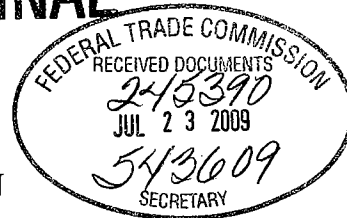


ORIGINAL



**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 PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Pursuant to the Court's July 1, 2009, Order on Post Trial Briefs, Respondents Gemtronics, Inc. and William H. Isley submit these Proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I. PROCEDURAL BACKGROUND

1. The Complaint in this matter issued on September 18, 2008. (JX-7; Complaint date found at www.ftc.gov _____).
2. Respondents filed their Answer on October 10, 2008. (JX 8; Answer date found at www.ftc.gov _____).
3. An initial Scheduling Order was issued by Administrative Law Judge D. Michael Chappell on October 28, 2008.

4. Trial commenced in this matter pursuant to 16 C.F.R. § 3.41 on June 24, 2009.
5. The last day in which testimony was received was June 25, 2009.
6. Oral arguments are scheduled to occur on July 30, 2009, according to an Order

issued by Administrative Law Judge D. Michael Chappell.

II. PERTINENT FACTS & EVENTS

7. 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).

8. 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).

9. 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).

10. 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, Isley 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).

11. By way of background, in 2001, Isley 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).

12. 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).

13. 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).

14. 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 Isely sold RAAX11 through our-agaricus.com was in September, 2004. (Isely, Tr. 194).

15. 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.

16. Isely 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).

17. No orders made by customers through our-agaricus.com came directly to Isely. (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 Isely, it went to George Otto. (Isely, Tr. 350-51).

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

19. 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 Isely's cell phone number and toll-free number on agaricus.net. (Isely, Tr. 353).

20. 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).

21. 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 Isely on any webpages of agaricus.net and as the contact person for agaricus.net. (Isely, Tr. 327-29; JX 70; JX 71; JX 72).

22. Isely'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).

23. 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).

24. 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).

25. Enclosed with the Respondents’ Counsel’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).

26. Respondents’ Counsel’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).

27. 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).

28. Complaint Counsel never instructed investigator Liggins to conduct a comprehensive investigation into the foreign corporate entity or G. Otto. (Liggins, Tr. 161).

29. 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).

30. 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).

31. In support of the charge that Isely disseminated deceptive advertisements through [agaricus.net](http://www.agaricus.net), Complaint Counsel offered the testimony of Inspector Michael Liggins.

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](http://www.agaricus.net). (Liggins, Tr. 115; JX 16).

32. 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](http://www.agaricus.net). (Liggins, Tr. 115; JX 16).

33. The WHOIS search results for [agaricus.net](http://www.agaricus.net) stated that the "Registrant, Administrative Contact, Technical Contact, and Zone Contact" for [agaricus.net](http://www.agaricus.net) was Isely. (Liggins, Tr. 115; JX 16). The WHOIS search results showing Isely as the contact person for [agaricus.net](http://www.agaricus.net) also included the email address for G. Otto as the email contact for [agaricus.net](http://www.agaricus.net), gotto@takesun.com. (JX 16).

34. 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).

35. The WHOIS search results for [agaricus.net](http://www.agaricus.net) identified Isley as the "Registrant" of [agaricus.net](http://www.agaricus.net), but this is no indication that Isely possessed the PIN number which would allow someone to control the content of [agaricus.net](http://www.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).

36. 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).

37. 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).

38. 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).

39. 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).

40. 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).

41. 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).

42. 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).

43. 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).

44. 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).

45. George 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).

46. 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).

47. 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).

48. 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).

49. 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).

50. 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).

51. 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).

52. 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).

53. 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).

54. 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. Isely 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).

55. 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.

56. 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).

57. 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).

58. 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).

59. 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).

60. 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).

II. CONCLUSIONS OF LAW

61. Section 5 of the Federal Trade Commission Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45. Section 12 of the Federal Trade Commission Act declares dissemination of false advertisements regarding certain categories of products to constitute an unfair or deceptive act or practice under Section 5. 15 U.S.C. § 52.

62. Complaint Counsel must prove, 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, those advertisements being those attached to the Complaint as Exhibits "A" – "D".

62. Complaint Counsel has failed to prove that the Respondents disseminated or caused to be disseminated advertisement for RAAX11 through the internet website www.agaricus.net, including, but limited to, the Exhibits "A" – "D" attached to the Complaint.

Respectfully Submitted,

LAW OFFICE OF
MATTHEW I. VAN HORN, PLLC

By 

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This the 21st day of June, 2009.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this **RESPONDENTS'** **COUNSEL'S PROPOSED FINDINGS OF FACT 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

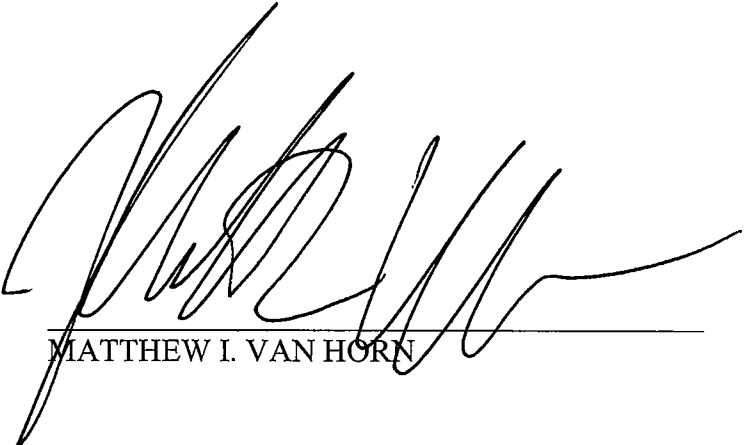
The original and one (1) paper copy via United States mail delivery and one (1) electronic copy via e-mail:

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 June, 2009.



MATTHEW I. VAN HORN