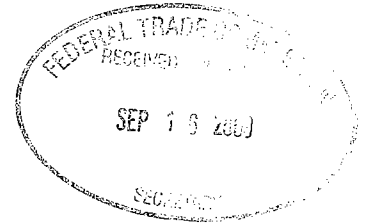


**PUBLIC**



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

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**DOCKET NO. 9330**

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**In the Matter of**

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

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

**Respondents.**

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**INITIAL DECISION**

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**D. Michael Chappell  
Chief Administrative Law Judge**

**Date: September 16, 2009**

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## **I. INTRODUCTION**

### **A. Summary of Complaint and Answer**

The Federal Trade Commission (“FTC”) issued the Complaint in this matter on September 16, 2008 against Gemtronics, Inc. and William H. Isely (“Isely”)(collectively, “Respondents”). The Complaint alleges that Respondents have violated Sections 5(a) and 12 of the Federal Trade Commission Act (“FTC Act”) by disseminating, or causing the dissemination of, false advertisements for the herbal product RAAX11. Complaint ¶¶ 3-5, 7, 10-11.

Specifically, the Complaint alleges that Respondents “disseminated or caused to be disseminated advertisements for RAAX11 through an Internet website, www.agaricus.net, including, but not limited to, the [exhibits attached to the Complaint as] Exhibits A through D” (the “Challenged Advertisements”). Complaint ¶ 5. According to the Complaint, through these and other advertisements on the www.agaricus.net website, Respondents have represented that RAAX11 is effective in the prevention, treatment, and cure of cancer, without a reasonable basis to substantiate such claims. Complaint ¶¶ 8-10. The Complaint further alleges that, through the advertisements on the www.agaricus.net website, attached as Exhibits A through D to the Complaint, among others, Respondents have falsely represented that reliable scientific evidence demonstrates that RAAX11 is effective in the prevention, treatment, and cure of cancer. Complaint ¶¶ 6-7.

In their Answer, filed on October 14, 2008, Respondents state that William H. Isely formed a corporation, Gemtronics, Inc., but that Gemtronics, Inc. has remained an inactive corporation since its inception. Answer ¶ 1. Respondents further state that Gemtronics, Inc. has no shareholders or board members, has never conducted any business or entered into any contracts, and has never obtained a federal tax identification number or filed taxes. Answer ¶ 1. Respondent Isely admits that he has offered for sale, sold and distributed the herbal product, RAAX11. Answer ¶ 3. However, Isely denies advertising or selling through the Internet website identified in the Complaint, www.agaricus.net. Answer ¶ 5. Respondents state that they “have forever lacked the authority or ability to disseminate any information or alter the content of the alleged offending website www.agaricus.net . . . [and that u]pon information and belief, . . . a Brazilian company, operating under the name Takesun do Brasil, and its agents and/or other individuals caused the alleged offending website to be formed, and have forever possessed the authority, exclusive of the Respondents, to securely and exclusively control all content disseminated on” the www.agaricus.net website. Answer ¶ 5.

### **B. Procedural History**

Respondents filed a motion for summary decision on March 16, 2009. Complaint Counsel, too, filed a motion for summary decision on March 19, 2009. Pursuant to Commission Rule 3.42(c)(7), the Administrative Law Judge conducted settlement conferences with the parties on March 19, 2009, March 31, 2009, April 8, 2009, and April 16, 2009. The parties were unable to settle the matter and each filed its response to

the other's motion for summary decision on May 28, 2009. Both parties' motions for summary decision were denied, as stated on the record in open court on June 24, 2009. Transcript of June 24, 2009 Final Pre-Hearing Conference at 5-6.

The final pre-hearing conference was held on June 24, 2009, with trial commencing immediately thereafter. Over seventy exhibits were admitted, including the expert report of Complaint Counsel's expert witness. Two witnesses testified at trial and one witness testified by deposition. Trial concluded on June 25, 2009. On July 21, 2009, the parties filed concurrent post-trial briefs, proposed findings of fact, and proposed conclusions of law. The parties filed concurrent replies to each other's briefs and proposed findings on August 4, 2009. Closing arguments were heard on July 30, 2009.

The hearing record was closed, pursuant to Commission Rule 3.44(c), by Order dated July 1, 2009. Rule 3.51(a) of the Commission's Rules of Practice states that an Initial Decision shall be filed "within ninety (90) days after closing the hearing record pursuant to § 3.44(c) . . . or within such further time as the Commission may by order allow upon written request from the Administrative Law Judge." 16 C.F.R. § 3.51(a). Ninety days from the close of the record is September 29, 2009.

Commission Rule 3.51(a) also states that an Initial Decision shall be filed within one year "after the issuance of the administrative complaint, except that the Administrative Law Judge may, upon a finding of extraordinary circumstances, extend the one-year deadline for a period of up to sixty (60) days." 16 C.F.R. § 3.51(a). The Complaint in this matter was issued on September 16, 2008. One year from the issuance of the Complaint is September 16, 2009.

### **C. Evidence and Burden of Proof**

This Initial Decision is based on the exhibits properly admitted into evidence, the transcripts of testimony at trial, and the briefs and proposed findings of fact and conclusions of law, and the replies thereto, submitted by the parties. Citations to specific numbered findings of fact in this Initial Decision are designated by "F."<sup>1</sup>

This Initial Decision is also based on a consideration of the whole record relevant to the issues and addresses the material issues of fact and law. Proposed findings of fact not included in this Initial Decision were rejected, either because they were not supported

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<sup>1</sup> References to the record are abbreviated as follows:

JX – Joint Exhibit

Tr. – Transcript of testimony before the ALJ

CA Tr. – Transcript of closing arguments

Dep. – Transcript of Deposition

CCB – Complaint Counsel's Post-Trial Brief

CCFF – Complaint Counsel's Proposed Findings of Fact

RB – Respondents' Post-Trial Brief

RFF – Respondents' Proposed Findings of Fact

by the evidence or because they were not dispositive or material to the determination of the allegations of the Complaint or the defenses thereto. The Commission has held that Administrative Law Judges are not required to discuss the testimony of each witness or all exhibits that are presented during the administrative adjudication. *In re Amrep Corp.*, No. 9018, 102 F.T.C. 1362, 1670, 1983 FTC LEXIS 17, \*566-67 (Nov. 2, 1983). Further, administrative adjudicators are “not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are ‘material.’” *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-94 (1959). *Accord Stauffer Labs., Inc. v. FTC*, 343 F.2d 75, 89 (9th Cir. 1965). *See also Borek Motor Sales, Inc. v. National Labor Relations Bd.*, 425 F.2d 677, 681 (7th Cir. 1970) (holding that it is adequate for the Board to indicate that it had considered each of the company’s exceptions, even if only some of the exceptions were discussed, and stating that “[m]ore than that is not demanded by the [APA] and would place a severe burden upon the agency”).

Under Commission Rule 3.51(c)(1), “[a]n initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence.” 16 C.F.R. § 3.51(c)(1); *see In re Chicago Bridge & Iron Co.*, No. 9300, 138 F.T.C. 1024, 1027 n.4, 2005 FTC LEXIS 215, at \*3 n.4 (Jan. 6, 2005). Under the Administrative Procedure Act (“APA”), an ALJ may not issue an order “except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.” 5 U.S.C. § 556(d). All findings of fact in this Initial Decision are supported by reliable, probative, and substantial evidence.

The parties’ burdens of proof are governed by Federal Trade Commission Rule 3.43(a), Section 556(d) of the APA, and case law. FTC Rules of Practice, Interim rules with request for comments, 66 Fed. Reg. 17,622, 17,626 (Apr. 3, 2001). Pursuant to Commission Rule 3.43(a), “[c]ounsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.” 16 C.F.R. § 3.43(a). Under the APA, “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. § 556(d).

“FTC enforcement actions typically are governed by the preponderance of the evidence standard.” *In re Rambus, Inc.*, No. 9302, 2006 FTC LEXIS 101, at \*45 (Aug. 20, 2006), *rev’d on other grounds*, 522 F.3d 456 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1318 (2009). *E.g.*, *In re Telebrands Corp.*, No. 9313, 140 F.T.C. 278, 426, 2004 FTC LEXIS 154, at \*76 (Sept. 15, 2004), *aff’d*, 140 F.T.C. 278, 2005 FTC LEXIS 178 (Sept. 19, 2005), *aff’d*, 457 F.3d 354 (4th Cir. 2006); *In re Automotive Breakthrough Sciences, Inc.*, No. 9275, 1998 FTC LEXIS 112, at \*37 n.45 (Sept. 9, 1998) (holding that each finding must be supported by a preponderance of the evidence in the record); *In re Adventist Health System/West*, No. 9234, 117 F.T.C. 224, 1994 FTC LEXIS 54, at \*28 (Apr. 1, 1994) (“Each element of the case must be established by a preponderance of the evidence.”).

“The Supreme Court has held that Section 7(c) of the Administrative Procedure Act (APA), which is applicable to administrative adjudicatory proceedings unless otherwise provided by statute, establishes ‘a standard of proof and . . . the standard adopted is the traditional preponderance-of-the evidence standard.’” *In re Rambus*, 2006 FTC LEXIS 101, at \*45 (quoting *Steadman v. SEC*, 450 U.S. 91, 95-102 (1981)). In *Steadman*, the Supreme Court found that the legislative history of the APA clearly reveals Congress’ intent: “‘Where there is evidence pro and con, the agency must weigh it and decide *in accordance with the preponderance.*’” *Steadman*, 450 U.S. at 101 (quoting H. R. Rep. No. 1980, 79th Cong., 2d Sess., at 37 (1946)). The Supreme Court further explained: “Congress was primarily concerned with the elimination of agency decisionmaking premised on evidence which was of poor quality -- irrelevant, immaterial, unreliable, and nonprobative -- and of insufficient quantity -- less than a preponderance.” *Id.* at 102 (citations omitted).

“The burden of showing something by a ‘preponderance of the evidence’ . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before he may find in favor of the party who has the burden to persuade the judge of the fact’s existence.” *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 622 (1993) (internal quotations and citations omitted). The Federal Circuit has defined the preponderance of the evidence standard for civil actions to be “the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it.” *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 769 (Fed. Cir. 1993). *Accord United States v. Mathis*, 216 F.3d 18, 28 (D.C. Cir. 2000) (explaining that “[p]reponderance’ means something more than ‘weight’; it denotes a superiority of weight, or outweighing”); *Smith v. United States*, 726 F.2d 428, 430 (8th Cir. 1984) (“If, upon any issue in the case, the evidence appears to be equally balanced, or if it cannot be said upon which side it weighs heavier, then plaintiff has not met his or her burden of proof.”). The Supreme Court further “observed that ‘where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application . . . .’” *Concrete Pipe*, 508 U.S. at 626 (citation omitted).

The Complaint in this case alleges that Respondents have advertised, promoted, offered for sale, sold, and distributed an herbal product, RAAX11. Complaint ¶ 3. The Complaint also alleges that Respondents disseminated or caused to be disseminated advertisements for RAAX11 through an Internet website, [www.agaricus.net](http://www.agaricus.net). Complaint ¶ 5. Complaint Counsel bears the burden of proving these allegations by a preponderance of credible evidence.

#### **D. Overview of Applicable Law**

Section 12(a) of the FTC Act makes it unlawful “for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement . . . [b]y any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, services, or cosmetics.” 15 U.S.C. § 52(a). “The dissemination or the causing to be disseminated of any false advertisement” under Section 12(a) constitutes an unfair or



deceptive act or practice within the meaning of Section 5 of the FTC Act. 15 U.S.C. § 52(b). Thus, the threshold determination under Section 12(a) is whether Respondents “disseminated” or “caused to be disseminated” the Challenged Advertisements on the www.agaricus.net website, as alleged in the Complaint.

The statute does not define either “dissemination” or “causing to be disseminated.” In examining case law, however, several applicable principles become clear. First, liability under Section 12 does not require proof that the respondent physically distributed advertisements, and a respondent can be held liable for its false advertisements, even if the respondent’s advertisements were disseminated by others. *Mueller v. United States*, 262 F.2d 443, 446 (5th Cir. 1958) (affirming lower court’s finding that defendant’s advertisements violated Commission’s cease and desist order, and rejecting defense that newspapers, rather than defendant, disseminated the advertisements); *Shafe v. FTC*, 256 F.2d 661, 664 (6th Cir. 1956) (affirming Commission’s order and rejecting defense that newspapers, and not the respondent, disseminated respondent’s product advertisements). Liability arises in this context because placing false advertisements in the hands of another for dissemination “causes” dissemination of those advertisements, in violation of the clear language of Section 12. *Mueller*, 262 F.2d at 446. See also *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963) (upholding Commission’s order prohibiting distribution of misleading “list prices,” and stating: “One who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of that Act.”); *C. Howard Hunt Pen Co. v. FTC*, 197 F.2d 273, 281 (3d Cir. 1952) (upholding Commission’s order against pen point manufacturer and rejecting manufacturer’s defense that misleading labeling was performed at the request of its customer); *In re Southwest Sunsites, Inc.*, No. 9134, 106 F.T.C. 39, 1985 FTC LEXIS 38, at \*342 n.86 (Aug. 9, 1985) (holding land developer liable for misrepresentations in printed materials provided by developer to its broker, and distributed by broker to consumers), *aff’d*, 785 F.2d 1431 (9th Cir. 1986).

Moreover, a respondent need not be the sole cause of dissemination of false advertisements, but can be held liable for participating with others in the creation and/or dissemination of false advertisements. See *In re Colgate-Palmolive Co.*, No. 7736, 59 F.T.C. 1452, 1961 FTC LEXIS 349, at \*44 (Dec. 29, 1961) (holding both advertising agency and its client jointly liable for dissemination of advertisements, where agency prepared the challenged advertisements and placed them for publication), *order set aside on other grounds*, 310 F.2d 89 (1st Cir. 1962), *order reinstated*, 380 U.S. 374 (1965); *accord Standard Oil Co. v. FTC*, 577 F.2d 653, 659-60 (9th Cir. 1978) (affirming Commission’s order against advertising agency that actively participated in developing false advertisements); *In re Porter & Dietsch, Inc.*, No. 9047, 90 F.T.C. 770, 1977 FTC LEXIS 11, at \*153 (Dec. 20, 1977), *affirmed and modified*, 605 F.2d 294 (7th Cir. 1979) (same).

Furthermore, it is sufficient for liability under Section 12 that a respondent disseminates false advertisements, even if the advertisements were devised and prepared entirely by others. *Porter Dietsch, Inc. v. FTC*, 605 F.2d 294, 308 (7th Cir. 1979) (affirming Commission’s holding that drug store was liable for disseminating advertising

circulars containing false advertisements created by others, regardless of drug store's knowledge of falsity, and holding that Section 12 imposes strict liability for dissemination of false advertisements).

Applying the foregoing principles, it is apparent that liability for dissemination, or causing dissemination, of advertisements requires proof of the respondent's participation in the creation or dissemination of the advertisements. *In re Dobbs Truss Co.*, No. 5808, 48 F.T.C. 1090, 1952 FTC LEXIS 49, at \*50-51 (Apr. 3, 1952) (holding manufacturer liable, along with distributors, only for distributors' dissemination of advertisements that manufacturer provided to distributors, but not for advertisements prepared by distributors); *In re Rizzi*, No. 8937, 83 F.T.C. 1183, 1974 FTC LEXIS 194, at \*21-22 (Jan. 3, 1974) (entering summary decision and dismissing complaint against employee of company that disseminated false advertisements, where there was no evidence that employee caused, engaged in, or had control over company's false advertisements).

An exception to the requirement of proof of actual participation in the creation or dissemination of the challenged advertising applies to a corporate principal's liability for false advertisements disseminated by the corporation. In that context, it is sufficient to prove the liability of the corporation and the principal's ability to control the challenged acts. *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 573 (7th Cir. 1989); *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1292 (D. Minn. 1985). In addition, in cases cited by Complaint Counsel where a corporate principal has been found to be jointly liable with the corporation for restitution under Section 13(b) of the FTC Act, the evidence must further demonstrate that the corporation's principal had actual knowledge of the corporation's misrepresentations, reckless indifference to the truth or falsity of the misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth. *Id.* See also *Waltham Watch Co. v. FTC*, 318 F.2d 28, 31 (7th Cir. 1963) (upholding cease and desist order against licensor because of false advertising of licensee, where evidence showed licensor reviewed licensee's advertising in advance, had knowledge of complaints of misrepresentations, and failed to act); *In re Southwest Sunsites, Inc.*, 106 F.T.C. 39, 1985 FTC LEXIS 38, at \*344-46 (holding principal liable for misrepresentations by broker/agent).

## **E. Summary of Contentions of the Parties**

### **1. Complaint Counsel's contentions**

Complaint Counsel contends that Respondents "offered for sale and sold RAAX11 to consumers through unsupported claims in Internet advertisements on the website www.agaricus.net." CCB at 1. Complaint Counsel has acknowledged that Respondents have denied responsibility for the content of that website. Nevertheless, Complaint Counsel maintains that Respondents should be held liable as "willing participants in the challenged acts and practices." CCB at 2. Complaint Counsel asserts that the evidence shows that Respondents were "(1) identified as the party responsible for the domain 'agaricus.net' the website; (2) identified as part of the website's cancer-related advertising claims; (3) the exclusive US sales outlet on the website for RAAX11; and (4) responsible for fulfilling orders for RAAX11 placed on the website." CCB at 2.

Among other things, Complaint Counsel points to evidence that: Isely was listed as the “registrant” for the www.agaricus.net website on a public database; Isely’s name and telephone number were listed on the website as a source for US telephone orders; Isely’s name and telephone number were on the website in connection with a testimonial and as a source for product information; and Isely fulfilled the two undercover purchases made through the website by a FTC investigator. CCB at 11-13.

Moreover, according to Complaint Counsel, the evidence shows that “Respondents participated in this scheme with full knowledge of the deceptive and unsubstantiated claims being made on the website.” CCB at 2. In support of this claim, Complaint Counsel asserts that the evidence shows: (1) Isely knew that the domain name “agaricus.net” was registered to him; (2) Isely knew that the advertisements disseminated on www.agaricus.net were deceptive; and (3) Isely knew that his name and telephone number were being used to sell RAAX11. CB at 20-21. Further, Complaint Counsel asserts that “Respondents had the ability to control” www.agaricus.net. CCB at 2. As a basis for this claim, Complaint Counsel states that after Isely was contacted by the FDA and by Complaint Counsel regarding www.agaricus.net, Isely’s name was removed from the domain name registration information; references to Isely were removed from www.agaricus.net; and www.agaricus.net no longer sells to residents of the United States. CCB at 5.

Complaint Counsel acknowledges that there is no proof that Respondents were involved in drafting or creating the advertisements at issue. CA Tr. at 8. Complaint Counsel also acknowledges that there is no proof that Isely saw any of the Challenged Advertisements on the website. CA Tr. at 26-27. In addition, Complaint Counsel concedes that it adduced no proof that Isely received any money from any sales through the www.agaricus.net website or that Respondents received any telephone orders as a consequence of the identification of Isely on the www.agaricus.net website. CA Tr. at 15-16, 19. Complaint Counsel argues that the evidence of Respondents’ participation in, knowledge of, and ability to control the www.agaricus.net website is sufficient to render Respondents liable under Section 12 of the Act for disseminating, or causing the dissemination of, the Challenged Advertisements on www.agaricus.net, and that liability under Section 12 does not require Respondents to have “push[ed] the proverbial button that launched the challenged advertising claims into cyberspace . . . .” CCB at 19. *See generally* CCB at 17-21.

## **2. Respondents’ contentions**

Respondents dispute Complaint Counsel’s interpretation of the evidence and contend that Complaint Counsel has failed to prove that Respondents disseminated, or caused the dissemination of, the Challenged Advertisements on the www.agaricus.net website. RB at 1-2.

Respondents assert that, according to the evidence: Isely, doing business under a trade name “Gemtronics,” operated a retail dietary supplement business out of his home beginning in 1993; in 2000, Isely became a wholesale customer of Takesun do Brasil, buying various products for resale in his retail business; and Isely sold dietary

supplements principally through telephone and e-mail orders, but with no orders coming from the www.agaricus.net website. RB at 9-11. In addition, according to Respondents, the evidence demonstrates that being listed as the registrant of www.agaricus.net on a public database does not prove that Respondents owned or controlled that website or its content, and that Takesun do Brasil and an individual named George Otto Kather, a/k/a George Otto (“Otto”), owned and controlled the www.agaricus.net website and its content. RB at 2, 5-9.

Respondents also assert that the evidence shows: Isely’s name was listed as registrant of www.agaricus.net without his knowledge or permission; Isely’s name and telephone number for USA telephone orders were placed on the www.agaricus.net website without his knowledge or permission; Isely learned of such unauthorized use for the first time when he received a draft administrative complaint from Complaint Counsel in March 2008; and Isely promptly contacted Otto, and demanded that Otto remove any reference to Isely on any webpages of www.agaricus.net and as a contact person for the www.agaricus.net website. RB at 1-2, 10-12. Respondents further assert that Isely received no money from the undercover purchases on the www.agaricus.net website, and that Complaint Counsel has failed to show that Respondents received any economic benefit from any sales through the www.agaricus.net website. RB 12-14. Moreover, Respondents contend the evidence shows that, although Isely formed the corporation Gemtronics, Inc., that corporation never conducted any business and is essentially an inactive corporate shell. RB at 16-17.

Respondents state that, in response to receiving the draft administrative complaint from Complaint Counsel in March 2008, they advised Complaint Counsel of the foregoing contentions and provided evidence in support thereof, but that Complaint Counsel did not conduct any further investigation and filed the Complaint in the same form as the draft provided to Respondents. RB at 2-3.<sup>2</sup>

#### **F. Summary of Initial Decision**

Following applicable law, and evaluating the allegations contained in the Complaint and the entire record, there is insufficient evidence to hold either Respondent liable for deceptive advertising on the www.agaricus.net website. As discussed more fully and in detail in this Initial Decision, Complaint Counsel has failed to meet its burden of demonstrating, by a preponderance of the evidence, that either Isely or Gemtronics, Inc. disseminated or caused the dissemination of advertisements on the www.agaricus.net website, as alleged in the Complaint. For this reason, the entire Complaint must be dismissed, and a determination of whether the advertisements in question are false or misleading need not, and will not, be reached.

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<sup>2</sup> In the last sentence of the conclusion in Respondents’ Post-Trial Brief, Respondents ask to be reimbursed for attorneys’ fees and costs pursuant to Rule 3.81 of the Commission’s Rules of Practice. RB at 18. Any such request is not appropriate at this time. 16 C.F.R. § 3.81(a), 3.82.

## **II. FINDINGS OF FACT**

### **A. The Parties**

1. Respondent William H. Isely (“Isely”) is an individual, residing at 964 Walnut Creek Road, Franklin, North Carolina. (Isely, Tr. 180; JX 12 (Isely, Dep. at 6)).
2. Respondent Gemtronics, Inc. was formed by Isely as a North Carolina corporation on September 20, 2006. Isely is listed as the registered agent for Gemtronics, Inc. and the principal office is listed as Isely’s home address, 964 Walnut Creek Road, Franklin, North Carolina. (JX 13; Liggins, Tr. 58-60).

### **B. Background Facts**

#### **1. The witnesses**

3. Complaint Counsel presented two live witnesses: an investigator for the Federal Trade Commission (“FTC”), Michael Liggins (“Liggins”) and Respondent Isely. Respondent Isely’s deposition testimony was also admitted into evidence. (JX 12).
4. Pablo Velasco testified by deposition. Velasco is a customer service supervisor for TierraNet, which does business as “Domain Discover.” Domain Discover is the registrar of the www.agaricus.net website. (JX 4 (Velasco, Dep. at 4-6; JX 5-6, 16)).
5. The expert report of Omer Kucuk, M.D. was admitted into evidence. Dr. Omer Kucuk was designated as an expert witness by Complaint Counsel to evaluate whether there is support for the advertising claims regarding RAAX11 on the www.agaricus.net website (the “Challenged Advertisements”). (JX 1).
6. Based on Isely’s demeanor, and his candid, forthcoming responses to questioning, Isely was a credible witness.
7. Based on Liggins’ demeanor, and his candid, forthcoming responses to questioning, Liggins was a credible witness.

#### **2. Isely’s background**

8. Isely was born in 1925 in Turkey. His parents were missionaries. (Isely, Tr. 346; JX 12 (Isely, Dep. at 6)).
9. Isely was mostly home-schooled abroad until high school. At that time, before World War II, he was sent back to the United States from overseas and finished high school in Kansas. (Isely, Tr. 346; JX 12 (Isely, Dep. at 6)).

10. Toward the end of World War II, Isely served in the Navy as a radio operator. (JX 12 (Isely, Dep. at 7)).
11. Isely received a bachelor's degree and a master's degree in mechanical engineering. He had an over forty-year career as a systems engineer for the defense industry, working on missiles and rockets, as well as on one spacecraft. Isely's highest position was as program manager of a two-billion dollar defense-related program. (Isely, Tr. 344; JX 12 (Isely, Dep. at 9); JX 9 (Isely's Answer to Interrogatory No. 20)).

### **3. Isely's dietary supplement business**

#### **a. Isely's retail business**

12. In 1970 or 1971, Isely experienced a downturn in his health and began researching the role of nutrition in health. He became a vegetarian and began ordering dietary supplements for his own use. He liked the products that he was using and shared information about those supplements with others. He began ordering products not only for himself, but also for his friends. (Isely, Tr. 335-36, 345).
13. By 1993, Isely had retired from his career in the defense industry and his home-based business selling dietary supplements grew to the point that he decided it was necessary to collect sales tax. Isely registered his business with the state of North Carolina for this purpose. Isely chose the name "Gemtronics" for his business because he was already using that name in connection with an existing business selling gemstones, and he had added dietary supplement sales to that business. (Isely, Tr. 181-82, 321-22, 336-37).
14. Isely operated his home-based dietary supplement business as a sole proprietor, doing business as Gemtronics. Isely did not file any official documents for the trade name Gemtronics because it was his understanding that, other than for sales tax purposes, there was no requirement in North Carolina to register a trade name. (Isely, Tr. 181-82; JX 9 (Isely's Answer to Interrogatory No. 1); JX 12 (Isely, Dep. at 105-06)).
15. Most of the orders Isely received from his customers were made by telephone or e-mail. People would either send Isely an e-mail, stating the products they wanted and how they wanted to pay for them, or, particularly in the case of regular customers, would place orders by telephone. (Isely, Tr. 187-88).
16. Isely had a bank account under the name "Gemtronics," in which he deposited funds received from the sale of dietary supplements and paid out expenses, including the expense of purchasing the products to be sold. (JX 9 (Isely's Answer to Interrogatory No. 18)).

17. Isely had a merchant bank account under the name "Gemtronics" to receive funds from consumers who paid for products by credit card. (Isely, Tr. 217, 222-23).
18. The most common method by which his customers paid Isely for dietary supplements was by credit card. The only way Isely could charge a credit card was by telephone access to his merchant account from his home, using the credit card number given to him by the customer. (Isely, Tr. 217, 222, 282).
19. Until approximately 2000, Isely sold only two major products. One product Isely sold was an aloe supplement by the Mannatech Company. The other product Isely sold was Microhydrin, an alkalizer by Royal Bodycare. (Isely, Tr. 181; JX 9 (Isely's Answer to Interrogatory No. 1)).

**b. Isely's wholesale importing business**

20. In 2000, Isely added to his retail product line products manufactured by Takesun do Brasil, Lda ("Takesun" or "Takesun do Brasil"). (Isely, Tr. 182, 184; JX 9 (Isely's Answer to Interrogatory No. 1); JX 12 (Isely, Dep. at 15)).
21. Isely began importing a dietary supplement called RAAX11 from Takesun in 2004, and made his first sale of RAAX11 in September 2004. (Isely, Tr. 182; JX 12 (Isely, Dep. at 31)).
22. In 2000, Isely began using the trade name "Nature First" for his importing business. (JX 9, Exhibit A).
23. In June 2001, Isely formed a partnership with a woman Isely identified only as "Jane X," who lived in the United States and was Isely's largest customer, to import and sell Takesun products in the United States. The plan was for Isely to handle the importing, because he had become experienced with this process, and his partner would distribute the products. The partnership was formally registered under the name "Takesun USA." There was insufficient business to make the partnership profitable and the partnership was dissolved in December 2001. (Isely, Tr. 204-05, 213; JX 9, Exhibit A).
24. For his partnership with Jane X, Isely decided to use the name "Takesun USA" because since he was selling Takesun products, it did not seem unreasonable to him to do so, and because Isely believed that customers might want to identify what products they were buying. The name was not intended to imply that he was part of Takesun do Brasil. As Isely stated: "When a Chevrolet dealer uses the word 'Chevrolet,' he's still an independent business." (Isely, Tr. 289).
25. Although the Takesun USA partnership with Jane X was formally dissolved in 2001, Isely continued to use "Takesun USA" as a trade name for some purposes. F. 26-30.

26. After the Takesun USA partnership was dissolved, Isely used "Takesun USA" as a trade name for his importing business because he had been using it, and because he wanted to distinguish his wholesale business from his retail business. (Isely, Tr. 288, 295-96).
27. After the Takesun USA partnership was dissolved, Isely placed the trade name Takesun USA on his business brochure, so customers would know the brand that they were buying. (Isely, Tr. 295).
28. After the Takesun USA partnership was dissolved, Isely continued to use the trade name Takesun USA in the belief that the partnership might get reconstituted, although it did not. (Isely, Tr. 213-15).
29. After the Takesun USA partnership was dissolved, Isely continued to use the trade name Takesun USA to look for distributors to sell Takesun products for his wholesale business. Isely was not able to retain any permanent distributors. In addition, Isely concluded that it was not economically viable to share the retail mark-up with distributors and stopped looking for distributors. (Isely, Tr. 215, 256-57).
30. JX 73 is entitled "Distributor Introductory Package – Welcome to the world of Takesun USA." It is directed at potential distributors of Takesun products for Takesun USA. It states in part: "More information is available on the Takesun do Brasil web site, [www.agaricus.net](http://www.agaricus.net) or [www.our-agaricus.com](http://www.our-agaricus.com)." (JX 73).
31. After the enactment of the Homeland Security Act in the wake of September 11, 2001, the logistics of importing dietary supplements into the United States became more complicated. In order to expedite getting his shipments through customs, in 2003 Isely registered his home, which was his place of business, with the FDA as an "FDA approved warehouse." To do so required a background check on Isely. (JX 12 (Isely, Dep. at 20); Isely, Tr. 201-02, 206, 341; JX 9, Exhibit A).
32. Isely registered his home as a warehouse with the FDA using the name "Nature First." (JX 9, Exhibit A).
33. An FDA warehouse registration enables an importer to expedite receipt of goods. Isely's FDA warehouse registration allows him to import goods from any company, anywhere in the world. (Isely, Tr. 341).

#### **4. Formation of Gemtronics, Inc.**

34. Isely formed the corporation Gemtronics, Inc. because his family advised him that he would be better off if he conducted business as a corporation. Although Isely was doubtful, he formed the corporation after one of his relatives offered to help with the accounting and tax aspects. The relative's offer of help was withdrawn thereafter. Isely thought paying for commercial accounting services did not make



- sense for a one-person, part-time business and, to avoid spending money on accountants, Isely decided thereafter not to use the corporation. (Isely, Tr. 215-16).
35. Gemtronics, Inc. never had an organizational meeting or issued any shares. (Isely, Tr. 216).
  36. Gemtronics, Inc. never obtained a federal or state tax identification number. (Isely, Tr. 216; JX 12 (Isely, Dep. at 101)).
  37. Gemtronics, Inc. has no officers or board of directors. (JX 12 (Isely, Dep. at 101)).
  38. Gemtronics, Inc. has never executed any documents, such as a contract. (JX 12 (Isely, Dep. at 102)).
  39. Gemtronics, Inc. has never conducted business. (Isely, Tr. 216).
  40. Gemtronics, Inc. has not earned any revenue, including revenue from the advertising, marketing, promotion, or sale of RAAX11. (JX 10 (Gemtronics, Inc.'s Answers to Interrogatory Nos. 6, 10)).
  41. Gemtronics, Inc. does not have a bank account. (Isely, Tr. 216; JX 12 (Isely, Dep. at 102)).
  42. Isely opened a merchant bank account under Isely's trade name, "Gemtronics," not in the name of the corporation Gemtronics, Inc. (Isely, Tr. 222-23).
  43. In anticipation of the Gemtronics corporation going forward, Isely had applied for and received a credit card in the name of Gemtronics, Inc. He put the card away in a drawer and never activated it. (Isely, Tr. 223).
  44. Gemtronics, Inc. did not have a corporate book or corporate seal. (Isely, Tr. 216).
  45. No annual reports have been filed for Gemtronics, Inc. (JX 12 (Isely, Dep. at 102-03)).
  46. If Gemtronics, Inc. still exists, it exists in name only as an empty corporate shell. F. 34-45.

## **5. RAAX11**

47. RAAX11, according to its product label, is produced in Brazil by Takesun. (Isely, Tr. 182; JX 55).
48. RAAX11 is a liquid which comes in a bottle. The label on the bottle states that RAAX11 is a "Strong Water Extract" dietary supplement, comprised of juice

- from chrysobalanus icaco and agaricus blazei murill mushrooms. (JX 55; JX 1 (Report of Dr. Omer Kucuk) at 003).
49. RAAX11 was invented in approximately January 2004. (Isely, Tr. 274).
  50. RAAX11 became available for sale in 2004. (Isely, Tr. 269).
  51. Isely began importing RAAX11 from Takesun in 2004, and made his first sale of RAAX11 in September 2004. (Isely, Tr. 182; JX 12 (Isely, Dep. at 31)).
  52. Isely is not the only person to have imported RAAX11 into the United States. Other entities, including Greenpharmacy, offer RAAX11 for sale in the United States. If retailers want to sell RAAX11, they do not need to buy it from Isely, but can purchase RAAX11 from anyone who can import it. (Liggins, Tr. 159-60; Isely, Tr. 234, 239-40; JX 33).
  53. Individuals in the United States who wish to purchase RAAX11 can do so directly on the www.agaricus.net website without going through Isely. (JX 12 (Isely, Dep. at 25); Liggins, Tr. 74-75).
  54. RAAX11 was one of approximately ten popular Takesun products that Isely imported and sold. (Isely, Tr. 207-10).
  55. Between 2004 and 2008, Isely's sales of RAAX11 totaled approximately \$115,000. (JX 9 (Isely's Answer to Interrogatory No. 5); JX 12 (Isely, Dep. at 42)).
  56. Approximately ninety-five percent of the orders Isely received were from repeat customers who contacted him by telephone or e-mail. (Isely, Tr. 335; JX 9 (Isely's Answer to Interrogatory No. 5)).
  57. In mid-2008, Isely stopped selling all dietary supplements, and ceased doing business. Isely is no longer selling RAAX11 or any other dietary supplements. (Isely, Tr. 200-01).

**C. Isely's Business Relationship with Takesun do Brasil and Otto**

58. Isely came to do business with Takesun do Brasil because, in 1999, when Isely was diagnosed with prostate cancer, he began experimenting with using dietary supplements to help manage his symptoms and learned about the agaricus mushroom from Brazil. (Isely, Tr. 182-83, 270; JX 12 (Isely, Dep. at 14-15)).
59. After buying the mushroom from a homeopath in Arizona proved unreliable, Isely began ordering Agaricus Blazei Murill, or ABM, for himself from Takesun do Brasil via the www.agaricus.net website. (Isely, Tr. 183, 270; JX 12 (Isely, Dep. at 14-15)).

60. Isely dealt with Takesun do Brasil through a man named George Otto Kather, also known as George Otto (“Otto”), a German national residing in Brazil. (JX 12 (Isely, Dep. at 15); JX 9 (Isely’s Answer to Interrogatory No. 7); Isely, Tr. 253, 348).
61. Although Otto spoke German, Portuguese, and Spanish, his spoken English was “a little bit above pidgin but not much.” Because of the language barrier, Isely avoided talking to Otto on the telephone and they communicated mostly by e-mail. (Isely, Tr. 184-85; F. 69).
62. Otto held himself out as, and Isely believed that Otto was, in control of Takesun. (JX 12 (Isely, Dep. at 15-16); JX 69; F. 61, 63-64, 67-68).
63. After a few months of ordering the agaricus mushroom for himself from Takesun via the [www.agaricus.net](http://www.agaricus.net) website, Isely found that such retail purchasing was very difficult because the methods of shipment from Brazil were not reliable. Otto advised Isely that Takesun did not have anyone reliably selling its products in the United States and asked Isely if he would be interested. After making some smaller purchases from Takesun and determining that there was sufficient interest in Takesun’s products from his existing client base, Isely decided to begin purchasing Takesun products on a wholesale basis. Isely first placed what he deemed to be a significant order of Takesun products, amounting to approximately \$3,000 in 2000. (Isely, Tr. 182-84; 337).
64. In the beginning of Isely’s relationship with Takesun, Otto asked if Isely wanted to be a distributor for Takesun. Otto sent Isely a proposed contract, but Isely was dissatisfied with the improper English language usage and was concerned about the international law aspects of entering into the contract. Isely determined not to enter into a distributorship agreement with Otto. Isely and Otto came to an understanding that each order would be a stand-alone purchase. Isely would not be required to purchase product from Takesun and would not have the right to receive a particular price from Takesun. (Isely, Tr. 211-12; JX 12 (Isely, Dep. at 21-22)).
65. In 2001, Isely agreed to share his prostate cancer story with people who were interested and gave Otto permission to use a small synopsis of Isely’s experience, including his medical condition, his use of Takesun products, and his use of vitamins. Isely prepared a short statement that Otto was to use. In addition, Isely required Otto not to use Isely’s real name, but instead to use the pseudonym “Henry.” Isely gave Otto factual information reflected in Isely’s medical records, so Isely was not concerned about misuse for advertising purposes. (Isely, Tr. 269, 342-43).
66. Prior to the time that RAAX11 was being sold on the [www.agaricus.net](http://www.agaricus.net) website, Isely learned that the statement he gave to Otto in 2001, described in F. 65, had been modified and that his real name was being used, instead of the pseudonym,

- “Henry.” Isely did not challenge Otto for violating their agreement. (Isely, Tr. 260-62).
67. During Isely’s peak time in business, he tried to place an order with Takesun about once a month in order to maintain the wholesale prices that Takesun was giving him. Isely’s understanding with Otto was that Otto expected to receive about \$5,000 per month in orders from Isely to maintain those wholesale prices. Isely’s total product orders from Takesun ranged from approximately \$5,000 to as much as \$8,000 per month. (Isely, Tr. at 210-11, 287; JX 12 (Isely, Dep. at 63)).
  68. Prior to placing his monthly order with Takesun, Isely and Otto would negotiate the order through several e-mail exchanges, over the course of approximately one week. Every order was an independent “cash deal.” (Isely, Tr. 201, 347-48).
  69. Otto’s limited English created a language barrier between Isely and Otto. It would take several e-mail exchanges between Isely and Otto simply to come to an understanding regarding Isely’s order. (Isely, Tr. 184-85, 347-48).
  70. The relationship between Isely and Takesun do Brasil was that of wholesale buyer and manufacturer/supplier. Isely and Takesun do Brasil were separate, independent businesses. (JX 9 (Isely’s Answer to Interrogatory No. 7); F. 63-64, 67-68).

**D. Isely’s Business Relationship with the www.agaricus.net website**

**1. Isely’s webpage link from the www.agaricus.net website**

71. During the 2000 to 2002 period, before RAAX11 was invented or sold, Takesun provided Isely with a free webpage (“Isely’s Webpage”), which Takesun offered to all of its wholesale buyers. Isely gave Otto the content for the webpage, and used the trade name “Nature First” on it. (Isely, Tr. 204; JX 12 (Isely, Dep. at 22-24); JX 9, Exhibit A; JX 9 (Isely’s Answer to Interrogatory No. 1); F. 49-50, 104).
72. Isely’s Webpage was not a separate website, but was a page linked to the www.agaricus.net website. (JX 12 (Isely, Dep. at 22-23); F. 73).
73. Isely’s Webpage was not the sole link for USA sales on the www.agaricus.net website. Isely’s customer and business associate Jane X had a webpage there as well. If consumers clicked “US Sales” on the www.agaricus.net website, they would be directed to a webpage that presented a choice of clicking through to Isely’s Webpage or Jane X’s webpage. It was anticipated that more seller pages would be added, but that did not occur. (JX 12 (Isely, Dep. at 24-25)).
74. The link to Isely’s Webpage from the www.agaricus.net website was terminated in 2002. (JX 9, Exhibit A); JX 12 (Isely, Dep. at 25-26)).

## 2. Isely's website, www.our-agaricus.com

75. In 2002, Isely learned that the FDA had contacted Otto about the www.agaricus.net website, which caused Isely to become concerned about Otto's advertising and to want to avoid formal legal ties with Takesun. (JX 12 (Isely, Dep. at 21-22)).
76. After 2002, Isely decided he needed an independent website, without a link to the www.agaricus.net website. Isely did not have the time, energy, or know-how to generate a website himself. Otto offered to arrange a website for Isely at no cost to Isely, which Otto offered to all of his larger buyers as a service. Isely believed that the only material on the planned website would be that to which Isely agreed. (Isely, Tr. 188-89, 247-48, 352; JX 9 (Isely's Answer to Interrogatory No. 7); JX 9, Exhibit A; JX 12 (Isely, Dep. at 26)).
77. Isely established his own website, www.our-agaricus.com, distinct from the www.agaricus.net website, in 2004. One of the reasons he did so was to isolate himself from advertising on the www.agaricus.net website. Isely was interested in selling RAAX11 only as a dietary supplement. (JX 12 (Isely, Dep. at 53-54)).
78. In July 2004, with Isely's permission, Otto registered the domain name selected by Isely, "www.our-agaricus.com," and created the website for Isely. Isely also had Otto create another domain, "www.our-agaricus.us." Although there were two names, there was essentially only one website ("Isely's Website") which used two names in an effort to maximize possible search hits. (JX 19; Isely, Tr. 247, 253, 264, 352; JX 12 (Isely, Dep. at 26, 45); JX 9, Exhibit A).
79. Otto managed Isely's Website and posted the content Isely directed Otto to post. If a change was necessary, typically to a price, Isely would send Otto an e-mail regarding the change, and Isely would thereafter check www.our-agaricus.com to verify that Otto had made the change. (JX 12 (Isely, Dep. at 26-27); Isely, Tr. 247, 254-55).
80. Isely had no understanding of the technicalities of registering websites or controlling their content. (Isely, Tr. 248-49, 255, 352).
81. Isely offered RAAX11 for sale on Isely's Website, www.our-agaricus.com. (Isely, Tr. 193).
82. Otto controlled whether Isely received sales made through the shopping cart page on Isely's Website. Isely could not receive payment from any credit card order on Isely's Website, unless Otto forwarded the credit card information to Isely, so that Isely could charge the card by telephone from his home. (Isely, Tr. 198, 281-85).
83. After the establishment of Isely's Website in June 2004, Isely's Website, www.our-agaricus.com, competed with Otto's website, www.agaricus.net. (Isely, Tr. 233-34).

84. During the period Isely was selling RAAX11, approximately two and one-half percent of Isely's orders came through Isely's Website, [www.our-agaricus.com](http://www.our-agaricus.com). (JX 9 (Isely's Answer to Interrogatory No. 5)).

### **3. Drop shipments**

85. On occasion, Otto would ask Isely to make a "drop shipment" for Otto, which Isely defined as a delivery of a product from Isely's stock for a sale that Otto made, for which Otto received payment. Typically, drop shipments were small, sample orders that were not cost-effective to ship from Brazil. Accordingly, as a favor to Takesun and to maintain a good business relationship with his supplier, Isely would fulfill the orders. Isely might or might not be paid for performing a drop shipment. (Isely, Tr. 195-96, 286-87; JX 12 (Isely, Dep. at 61-63)).
86. To request a drop shipment, Otto would send an e-mail to Isely that included the amount of the sale and confirmation that Otto had been paid. Isely agreed that he would include a receipt in the package, which Isely entitled an "invoice," so that the customer receiving the package would see what amount was paid, where the package came from, and whom the purchaser could contact if there was a problem. (Isely, Tr. 196-97, 294, 354-55).
87. Approximately two and one half percent of Isely's RAAX11 orders were drop shipment requests from Otto. (JX 9 (Isely's Answer to Interrogatory No. 5)).

### **4. Price comparisons**

88. Isely's business strategy for selling RAAX11 was not to advertise the product, but to have the lowest price, because Isely believed that people who shopped on the Internet were looking for the lowest price. To check what others were charging, Isely would search various websites on the Internet, including [www.agaricus.net](http://www.agaricus.net), Greenpharmacy, All-Vita Northwest, and KAG Naturals, all of which sold RAAX11 in the United States. (Isely, Tr. 233-35).
89. Because the [www.agaricus.net](http://www.agaricus.net) website was a competitor of Isely's, Isely would check the prices on the shopping cart page of [www.agaricus.net](http://www.agaricus.net) once or twice a year. In addition, if Takesun significantly changed its wholesale price to Isely, Isely also would go to the shopping cart to check Takesun's retail prices. To get to the shopping cart page, Isely would go the [www.agaricus.net](http://www.agaricus.net) home page, and then to the shopping cart page, by clicking a link on the home page. (Isely, Tr. 233-34).
90. Once Isely's Website was established in July 2004, the only reason Isely would go to the [www.agaricus.net](http://www.agaricus.net) website was to check the prices on the shopping cart page, to make sure Isely's prices were lower than Otto's. (JX 12 (Isely, Dep. at 54)).

91. Isely did not see the advertisements that are the Exhibits to the Complaint when he visited the [www.agaricus.net](http://www.agaricus.net) website to check prices. (Isely, Tr. 236-37).

**E. Connection between RAAX11 Advertisements on the [www.agaricus.net](http://www.agaricus.net) website and Isely**

**1. Reference to Isely's name and/or telephone number for information or telephone orders**

92. During the times relevant to this action, the following telephone numbers belonged to Isely: 828-369-7590; 828-369-5861; and 866-944-7359. (JX 9 (Isely's Answer to Interrogatory No. 21; JX 15)).

**a. Exhibits to the Complaint**

93. Exhibit A to the Complaint, entitled "Not working Chemo . . . and now," is a printout from the [www.agaricus.net](http://www.agaricus.net) website. It describes a purported OPC Agaricus protocol for breast cancer and urges consumers to "try it." The webpage printout makes representations concerning the protocol and results. It refers to OPC Agaricus, "ABM" and RAAX11. RAAX11 is referred to in conjunction with the phrase "Has a cancer killer been discovered." Regarding the OPC Agaricus protocol, the webpage printout concludes by stating: "If you are living in the US, just call Mr. Isely and he will explain how it works. Or fill out form." (JX 7, Exhibit A).

94. Exhibit A to the Complaint, after representations concerning leukemia, states: Informations [sic] USA 828-369-7590 or Brazil 55 47 3001 5260 or UK 44 020 8133 2774. (JX 7, Exhibit A).

95. JX 33 is a printout from the [www.agaricus.net](http://www.agaricus.net) website containing virtually the same advertisement as Exhibit A to the Complaint, including erroneous use of the word "informations." JX 33 also includes, after the telephone numbers, the statement, "RAAX11 is also sold in the USA by Greenpharmacy." (JX 7, Exhibit A; JX 33; Liggins, Tr. 92).

96. The USA telephone number on Exhibit A to the Complaint, and on JX 33, belongs to Isely. (JX 7, Exhibit A; F. 92).

97. Exhibit A to the Complaint contains errors in English usage, including the statement: "Many doctors all over the world are, reporting, since he is using the OPC Agaricus protocol nobody of his patient died." (JX 7, Exhibit A).

98. Exhibit B to the Complaint is a printout from the [www.agaricus.net](http://www.agaricus.net) website that contains a headline, "Has a cancer killer been discovered?" It describes purported cancer studies and results involving chrysobalanus icaco, and refers to a RAAX11 protocol in several countries around the world and "excellent results." Representations in Exhibit B overlap with representations in Exhibit A to the

Complaint. Exhibit B to the Complaint is virtually the same document as JX 32 and JX 42, which are each printouts from the [www.agaricus.net](http://www.agaricus.net) website dated August 15, 2007 and January 27, 2006, respectively. (JX 7, Exhibit A; JX 7, Exhibit B; JX 32; Liggins, Tr. 91-92, 102).

99. There are no telephone numbers or references to Isely on the advertisement, “Has a cancer killer been discovered?,” which comprises Exhibit B to the Complaint, JX 32, and JX 42. Instead, each document states: “If you are interested in this kind of alternative treatment, send us [sic] e-mail with you [sic] phone number and we will contact you a.s.a.p.” (JX 7, Exhibit A; JX 7, Exhibit B; JX 32, 42).
100. Exhibit C to the Complaint is a printout from the [www.agaricus.net](http://www.agaricus.net) website. It describes a purported RAAX11 protocol for breast and other forms of cancer, including the claimed number of patients, products consumed, and results. The document states that “41 women had totally recovered, 23 women were in remission, [and] 27 were stable . . . .” After the word “contact,” the page sets forth telephone numbers that belong to Isely. Exhibit C also states: “If you would like to find out how you too can participate in our ongoing study in the USA,” call a telephone number belonging to Isely. (JX 7, Exhibit C; F. 92).<sup>3</sup>
101. Exhibit D to the Complaint is a printout from the [www.agaricus.net](http://www.agaricus.net) website. It describes a purported leukemia patient who claimed results after taking the “RAAX11 protocol.” Exhibit D also refers to a purported patient with “Prostate cancer, advanced stage, using RAAX11, PSA drops from 160 to 120 within 8 days.” JX 38 is a printout from the [www.agaricus.net](http://www.agaricus.net) website, from 2004, that makes essentially the same representations as those contained in Exhibit D. (JX 7, Exhibit D; JX 38; Liggins, Tr. 99-100). There is no telephone number on Exhibit D to the Complaint or on JX 38. (JX 7, Exhibit D; JX 38).
102. The name “Gemtronics, Inc.” does not appear on any of the Exhibits to the Complaint or other exhibits of printouts from the [www.agaricus.net](http://www.agaricus.net) website. (JX 7, Exhibits A-D; JX 24-42).

**b. Other printouts from the [www.agaricus.net](http://www.agaricus.net) website**

103. JX 34 is a printout of the home page from the [www.agaricus.net](http://www.agaricus.net) website. The date is obscured, but appears to be 8/15/2007. The page describes a purported study involving breast-cancer patients, agaricus, agaricus extract, and RAAX11. The claimed statistical results are the same as those claimed in Exhibit C to the Complaint. There is also a chart, which is not legible, that refers to other types of cancer. (JX 34; JX 7, Exhibit C).

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<sup>3</sup> The telephone numbers are redacted on the copy of Exhibit C to the Complaint that is on file at [www.ftc.gov](http://www.ftc.gov) for this matter. The telephone numbers are not redacted on the copy of Exhibit C to the Complaint that was submitted into evidence.



104. Near the top of the page of JX 34 is the statement: "Chemo and Radiation not working. Call now 1 866 944 7359 for US informat[ion]." The telephone number on JX 34 belongs to Isely. At the side of the page of JX 34 is the statement, "Put your link here FREE" and below that, is what appears to be a link to "the Greenpharmacy." (JX 34; Isely, Tr. 279; F. 92).
105. JX 30 is a printout from the www.agaricus.net website, dated 1/30/2008, entitled "Not working Chemo – Try our OPC Agaricus and get 100 \$ discount for ea. bottle." Below is the statement, "You need help? Let's talk about it . . . . Phone: 828-369-7590." The telephone number on JX 30 belongs to Isely. (JX 30; F. 92).
106. At the top of JX 30 is a reference to a claimed RAAX11/OPC Agaricus protocol and the statement: "Dr. Steven Hall reports that 100% of his patients are in remission. (16.08.2006)." (JX 30; *see also* JX 41 ("Dr. Steven Hall reports that 100% of his patients are in remission. (06.01.2006)").
107. On two occasions Isely received telephone calls from women who said that they had heard about a cancer study in the United States. The callers did not tell Isely where they had learned of the study. Isely told them that he was not aware of any study and that he could not help them. (Isely, Tr. 271-72).
108. Two printouts from the www.agaricus.net website set forth Isely's telephone number with regard to product ordering: JX 26 and JX 35. JX 35 is a printout from the www.agaricus.net website from April 2004, entitled "Shopping cart for USA only." Underneath a prominent display of the logos for Visa, Master Card, and American Express credit cards, the document depicts a telephone icon and states, "USA Phone 1 828 369 7590," which is one of Isely's telephone numbers. (JX 35).
109. This shopping cart webpage depicted in JX 35 does not offer RAAX11. (JX 35).
110. The shopping cart webpage depicted in JX 27 does not contain Isely's telephone number. (JX 27).
111. JX 26, a printout of the shopping cart webpage for USA and Asia from December 13, 2007, refers prominently to payments through "PayPal," with the "PayPal" logo adjacent to a display of the logos for American Express, Master Card and Visa credit cards. Underneath those icons is the statement, "Phone Order 866-944-7359," which is one of Isely's telephone numbers. (JX 26; F. 92).
112. JX 35 notes at the top: "You buy direct from registered manufacture [sic] at the FDA in Brazil with FDA registered Warehouse in NC/USA." JX 36, a printout from the www.agaricus.net website from 2004, also makes a similar representation to that in JX 35 above, stating: "FDA registered manufacture [sic] in Brazil and FDA registered Warehouse in USA." (JX 35; JX 36).

113. Isely's telephone number appears on JX 21, which is a printout from www.takesun.com, dated 12/20/2007, seeking distributors for Takesun, and referring to an FDA registered warehouse in Franklin in the USA. (JX 21).
114. A printout from the www.agaricus.net website on January 30, 2008, JX 28, states: "Become our Partner . . . You own a health food store, are a medical advisor or just want to offer your people Agaricus blazei Murill; this is your chance to sign up. . . . Get the product right from the producer in Brazil. . . . [J]ust call us, . . . or send us your phone number and we [sic] call you back." The only telephone number on the page is described as "Contato International: Fone +55 47 3001 5260." (JX 28).
115. There was no agreement between Isely and Otto that the www.agaricus.net website would refer consumers to Isely. (Isely, Tr. 267).
116. Isely did not accept PayPal for retail purchases. (Isely, Tr. 220).
117. Isely did not sell RAAX11 through the www.agaricus.net website. (Isely, Tr. 194-97; JX 9 (Isely's Answer to Interrogatory No. 5)).
118. Otto controlled orders received through the shopping cart page on the www.agaricus.net website. (Isely, Tr. 198, 351-52; *see* F. 85-86, 127, 134, 141).

## 2. Use of Isely's name and telephone number for testimonial

119. JX 24 is a printout from the www.agaricus.net website, dated 12/13/2007, entitled "Prostate Cancer Survivor." The document states in pertinent part:

This is the story of Bill Isely who came to us in the summer of 2000, looking for a natural way to handle the prostate cancer his doctor had told him he had . . . . [H]e bought our RF 1000 and in a short time his PSA came down . . . . He took the AMAS blood test that showed his cancer was gone.

Now he helps other people get our products for their cancer problems like breast, lung, liver, and all the other cancer problems in this modern world of so much pollution. He is even working with doctors who want to use our latest miracle from the Rain Forest, the RAAX11.

He is in North Carolina and wants to help you. Call 828-369-7590 to talk to him, or go to our home page and click on USA.

(Liggins, Tr. 52; JX 24; *see also* JX 29 (same, dated 1/30/08); JX 31 (www.agaricus.net home page including the text, "Prostate Cancer Patient now cancer free . . . . Call now testimonie [sic] Bill at 828-369-7590"; JX 40 (same)).

120. JX 25, the home page of the www.agaricus.net website printed on December 13, 2007, and JX 28, the home page of the www.agaricus.net website printed on January 13, 2008, advertise RAAX11. The second page of each of these printouts states: "Call now testimonie [sic] Bill at 828-369-7590." (Liggins, Tr. 53-54, 105; JX 25).
121. JX 25, 28, 31, 34, and 40 are printouts of home pages from the www.agaricus.net website that refer to Isely. JX 25, 28, 31, and 40 refer to Isely's telephone number for "testimonie." JX 34 refers to Isely's telephone number for US information. (JX 25, 28, 31, 34, 40).
122. Isely did not give Otto permission to expand on the prostate cancer statement Isely gave to Otto, or to use the statement for advertising purposes. Isely did not give Otto permission to use the statement that Isely provided in 2001 to advertise RAAX11, which was not for sale until 2004. (F. 49-50; Isely, Tr. 269, 342-43).
123. Isely did not give Otto permission to use his name as a general point of contact for Takesun's websites, and Isely's name was used on the www.agaricus.net website without his permission. (Isely, Tr. 200-01, 343-44).

### **3. Isely's fulfillment of undercover purchases**

#### **a. The purchases**

124. As part of its investigation, on January 3, 2008, FTC investigator Michael Liggins, using the name Riece Miles, conducted an undercover purchase of one bottle of RAAX11 from the www.agaricus.net website (the "Miles Purchase"). The product sent in the Miles Purchase package was damaged in transit. On January 23, 2008, Liggins made a second purchase of one bottle of RAAX11 from the www.agaricus.net website using the name Dana Long (the "Long Purchase") (collectively, the "Undercover Purchases"). (Liggins, Tr. 44-45, 60-61, 74-75, 79-80, 82-84; JX 43-60).
125. Neither of the Undercover Purchases was made by telephone order. Liggins did not consider making the Undercover Purchases by telephone order. (Liggins, Tr. 160-61; *see* F. 126, 130).
126. The Miles Purchase was made by a credit card through PayPal, because PayPal was the only method by which a credit card could be used to pay for a purchase on the www.agaricus.net website. (Liggins, Tr. 150; JX 43-44; JX 49).
127. The e-mail sent from PayPal confirming the Miles Purchase contains the subject line: "Receipt for Your Payment to gotto@takesun.com." The e-mail confirms the purchase of one bottle of RAAX11 and that Miles has "paid (gotto@takesun.com)" \$134.90 for the purchase. The e-mail further states that if there are questions, "contact . . . gotto@takesun.com." (JX 43).

128. The e-mail receipt for the Miles Purchase contains the heading “gotto@takesun.com” and “PayPal secure payments.” The receipt identifies the seller as gotto@takesun.com. (Liggins, Tr. 76; JX 44).
129. The credit card receipt for the Miles Purchase shows payment, in the amount of \$134.90, to PayPal. Adjacent to the identification of PayPal is the telephone number 402-935-7733 and the letters “CA.” (Liggins, Tr. 82; JX 49).
130. The Long Purchase was made by a credit card through PayPal, because PayPal was the only method by which a credit card could be used to make a purchase on the www.agaricus.net website. (Liggins, Tr. 150; JX 50-52; JX 60).
131. The shopping cart verification page that appeared during the purchase process for the Long Purchase is entitled “Takesun do Brasil,” states the details of the purchase of one bottle of RAAX11 for \$134.90, and notes that payment is made, in credit or cash, via PayPal. The verification page then states: “Your Credit Card is charged using a SSL secured server. On your statement will appear [sic] GEMTRONICS SECURE PAYMENTS.” (Liggins, Tr. 83-84, 136; JX 50 (capitalization in original)).
132. Liggins clicked the “continue” box at the bottom of the verification page described in F. 131, and was presented with another page, depicting the Takesun logo, entitled “Review Your Payment.” At the top of the page appears: “PayPal Secure Payments.” This review page contains the details of the Long Purchase and states: “This credit card transaction will appear on your bill as “TAKESUNPORT.” The review page further advises that “Takesun Portugal Lda. Verkauf Deutschland requires a phone number to complete this order.” (Liggins, Tr. 136-37; JX 51 (capitalization in original)).
133. Liggins did not know what “Takesunport” meant. (Liggins, Tr. 84-85; JX 51).
134. Liggins received an e-mail confirmation from PayPal regarding the Long Purchase. The subject line states: “Receipt for Your Payment to Takesun Portugal Lda. Verkauf Deutschland.” The e-mail “confirms that you have paid Takesun Portugal Lda. Verkauf Deutschland (vendas@takesunportugal.com)” and states that the credit card transaction will appear on the bill as “PAYPAL \*TAKESUNPORT\*.” Under “Business Information” the e-mail sets forth Takesun Portugal Lda. Verkauf Deutschland, with a contact e-mail address of vendas@takesunportugal.com. The e-mail advises that, if there are any questions, to contact Takesun Portugal Lda. Verkauf Deutschland at vendas@takesunportugal.com. According to Liggins, the name, “Takesun Portugal Lda Verkauf Deutschland” is apparently German. (Liggins, Tr. 86, 142-43, 149; JX 52 (capitalization in original)).
135. The corporate credit card statement with respect to the Long Purchase shows a charge in the amount of \$134.90 with the reference “PAYPAL TAKESUNPORT,” followed by the telephone number 402-935-7733, and the

letters “CA.” The apparent receipt by “Takesunport” of the payment is consistent with the e-mail confirmation provided by PayPal. (Liggins, Tr. 91, 143-44; JX 60 (capitalization in original)).

136. Liggins was unaware of the meaning of the telephone number 402-935-7733 or the letters “CA,” which appeared on the credit card statement comprising JX 60, and did not investigate the telephone number. (Liggins, Tr. 138; JX 60).
137. A USA shopping cart page on the [www.agaricus.net](http://www.agaricus.net) website from 2004 states at the bottom: “I authorize Takesun USA to charge my credit card . . . . By pressing the ORDER Confirmations [sic] button below, I agree to pay Takesun do Brasil (GEMTRONICS)[.] For any question [sic] call [Isely’s telephone number] 1 828-369-7590.” (JX 35). The reference to authorizing credit card charges by Takesun USA and Gemtronics also appears on JX 39, which is another 2004 printout from the [www.agaricus.net](http://www.agaricus.net) website. (JX 35; JX 39).
138. JX 26, a shopping cart printout from the [www.agaricus.net](http://www.agaricus.net) website, dated 12/13/2007 and depicting RAAX11, does not contain any reference to authorizing a charge by Takesun USA or Gemtronics, stating: “By pressing the ORDER Confirmations [sic] button below, I agree to pay.” (JX 26).
139. Sales made on the [www.agaricus.net](http://www.agaricus.net) website went to Otto and/or Takesun Portugal Lda, or persons or entities other than Respondents. (F. 127-29, 132, 134-35; *e.g.*, JX 27 (“By pressing the ORDER Confirmations [sic] button below, I agree to pay Takesun Portugal Lda.”)).
140. The reference to authorizing credit card charges by “Gemtronics Secure Payments” on JX 50, and similar references to credit card payments to Takesun USA and/or Gemtronics in JX 27, JX 35, and JX 39 are not indicative of which person or entity was receiving payment for sales made on the [www.agaricus.net](http://www.agaricus.net) website. (F. 127-29, 132, 134-35, 139).

**b. Isely’s fulfillment of the orders**

141. Isely fulfilled the Undercover Purchases, at the request of Otto, as “drop shipments.” The two Undercover Purchases were the only two drop shipments Isely had completed for Otto in the preceding two years. (Isely, Tr. 195-96, 286-87, 292-93, 354; *see* F. 85-86).
142. Isely was not paid for fulfilling the orders made through the Undercover Purchases. (Isely, Tr. 286, 292-93; Liggins, Tr. 143-44; JX 52; JX 60).
143. The Undercover Purchase orders were mailed from Isely’s home in North Carolina to addresses in Virginia. (JX 46; JX 53; Isely, Tr. 286; Liggins, Tr. 87-88).

144. Isely included in the package sent for the Long Purchase, in addition to the ordered product: (1) a document labeled “shipment invoice”; (2) a brochure written by Isely with product listing and prices, which Isely termed “his brochure” (“Isely’s Brochure”); and (3) a document entitled “RAAX11/Agaricus OPC Protocol Description and Results.” (Liggins, Tr. 88-90; Isely, Tr. 294-95; JX 12 (Isely, Dep. at 34); JX 56-59).<sup>4</sup>
145. The shipment invoice for the Long Purchase states that it is from “Gemtronics” at Isely’s address. It shows Isely’s telephone number and his e-mail address, w.isely@ftpmailbox.com. It contains the notation: “Please order direct by phone or email in the future. Thanks, Bill Isely.” (JX 56; Isely, Tr. 298).
146. Isely placed the notation, “Please order direct by phone or email in the future. Thanks, Bill Isely,” on drop shipment invoices because the process of receiving such orders via e-mail from Otto was roundabout and it was simpler for customers to get their product directly from Isely. (Isely, Tr. 293).
147. Isely’s Brochure included the names “Takesun do Brasil” and “Takesun U.S.A.®.” Isely included these references so that recipients would know what product they were getting, and to preserve the Takesun USA name in case the partnership ever reconstituted. (See F. 23). The brochure also included Isely’s telephone number and his e-mail address, w.isely@ftpmailbox.com. (JX 57; Isely, Tr. 214-15, 294-95, 298).
148. Isely’s Brochure further states, with regard to product information:
- For more information go to web site:  
Go to [www.agaricus.net](http://www.agaricus.net)  
Click on USA sales, or  
[www.our-agaricus.com](http://www.our-agaricus.com)
- (JX 57).
149. Isely’s Brochure was a form document that he designed at the time he was transitioning from his Webpage, linked from the [www.agaricus.net](http://www.agaricus.net) website, to his independent website, [www.our-agaricus.com](http://www.our-agaricus.com). The reference to [www.agaricus.net](http://www.agaricus.net) was an error. If someone tried to use the link, it would not have operated. (Isely, Tr. 296-97, 356-58).

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<sup>4</sup> The invoice and RAAX11 protocol documents for the Miles Purchase were submitted into evidence but functionally illegible because the package was damaged in transit. See F. 124. It is unknown whether a brochure was included in the package for the Miles Purchase. The evidence submitted from the Miles Purchase did not include a brochure.

150. The document entitled “RAAX11/Agaricus OPC Protocol Description and Results,” referred to in F. 144 (JX 59), was prepared by Isely based on information in an e-mail he received from Otto. (Isely, Tr. 299-300, 302-303).
151. The e-mail from Otto, referred to in F. 150, included what Otto called the RAAX/Agaricus OPC Protocol, which is a schedule of use of certain dietary supplements that were common in some institutions in Europe. Otto’s e-mail used terms such as “curing” and “remission” as a result of what he called a “study.” Isely researched Otto’s information, and determined that Otto’s data were not scientific, but more in the nature of testimonials. Consequently, Isely revised the information from what Otto had sent him by e-mail to present the data without Otto’s terms “remission” and “cure,” and to include instead such terms as “improvement” or “no improvement.” Isely also added information regarding following a Mediterranean diet, avoiding meat, using organic products, and using good supplements, including anti-oxidants. (JX 12 (Isely, Dep. at 69-74); JX 59).
152. JX 59 states in part: “Takesun has been developing . . . liquid extract blends, . . . principally for support of combating various degenerative health conditions.” JX 59 also states: “Takesun has now been able to gather meaningful data from professional practitioners and natural health clinics in a number of European countries, Germany, the UK, Austria and Spain. The results, if compared on breast cancer only, are that the RAAX11/Agaricus OPC protocol has improved the positive response from 80 to 92%. . . .” JX 59 then presents data on the percentage of cases “responding” to the protocol, for over 1000 cases for various conditions. (JX 59).
153. Isely provided the document represented by JX 59 only to individuals who had already ordered RAAX11 and to whom Isely had not been able to speak first. Isely’s intention in revising the information that Otto provided, to prepare the document represented by JX 59, was to communicate Isely’s opinion that the product was a dietary supplement with health benefits, regardless of whether the purchaser had cancer, and to counter impressions that the purchaser may have had from seeing advertisements for RAAX11 in another forum, including the www.agaricus.net website. (Isely, Tr. 299-302; JX 12 (Isely, Dep. at 71)).

**F. Ownership and Control of the Content of the www.agaricus.net website**

**1. Ownership of the www.agaricus.net website**

154. As part of his investigation, Liggins obtained Internet search results concerning the domain name “www.agaricus.net” from the “WHOIS” database. WHOIS is a database that is accessible through several different websites. After entering a website address, a search result is provided that states the identity and contact information for the listed “registrant” of the domain name, as well as the listed “administrative contact,” “technical contact,” and “zone contact” for that domain name. (Liggins, Tr. 63-64; JX 16).

155. JX 16 is a printout of the WHOIS search result, performed through the website, [www.networksolutions.com](http://www.networksolutions.com), for the domain [www.agaricus.net](http://www.agaricus.net). The information listed for registrant, administrative contact, technical contact, and zone contact is set forth as follows:

Registrant:

William Isley [sic]  
964 Walnut Creek Rd  
Franklin, NC 28734-9533  
US

Administrative Contact, Technical Contact, Zone Contact:

William Isley [sic]  
George Otto  
964 Walnut Creek Rd  
Franklin, NC 28734-9533  
US  
(828)389-7590  
[gotto@takesun.com](mailto:gotto@takesun.com)

(JX 16).

156. Isely's name is spelled "Isely," and not "Isley," as it was misspelled on JX 16. (Isely, Tr. 251).
157. The telephone number listed for Isely in JX 16, 828-389-7590, is not a telephone number belonging to Isely. (JX 15; JX 16; F. 92; JX 12 (Isely, Dep. at 47-48)).
158. Otto does not live at 964 Walnut Creek Rd, Franklin, NC, which is Isely's home. (Isely, Tr. 244).
159. The e-mail address listed in JX 16, [gotto@takesun.com](mailto:gotto@takesun.com), is not Isely's e-mail address. "[G]otto" was the e-mail name used by Otto. (Isely, Tr. 185, 298; JX 70-71; F. 147).
160. The "registrant" listed for a domain on WHOIS is the individual whose name the person who holds the domain name would like to display as the owner of the website. The listed "registrant" is not necessarily the owner of the website. (JX 4 (Velasco, Dep. at 12-13, 17-18)).
161. The legal owner of a website is not public information. The identity of the legal owner of a website is obtainable from the "registrar" of the website. The registrar of the [www.agaricus.net](http://www.agaricus.net) website is shown on the WHOIS database. The registrar of the [www.agaricus.net](http://www.agaricus.net) website shown in JX 16 was an entity called "Domain Discover." (JX 16; JX 4 (Velasco, Dep. at 13, 18); Liggins, Tr. 109).



162. The individual who sets up a domain name with the registrar can designate an individual to be listed as registrant, and administrative, technical, and zone contact, even without that individual's permission. (JX 4 (Velasco, Dep. at 17-19); Liggins, Tr. 122).
163. When a domain is established with the registrar, whoever is designated as administrative contact will show up as the administrative, technical, billing and/or zone contact, by default. (JX 4 (Velasco, Dep. at 18)).
164. JX 16 contains the following information in addition to the information stated in F. 155:

The previous information has been obtained either directly from the registrant or a registrar of the domain name other than Network Solutions. Network Solutions, therefore, does not guarantee its accuracy or completeness.

(JX 16).

165. Isely's Website, [www.our-agaricus.com](http://www.our-agaricus.com), was the only website that Isely authorized Otto to register in Isely's name. Otto had no permission to use Isely's name with regard to any other website except Isely's Website, [www.our-agaricus.com](http://www.our-agaricus.com). (Isely, Tr. 253; JX 19).
166. In 2008, Isely received in the mail a document entitled "Domain Expiration Notice" referring, *inter alia*, to the domain name [www.agaricus.net](http://www.agaricus.net). The document states it is from "Domain Registry of America" and:

As a courtesy to domain name holders, we are sending you this notification of the domain name registrations that are due to expire in the next few months. When you switch today to the Domain Registry of America, you can take advantage of our best savings. Your domain name registrations will expire in June 2008. Act today!

The document sets forth various prices for various registration periods and requests a reply by February 22, 2008. (JX 61; Isely, Tr. 306).

167. Isely had previously received solicitations similar to JX 61, first in 2006. That solicitation referred to Isely's Website, [www.our-agaricus.com](http://www.our-agaricus.com), and to some websites that were not Isely's. Isely did not know anything about domain registration companies at that time and the document did not mean anything to him. Isely sent an e-mail to Otto asking about the meaning of the document. Otto told Isely, "Don't worry about it. I take care of it." Otto did not tell Isely that the [www.agaricus.net](http://www.agaricus.net) website was registered to Isely. Isely figured that the 2006 solicitation was a mistake. When Isely received JX 61 in 2008, he determined it

was commercial “spam,” and put it away. (Isely, Tr. 306-09; JX 12 (Isely, Dep. at 28)).

## 2. Control of content on the www.agaricus.net website

168. In order to post or change content on a website, a user name and a “PIN” password are required. (Liggins, Tr. 108-09; JX 4 (Velasco, Dep. at 13-14)).
169. The legal owner of a website is entitled to have the user name and password. The person who registers the domain on behalf of the legal owner is given the user name and password. (JX 4 (Velasco, Dep. at 14)).
170. The person listed as “registrant” of a domain on the WHOIS database does not necessarily have the user name and password required to post or change content on a website. (JX 4 (Velasco, Dep. at 13-18; *see* F. 160, 169).
171. Isely did not have the user name or PIN required to post or change content on the www.agaricus.net website. (JX 12 (Isely, Dep. at 26-27, 55); *see also* Liggins, Tr. 110-11, 133).
172. The individual(s) or entity(ies) that control the content of a website can post a third party’s name on a website, or any other content, without the third party’s permission. (Liggins, Tr. 122-24).
173. Otto controlled the orders received through the www.agaricus.net website. (*See* F. 85, 86, 118, 127, 141).
174. Printouts in evidence from the www.agaricus.net website contain English language errors. (*E.g.*, JX 31, 33, 37 (call for “informations”); JX 25, 31, 40 (“testimonie” of Bill Isely); JX 7, Exhibit A (“Many doctors all over the world are, reporting, since he is using the OPC Agaricus protocol nobody of his patient died.”); JX 27, 35, 39 (“confirmations” button for ordering); JX 25 (“Over the years we receive a lot of questions . . . . Many have been recovered on a natural base.”)).
175. Printouts in evidence from the www.agaricus.net website contain foreign language, an international telephone number, and currency formats that are not used in the United States. Examples include JX 25 and 26, where, at the top of the page is the statement, “Contato International: Fone +55 47 3001 5260,” and Exhibit A to the Complaint, which directs consumers for “informations” [sic] to telephone numbers including, “Brazil 55 47 3001 5260 or UK 44 020 8133 2774,” as well as Isely’s telephone number. In addition, JX 25 includes product pricing, formatted as follows:

19,90 \$ Bag with 100g  
39,90 \$ bottle with 100ml . . .  
119,00 \$ bottle with 100 ml

- (JX 25, 26; *see also* JX 28 (“Contato International: Fone +55 47 3001 5260”); Liggins Tr. 54-55).
176. Persons or entities other than Respondents, and most likely Otto and/or Takesun do Brasil, owned the www.agaricus.net website. (*See* F. 160, 165, 179, 180).
  177. Persons or entities other than Respondents, and most likely Otto and/or Takesun do Brasil, controlled the content of the www.agaricus.net website. (*See* F. 168-75, 180-82).
  178. Persons or entities other than Respondents, and most likely Otto and/or Takesun do Brasil, created and posted the RAAX11 advertisements at issue in this case on the www.agaricus.net website. (*See* F. 168-75, 180-82).
  179. In March 2008, after he was contacted by Complaint Counsel concerning the www.agaricus.net website, Isely communicated with Otto regarding the use of Isely’s name for the registration of www.agaricus.net. Otto advised Isely that www.agaricus.net was in the name of Otto, with Isely’s address, because Otto wanted to have a US address. Otto also told Isely that he “changed [the registration] now to [sic] at domain discover to” Takesun, with Otto’s address and telephone number in Brazil. Otto also stated that the owner of www.agaricus.net was, and since 1998 had been, Agarix International or its predecessor Takesun do Brasil. (Isely, Tr. 327-30; JX 70; JX 71; JX 12 (Isely, Dep. at 48)).
  180. On or about March 28, 2008, the contact information for the domain www.agaricus.net was changed to “Takesun, Attn: George Otto,” with a contact address and telephone number in Brazil and the e-mail contact, gotto@takesun.com.br. The change was effected from within the control panel for the website, connected from an IP address belonging to Deutsche Telekom AG in Germany. (JX 5-6; JX 14 (Velasco, Dep. at 10-12); JX 70-71).
  181. After Isely was informed by Complaint Counsel in March 2008 that Isely’s name and information were on the www.agaricus.net website, Isely reviewed www.agaricus.net and was appalled at what had been done. Thereafter, Isely demanded that Otto remove the references to Isely and Isely ceased importing from Takesun. (Isely, Tr. 316-18, 327).
  182. As of November 3, 2008, the www.agaricus.net website stated that it is “unable to service residents of the USA.” Isely had nothing to do with this change and did not control it. (JX 68; Isely, Tr. 316-17).

### **G. The FTC Pre-Complaint Investigation**

183. The investigation in this matter commenced in mid-2007, when Liggins received information from the Food and Drug Administration (“FDA”) regarding the www.agaricus.net website. This information included printed pages from the

- website advertising RAAX11, and a printout of a WHOIS search result for www.agaricus.net. (Liggins, Tr. 47-48, 92-93, 131; JX 32-34; JX 17).
184. Liggins reviewed the www.agaricus.net website and printed pages that referred to RAAX11 or Isely. (Liggins, Tr. 53-55).
  185. Liggins did not coordinate or work with anyone at the FDA on the investigation. He just received the documents referenced in F. 183 from the FDA. (Liggins, Tr. 176).
  186. Liggins does not recall investigating The Greenpharmacy, which also sells RAAX11 in the United States and which was identified as a RAAX11 seller on the www.agaricus.net website. (JX 33; Liggins, Tr. 92, 159-60).
  187. Even though pages from the www.agaricus.net website state “Statistic for People who are using the RAAX11/OPC Agaricus protocol. Dr. Steven Hall reports that 100% of his patients are in remission,” the evidence presented at trial does not indicate that there was any investigation of Dr. Hall or of that representation. (JX 30; JX 41).
  188. When he investigated this matter, Liggins was aware of the difference between an “owner” of a website and the listed “registrant,” and was aware that an owner could list someone else as the registrant. Liggins did not know whether Isely had the user name and password to control the content of the www.agaricus.net website. Liggins does not recall that he contacted the registrar of the domain, www.agaricus.net. (Liggins, Tr. 110-11, 122).
  189. Liggins did not investigate the telephone number 402-935-7733, or the letters “CA,” which appeared on the credit card statement for the Long Purchase and the Miles Purchase. Liggins did not investigate further even though it appeared to Liggins that “Takesunport” received the payment for the Long Purchase; Liggins did not know what “Takesunport” meant; and the telephone number and letters appeared after the identification of “Takesunport” on the credit card statement for the Long Purchase. (Liggins, Tr. 84-85, 138, 143-44; JX 49; JX 51; JX 60).
  190. Liggins did not consider making either Undercover Purchase by telephone order. (Liggins, Tr. 160-61).
  191. Liggins did not look into any of the foreign entities disclosed by the investigation, such as entities identified with Brazil, Portugal, or Germany. (Liggins, Tr. 161; JX 50; JX 51-52).
  192. Liggins limited his investigation regarding Otto to corporate records and LEXIS and Internet searches, and did not find any information on Otto through these databases. Liggins did not conduct any search for the name George Otto Kather. Liggins did not run a search for Otto or Takesun do Brasil through any overseas databases because of the limited resources available to him to investigate civil

matters. Due to this resource restriction, Liggins did not do an in-depth search into Takesun do Brasil or Otto. (Liggins, Tr. 74, 125, 161-62, 177-79).

193. At the time of the administrative trial in this matter, Liggins still could not say what Takesun was. Liggins did not know anything about Otto, other than that Otto's name appeared on some of the WHOIS information. He did not know if Otto ever came to the United States. (Liggins, Tr. 162-63, 177-78).
194. The investigation in this matter, as Liggins acknowledged, "could have [been] better." (Liggins, Tr. 161).

#### **H. Contacts between Complaint Counsel and Isely**

195. Isely's first contact from the FTC was on March 26, 2008, when he received a demand letter, draft federal district court complaint, and proposed settlement from Complaint Counsel. After he received these materials, Isely advised Complaint Counsel in a telephone conversation that he had no control over the www.agaricus.net website, and that Isely had a different website, www.our-agaricus.com. Because Complaint Counsel required financial data in order to settle the matter, and because Isely felt he could not get anyone to listen to him, Isely turned the matter over to his lawyer. (JX 63-64; Isely, Tr. 311-14).
196. On May 6, 2008, counsel for Respondents wrote a letter to Complaint Counsel stating that Otto and Agarix International, the successor corporation to Takesun do Brasil, controlled the www.agaricus.net website. The letter attached documents indicating that Otto, Takesun, and Agarix International could be responsible for the www.agaricus.net website. (JX 5, 66).
197. On May 15, 2008, by letter to Complaint Counsel, Respondents' counsel reiterated the position that Isely had no control over the www.agaricus.net website. Respondents' counsel also noted that Isely did not receive the FTC's warning letter until May 6, 2008, when Complaint Counsel sent the document to Respondents' counsel. (JX 67; Isely, Tr. 325-26).
198. The FTC's warning letter had been previously sent by e-mail to "support@ashnow.com," and had been addressed to "www.agaricus.net." Isely did not receive the FTC's warning letter by e-mail because Isely was not the administrator of the www.agaricus.net website and did not have control of the website. (JX 67; Isely, Tr. 325-26, 359).
199. In mid-2008, Isely's dietary supplement business ceased completely, because of a loss of customers due to adverse publicity that Isely received. In addition, Isely ceased importing from Takesun, because Isely believed he had been "used" by Otto and Takesun. (Isely, Tr. 200; *see* F. 181).
200. The Complaint in this matter was issued on September 16, 2008. (JX 7).

201. Respondents' Interrogatory No. 16 asked:

Identify each and every fact in support of your allegation in paragraph 5 of the Complaint 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" and identify all persons with knowledge of the facts upon which these allegations are based and identify all documents relating to these facts.

Complaint Counsel provided in part the following response:

[P]ublicly 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

In response to the FTC's two separate undercover purchases of the product RAXX11 from the website www.agaricus.net, Respondents mailed product literature, invoices, and the RAXX11 product to the FTC's undercover mailboxes. . . .

Complaint Counsel further states that publicly available information on WHOIS domain registration for the domain 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 (Complaint Counsel's Responses to Interrogatories 13, 15, 16)).

202. Respondents' Proposed Finding of Fact Number 30 stated Complaint Counsel's Response to Respondents' Interrogatory Number 16, as set forth above in F. 201. Complaint Counsel's Reply to Respondents' Proposed Finding of Fact Number 30 provided no further facts in support of the allegations in Paragraph 5 of the Complaint and stated only that Complaint Counsel had no specific response other than to state that Respondents' proposed finding is "without merit and not supported by the record."

### **III. ANALYSIS**

#### **A. Overview**

Section 12(a) of the Federal Trade Commission Act (“FTC Act”) makes it unlawful “for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement . . . [b]y any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, services, or cosmetics.” 15 U.S.C. § 52(a). “The dissemination or the causing to be disseminated of any false advertisement” under Section 12(a) of the FTC Act constitutes an unfair or deceptive act or practice within the meaning of Section 5 of the FTC Act. 15 U.S.C. § 52(b).

The Complaint in this case alleges that Respondents have violated Sections 5(a) and 12 of the FTC Act by disseminating, or causing to be disseminated, false advertisements for RAAX11 through the [www.agaricus.net](http://www.agaricus.net) website, including the advertisements attached to the Complaint as Exhibits A through D (“the Challenged Advertisements”). Complaint ¶¶ 3-5, 7, 10-11. Respondents deny these allegations, and contend that the Challenged Advertisements were the responsibility of other parties not named in this action. Thus, the pivotal inquiry in this case is whether Complaint Counsel has proved, by a preponderance of credible, reliable evidence, that Respondents disseminated, or caused to be disseminated any of the Challenged Advertisements, as that phrase has been interpreted by case law. If not, the Complaint must be dismissed and none of the remaining issues, including whether the Challenged Advertisements were false, and were for the purpose of inducing or were likely to induce the purchase of food or drugs, need to be addressed.

#### **B. Jurisdiction**

Section 5 of the FTC Act grants the Federal Trade Commission (“FTC”) the authority to “prevent unfair or deceptive acts or practices in or affecting commerce” by “persons, partnerships, or corporations.” 15 U.S.C. § 45(a)(1)-(2). Section 4 of the FTC Act defines “corporation” in part as “any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest . . . .” 15 U.S.C. § 44.

##### **1. Person, partnership, or corporation**

Respondent Gemtronics, Inc. (“Gemtronics, Inc.”) was formed by Respondent William Isely (“Isely”) as a North Carolina corporation on September 20, 2006. F. 2. Isely is listed as the registered agent for Gemtronics, Inc. and the principal office listed is Isely’s home address. F. 2. The evidence shows that Gemtronics, Inc. is an inactive corporation that has never engaged in any business activity. F. 46. Gemtronics, Inc. never had an organizational meeting or issued any shares; never obtained a federal or state tax identification number; never filed an annual report; never executed any

documents, such as a contract; does not have a bank account or a corporate book or corporate seal; and has no officers or board of directors. F. 35-45.

Gemtronics, Inc. has not earned any revenue, including revenue from the advertising, marketing, promotion, or sale of RAAX11. F. 40. Instead, revenue from the sale of RAAX11 has gone to Isely. F. 42, 55. The preponderance of the evidence does not prove, however, that Isely made sales of RAAX11 on the website displaying the Challenged Advertisements, [www.agaricus.net](http://www.agaricus.net). See F. 85-86, 116-18, 125-42. Complaint Counsel argues that corporate Respondent Gemtronics, Inc. is liable by and through its owner, William Isely. CCB at 13.

The Commission's jurisdiction extends to any legal entity without shares of capital which engages in business for profit in the traditional meaning of that language. *California Dental Ass'n v. FTC*, 526 U.S. 756, 766-67 (1999); *Community Blood Bank v. FTC*, 405 F.2d 1011, 1017 (8th Cir. 1969). From the record here, it is clear that, while Gemtronics, Inc. did not engage in business for profit, Isely did. The Commission, in *Ohio Christian College*, found jurisdiction over "corporate respondents which were, in reality, the individual respondent." *In re Ohio Christian College*, No. 8820, 80 F.T.C. 815, 1972 FTC LEXIS 223, at \*67 (May 19, 1972). There, the corporations were "mere shells without substance," completely dominated by the individual respondent. *Id.* Here too, Gemtronics, Inc. is a mere shell without substance, completely dominated by Isely. Under *Ohio Christian*, the Commission has jurisdiction over Gemtronics, Inc. through its owner, Respondent Isely, and has jurisdiction over Isely, an individual who, as set forth below, was engaged in acts or practices in or affecting commerce. See also *Lane v. FTC*, 130 F.2d 48, 50 (9th Cir. 1942) (upholding Commission's exercise of jurisdiction over an individual who, under various trade names, had been engaged in the sale of goods in commerce); *In re Nat'l Housewares, Inc.*, No. 8733, 90 F.T.C. 512, 598 (Nov. 18, 1977) ("Court decisions affirming or denying liability under the FTC Act of natural persons for conduct performed in the name of the corporation are plentiful.") (citations omitted).

## 2. Practices in or affecting commerce

Section 5(a)(1) of the FTC Act declares unlawful "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). In the Answer, Respondent Isely admits that he has offered for sale, sold, and distributed the herbal product RAAX11 and the evidence establishes the same. Answer ¶ 3; F. 55. In addition, Isely shipped RAAX11 from North Carolina to Virginia to the FTC investigator who made two undercover purchases in this case ("Undercover Purchases"). F. 143. These sales are in or affecting commerce. See *United States v. Robertson*, 514 U.S. 669, 672 (1995) (per curiam) ("[A] corporation is generally engaged in commerce when it is itself directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce.") (citation omitted).

The Commission has jurisdiction over Respondents, and the conduct challenged in the Complaint, pursuant to Sections 4 and 5 of the FTC Act. 15 U.S.C. §§ 44, 45.



**C. The Preponderance of the Evidence in the Case Does Not Prove Liability of Isely or Gemtronics, Inc.**

Complaint Counsel's asserted factual bases for the allegation that "Respondents disseminated or caused to be disseminated advertisements for RAAX11 through an internet website, www.agaricus.net," consist of documentary evidence, gathered in the investigation, that:

- Isely formed a corporation in the name of "Gemtronics, Inc." in 2006, with a principal place of business at Isely's home;
- Isely was listed on the WHOIS database as the registrant, and the administrative, technical, and zone contact for the domain www.agaricus.net;
- Isely's name, Isely's tradenames Takesun USA and Gemtronics, Isely's telephone numbers, and references to an FDA registered warehouse in Franklin, North Carolina, appeared on various webpages on the www.agaricus.net website; and
- Isely fulfilled two undercover purchases made on the www.agaricus.net website, including providing the RAAX11 product and product literature.

(See F. 202; JX 11 (Complaint Counsel's Answer to Interrogatory No. 16)). The documentary evidence gathered in the investigation proves the above-referenced facts. F. 1-2, 96, 100, 104-05, 108, 111-12, 119-21, 131, 137, 141, 144, 155. However, the documentary evidence upon which Complaint Counsel relies, as explained and supplemented by credible testimony, does not prove that Respondents disseminated, or caused to be disseminated, the Challenged Advertisements on the www.agaricus.net website, as alleged in the Complaint.

Complaint Counsel called two live witnesses at the administrative trial to supplement its documentary evidence: FTC investigator Michael Liggins ("Liggins") and Respondent Isely. Both Isely and Liggins testified at length and in great detail. They both were credible witnesses, F. 6-7, and their testimony on material issues was not refuted.

Respondent Isely was a very forthcoming witness who, under lengthy questioning, candidly volunteered detailed information about his dietary supplement business, his dealings with Takesun do Brasil ("Takesun" or "Takesun do Brasil") and George Otto Kather, also known as George Otto ("Otto"), and Isely's actions in fulfilling the Undercover Purchases made by Liggins. *E.g.*, F. 12-15, 17-21, 23-29, 31, 33-36, 39, 41-44, 58-61, 63-69, 71, 75-76, 78-83, 85-86, 88-89, 91, 141-44. Isely explained that, at least since 2004, when his website, www.our-agaricus.com, was established and he began selling RAAX11, Isely was not connected to the www.agaricus.net website; Isely was not responsible for the www.agaricus.net website; Gemtronics, Inc. was an inactive corporate shell that never conducted business; and documentary evidence indicating otherwise was inaccurate or misleading. *E.g.*, F. 46, 70, 74, 77-78, 81, 115, 117, 122-23, 165, 176-78.

Isely also testified to communicating the relevant facts to Complaint Counsel during the investigative phase of the case, to no avail. F. 179, 195-98.

FTC investigator Michael Liggins was also a forthcoming and credible witness. F. 7. Liggins' testimony did not contradict Isely's position in any material respect, and in fact, supported Isely's position on some key issues. *E.g.*, F. 135, 162, 168, 172. Liggins acknowledged that an individual setting up a domain can identify any individual as a "registrant" or other contact, without permission; that Liggins did not know whether Isely had the required user name and password to control the content of a website; and that an individual who has the required user name and password can post a third party's name on a website, without permission. *E.g.*, F. 162, 172, 188. Liggins also was forthcoming in disclosing that, due to resource restrictions, he did not contact the domain registrar for the www.agaricus.net website to determine the owner of the www.agaricus.net website, and did not sufficiently investigate Otto or Takesun do Brasil, F. 191-92, either of which steps could have pointed the investigation away from Respondents. At a minimum, as Liggins forthrightly admitted, the investigation of this matter "could have [been] better." F. 194.

Since Isely and Liggins were credible witnesses, the testimonial evidence they gave at the administrative trial more fully explains and discredits much of Complaint Counsel's documentary evidence. The testimony on material and probative issues given by both of these witnesses, which supports Respondents and not Complaint Counsel, and forms a basis for this Initial Decision, was not refuted. "[I]t is the [Administrative Law Judge ("ALJ")], as trier of the facts, who has lived with the case, and who has had the opportunity to closely scrutinize witnesses' overall demeanor and to judge their credibility. Accordingly, absent a clear abuse of discretion, the Commission will not disturb on appeal the ALJ's conclusions as to credibility." *In re Horizon Corp.*, No. 9017, 97 F.T.C. 464, 1981 FTC LEXIS 47, at \*131 (May 15, 1981). *Accord In re Trans Union Corp.*, No. 9255, 2000 FTC LEXIS 23, at \*9 (Feb. 10, 2003). "The Supreme Court has noted the importance of an [ALJ's] determination of credibility, and explained that evidence which supports an administrative agency's fact-finding 'may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the agency's . . .'" *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1070-71 (11th Cir. 2005) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88, 496 (1951)).

This is a case about alleged deceptive advertisements on the www.agaricus.net website. As discussed more fully and in detail below, the preponderance of the evidence fails to demonstrate that the www.agaricus.net website was owned or controlled by Respondents or that Respondents were otherwise responsible for disseminating the Challenged Advertisements on the www.agaricus.net website, as alleged in the Complaint.

**1. The preponderance of the evidence does not prove that Respondents were “willing participants in a scheme” of alleged deceptive advertisements on the www.agaricus.net website**

Complaint Counsel overreaches to claim that Respondents were “willing participants” in a “profitable scheme to sell RAAX11 by deceiving consumers that the product could treat their cancer.” CCB at 2. In support of this claim, Complaint Counsel contends that the evidence shows that Respondents were (1) identified as the party “responsible” for the domain “agaricus.net”; (2) identified “as part of” that website’s cancer-related advertising claims; (3) the “exclusive US sales outlet on the website” for RAAX11; and (4) “responsible for fulfilling orders” for RAAX11 placed on the www.agaricus.net website. *Id.* The preponderance of the credible, reliable evidence does not support such assertions. A comparison of Complaint Counsel’s assertions with the facts, as demonstrated at trial, follows:

**Complaint Counsel’s Assertion:** Respondents were “identified” as the party “responsible” for the domain “agaricus.net.” CCB at 2.

**Facts**

- The evidence does not demonstrate that Gemtronics, Inc. was identified anywhere in connection with the www.agaricus.net website. F. 102. “Gemtronics” is a trade name for Isely. F. 14, 16-17, 42.
- Isely was identified on the WHOIS database as the “registrant,” and along with Otto, using Otto’s e-mail address, as the “administrative,” “technical” and “zone” contact for the domain, www.agaricus.net. F. 155. However, a listed “registrant” is not necessarily the owner of a website. F. 160. The person listed as “registrant” does not necessarily have the user name and password required for controlling website content. F. 170. Isely did not have the user name or password to control the content of the www.agaricus.net website. F. 171.
- Identification of Isely in connection with the registration of the domain www.agaricus.net was not authorized by Isely. F. 165.
- Isely’s name was misspelled on the WHOIS search results for the domain www.agaricus.net. F. 155-56. Moreover, the telephone number attributed to Isely was not, in fact, Isely’s. F. 157.
- Persons or entities other than Respondents, and most likely Otto and/or Takesun Portugal Lda, owned, controlled, and were responsible for the advertisements posted on, the www.agaricus.net website. F. 176-78.

The preponderance of the evidence fails to demonstrate that Respondents are responsible for the www.agaricus.net website.

**Complaint Counsel's Assertion:** Respondents were “identified” “as part of” the website’s cancer-related advertising claims. CCB at 2.

### **Facts**

- The evidence does not demonstrate that Gemtronics, Inc. was identified anywhere in connection with the www.agaricus.net website. F. 102. “Gemtronics” is a trade name for Isely. F. 14, 16-17, 42.
- Isely’s telephone number was identified on some pages of the www.agaricus.net website as a source for telephone orders. *E.g.*, F. 108, 111-12. However, there was no agreement between Isely and Otto that the www.agaricus.net website would refer consumers to Isely. F. 115. Moreover, Isely did not sell RAAX11 on the www.agaricus.net website. F. 117.
- Isely’s name and telephone number were identified on some pages on the www.agaricus.net website in connection with a “testimonie” [sic] created by Otto. *E.g.*, F. 119-21. The medical statement Isely gave to Otto in 2001 concerned Isely’s prostate cancer and did not involve RAAX11. F. 65-66. RAAX11 was not available until 2004. F. 49-50. Isely did not give Otto permission to expand on the medical statement or to use the statement for advertising purposes, including advertising for RAAX11. F. 122.
- Isely’s name and/or telephone number appeared on some pages of the www.agaricus.net website as a source for information, including information on participating in a study. F. 96, 100, 104-05. However, there was no agreement between Isely and Otto that the www.agaricus.net website would refer consumers to Isely. F. 115.
- While the evidence shows that Isely received two telephone calls regarding a study, the callers did not tell Isely where they had learned of the study. Isely told them that he was not aware of any study and that he could not help them. F. 107.
- Isely did not give Otto permission to use his name as a general point of contact for Takesun’s websites, and Isely’s name was used on the www.agaricus.net website without his permission. F. 123.
- Any individual or entity that can control the content of a website can post a third party’s name on a website, or any other content desired, without the third party’s permission. F. 162.
- A few webpages on the www.agaricus.net website have references to “Gemtronics” and “Takesun USA” with respect to credit card charges. *E.g.*, F. 131, 137. However, these references are not probative of which person or entity received payment for sales made on the www.agaricus.net website,

because the evidence demonstrates that persons or entities other than Respondents received money for sales made on the www.agaricus.net website. F. 139-40.

- Persons or entities other than Respondents, and most likely Otto and/or Takesun Portugal Lda, owned, controlled, and were responsible for the advertisements posted on, the www.agaricus.net website. F. 176-78.

The preponderance of the evidence fails to demonstrate that Respondents were identified as part of the Challenged Advertisements on the www.agaricus.net website.

**Complaint Counsel's Assertion:** Respondents were the “exclusive US sales outlet on the website” for RAAX11. CCB at 2; *see also* CCF 74 (“Respondent Isely’s business was the sole beneficiary of these claims for sales of RAAX11 in the United States.”).

### **Facts**

- Isely’s telephone number was identified on some pages of the www.agaricus.net website as a source for telephone orders. *E.g.*, F. 108, 111-12. In addition, on some pages of www.agaricus.net, the website referred to an FDA warehouse in North Carolina. *E.g.*, F. 112-13. Isely registered his home in North Carolina with the FDA as an approved warehouse. F. 31. However, approximately ninety-five percent of the RAAX11 orders Isely received were repeat orders from his existing retail customers. The remaining orders were from Isely’s Website, www.our-agaricus.com, or drop shipment requests received from Otto by e-mail. F. 56, 84-85, 87. Isely did not sell RAAX11 through the www.agaricus.net website. F. 117. *See also* F. 118, 173.
- Neither of the Undercover Purchases was made by telephone order. Liggins did not consider making the Undercover Purchases by telephone order. F. 125.
- Purchases could be made directly on the agaricus.net website, and those sales went to Otto and/or Takesun Portugal Lda or persons or entities other than Respondents. F. 53, 124-35, 139.
- A few webpages on www.agaricus.net have references to “Gemtronics” and “Takesun USA” with respect to credit card charges. *E.g.*, F. 131, 137. However, these references are not probative of which person or entity received payment for sales made on the www.agaricus.net website, because the evidence demonstrates that persons or entities other than Respondents received money for sales made on the www.agaricus.net website. F. 139-40.
- The agaricus.net website identified one other RAAX11 retailer in the United States besides Isely and provided an apparent link to another retailer. F. 95,

104. Moreover, RAAX11 was available for sale in the United States through a variety of retailers besides Isely. F. 52, 88.

The preponderance of the evidence fails to demonstrate that Respondents were the exclusive US sales outlet for RAAX11 on the www.agaricus.net website.

**Complaint Counsel's Assertion:** Respondents were “responsible for fulfilling orders” for RAAX11 placed on the agaricus.net website. CCB at 2.

**Facts**

- Gemtronics, Inc. is an inactive corporate shell that has never conducted business. F. 46. “Gemtronics” is a trade name for Isely. F. 14, 16-17, 42.
- Isely was a wholesale buyer of Takesun products for resale in his own retail business. F. 20-21, 70. Isely and Takesun ran separate businesses. F. 63-64, 70.
- As a business favor to Otto, Isely occasionally completed “drop shipments” of small, sample orders that Otto did not want to ship himself because such orders were not cost effective to ship from Brazil. F. 85. Isely fulfilled the two Undercover Purchases as drop shipments. F. 141.
- Purchases of RAAX11 on the www.agaricus.net website could be made directly on the www.agaricus.net website, and such purchases were controlled by Otto. F. 53, 118, 124-26, 130, 173.
- Isely did not sell RAAX11 through the www.agaricus.net website. F. 117.

The preponderance of the evidence fails to demonstrate that Respondents were responsible for fulfilling orders for RAAX11 placed on the www.agaricus.net website.

**Complaint Counsel's Assertion:** Respondents “sold RAAX11 through the website www.agaricus.net.” CCFF 14.

**Facts**

- Gemtronics, Inc. is an inactive corporate shell that has never conducted business. F. 46. “Gemtronics” is a trade name for Isely. F. 14, 16-17, 42.
- As a business favor to Otto, Isely fulfilled, as drop shipments, the two Undercover Purchase orders that Otto received on the www.agaricus.net website and requested that Isely ship. F. 85, 141. Isely was not paid for these orders. F. 42.
- Isely did not sell RAAX11 on the www.agaricus.net website. F. 117.

- Neither of the Undercover Purchases was made by telephone order. Liggins did not consider making the Undercover Purchases by telephone order. F. 125.
- Approximately ninety-five percent of the RAAX11 orders Isely received were repeat orders from his existing retail customers. The remaining orders were from Isely's Website, [www.our-agaricus.com](http://www.our-agaricus.com), or drop shipment requests received from Otto by e-mail. F. 56, 84-85, 87.
- There was no agreement between Isely and Otto that the [www.agaricus.net](http://www.agaricus.net) website would refer consumers to Isely. F. 115.
- Isely did not accept PayPal for retail purchases, and PayPal was the only way by which a purchaser could pay by credit card on the [www.agaricus.net](http://www.agaricus.net) website. F. 116, 126, 130.
- Sales made on the [www.agaricus.net](http://www.agaricus.net) website went to Otto and/or Takesun Portugal Lda, or persons or entities other than Respondents. F. 139.
- The [www.agaricus.net](http://www.agaricus.net) website was a competitor to Isely's Website, [www.our-agaricus.com](http://www.our-agaricus.com). F. 83.
- A few webpages on [www.agaricus.net](http://www.agaricus.net) have references to "Gemtronics" and "Takesun USA" with respect to credit card charges. *E.g.*, F. 131, 137. However, these references are not probative of which person or entity received payment for sales made on the [www.agaricus.net](http://www.agaricus.net) website, because the evidence demonstrates that persons or entities other than Respondents received money for sales made on the [www.agaricus.net](http://www.agaricus.net) website. F. 139-40.

The preponderance of the evidence fails to demonstrate that Isely sold RAAX11 through the [www.agaricus.net](http://www.agaricus.net) website.

**Complaint Counsel's Assertion:** Respondents were the "exclusive source" for RAAX11 in the United States. CCB at 11-12.

### **Facts**

- Gemtronics, Inc. is an inactive corporate shell that has never conducted business. F. 46. "Gemtronics" is a trade name for Isely. F. 14, 16-17, 42.
- Isely's telephone number was identified on some pages of [www.agaricus.net](http://www.agaricus.net) as a source for telephone orders. *E.g.*, F. 108, 111-12. However, RAAX11 was available for purchase in the United States through a variety of retailers besides Isely, including Greenpharmacy. F. 52, 88. The [www.agaricus.net](http://www.agaricus.net) website

identified one other RAAX11 retailer in the United States, besides Isely, and provided an apparent link to that retailer. F. 95, 104.

- Purchases could be made directly on the agaricus.net website, and those sales went to Otto and/or Takesun Portugal Lda, or persons or entities other than Respondents. F. 53, 124-35, 139.
- A few webpages on www.agaricus.net have references to “Gemtronics” and “Takesun USA” with respect to credit card charges. *E.g.*, F. 131, 137. However, these references are not probative of which person or entity received payment for sales made on the www.agaricus.net website, because the evidence demonstrates that persons or entities other than Respondents received money for sales made on the www.agaricus.net website. F. 139-40.
- Isely did not sell RAAX11 on the www.agaricus.net website. F. 117.

The preponderance of the evidence fails to demonstrate that Respondents were the exclusive source for RAAX11 in the United States.

**2. The preponderance of the evidence does not prove that Respondents had “full knowledge” of the Challenged Advertisements or that Isely “ignored” this knowledge in order to enjoy “financial benefits” from the Challenged Advertisements**

Complaint Counsel further asserts that Respondents participated in a “scheme” on the www.agaricus.net website with “full knowledge of the deceptive and unsubstantiated claims being made on the website.” CCB at 2. In support of this claim, Complaint Counsel asserts that the evidence shows: (1) Isely knew that the domain name “agaricus.net” was registered to him; (2) Isely knew that the advertisements disseminated on www.agaricus.net were deceptive; (3) Isely knew that his name and telephone number were being used to sell RAAX11; and (4) Isely ignored this knowledge in order to continue to enjoy “financial benefits.” CCB at 20-21. As shown by the following comparison of Complaint Counsel’s assertions with the facts demonstrated at trial, Complaint Counsel has failed to prove these assertions by a preponderance of the evidence.

**Complaint Counsel’s Assertion:** Isely knew that the domain name “agaricus.net” was registered to him. CCB at 20.

**Facts**

- Isely received a commercial solicitation to renew domain registrations, including domains that did not belong to him, in 2006. Isely, who did not understand anything about domain registrations, sought information from Otto, who did not tell Isely that the www.agaricus.net website was registered to Isely, but simply told Isely “don’t worry about it.” Isely decided the



document was a mistake. When Isely received another solicitation in 2008, he ignored it, figuring it was just commercial “spam.” F. 167.

The preponderance of the evidence fails to demonstrate that Isely knew that the domain name agaricus.net was registered to him.

**Complaint Counsel’s Assertion:** Isely knew that the advertisements disseminated on www.agaricus.net were deceptive. CCB at 20.

### **Facts**

- In 2002, prior to the time RAAX11 was sold on the www.agaricus.net website, Isely learned that the FDA had contacted Otto about claims made on the www.agaricus.net website. F. 75.
- Once Isely’s own website, www.our-agaricus.com, was established in July 2004, Isely had no reason to visit the www.agaricus.net website except to check prices on the shopping cart page of the agaricus.net website. F. 77, 88, 90. *See also* F. 83. Isely went to the shopping cart page on the www.agaricus.net website once or twice a year to check prices, navigating directly from the home page of www.agaricus.net. F. 89. The evidence includes a number of pages from www.agaricus.net with advertisements that Isely could have seen prior to navigating to the shopping cart page. F. 120-21. However, evidence that Isely “could have” seen some pages with advertisements does not establish that Isely saw any of the Challenged Advertisements.
- While JX 59, entitled “RAAX11/Agaricus OPC Protocol Description and Results,” repeats certain statistics appearing on the www.agaricus.net website regarding claimed use of the protocol by breast cancer patients, the evidence is that Isely received those statistics from an e-mail he received from Otto, rather than from the www.agaricus.net website. F. 150.
- The evidence does not establish that Isely saw any of the Challenged Advertisements. *See* F. 91.

The preponderance of the evidence fails to demonstrate that Isely knew that the Challenged Advertisements were disseminated on the www.agaricus.net website.

**Complaint Counsel’s Assertion:** Isely knew that his name and telephone number were being used to sell RAAX11 on www.agaricus.net. CCB at 20.

### **Facts**

- Prior to the time RAAX11 was sold on the www.agaricus.net website, Isely learned that Otto had violated their agreement to use a pseudonym for Isely’s prostate cancer story, but did not challenge Otto on this matter. F. 66.

- The prostate cancer story Isely gave to Otto in 2001 did not involve the use of RAAX11. RAAX11 was not available until 2004. F. 49-50, 65, 122.
- Isely received two telephone calls regarding a study. However, the callers did not tell Isely where they had learned of the study. F. 107.
- Isely did not authorize the use of his name or telephone number on the www.agaricus.net website to advertise RAAX11. F. 115, 122-23.
- Approximately ninety-five percent of the RAAX11 orders Isely received were repeat orders from his existing retail customers. The remaining orders were from Isely's Website, www.our-agaricus.com, or drop shipment requests received from Otto by e-mail. F. 56, 84-85, 87.

The preponderance of the evidence fails to demonstrate that Isely knew that his name and telephone number were being used to sell RAAX11 on the www.agaricus.net website.

**Complaint Counsel's Assertion:** Isely ignored knowledge of deceptive advertising claims and domain registration in order to continue to receive "financial benefits" from the advertising on www.agaricus.net. CCB at 21.

### **Facts**

- Prior to the time RAAX11 became available on the www.agaricus.net website, Isely responded to any concern he had about Otto's advertising methods by starting his own website, www.our-agaricus.com, which was independent of any links to www.agaricus.net. F. 75-77. Isely also declined a formal distributor relationship as one means of ensuring that he maintained a separate business, independent of Takesun do Brasil. F. 64.
- Gemtronics, Inc. is an inactive corporate shell that never had a bank account and has never conducted business. F. 46.
- A few webpages on www.agaricus.net have references to "Gemtronics" and "Takesun USA" with respect to credit card charges. *E.g.*, F. 131, 137. However, these references are not probative of which person or entity received payment for sales made on the www.agaricus.net website, because the evidence demonstrates that persons or entities other than Respondents received money for sales made on the www.agaricus.net website. F. 139-40.
- Money for the Undercover Purchases was paid to Takesun via PayPal. F. 127-28, 132, 134-35.
- Isely was not paid for fulfilling the Undercover Purchases placed through the www.agaricus.net website. F. 142.

- Approximately ninety-five percent of the RAAX11 orders Isely received were repeat orders from his existing retail customers. The remaining orders were from Isely's Website, www.our-agaricus.com, or drop shipment requests received from Otto by e-mail. F. 56, 84-85, 87.
- Isely might or might not get paid by Otto for completing drop shipments, which were small orders for which Otto was paid, but which Isely would fulfill for Otto as a business favor. F. 85.
- Sales made on the www.agaricus.net website went to Otto and/or Takesun Portugal Lda, or persons or entities other than Respondents. F. 139-40.
- Isely did not sell RAAX11 on the www.agaricus.net website. F. 117.

The preponderance of the evidence fails to demonstrate that Isely ignored knowledge of deceptive advertising claims and domain registration in order to continue to receive financial benefits from the advertisements on the www.agaricus.net website.

**3. The preponderance of the evidence does not support Complaint Counsel's assertions that Isely was an "integral part" of the www.agaricus.net website or that Respondents had the "ability to control" the www.agaricus.net website**

Drawing inferences from incomplete facts, Complaint Counsel contends that Respondents were an "integral part" of www.agaricus.net, "as the domain's registered contact" and as the website's "front man" for RAAX11. CCB at 15. Complaint Counsel also contends that Respondents had the "ability to control" the www.agaricus.net website. CCB at 2. Again, as the following comparisons show, the facts demonstrated at trial do not justify the assertions made by Complaint Counsel.

**Complaint Counsel's Assertion:** Respondents were an "integral part" of www.agaricus.net, "as the domain's registered contact" and as the website's "front man" for RAAX11. CCB at 15.

**Facts**

- Gemtronics, Inc. is an inactive corporate shell that has never conducted business. F. 46.
- Isely was a wholesale buyer of Takesun products for resale in his own retail business. F. 20-21, 70. Isely and Takesun were separate businesses. F. 63-64, 70.
- The www.agaricus.net website was a competitor to Isely's Website, www.our-agaricus.com. F. 83.

- Isely's name and/or telephone number were identified on some pages of the www.agaricus.net website. *E.g.*, F. 96, 100, 104-05, 108, 111-12. However, Isely did not give Otto permission to use him as a general point of contact for Takesun's websites, and Isely's name was used on the www.agaricus.net website without his permission. F. 123. Moreover, there was no agreement that the www.agaricus.net website would refer sales to Isely. F. 115. Isely did not sell RAAX11 through the www.agaricus.net website. F. 117. Sales made on the www.agaricus.net website went to Otto and/or Takesun Portugal Lda, or persons or entities other than Respondents. F. 139.
- Isely was identified as the "registrant" and, along with Otto, using Otto's e-mail address, as the "administrative," "technical," and "zone" contact for the domain www.agaricus.net, on the WHOIS database. F. 155. However, identification of Isely in connection with the registration of the domain www.agaricus.net was not authorized by Isely himself. F. 165.

The preponderance of the evidence fails to demonstrate that Respondents were an integral part of the www.agaricus.net website.

**Complaint Counsel's Assertion:** Respondents had the "ability to control" www.agaricus.net. CCB at 2.

### **Facts**

- Gemtronics, Inc. is an inactive corporate shell and had no officers or directors to take any action on its behalf. F. 37, 46.
- Isely was a wholesale buyer of Takesun products for resale in his own retail business. F. 20-21, 70. Takesun and Isely operated separate retail businesses. F. 63-64, 70.
- Isely did not have the user name or password to control the content of the www.agaricus.net website. F. 171.
- In March 2008, after Isely contacted Otto concerning the use of Isely's name on the domain registration documents for www.agaricus.net, Otto changed the domain registration to remove references to Isely. F. 181. In addition, the www.agaricus.net website no longer sells to residents of the United States. F. 182.
- Persons or entities other than Respondents, and most likely Otto and/or Takesun Portugal Lda, owned, controlled, and were responsible for the advertisements posted on, the www.agaricus.net website. F. 176-78.

The preponderance of the evidence fails to demonstrate that Respondents had the ability to control the www.agaricus.net website.

**4. Complaint Counsel has overstated the evidence in support of its assertions**

Furthermore, Complaint Counsel has overstated the evidence in support of many of its remaining assertions, as shown by the following comparisons between Complaint Counsel's assertions and the facts demonstrated at trial.

**Complaint Counsel's Assertion:** Respondent Isely "admitted" that consumers could purchase RAAX11 on the www.agaricus.net website using a credit card, and Isely would receive the payment. CCF 72.

**Facts**

- The testimony was that Isely might or might not get paid for drop shipping a small order that was placed on the www.agaricus.net website, for which Otto took payment. F. 85. In addition, Isely was not paid for the two Undercover Purchases. F. 142.
- Purchases could be made on the www.agaricus.net website only by credit card, through PayPal. F. 126, 130. Isely did not have a PayPal account for retail purchases. F. 116.
- Isely could not charge a credit card for an order on any website, unless Otto, who controlled the shopping cart for Isely's Website as well as the www.agaricus.net website, provided the credit card number so Isely could charge the card from his home by telephone. F. 18, 82, 118.

The preponderance of the evidence fails to demonstrate that Isely received payment from consumers who purchased RAAX11 on the www.agaricus.net website using a credit card.

**Complaint Counsel's Assertion:** Isely "frequently" visited www.agaricus.net. CCF 71.

**Fact**

- After Isely began selling RAAX11 in the United States in 2004, Isely went to the shopping cart page on the www.agaricus.net website once or twice a year, to check prices. F. 77, 88-90.

The preponderance of the evidence fails to demonstrate that Isely frequently visited the www.agaricus.net website.

**Complaint Counsel's Assertion:** Respondents created "promotion literature that . . . parroted" the website's cancer-related claims for RAAX11 and Isely sent out a "promotional piece that he received from Takesun that made cancer claims which were made on www.agaricus.net." CCB at 21; CCF 90.

### Facts

- Gemtronics, Inc. is an inactive corporate shell that has never conducted business, F. 46, which would include the preparation of promotional literature.
- JX 59, entitled “RAAX11/Agaricus OPC Protocol Description and Results,” which Complaint Counsel cites, was a document Isely provided only to customers who had already purchased RAAX11 and with whom Isely had been unable to speak in advance, such as the undercover “customers,” Riece Miles and Dana Long. F. 153.
- JX 59 originated with information provided to Isely in an e-mail from Otto regarding the purported RAAX11/OPC Agaricus protocol. F. 150. While JX 59 repeats certain statistics that appear on the www.agaricus.net website regarding claimed use of the protocol by breast cancer patients, the evidence is that Isely received those statistics from an e-mail he received from Otto, rather than from the www.agaricus.net website. F. 150.
- JX 59 does not repeat the cancer-related claims that such patients have “totally recovered,” are “stable” or are “in remission,” which are identified by Complaint Counsel as being made on the www.agaricus.net website, and which are challenged in the Complaint. *Compare* F. 151-52 *with* Complaint ¶ 5. Isely prepared JX 59 without claims of “remission” or “cure” so as to correct or avoid such messages. F. 151.

The preponderance of the evidence fails to demonstrate that Respondents made the same cancer-related claims which were made on the www.agaricus.net website or created promotion literature that parrots the cancer-related claims for RAAX11 made on the www.agaricus.net website.

**Complaint Counsel’s Assertion:** Respondents were “in near constant communication with Takesun.” CCB at 20.

### Facts

- Gemtronics, Inc. is an inactive corporate shell and had no officers or directors to communicate on its behalf. F. 37, 46.
- Prior to placing his monthly order with Takesun, Isely would negotiate the order with Otto through several e-mail exchanges, over the course of approximately one week. F. 68.

The preponderance of the evidence fails to demonstrate that Respondents were in near constant communication with Takesun.

## 5. Summary of the evidence

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

### D. Applicable Case Law Does Not Support a Finding of Liability on the Facts of this Case

#### 1. The law requires proof of participation in the creation or dissemination of challenged advertisements, which is lacking in this case

##### a. Creating advertisements disseminated by others

The cases upon which Complaint Counsel relies to establish liability in this case are unavailing. In *Mueller v. United States*, cited in CCB at 18, the defendant placed his own advertisements in the newspaper, and the newspaper publishers distributed the newspapers. 262 F.2d at 445. The court correctly held that it was no defense that the defendant did not physically disseminate the advertisements because the defendant plainly created the advertisements and “caused” them to be disseminated when he placed them with the newspapers. *Id.* at 445-46. The court noted that the phrase “cause to be disseminated” in Section 12 of the FTC Act “is in the statute without qualification related to the advertiser’s state of mind” and that “the statute holds him liable for the natural consequences of his act regardless of his intentions.” *Mueller*, however, is readily distinguishable from the instant case, where, as Complaint Counsel concedes, there is no evidence that these Respondents created the Challenged Advertisements. CA Tr. at 8.

##### b. Disseminating advertisements created by others

Complaint Counsel also relies on *In re Porter & Dietsch*, in which a drug store chain, Pay’n Save, was held liable under Section 12 for disseminating false advertisements that it did not participate in creating. CCB at 19. In that case, the evidence established that Pay’n Save received the challenged advertisements from the product wholesaler and distributed the advertisements in circulars under the Pay’n Save name. 1977 FTC LEXIS 11, at \*205. In support of its argument, Complaint Counsel cites JX 59, entitled “RAAX11/OPC Agaricus Protocol Description and Results,” which Isely placed in the product packages shipped with the Undercover Purchases. F. 144. As discussed below, this document does not constitute a basis for liability against Respondents.

First, and most critically, there is no contention or allegation that JX 59 itself is a false advertisement by Isely. The Complaint does not allege that Respondents engaged in false advertising through this document, or that the document contains false or misleading representations. Rather, the Complaint charges Respondents with disseminating false advertisements on the [www.agaricus.net](http://www.agaricus.net) website. Complaint ¶¶ 5, 9-11. Since JX 59 is not part of the Complaint in this case, Complaint Counsel was questioned about its relevance at the administrative trial. Complaint Counsel readily conceded that this document is not part of the claim against Respondents, but argued JX 59 was nevertheless relevant and admissible to show conduct “consistent” with claims made on the [www.agaricus.net](http://www.agaricus.net) website. CA Tr. at 304-05; CCRRFF 52 (“To the extent that this item contains cancer-related product claims for RAAX11 that are similar, if not identical, to the website claims for RAAX11, it provides evidence of consistent behavior on the part of Respondents.”). Regardless of whether JX 59 constitutes relevant and admissible evidence, since it was never shown to be part of, similar to, or even displayed as a claim for RAAX11 made on the [www.agaricus.net](http://www.agaricus.net) website, JX 59 cannot form the fundamental basis for holding Respondents liable for disseminating false advertisements on the [www.agaricus.net](http://www.agaricus.net) website, as alleged in the Complaint.

In addition, contrary to Complaint Counsel’s assertion, JX 59 does not “parrot” the Challenged Advertisements on the [www.agaricus.net](http://www.agaricus.net) website. As shown in Section III.C.4 *supra*, while JX 59 repeats certain statistics from the [www.agaricus.net](http://www.agaricus.net) website regarding claimed use of the protocol, the document was derived from an e-mail from Otto to Isely, not from the [www.agaricus.net](http://www.agaricus.net) website. F. 150. Moreover, JX 59 does not repeat the cancer-related claims, that such patients have “totally recovered,” are “stable” or are “in remission,” which are identified by Complaint Counsel as being made on the [www.agaricus.net](http://www.agaricus.net) website, and which are challenged in the Complaint. Compare F. 152; JX 59 (Protocol “Description and Results . . . Takesun has been developing liquid extract blends principally for support of combating various degenerative health conditions”) with Complaint ¶ 5 (“RAAX11 Offers New Hope for an Alternative Breast Cancer Treatment. In a recent study, . . . 41 women had totally recovered, 23 women were in remission, 27 were stable . . .”). Thus, JX 59 does not parrot the claims made on the [www.agaricus.net](http://www.agaricus.net) website. See F. 151. These facts readily distinguish this case from *Porter & Dietsch*, where the respondent published the challenged advertisements provided by the product manufacturer.

Complaint Counsel next contends that Respondents disseminated, or caused the dissemination of, the Challenged Advertisements on the [www.agaricus.net](http://www.agaricus.net) website by directing people to the [www.agaricus.net](http://www.agaricus.net) website. Complaint Counsel cites: (1) JX 57, a brochure created by Isely with product listing and prices, which includes the statement, “For more information go to web site: Go to [www.agaricus.net](http://www.agaricus.net). Click on USA sales or [www.our-agaricus.com](http://www.our-agaricus.com),” CCB at 21; F. 148; and (2) JX 73, a package Isely created containing information for potential distributors for his wholesale business, which states, “More information is available on the Takesun do Brasil web site, [www.agaricus.net](http://www.agaricus.net) or [www.our-agaricus.com](http://www.our-agaricus.com).” CCB at 21; F. 30.



Complaint Counsel concedes that it knows of no case that supports finding liability on the basis of referring people to a website. CA Tr. at 13. To be sure, none of the cases cited by Complaint Counsel would support such a holding, all of which involved active participation in creation or dissemination of advertisements. *See, e.g., Standard Oil*, 577 F.2d at 660 (finding dissemination where representatives were active participants in numerous meetings regarding the advertisements and actively participated in the filming, drafting, promotion and distribution of the advertisements); *Colgate-Palmolive*, 1961 LEXIS 349, at \*44 (finding dissemination where agency originated the idea for and carried the commercials to the television network); *In re Porter & Dietsch*, 1977 FTC LEXIS 11, at \*205 (finding dissemination where store published materials provided by others in advertising circulars under its name).

Although these documents, JX 57, 59, and 73, were created and disseminated by Respondents, none of the documents is alleged to have made any deceptive cancer claims. Indeed, in the case of JX 59 and 73, the documents merely refer to the agaricus.net website. To find liability on these facts would require extending the meaning of “dissemination” or “causing to be disseminated” beyond that which is supported by the language of the statute and case interpretation thereof. In light of Complaint Counsel’s burden of proof, and consistent with case law which finds liability for disseminating or causing dissemination on evidence of participation in the challenged advertisements that is not present in this case, these documents do not support a conclusion that Respondents are liable for disseminating or causing to be disseminated the Challenged Advertisements on the www.agaricus.net website, as alleged in the Complaint.

**c. Participating with others in the creation and dissemination of advertisements**

Next, Complaint Counsel relies on cases holding advertising agencies jointly liable with their clients for false advertising. CCB at 18-19 (citing *In re Standard Oil Co.*, No. 8827, 84 F.T.C. 1401, 1974 FTC LEXIS 24 (Nov. 26, 1974), *aff’d and modified*, *Standard Oil Co. v. FTC*, 577 F.2d 653 (9th Cir. 1978); *In re Colgate-Palmolive*, 59 F.T.C. 1452, 1961 FTC LEXIS 349). An advertising agency may be held liable for deceptive advertising if the agency (1) was an active participant in the preparation of the advertisement, and (2) knew or had reason to know that the advertisement was deceptive. *See In re Standard Oil*, 1974 FTC LEXIS 24, at \*163-65. Thus, in *In re Standard Oil*, the evidence established that representatives of the advertising agency “were involved in the development of the [challenged advertisements] from the very earliest stages . . . [and] were active participants in numerous meetings” regarding the challenged advertisements. *Id.* at \*164-65. In addition, the final determination to use the challenged advertisements “was a joint decision of” the advertising agency and the seller, Standard Oil, and the agency “actively participated in the filming of the pictorial portions of the advertisements, the drafting of the verbal texts, the preparation of layouts and the promotion and distribution of the advertisements.” *Id.* at \*165. Because the agency actively participated in the advertisements, and knew or had reason to know that the challenged advertisements were false or deceptive, liability was appropriate. *Standard Oil v. FTC*, 577 F.2d at 659-60.

Similarly, the advertising agency in *Colgate-Palmolive* actively participated in creating and disseminating the challenged advertisements. In that case, the evidence established that the advertising agency “originated the idea” for the challenged advertisements and “carried these commercials to the television network.” 1961 FTC LEXIS 349, at \*44.

In contrast to *Standard Oil* and *Colgate-Palmolive*, there is no proof in the instant case that either Respondent had any role in creating, or participating in creating, the Challenged Advertisements, as Complaint Counsel acknowledges. CA Tr. at 8.

**d. “Guilt by association” is insufficient to prove participation**

Complaint Counsel contends further that Respondents “participated” in the www.agaricus.net website generally, and that Isely had a close “association” with the manufacturer of RAAX11, Takesun do Brasil, as manifested in Isely’s use of “Takesun” in the trade name of his importing business, Takesun USA. CCB at 19-20. Neither unsupported assertions of general “participation” in the website displaying the Challenged Advertisements, nor a business relationship with Takesun, substitutes, however, for proof of participation in creating or disseminating the Challenged Advertisements. Guilt by association is not the applicable legal standard.

In *In re Dobbs Truss Co.*, the Commission found the evidence insufficient to hold a product manufacturer liable for the deceptive advertisements created and disseminated by its distributors. 1952 FTC LEXIS 49, at \*50-51, \*76-77. The Commission found that, although there was a formal franchise agreement between the manufacturer and the distributor respondents, that agreement did not give the manufacturer control over its distributors’ advertisements, and the manufacturer did not exercise control over the challenged advertisements of the distributors. In addition, the manufacturer did not pay any advertising allowance or furnish any other financial aid to the distributor respondents. *Id.* at \*49. The record was insufficient in *Dobbs* to find the manufacturer liable for advertisements created and disseminated by the distributors, even though, unlike the instant case, the manufacturer and distributors in *Dobbs* entered into formal distributorship agreements. *Id.* at \*47. Moreover, the record in *Dobbs* was insufficient to find the manufacturer liable despite the fact that the distributors in that case, like Isely, used trade names incorporating the name of the manufacturer. *Id.* at \*41-44, \*49-50. In this regard, *Dobbs* confirms Isely’s statement that “[w]hen a Chevrolet dealer uses the word ‘Chevrolet,’ he’s still an independent business.” F. 24.

Significantly, the Commission in *Dobbs* also held that the manufacturer *was* liable for certain advertisements that the manufacturer created and provided to the distributors for dissemination. *Id.* at \*51, \*76-77. Thus, the holding in *In re Dobbs* affirms that liability for false advertising requires proof of participation in the creation and/or dissemination of the challenged advertising. Evidence that Isely had a relationship with Takesun, or was “identified” as connected to the www.agaricus.net website, is not sufficient.

A lack of proof of participation in the challenged misconduct was also fatal to complaint counsel's case in *Rizzi*, 1974 FTC LEXIS 194 (entering summary initial decision and dismissing complaint as to individual Rizzi, which became the final order and decision of the Commission). In that case, complaint counsel had alleged that the respondent Rizzi was a "co-partner" of another respondent in a business that disseminated false advertisements. *Id.* at \*1-2, \*4. On respondent's motion for summary decision, the undisputed evidence showed that Rizzi was not a partner in the business, but an employee in charge of marketing. The undisputed evidence further showed that Rizzi was aware of complaints from customers and was knowledgeable of the business' overall method of doing business, including its advertising and sale of merchandise. *Id.* at \*18-19. While conceding that Rizzi was only an employee, rather than a co-partner, as originally believed, complaint counsel maintained that the undisputed evidence, described above, showed that respondent "cooperated and acted together [with the co-respondents] in the performance of the acts and practices" challenged in the complaint. *Id.* at \*20. The ALJ rejected this inference on the facts presented and granted summary decision for Rizzi. The ALJ noted that for an employee to be liable, as a matter of law, "[s]ome involvement in management or some overt act involving the challenged conduct or some control over such conduct of others appears to be necessary. Mr. Rizzi does not appear to meet these requirements. Moreover, mere knowledge of the existence of challenged conduct does not appear to be sufficient grounds for [liability]." *Id.* at \*22.

The evidence of Respondents' connection to the challenged advertising practices of the [www.agaricus.net](http://www.agaricus.net) website is even weaker than that held insufficient as a matter of law in *Rizzi*. Unlike *Rizzi*, there is no suggestion and no evidence in this case that either Respondent was an employee of Takesun do Brasil or the [www.agaricus.net](http://www.agaricus.net) website. Also, unlike *In re Rizzi*, there is no suggestion and no evidence in this case that either Respondent was in charge of marketing for Takesun or the [www.agaricus.net](http://www.agaricus.net) website. As in *Rizzi*, it has not been established that Isely was involved in the management or control of Takesun or the [www.agaricus.net](http://www.agaricus.net) website, even though he was listed in the WHOIS database as a registrant and contact for the domain [www.agaricus.net](http://www.agaricus.net). *See supra* Section III.C.1. Complaint Counsel has not established that Isely had knowledge of the Challenged Advertisements, *see supra* Section III.C.2, but, in any event, as *Rizzi* states, "mere knowledge of the existence of challenged conduct" is insufficient to create liability.

The evidence shows that Gemtronics, Inc. was an inactive corporate shell that conducted no business activities, that Isely was a wholesale buyer of Takesun, and that Takesun and Isely ran separate, independent businesses. *See supra* Section III.C.1. As in *Rizzi*, the Complaint against Respondents was based on incomplete or incorrect information and cannot be salvaged by supposition and conjecture to meet the required burden of proof.

## **2. Neither "knowledge" nor "ability to control" the Challenged Advertisements creates liability under the facts of this case**

An exception to the requirement of proof of actual participation in the creation or dissemination of challenged advertisements may apply to hold a corporate principal, such

as an officer or director, liable for false advertisements disseminated by his or her corporation. In that context, it is sufficient to prove the liability of the corporation and the principal's ability to control the challenged acts. *FTC v. Amy Travel Service*, 875 F.2d at 573; *FTC v. Kitco*, 612 F. Supp. at 1292. In addition, in cases relied upon by Complaint Counsel, where a corporate principal was held jointly liable with the corporation for restitution under Section 13(b) of the FTC Act, the evidence must further demonstrate that the corporation's principal had actual knowledge of the corporation's misrepresentations, reckless indifference to the truth or falsity of the misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth. *Id.* See also *Waltham Watch v. FTC*, 318 F.2d at 31-32 (upholding cease and desist order against licensor because of false advertising of licensee, where evidence showed licensor's review of licensee's advertising in advance, knowledge of complaints of misrepresentations, and failure to act); *In re Southwest Sunsites*, 1985 FTC LEXIS 38, at \*344-46 (holding principal liable for misrepresentations by his broker/agent).

This theory of liability does not apply to this case because there is no contention or proof that either Isely or Gemtronics, Inc. was an officer, director, or other principal of Takesun do Brasil, and because Takesun do Brasil has not been found liable and indeed is not even a party to this action. Accordingly, neither actual or constructive knowledge, nor "ability to control," can substitute for proof of actual participation in creating or disseminating the Challenged Advertisements in this case.

### **3. Summary of liability**

The Complaint in this case targeted advertisements appearing on the www.agaricus.net website. Under the theory of liability presented by Complaint Counsel, Respondents Isely and Gemtronics, Inc. were the responsible parties, despite the evidence indicating that persons or entities other than Respondents were responsible for the www.agaricus.net website and for disseminating, or causing to be disseminated, the Challenged Advertisements. Complaint Counsel apparently declined to pursue the possibility that entities other than Respondents could be responsible for the www.agaricus.net website or the Challenged Advertisements. For example, even though pages from the www.agaricus.net website state, "Dr. Steven Hall reports that 100% of his patients are in remission," the evidence presented at trial does not indicate that there was any investigation of Dr. Hall or of that representation. F. 106. Moreover, although the record in this case is replete with references to Otto (*e.g.*, F. 78, 127-28, 155, 159, 174-75, 196), Otto was not part of these proceedings. In fact, Complaint Counsel maintained at closing argument, "I don't even know if Mr. Otto exists." CA Tr. at 21.

The evidence failed to establish that the charged Respondents were responsible for the www.agaricus.net website and the representations made thereon. Therefore, Complaint Counsel's theory of liability falls short of the required burden of proof.

Complaint Counsel failed to carry its burden of proving that Respondents disseminated or caused to be disseminated the Challenged Advertisements on the www.agaricus.net website. Accordingly, the Complaint is DISMISSED.

#### IV. SUMMARY OF CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over Respondents William H. Isely and Gemtronics, Inc.
2. Isely is a “person,” whose acts and practices with respect to the sale of RAAX11 were in or affecting “commerce” as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. Gemtronics, Inc. is a mere shell corporation, without substance, that is completely dominated by Isely. The Commission has jurisdiction over Gemtronics, Inc. through Isely. 15 U.S.C. § 44.
4. Under the Administrative Procedure Act, an Administrative Law Judge may not issue an order “except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.” 5 U.S.C. § 556(d).
5. Complaint Counsel bears the burden of proof of establishing each element of the violations of the Complaint by a preponderance of the evidence.
6. The burden of proving a fact by a “preponderance of the evidence” requires the fact-finder to believe that the existence of the fact is more probable than its nonexistence.
7. If, upon any issue in the case, the evidence appears to be equally balanced, or if it cannot be said upon which side it weighs heavier, then the burden of proof has not been met.
8. Proving that Respondents are liable for disseminating, or causing the dissemination of, false advertisements for RAAX11 on the [www.agaricus.net](http://www.agaricus.net) website, as alleged in the Complaint, requires Complaint Counsel to prove, *inter alia*, that Respondents participated in the creation or dissemination of the Challenged Advertisements. 15 U.S.C. § 52.
9. Complaint Counsel has failed to prove by a preponderance of the evidence that Gemtronics, Inc. or Isely created, or participated in creating, the Challenged Advertisements for RAAX11 on the [www.agaricus.net](http://www.agaricus.net) website.
10. Complaint Counsel has failed to prove by a preponderance of the evidence that Gemtronics, Inc. or Isely disseminated, or participated in disseminating, the Challenged Advertisements for RAAX11 on the [www.agaricus.net](http://www.agaricus.net) website.
11. Complaint Counsel has failed to prove by a preponderance of the evidence that Gemtronics, Inc. or Isely disseminated, or caused the dissemination of, the Challenged Advertisements for RAAX11 on the [www.agaricus.net](http://www.agaricus.net) website.


12. Complaint Counsel has failed to prove by a preponderance of the evidence that Gemtronics, Inc. or Isely owned or controlled the www.agaricus.net website.
13. Proof that Isely had a business association with the manufacturer of RAAX11, Takesun do Brasil, including proof that Isely was a wholesale purchaser of RAAX11 for resale in Isely's separate retail business and that Isely used the trade name, "Takesun USA," in his wholesale business, is insufficient to establish the legal liability of either Respondent for the Challenged Advertisements for RAAX11 on the www.agaricus.net website.
14. Neither Gemtronics, Inc. nor Isely is an officer, director, shareholder, or other principal of Takesun do Brasil or the www.agaricus.net website, and therefore, standards for liability arising from purported "ability to control" or "knowledge" of the advertising practices of the www.agaricus.net website do not apply to determine Respondents' liability for the Challenged Advertisements for RAAX11 on the www.agaricus.net website.
15. Complaint Counsel failed to meet its burden of proof in support of the violations alleged in the Complaint.
16. Respondents William H. Isely and Gemtronics, Inc. are not liable for violating Sections 5(a) and 12 of the FTC Act. 15 U.S.C. §§ 45(a), 52.
17. The Complaint should be and is dismissed.

### **ORDER**

For the reasons stated above,

IT IS ORDERED that all violations of the Complaint are, and the Complaint is, hereby dismissed.

ORDERED:

  
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D. Michael Chappell  
Chief Administrative Law Judge

Date: September 16, 2009