to prove its case by a preponderance of the evidence.

III. RESPONDENTS DID NOT OWN WWW.AGARICUS.NET OR POSSESS ANY AUTHORITY TO CONTROL ANY ADVERTISEMENTS DISSEMINATED OR CAUSED TO BE DISSEMINATED THROUGH WWW.AGARICUS.NET.

In support of the charge that Isely disseminated deceptive advertisements through agaricus.net, Complaint Counsel offered the testimony of Inspector Michael Liggins. Mr. Liggins' testimony can be summarized as a process of authenticating exhibits that were otherwise available to the public over the internet and a description of his undercover purchases. For the most part, the results of Liggins's internet searches and the documents produced from his RAAX11 purchases lacked a nexus to the Complaint. Likewise, Liggins's testimony failed to support Complaint Counsel's contention that Isely disseminated the advertisements attached as Exhibits "A" through "D" to the Complaint or any other advertisements through agaricus.net.

Mr. Liggins testified about his results from online searches through WHOIS, an online database which provides information to the public about domains such as agaricus.net. (Liggins, Tr. 115; JX 16). The search results from WHOIS indicate who the "Registrant" for a domain is. (Liggins, Tr. 70-71; JX 16). Mr. Liggins produced the search results from WHOIS for agaricus.net. (Liggins, Tr. 115; JX 16). The WHOIS search results for agaricus.net stated that the "Registrant, Administrative Contact, Technical Contact, and Zone Contact" for agaricus.net was Isely. (Liggins, Tr. 115; JX 16). The WHOIS search results showing Isely as the contact person for agaricus.net also included the email address for G. Otto as the email contact for agaricus.net, gotto@takesun.com. (JX 16).

According to Liggins, WHOIS search results identify who the "Registrant" is for a domain, but the WHOIS search results do not actually list who actually paid for the website or who is the owner. (Liggins, Tr. 70-71; JX 16). In order to access a website and control the content of a website, a person must possess a PIN number or password. (Liggins, Tr. 108). The WHOIS search results for agaricus.net identified Isely as the "Registrant" of agaricus.net, but this is no indication that Isely possessed the PIN number which would allow someone to control

the content of agaricus.net. (Liggins, Tr. 110-11). Further, Liggins testified that he personally owns a domain and website and that he could identify the undersigned's name, address, telephone number and email as the "Registrant" of his website without the undersigned's permission. (Liggins, Tr. 122-23). Mr. Liggins also agreed that the representative of DomainDiscovery testified that Isely was not the owner of agaricus.net. (Liggins, Tr. 133). It is noteworthy that the Complaint alleges agaricus.net is the only website alleged to be an offending website. (Liggins, Tr. 131).

The results of a Subpoena Duces Tecum served on DomainDiscovery, and the sworn testimony from Pablo Valesco, a representative of DomainDiscovery, expanded the understanding as to who is the owner of and who controls the content of agaricus.net.

Pablos Velasco testified that "[t]he registrant, as it appears on the WHOIS database, is who the person that holds the domain name wants to show as the owner of the domain, but is not necessarily the legal owner of the domain name itself." (JX 4 (Velasco, Dep. at 12). "That's [the Registrant] the published owner of the domain name, but not the actual owner." (JX 4 (Velasco, Dep. at 12).

Velasco further testified that "[t]he legal owner, as it appears on our [DomainDiscovery] system, is never shown on the WHOIS database or is never made available to the public unless, of course, owner of the domain name wants to show who the -- wants the actual published owner and legal owner." (JX 4 (Velasco, Dep. at 13). Continuing, Velasco stated that "[i]n this case, or in this specific case, the legal owner as it appears in our system is the same as the published registrant, which is Agarix International." (JX 4 (Velasco, Dep. at 13; JX 5). The address of the owner of the domain name is "a foreign address in Brazil," and the contact e-mail is

gotto@takesun.com.br., which appears to correspond to the e-mail contact from the WHOIS search results for agaricus.net (JX 4 (Velasco, Dep. at 13; JX 5); (Liggins, Tr. 115-16; JX 16).

Mr. Velasco further explained that “[i]n this case [of agaricus.net], the administrative contact will be the one that has the password and the user name. The administrative contact in this case is listed as George Otto.” (JX 4 (Velasco, Dep. at 15; JX 5). The following exchange from the deposition of Mr. Velasco explains how Mr. Isely’s name was used without his permission:

Q. Okay. So, for instance, following your example, I could, I could call you, buy a domain for my website and my brother, I could identify him as the registrant; correct? That is correct?

A. That is correct, yes. When you register a domain name by default, whoever the administrative contact is will show as the administrative, technical, billing and/or zone contact, which is public register.

Q. Okay.

A. Then after you're done with the registration, there is an option in our system, you can go and specify each contact separately. You can have one person listed as the administrative and billing contact, and a totally different person listed as the organizational or registrant and technical contact.

Q. Okay. And specifically with this example, if I called you and set up one for my law firm and paid for it, but became the legal owner, obtained my user name and domain name, I could identify my brother as the registrant, which is shown to the public, and I could put his address and his e-mail as a contact?

A. That is correct.

Q. Okay. Secondly, with the second category, on the document administrative contact, technical contact and zone contact, I could also put my brother or any third party there as -- just like the registrant. I could put my brother or any third party there as the -- and put their name and their contact information and their e-mail; is that correct?

A. That is correct.

(JX 4 (Velasco, Dep. at 18-19).

In further testimony, Mr. Velasco explained that the most recent update to the contact information for “registrant, . . . administrative contact, technical contact and zone contact” for agaricus.net was on March 28, 2008. (JX 4 (Velasco, Dep. at 10-11; JX 6). Demonstrating that the changes were made by G. Otto, the update to the contact information for agaricus.net was initiated from an IP address belonging to Deutsche Telekom AG in Germany. (JX 4 (Velasco, Dep. at 10-11; JX 6).

This date of March 28, 2008, when information for agaricus.net was updated from a German owned IP, corresponds directly with the date emails were sent from George Otto to Isley responding to a complaint by Isley to G. Otto that Isley’s name and contact information had been used without his permission by G. Otto. (JX 70, 71, 72). Isely’s email to G. Otto, dated April 25, 2009, complaining about the use of Isely’s name without his consent stated:

What really counts is who has control and real ownership. That person is the one who had the account and PIN number all that time. This the registrar [DomainDiscovery] will not give out, only to you. Since I did not know you had done this I think it is your responsibility to get your registrar [DomainDiscovery] to send an official letter to my lawyer...” (JX 72).

G. Otto responded to Isley in emails on March 28, 2008, the date agaricus.net was edited from the German IP address, denying any wrong doing but stating that Isely’s name had been removed from agaricus.net’s registrar DomainDiscovery. (JX 70, 71; RX 4). This evidence demonstrates that indeed Mr. Isley had not given permission to G. Otto to use his name, that Isley had no ability to control the content of agaricus.net and that G. Otto was the owner of and possessed the user name and password to agaricus.net.

Notably, the WHOIS results for agaricus.net contains a warning which states that “This WHOIS database is provided for information purposes only. We do not guarantee the accuracy of this data.” (Liggins, Tr. 110; JX 16). Unexplainably, Complaint Counsel ignored the

accuracy warning on the WHOIS search result. (Liggins, Tr. 110; JX 16). Neither inspector Liggins or Complaint Counsel took any steps to contact the domain registrar Domain Discovery. (Liggins, Tr. 110; JX 16).

In sum, the prosecution of this case was precipitated entirely on false information that could have been corrected with a telephone call by Complaint Counsel to DomainDiscovery. Only as a result of the efforts by Isely and the undersigned through contacting and serving a subpoena duces tecum on DomainDiscovery was the actual owner of agaricus.net identified. Even worse, Complaint Counsel ignored this information as to the true owner of agaricus.net when it was provided to Complaint Counsel prior to the date the Complaint was issued.

IV. ISELY PERMITTED GEORGE OTTO ONLY TO USE ISELY'S TESTIMONIAL AT A TIME PERIOD BEFORE RAAX11 WAS UNAVAILABLE FOR PURCHASE AND OTHERWISE ISELY'S NAME, CONTACT INFORMATION AND LIKENESS WAS USED BY GEORGE OTTO WITHOUT ISELY'S PERMISSION.

Faced with the evidence that Respondents did not own and likewise lacked any control over the content disseminated through agaricus.net, Complaint Counsel has offered alternative theories and ancillary evidence related to Isely's lawful sales of vitamin supplements, including RAAX11. Complaint Counsel's new theories also fail to show by a preponderance of the evidence that Respondents violated Sections 5(a) and 12.

Isely entered the retail vitamin supplement business in 1993, and during the same year registered the assumed name "Gemtronis" in the state of North Carolina for the purpose of collecting sales tax. (Isely, Tr. 181). Isely learned of Takesun do Brasil and contacted it through the subject website agaricus.net (Isely, Tr. 183). Isley began doing business with Takesun do Barsil in the year 2000. (Isely, Tr. 182).

Isely dealt with Mr. George Otto Kather [a/k/a George Otto] when he did business with

Takesun do Brasil. (Isely, Tr. 184). Isley's purchases from G. Otto were wholesale cash transactions and were placed by Isely through e-mails. (Isely, Tr. 201). Isley would receive invoices from Takesun do Brasil from the products he ordered. (Isely, Tr. 225, 337; JX 69).

In 2003, Isely applied for and registered an FDA approved warehouse under the Homeland Security Act which required importers to register their facilities. (Isely, Tr. 202). Beginning in 2004, Isely ordered and purchased RAAX11 for the first time from Takesun do Brasil and Isely's first sale of RAAX11 was in September of 2004. (Isely, Tr. 182, 207).

By way of background, in 2001, Isely and another individual formed a partnership under the name Takesun USA which was designed to import herbal products. (Isely, Tr. 204). The partnership dissolved after approximately eight months. (Isely, Tr. 204). Isley did not do business under the name Takesun USA at a time when RAAX11 was available to the public. (Isely, Tr. 259).

Isely sold his products over the telephone and through e-mails. (Isely, Tr. 187). The most common sales method was over the telephone where Isely's customers would provide their credit card number and Isely would charge it at his home. (Isely, Tr. 217, 282). Isely opened and utilized a PayPal account for the sole purpose of receiving funds from G. Otto on the occasion that G. Otto would refund funds overpaid by Isely for wholesale product shipments ordered by Isely from G. Otto. (Isely, Tr. 219-20).

Because Isely was a wholesale customer of Takesun do Brasil, G. Otto provided and registered a website for Isley at no cost. (Isely, Tr. 188-89). The web site was www.our-agaricus.com. (Isely, Tr. 193). Isely did not give G. Otto permission to use Isely as the contact person for the website and did not know he was the same until informed by Complaint Counsel. (Isely, Tr. 247-48). Isely had a shopping cart on our-agaricus.com and it was a USA-only

website. (Isely, Tr. 193). The shopping cart on our-agaricus.com was a separate shopping cart from George Otto's shopping cart. (Isely, Tr. 193). The first time Isley sold RAAX11 through our-agaicus.com was in September, 2004. (Isely, Tr. 194).

When Isely sold products through the internet, the purchases were made through our-agaricus.com, not agaricus.net. (Isely, Tr. 232). In an effort to offer products at competitive prices, Isely would occasionally visit agaricus.net to determine the price of products being sold through agaricus.net. Isley had webpages on the website agaicus.net, but only before the product RAAX11 was being sold. (Isely, Tr. 197). The web site our-agaricus.net is not the subject of the Complaint and is not identified in the Complaint. (JX 7). No orders made by customers through our-agaricus.com came directly to Isley. (Isely, Tr. 351). All orders went through G. Otto. (Isely, Tr. 351). Whether a customer purchased products from agaricus.net or our-agaricus.com to purchase, the order never went to Isley, it went to George Otto. (Isely, Tr. 350-51).

After consuming herbal products to treat his own cancer, Isley gave G. Otto permission to use Isley's testimonial with respect to consuming herbal products from G. Otto. (Isely, Tr. 260-62, 269). However, Isley's personal use of herbal products did not include the use of RAAX11 and RAAX11 was not available during the time period Isley gave G. Otto permission to use Isley's testimonial. (Isely, Tr. 260-62, 269).

Isely learned that his likeness and telephone number was on agaricus.net only after he was contacted by telephone from Complaint Counsel prior to the date the Complaint was issued. (Isely, Tr. 199). Isely testified that he was unaware and did not know why George Otto was putting Isley's cell phone number and toll-free number on agaricus.net. (Isely, Tr. 353). Likewise, Isely was not aware that he was identified as the registrant, administrative contact,

technical contact and zone contact for agaricus.net until he was informed by Complaint Counsel prior to the issuance of the Complaint. (Isely, Tr. 241-43; JX 16).

It is noteworthy that the homepage for agaricus.net contained what appeared to be an international phone number with which an individual could order products from agaricus.net. (Liggins, Tr. 106-07). When Isely was informed by Complaint Counsel that his name was being used without his permission, he emailed G. Otto demanding that G. Otto remove any reference to Isley on any webpages of agaricus.net and as the contact person for agaricus.net. (Isely, Tr. 327-29; JX 70; JX 71; JX 72).

Isley's name and contact information appears on the webpage advertisements from agaricus.net which are the subject of this case and attached as Exhibits "A" and "C" to the Complaint. (JX 7, at Exs. A and C). Isely did not give G. Otto permission to use his name, contact information or any likeness or representation appearing to originate from Isely on the webpages attached as Exhibits "A" and "C" to the Complaint. (Isely, Tr. 266-69, 271; JX 7, at Exs. A and C).

V. ISELY RECEIVED NO BENEFIT BY DROP SHIPPING RAAX11 PURCHASED BY THE FTC THROUGH WWW.AGARICUS.NET AND AND THE LITERATURE ISLEY MAILED WITH THE SHIPMENTS OF RAAX11 IS NOT RELEVANT TO THE COMPLAINT.

The purchases of RAAX11 conducted by FTC agent Liggins were drop shipment sales consummated by G. Otto through agaricus.net. (Isely, Tr. 195). After the FTC purchases were made from G. Otto, G. Otto asked Isely to ship the single bottles purchases of RAAX11 product and Isley mailed the bottles of RAAX11. (Isely, Tr. 195-96). Isely did not sell the product RAAX11 on the website agaricus.net. (Isely, Tr. 197). Isely did not receive any money for the FTC purchases and mailed the single bottle orders of RAAX11 as a favor for Takesun do Brasil. (Isely, Tr. 286-87, 292).

As testified by the FTC's investigator Liggins, the money paid for RAAX11 in the purchase under the name "Riece Miles" went to gotto@takesun.com, the email address for G. Otto. (Liggins, Tr. 148; JX 43). The credit card statement memorializing the purchase by inspector Liggins indicated that payment was made to "PayPal Takesunport. (Liggins, Tr. 143; JX 60). Also, the receipt produced from an email memorializing the purchase stated specifically that this "confirms that you have paid Takesun Portugal Lda." (Liggins, Tr. 144; JX 52). As best understood by inspector Liggins, with respect to the FTC's undercover purchases, he testified that he thought he was making a purchase "from whoever was at the North Carolina address [on the webpage]. . .," but that "with the email addresses you can't really tell." (Liggins, Tr. 162).

When Isely mailed the RAAX11 product as a result of the undercover purchase, Isley included literature within the mailings he sent to the FTC undercover agents. (Isely, Tr. 300; JX 59; JX 60). The literature contains information which Isely provided to customers who typically already ordered RAAX11 from him and was never published to the general public or for any potential consumers to review. (Isely, Tr. 300). Moreover, any information in Isely's literature was immaterial to the purchasing decision of the FTC investigators, or any would be consumers, because the literature was delivered with the product after the transaction was consummated.

Moreover, the information provided within the literature identified as JX 59 referred to a different combination of herbal extracts and was referring to a product/protocol other than RAAX11. (Isely, Tr. 301; JX 59). The literature mailed by Isely to the FTC investigators is not part of the Complaint and was not identified in any portion of the Complaint. (Isely, Tr. 303).

At bottom, the only conclusion that can be reached from Complaint Counsel's case is that Isely may have received an indirect, intangible and unknown benefit from G. Otto's

promotion and marketing of RAXX11 and other vitamin supplements---the same indirect, intangible and unknown benefit received by the countless number of other U.S. retailers of the same products.

VI. THE APPLICABLE LEGAL AUTHORITY SUPPORTS THE DISMISSAL OF THE COMPLAINT.

The activities by Takesun do Brasil George Otto in the arena of internet advertising do not necessarily fit easily into the traditional concept of “dissemination”. *FTC v. Seismic Entertainment Productions, Inc.*, 2004 U.S. Dist. LEXIS 22788 (October 21, 2004). Moreover, there are few FTC cases which define “disseminated or caused to be disseminated”.² However, those cases that do address the issue demonstrate that the evidence here does not show that Respondents “disseminated or caused to be disseminated” the advertisements at issue, which are those representations and statements displayed on the web pages of www.agaricus.net, attached as Exhibits “A” through “D” to the Complaint. (JX 7).

In *Meuller v. United States*, the Court defined “disseminated or caused to be disseminated” from the FTC Act where an individual was charged violating a cease and desist order when newspapers containing his advertisement crossed state lines, thereby triggering the interstate commerce requirement. 262 F.2d 443, 446 (5th Cir. 1958). Mr. Meuller had prepared the advertisement and published it in the newspapers. *Id.* His defense was that he had no knowledge that the newspaper company would sell the papers across state lines and that he did not intend for the advertisement to leave his home state. *Id.* The Court found that his lack of intent to cause his advertisement to cross state lines was not a defense. *Id.*

Under the logic of the Court in *Meuller*, Mr. Isley would not be found to have disseminated or caused to be disseminate any advertisements through www.agaricus.net. 262

² Likewise, Black’s Dictionary does not define the term. However, Websters Dictionary defines the term as “1. To scatter widely, as in sowing a seed. 2. To spread abroad; promulgate.”

F.2d 443, 446 (5th Cir. 1958) (citing *Shafe v. FTC*, 256 F.2d 661, 664 (6th Cir. 1956) (Ruling consistent with *Meuller* under similar facts regarding newspaper advertisements crossing state lines). The *Meuller* Defendant paid to introduce an advertisement he created into commerce, vis-à-vis into the possession of a third party newspaper company, and his acts contributed greatly to the violation. Here, Isely did not create any alleged offending web page advertisement, including those attached to the Complaint. Likewise, he did not pay to and lacked knowledge that any of his information was placed on www.agaricus.net.

Also, in *Meuller and Shafe*, the Defendants *did* intend to disseminate the subject advertisements and the issue was to what scope, extent and degree the Defendants intended to disseminate the advertisements. Here, Isely never created any advertisement to be disseminated on www.agaricus.net. 262 F.2d 443, 446 (5th Cir. 1958) and 256 F.2d 661, 664 (6th Cir. 1956).

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

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

VII. RESPONDENT GEMTRONICS, INC. HAS FOREVER BEEN AN INACTIVE CORPORATE ENTITY INCAPABLE OF TAKING ANY ACTION OR ENGAGING IN BUSINESS.

The evidence shows that Respondent Gemtronics, Inc. was an inactive corporation that has never engaged in any business activity. Respondent Gemtronics, Inc. was formed on September 20, 2006, by the Respondent William H. Isely. (JX 13); (Isely, Tr. 215-17, 223, 323-24); (JX 9 at 4-5). Gemtronics, Inc. has never had a shareholder, board members, officers or an employee and has never been activated. (Isely, Tr. Tr. 215-16, 223, 323-24); (JX 9 at 4-5). Moreover, Gemtronics, Inc. has never engaged in any business or entered into any contracts. (Isely, Tr. Tr. 215-16, 223, 323-24); (JX 9 at 4-5).

Gemtronics, Inc. has never applied for or obtained a federal tax identification number and has never filed taxes. (JX 13); (Isely, Tr. 215-16, 223, 323-24); (JX 9 at 4-5). Gemtronics, Inc.

has since its inception always been an inactive corporate shell. (JX 13); (Isely, Tr. 215-16, 223, 323-24); (JX 9 at 4-5). Mr. Isley is not the owner of Gemtronics, Inc. and no other individual is the owner of Gemtronics, Inc. (JX 13); (Isely, Tr. 215-16, 223, 323-24); (JX 9 at 4-5).

Gemtronics, Inc. has never applied for or received a designation as a closely held s-corporation or as a c-corporation. (JX 13); (Isely, Tr. 215-16, 223, 323-24); (JX 9 at 4-5). Moreover, Complaint Counsel has not proffered any evidence to the contrary. Consequently, Gemtronics, Inc. should be dismissed for these reasons as well as the other reasons applicable to Isely.

VIII. THERE IS NO POSSIBLE PUBLIC INTEREST SERVED BY PROSECUTING RESPONDENT ISELY OR BARRING ISELY FROM ENGAGING IN THE DISSEMINATION OF ADVERTISEMENTS.

Isely is completely out of the business of selling any herbal products under the name “Gemtronics” or any other name. (Isely, Tr. 200, 349). Isely never manufactured herbal products and there has never been a claim by the FTC that he has ever manufactured herbal products. (Isely, Tr. 346-47). When Isely began the business of selling herbal products, his customer base originated his personal consumption of herbal products, his friends and grew through word of mouth. (Isely, Tr. 188, 334-36). While in business, Isely’s revenue source from the internet was negligible as only approximately 95% of his orders originated from sources other than the internet and approximately only 5% of his orders were off of the internet. (Isely, Tr. 334-35).

Isely ceased purchasing any products from George Otto after learning from Complaint Counsel that G. Otto used Isely’s name and contact information without his permission. (Isely, Tr. 200-01). Isely revoked any permission he ever gave G. Otto to use Isely’s testimonial after learning from Complaint Counsel that G. Otto was using Isely’s information without Isely’s permission. (Isely, Tr. 269-70). The two drop shipments that Mr. Isely made at the request of

George Otto to the FTC investigators were the only two shipments of that type made during the last two years. (Isely, Tr. 353-54). Moreover, Isely made the shipments as a good faith gesture because Isely was a wholesale customer of Takesun do Brasil and G. Otto. (Isely, Tr. 353-54).

The facts at bar warrant a dismissal of the Complaint in equity based on the fact that no possible public interest is served by prosecuting (i) the Respondent Gemtronics, Inc. in that it is an empty corporate shell and has never been activated or committed any act; and (ii) Respondent Isely who has ceased doing business and had virtually no part or knowledge of the subject advertising or dissemination thereof. *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (citing *FTC v. Rhodes Pharmacal Co.*, 191 F.2d 744, 747 (7th Cir. 1951) (describing the broad discretion of the Commission to dismiss Complaint against Respondents whose acts and involvement with the offending advertisement were uncritical and the resulting harm of their acts *de minimis* and insufficient to support an inference that there was a substantial danger that future advertisements by Respondents for the offending product would be deceptive).

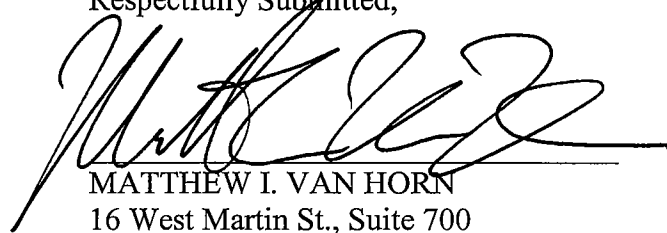
CONCLUSION

The question in this case is relatively straightforward: has Complaint Counsel proven, by a preponderance of the evidence, that Respondents disseminated or caused to be disseminated advertisements for RAAX11 beginning from May, 2004, going forward, through the internet website, www.agaricus.net, the advertisements being those attached to the Complaint as Exhibits A-D? The undisputed facts demonstrate that not only did Respondents not disseminate advertisements through www.agaricus.net, but that Respondents could not have done.

Further, neither the testimony or documents proffered by Liggins regarding web pages other than www.agaricus.net, nor the literature prepared and mailed by Isely in response to the FTC's

undercover purchases sufficiently support Complaint Counsel's case or are otherwise relevant. Consequently, the Complaint should be dismissed. Finally, based on Complaint Counsel Counsel's decision to prosecute this case based on unreliable and false information, the Respondents should be reimbursed for the attorney's fees and costs they have incurred as a result of defending this case pursuant to Rule 3.81 of the Commissions Rules of Practice.

Respectfully Submitted,



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*Attorney for Respondents Gemtronics, Inc.
and William H. Isley*

July 21, 2009

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this **RESPONDENTS' COUNSEL'S POST-TRIAL BRIEF and RESPONDENTS' PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW** 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 four (4) 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 21st day of July, 2009.



MATTHEW I. VAN HORN