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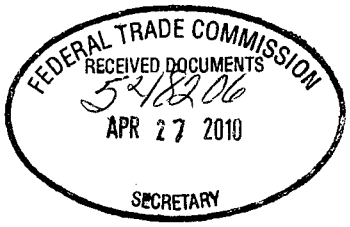

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

DOCKET NO. 9330

In the Matter of

GEMTRONICS, INC.,
a corporation, and

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

Respondents.

INITIAL DECISION ON RESPONDENTS' APPLICATION FOR AN AWARD OF ATTORNEY FEES AND OTHER EXPENSES

D. Michael Chappell
Chief Administrative Law Judge

Date: April 27, 2010

APPEARANCES FOR THE PARTIES

Counsel Supporting the Complaint:

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Pro se on behalf of himself and Respondent Gemtronics, Inc.:

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I. INTRODUCTION

On December 2, 2009, Gemtronics, Inc. and William H. Isely ("Isely") (collectively, "Respondents"), submitted an Application for an Award of Attorney Fees and Other Expenses, under the Equal Access to Justice Act pursuant to Rule 3.81, *et seq.* of the Commission Rules of Practice, 16 C.F.R. § 3.81 *et seq.* ("Application"). As more fully discussed below, Respondents assert that Gemtronics, Inc. and Isely are eligible for an award, and are entitled to an award as prevailing parties in a prior administrative action that lacked substantial justification. Complaint Counsel opposes the Application on the grounds that the position taken in the prior proceeding was substantially justified within the meaning of applicable law, that special circumstances make an award unjust, and that Respondents seek fees and expenses that are not allowed by law.

This is the Initial Decision on the Application, issued pursuant to Commission Rule 3.83(g). This Initial Decision is based on a consideration of the whole record relevant to the issues and addresses the material issues of fact and law. All factual and legal contentions urged by the parties with regard to the Application have been fully reviewed and evaluated. Those not addressed in this Initial Decision were rejected because they were not supported by the evidence, or because they were not dispositive or material to the determination of the merits of the Application. *See Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-94 (1959) (holding in connection with decision of another Commission, and interpreting the Administrative Procedure Act ("APA"), "[b]y the express terms of [the APA], the Commission is not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are material"); *accord Stauffer Labs., Inc. v. FTC*, 343 F.2d 75, 82 (9th Cir. 1965); *see also Borek Motor Sales, Inc. v. NLRB*, 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").

Upon full consideration of the written submissions of the parties, and the administrative record as a whole, the Application is DENIED, as explained below.

II. PROCEDURAL HISTORY

A. The Prior Adjudicative Proceeding

The Application stems from an Administrative Complaint issued by the Commission on September 16, 2008 ("Complaint") against Gemtronics, Inc. and Isely. The Complaint and the proceedings that followed will be referred to herein collectively as the "Prior Adjudicative Proceeding."

The Complaint alleged that Respondents 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 through an Internet website, www.agaricus.net. Complaint ¶¶ 3-5, 7, 10-11. Respondents denied these allegations of the Complaint. Answer ¶¶ 3-5, 7, 10-11. In particular, among other things, Respondents denied that they were responsible for advertisements on www.agaricus.net and further averred that a Brazilian company, Takesun do Brasil, and its agents and/or other individuals not named in the action, owned and controlled the website, and caused dissemination of the advertisements challenged in the Complaint. *Id.*

The parties conducted discovery. After the conclusion of discovery, each side submitted Motions for Summary Decision pursuant to Rule 3.24 of the Commission Rules of Practice, 16 C.F.R. § 3.24. Each side's motion was denied because, based upon the depositions, interrogatories and documents submitted by the parties, it could not be "conclude[d] that there is no genuine dispute of fact as to any material issue or that either party is entitled to judgment as a matter of law." Transcript of Final Prehearing Conference, June 24, 2009, at 6.

An evidentiary hearing was conducted on June 24, 2009. Thereafter, the parties submitted post-trial briefs, proposed findings of fact and conclusions of law, and replies thereto. Closing arguments were heard on July 30, 2009.

On September 16, 2009, an initial decision was issued dismissing the Complaint.[1] The Initial Decision in the Prior Adjudicative Proceeding found, among other things, that Complaint Counsel failed to prove by a preponderance of the evidence that Respondents owned or controlled the website www.agaricus.net, or that Respondents participated in creating or disseminating the alleged false advertisements on www.agaricus.net. IDFOF 176-78. Based upon the language of the FTC Act, and governing case precedent, it was held that the preponderance of the evidence did not establish that Respondents disseminated or caused the dissemination of the challenged advertisements on www.agaricus.net. IDPAP at 37-56. Accordingly, the Complaint was dismissed. IDPAP at 57-58.

The Initial Decision in the Prior Adjudicative Proceeding was not appealed and became the Decision of the Commission on November 9, 2009. Order of the Commission, December 8, 2009. *See* 16 C.F.R. § 3.51(a).

B. Proceedings on the Application

Respondents' Application was submitted on December 2, 2009. On December 23, 2009, Respondents submitted written notification that they terminated their counsel's representation. *See* Letter to Hon. D. Michael Chappell, December 23, 2009, enclosing

[1] Unless otherwise defined herein, the following abbreviations shall apply:
App. – Respondents' Application for Award of Attorney Fees and Other Expenses
IDPAP – Initial Decision in the Prior Adjudicative Proceeding
IDFOF – Finding of Fact in the Prior Adjudicative Proceeding
JX – Joint Exhibit from the evidentiary hearing in the Prior Adjudicative Proceeding
Tr. – Transcript of proceedings before the Administrative Law Judge

December 22, 2009 termination letter to Matthew Van Horn, Esq. Mr. Van Horn confirmed in writing that his services had been terminated, and thereafter submitted his Notice of Withdrawal. At the next proceeding on the record, Respondents reaffirmed their desire to go forward with the Application proceedings without an attorney. Transcript of Status Hearing, March 2, 2010, at 15-17. Accordingly, after December 22, 2009, Respondents proceeded *pro se*.

Respondents submitted a supplement to their Application on December 23, 2009,[2] seeking additional attorney fees for a bill that had not yet issued at the time the Application was submitted ("Supplemental Fee Request"). Complaint Counsel submitted its Answer in Opposition to Respondents' Application ("Answer") on January 6, 2010. Respondents submitted their Reply to the Answer ("Reply") on January 20, 2010.

A number of motions were also submitted in connection with the Application. On January 7, 2010, Respondents submitted a Motion to Exclude Complaint Counsel's Answer as untimely. On February 1, 2010, Complaint Counsel submitted its Motion for Leave to File a Response in Support of its Answer in Opposition to Respondents' Application for an Award Under the Equal Access to Justice Act ("Complaint Counsel's Motion for Leave"), which attached Complaint Counsel's proposed response. The following day, on February 2, 2010, Respondents submitted their Motion for Leave to File a Response to Complaint Counsel's Motion for Leave and proposed response ("Respondents' Motion for Leave"), in which Respondents also withdrew their prior Motion to Exclude Complaint Counsel's Answer.

On February 3, 2010, Complaint Counsel submitted its Motion for Leave to File an Amended Attachment to its Response ("Motion to Amend"), along with its proposed amended Attachment "A." On February 4, 2010, Respondents submitted their Motion to Object and to Oppose Complaint Counsel's Three Motions. Respondents submitted their Further Motion to Strike and Oppose the same filings of Complaint Counsel, on February 8, 2010.[3]

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[2] Also on December 23, 2009, Respondents submitted a Petition to the Commission for Rulemaking on Maximum Rates for Attorney Fees as Provided under Rule 3.81(g). Under Commission Rule 3.81(f), an attorney fee award cannot exceed the $125 hourly rate specified in Section 504(b) of the Equal Access to Justice Act ("EAJA"). However, under Rule 3.81(g), "[i]f warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Commission may, upon its own initiative or on petition of any interested person or group, adopt regulations providing that attorney fees may be awarded at a rate higher than the rate specified" in the EAJA. Such Rulemaking proceedings would be before the Commission under Part 1, Subchapter C of the Commissions Rules. *Id.*

[3] Unrelated to the Application, Respondents submitted a Motion to Sanction Complaint Counsel for Her Improper Actions in the Matter of Gemtronics, Inc. and William H. Isely ("Motion for Sanctions") on February 26, 2010. Complaint Counsel submitted its opposition on March 18, 2010. Respondents submitted a Motion for Leave to Submit a Reply to Complaint Counsel's Answer to the Motion for Sanctions and a proposed Reply. By Order dated April 27, 2010, Respondents' Motion for Sanctions was denied.

By Order dated February 4, 2010, Complaint Counsel and Respondents were directed to attend a telephonic status hearing regarding the Application. *See* Commission Rule 3.83(f), 16 C.F.R. § 3.83(f) (providing that Administrative Law Judge may order further proceedings, such as an informal conference, "when necessary for full and fair resolution of the issues arising from the application"). The status hearing, originally scheduled for February 11, 2010, was rescheduled due to weather conditions that necessitated the closure of the federal government. Pursuant to a Revised Order for Further Proceedings on Respondents' Application for Award of Attorney Fees and Other Expenses, issued on February 19, 2010, the status hearing was conducted on March 2, 2010, by telephone conference on the record, at which all parties were present.

All motions related to the Application were addressed and ruled upon during the March 2, 2010 status hearing, and an order confirming those rulings was issued on March 4, 2010. Specifically, Complaint Counsel's Motion for Leave to File Response in Support of its Answer was granted, and it was further ordered that the proposed response attached to the Motion for Leave would be deemed submitted. In addition, Complaint Counsel's Motion to Amend was granted, and it was further ordered that the proposed amendment would be deemed submitted. Respondents' Motion for Leave was also granted, and Respondents submitted their reply to Complaint Counsel's Response, on March 10, 2010.

The possibility of settlement was also discussed at the March 2, 2010 status hearing. *See* Rule 3.83(e), 16 C.F.R § 3.83(e) ("The applicant and complaint counsel may agree on a proposed settlement of the award before final action on the application."). The parties were directed to report the status of settlement discussions on March 24, 2010. On that date, the parties reported that they had engaged in settlement negotiations, but were unable reach a settlement on Respondents' Application. On March 26, 2010, pursuant to Rule 3.83(f) and (g), an Order issued closing the proceedings.

Rule 3.83(g) states that "[t]he Administrative Law Judge shall issue an initial decision on the application within 30 days after closing proceedings on the application." 16 C.F.R. § 3.83(g). Thirty days from March 26, 2010 is April 27, 2010.

III. OVERVIEW OF APPLICABLE LAW

The Equal Access to Justice Act, 5 U.S.C. § 504, 28 U.S.C. § 2412 ("EAJA"), provides for an award of attorney fees and expenses to a prevailing party in litigation involving the government.[4] When a party prevails in administrative litigation, Section

[4] 5 U.S.C. § 504 and 28 U.S.C. § 2412 were enacted together as Sections 203 and 204, respectively, of PL 96-481, 94 Stat. 2325 *et seq.* (Oct. 21, 1980). Section 2412 of Title 28 provides for an award of attorney fees in connection with civil litigation arising from government action, while Section 504 of Title 5 applies to administrative litigation. *Compare* 28 U.S.C. § 2412(b) ("[A] court may award reasonable fees and expenses of attorneys, . . . to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action.") *with* 5 U.S.C. § 504(a)(1) ("An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding . . .").

504(b) of Title 5 of the United States Code provides that the "agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1). "Fees and other expenses" are defined as "the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees." *Id.* at § 504(b)(1)(A). An "adjudicative officer" includes an administrative law judge who presided over the administrative adjudication. *Id.* at § 504(b)(1)(D).

Section 504(c)(1) of the EAJA further directs that "each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses." 5 U.S.C. § 504(c)(1). Implementing this portion of the EAJA, Commission Rules 3.81 through 3.83 "describe the parties eligible for awards, how to apply for awards, and the procedures and standards that the Commission will use to make them." 16 C.F.R § 3.81(a). An eligible party is entitled to an award, *inter alia*, when "it prevails in the adjudicative proceeding, unless the Commission's position in the proceeding was substantially justified or special circumstances make an award unjust." 16 C.F.R. § 3.81(a)(1)(i); *see* 5 U.S.C. § 504(a)(1). The burden of proving that its position was substantially justified is on Complaint Counsel, "which may avoid an award by showing that its position had a reasonable basis in law and fact." 16 C.F.R. § 3.81(e)(1)(i). In addition, "[a]n award to a prevailing party will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make an award unjust." 16 C.F.R. § 3.81(e)(1)(ii); 5 U.S.C. § 504(a)(3).

A decision involving a prevailing party "shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust." 16 C.F.R. § 3.83(g)(1).

IV. FINDINGS AND CONCLUSIONS

A. Respondents' Eligibility for an Award

The burden of proving eligibility is on the applicant. 16 C.F.R. § 3.81(d)(1). An eligible party includes: an individual with a net worth of not more than $2 million, 16 C.F.R. § 3.81(d)(2)(i); the sole owner of an incorporated business which has a net worth of not more than $7 million, and not more than 500 employees, 16 C.F.R. § 3.81(d)(2)(ii); and a corporation with a net worth of not more than $7 million and not more than 500 employees. 16 C.F.R. § 3.81(d)(2)(v). *See generally* 5 U.S.C. § 504(b)(1)(B). Rule 3.82(b) requires that a "net worth exhibit" be provided with an application submitted under

Rule 3.81, and that the application contain "[a]written verification under oath or under penalty or perjury that the information provided is true and correct accompanied by the signature of the applicant or an authorized officer or attorney." 16 C.F.R. § 3.82(a)(8).

Respondents submitted verified net worth exhibits for both Gemtronics, Inc. and Isely. According to the Application and Exhibit A attached thereto, Gemtronics, Inc. is a corporation with a net worth of less than $7 million, with no employees. The Application and Exhibit B thereto demonstrate that Isely is an individual with a net worth of less than $2 million and, further, that Isely was the sole owner of an unincorporated business operated under the trade name, "Gemtronics," with a net worth of less than $7 million and no employees. *See* App. ¶ 4, and Exhibits A and B.

The Application and net worth exhibits submitted by Respondents demonstrate that they are both eligible parties under the law. Complaint Counsel's Answer does not dispute that Respondents are eligible parties within the meaning of the EAJA, 5 U.S.C. § 504(b)(1)(B), and Commission Rule 3.81(d)(2). Accordingly, Respondents are eligible for an award.

B. Prevailing Party

Respondents assert that they are entitled to an award as the prevailing parties in the Prior Adjudicative Proceeding. App. ¶ 2. Complaint Counsel's Answer and other written submissions do not dispute that Respondents were prevailing parties within the meaning of applicable law.

Neither the EAJA nor the Commission Rules defines "prevailing party." However, previous applicants were considered prevailing parties when the underlying complaints against them had been dismissed for lack of evidence. *In re Koski*, No. 9225, 113 F.T.C. 130, 1990 FTC LEXIS 531, at *5 (Jan. 25, 1990); *In re Motor Transport Ass'n of Conn., Inc.*, No. 9186, 112 F.T.C. 574, 1989 FTC LEXIS 120, at *2 (Nov. 17, 1989). In the instant case, as set forth in section II A, above, the Complaint against Respondents was dismissed for failure of proof, after a full evidentiary hearing. Thus, Respondents have demonstrated that they were prevailing parties in the Prior Adjudicative Proceeding, as required by Section 504(a)(1) of the EAJA and Commission Rule 3.81.[5]

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[5] In their February 2, 2010 Motion for Leave, *see* section II B, supra, Respondents attempted to raise an additional ground justifying an award, that in settlement discussions related to the Prior Adjudicative Proceedings, Complaint Counsel made "an excessive and unreasonable demand." *See* Commission Rule 3.81(a)(1)(ii) (eligible party will receive an award when the "agency's demand is substantially in excess of the decision of the adjudicative officer, and is unreasonable when compared with that decision, under all the facts and circumstances of the case"); *see also* 5 U.S.C. § 504(a)(4) (permitting award "[i]f, in an adversary adjudication arising from an agency action . . . , the demand by the agency is substantially in excess of the decision of the adjudicative officer . . ."). Respondents' assertion is untimely. Moreover, excessive demand by the agency is not a permissible basis for an award where, as here, the applicant is the prevailing party in the underlying adjudication. *Park Manor, Ltd. v. HHS*, 495 F.3d 433, 437 (7th Cir. 2007), *cert. denied,* 552 U.S. 1099 (2008); *Am. Wrecking Corp. v. Sec'y of Labor*, 364 F.3d 321, 327-28 (D.C. Cir. 2004); *Secretary v. Colorado Lava, Inc.*, No. EAJ 2001-227 FMSHRC 186 (Mar. 4, 2005).

C. Substantial Justification for Prior Adjudicative Proceeding

1. Contentions of the Parties

a. Complaint Counsel's contentions

In support of its claim that the position taken in the Prior Adjudicative Proceeding against Respondents was substantially justified, Complaint Counsel points to evidence that the challenged advertising on www.agaricus.net referred potential consumers to Isely for information or to purchase RAAX11. Answer at 8; *see* IDFOF 93, 96, 98, 100, 104-05, 108, 111, 119-121.

Complaint Counsel further notes that information contained in the "WHOIS" internet database listed Isley as a registrant, as well as the administrative, technical, and zone contact for www.agaricus.net. Answer at 8; *see* IDFOF 154-55.

In addition, Complaint Counsel relies on evidence that: undercover purchases of RAAX11 made through www.agaricus.net by FTC Investigator Michael Liggins were fulfilled by Respondents, Answer at 9; *see* IDFOF 124, 141, 143; the invoices from the undercover purchases were under the names of Isely and Gemtronics, and invited consumers to make future purchases of RAAX11 directly from Respondents, Answer at 9; IDFOF 144-46; and the product package enclosed a brochure referring customers to www.agaricus.net for additional product information. Answer at 9; IDFOF 148. Furthermore, Complaint Counsel states, Isely incorporated an entity called Gemtronics, Inc. in North Carolina in 2006. Answer at 9 n.19; *see* IDFOF 2.

As further support for its position in the Prior Adjudicative Proceeding, Complaint Counsel points to evidence that, after Complaint Counsel first contacted Respondents in March 2008 regarding the challenged advertising on www.agaricus.net, Isely advised Complaint Counsel that he was able to have his name and contact information removed from the website and domain registration, and that the content of www.agaricus.net was changed to state that its products were not available to United States residents. These changes were effected by Isely, despite Isely's having contended to Complaint Counsel that he had no ability to control the content of www.agaricus.net. Answer at 9-10; IDFOF 179-82. Finally, Complaint Counsel argues, as evidence that it acted reasonably regarding Respondents, that "Respondents did not provide Complaint Counsel with any valid evidence to confirm that they did not control the contents of the website . . . [and] did not deny that [they] sold RAAX11 on the website." Answer at 10.

b. Respondents' contentions

Respondents argue that the agency's prosecution of Respondents in the Prior Adjudicative Proceeding was not substantially justified because, on May 6, 2008, prior to issuance of the Complaint, counsel for Respondents provided Complaint Counsel with evidence indicating that www.agaricus.net was not owned by Respondents, but rather by George Otto ("Otto"), and that Otto was responsible for the content of the website. Application, at 5-6; *see* IDFOF 196 (finding that Respondents' counsel's May 6, 2008

letter to Complaint Counsel "attached documents indicating that Otto, Takesun, and Agarix International could be responsible for the www.agaricus.net website"). Respondents also contend that documents and testimony provided during discovery from the company that hosted the agaricus.net website, DomainDiscover, showed that the website was not registered to Respondents and that Respondents "lacked authority" to control the content. Application at 6-7.

According to Respondents, Complaint Counsel acted unreasonably by ignoring the evidence indicating that Otto and his affiliated corporate entities owned and controlled www.agaricus.net, Application at 8, Reply at 6-12, and that it was also unreasonable to pursue "Gemtronics, Inc." as a respondent when Respondents' counsel had informed Complaint Counsel that the entity was an inactive shell. Application at 8-9. Respondents further note that they were not the only RAAX11 retailers referred to on www.agaricus.net. Reply at 23; *see* IDFOF 95, 104, 186. Moreover, Respondents state that they did in fact deny selling RAAX11 on www.agaricus.net, and contended that any internet sales they made were through a different website they owned and controlled, www.our-agaricus.com, which was not the subject of the Complaint. Reply at 13; *see* IDFOF 77-81. Respondents contend that Complaint Counsel unreasonably targeted Respondents, given the evidence provided, because Complaint Counsel did not have the resources to locate and pursue assets of Otto, a foreign national. Reply at 4-5, 9; *see* IDFOF 60.

2. Applicable legal standards

The EAJA does not define the phrase, "substantially justified." However, the Supreme Court has held that the government's position is "substantially justified" for purposes of an award of attorney fees to a prevailing party under the EAJA "if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 n.2 (1988). *See* Rule 3.81(e)(1)(i), 16 C.F.R. § 3.81(e)(1)(i) (stating that "complaint counsel . . . may avoid an award by showing that its position had a reasonable basis in law and fact"). The test is met when there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"; "if there is a 'genuine dispute'"; or "if reasonable people could differ as to the appropriateness of the contested action." *Pierce*, 487 U.S. at 565. While the standard requires more than conduct that is "merely undeserving of sanctions for frivolousness," it does not require that the action be "justified to a high degree." *Id.* at 565-66. Rather, the action need only "satisfy a reasonable person." *Id.*[6] To be sure, "[t]he EAJA is not a 'loser pays' statute." *Morgan v. Perry*, 142 F.3d 670, 685 (3d Cir. 1998). A court cannot assume that the government's position was not substantially justified simply because the

[6] Although *Pierce* decided the meaning of the phrase, "substantially justified" in 28 U.S.C. § 2412(d)(1)(A), the language is identical to that found in 5 U.S.C. § 504(a)(1), which is at issue in the instant case. *Compare* 28 U.S.C. § 2412(d)(1)A) (requiring award to prevailing party "unless the court finds that the position of the United States was substantially justified . . .") *with* 5 U.S.C. § 504(a)(1) (requiring award "unless the adjudicative officer of the agency finds that the position of the agency was substantially justified . . ."). Moreover, courts have relied on the definition in *Pierce* when evaluating "substantial justification" under 5 U.S.C. § 504(a)(1). *E.g.*, *Inter-Neighborhood Hous. Corp. v. NLRB*, 124 F.3d 115, 120 (2d Cir. 1997); *Blaylock Elec. v. NLRB*, 121 F.3d 1230, 1233 (9th Cir. 1997); *First Nat'l Monetary Corp. v. Commodity Futures Trading Comm'n.*, 860 F.2d 654, 657 (6th Cir. 1988).

government lost on the merits. *Id.*

The EAJA specifies that whether the position of the agency was substantially justified "shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication . . . ." 5 U.S.C. § 504(a)(1); *see* 16 C.F.R. § 3.81(a)(1)(i) (same). In determining whether the agency's position was substantially justified, both the government's prelitigation position and its litigation position are examined. *Murphy v. Astrue*, No. 08-1848, 2009 U.S. App. LEXIS 24499, at *6 (7th Cir. Nov. 9, 2009); *Morgan*, 142 F.3d at 685; *see* 5 U.S.C. § 504(b)(1)(E) (stating that "position of the agency" means, "in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based").

Applying the foregoing principles, the issue is whether there was a "reasonable basis in fact and law" for taking the position that Respondent Gemtronics, Inc., and Respondent Isely, individually and/or as a controlling officer of Gemtronics, Inc., disseminated, or caused the dissemination of, the challenged advertisements on www.agaricus.net, in violation of Sections 5 and 12(a) of the FTC Act.

As noted in the Initial Decision in the Prior Adjudicative Proceeding, the FTC Act does not define either "dissemination" or "causing dissemination." IDPAP at 5. Case law makes clear, however, that liability requires, at a minimum, some participation in the creation of the advertisements, or the dissemination of the challenged 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). *See also Standard Oil Co. v. FTC*, 577 F.2d 653, 659-60 (9th Cir. 1978) (affirming liability of advertising agency that actively participated in developing false advertisements on behalf of client); *Mueller v. United States*, 262 F.2d 443, 446 (5th Cir. 1958) (affirming liability where defendant's false advertisements were disseminated by others); *Shafe v. FTC*, 256 F.2d 661, 664 (6th Cir. 1956) (same); *In re Porter & Dietsch, Inc.*, No. 9047, 90 F.T.C. 770, 1977 FTC LEXIS 11, at *153-54 (Dec. 20, 1977), *affirmed and modified*, 605 F.2d 294 (7th Cir. 1979) (holding retailer liable for disseminating advertisements it did not create); *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 advertisements prepared by agency), *order set aside on other grounds*, 310 F.2d 89 (1st Cir. 1962), *order reinstated*, 380 U.S. 374 (1965). *See generally* IDPAP at 4-6.

Applying the foregoing principles to the evidence presented at trial in this case, the Initial Decision in the Prior Adjudicative Proceeding held:

> [T]here 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.

IDPAP at 8.

3. The position taken in the prior adjudicative proceeding was substantially justified

Based on the administrative record as a whole, there was a reasonable basis for the position taken in the Prior Adjudicative Proceeding. Documentary evidence submitted at trial showed 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 a registrant, and the administrative, technical, and zone contact for the domain www.agaricus.net; Isely's name and telephone numbers appeared on various webpages on www.agaricus.net, including for product sales; and Isely fulfilled two undercover purchases made on the www.agaricus.net website, and provided documents in the packaging that referred to Respondents, and also directed customers to www.agaricus.net. IDFOF 1-2, 93, 96, 98, 100, 104-05, 108, 111-12, 119-21, 131, 137, 141, 143-48, 155. Although these documents were not sufficient to entitle Complaint Counsel to prevail in the Prior Adjudicative Proceeding, they do constitute "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that Respondents were participating in the dissemination of advertisements on www.agaricus.net. *Pierce*, 487 U.S. at 565.

In arguing against a finding of substantial justification, Respondents give undue weight to evidence indicating that someone other than Respondents, *i.e.*, George Otto owned the agaricus.net website.[7] Respondents cite no authority for the proposition that participation in the dissemination of advertisements requires ownership of the advertising medium. In fact, case law indicates otherwise. *Mueller*, 262 F.2d 443 (holding defendant liable where its advertisements were distributed by newspaper); *Shafe*, 256 F.2d 661 (same).

[7] In addition, citing JX 66, Respondents state that they provided evidence to Complaint Counsel, prior to the Complaint being issued, establishing that Respondents had never owned or controlled www.agaricus.net. Reply at 23; App. at 5. JX 66 does not support Respondents' claim. JX 66, which is a letter from Matthew Van Horn, Esq. to Complaint Counsel dated May 6, 2008, included documentation that as of April 2008, the registrant, administrative, technical and zone contact for www.agaricus.net was not Gemtronics, Inc. or Isely. The documentation did not establish ownership or control of the website prior to April 2008.

Moreover, as the testimony of FTC Investigator Michael Liggins and DomainDiscover employee Pablo Velasco in the Prior Adjudicative Proceeding made clear, the owner of a website is not necessarily the only party possessing the password required to control content posted on a website. Liggins, Tr. 123, 132; JX 4 (Velasco Dep.) at 14-16. *See* IDFOF 168-70. The fact that Respondents appeared to cause changes to the content of www.agaricus.net and its registration information after being contacted by Complaint Counsel was a reasonable basis for concluding that Respondents had some control over www.agaricus.net, despite Respondents' protestations to the contrary. In short, the evidence pointing to Otto's ownership of the website did not negate the evidence, as described above, indicating Respondents' participation in the website, including its advertising. Similarly, the fact that other RAAX11 retailers referred to on www.agaricus.net does not mean that it was unreasonable to pursue Respondents, who, as noted above, also appeared to be involved in retailing RAAX11 through the website. The law recognizes that more than one party may be liable in connection with the dissemination of false advertisements. *See, e.g., In re Porter & Dietsch, Inc.*, 90 F.T.C. 770 (holding retailer and advertising agency liable); *In re Colgate-Palmolive Co.*, 59 F.T.C. 1452 (holding both advertising agency and its client jointly liable); *In re Dobbs Truss Co.*, 48 F.T.C. 1090 (holding product manufacturer and distributors liable).

Significantly, the evidence upon which Complaint Counsel relies to oppose the Application is essentially the same evidence upon which it relied in support of its motion for summary decision in the Prior Adjudicative Proceeding, including the WHOIS document regarding agaricus.net; pages from agaricus.net identifying Isely, the undercover purchase invoices and related documentation, and the incorporation certificate for Gemtronics, Inc. *E.g.*, Complaint Counsel's Motion for Summary Decision, Exhibit 1 (Respondents' Answers to Interrogatories and Exhibit A thereto) and Exhibit 2 (Liggins Decl. and attachments thereto).[8] Respondents opposed that motion and submitted their own motion for summary decision, which relied principally on the same evidence as they rely upon to support their Application, *i.e.*, that documents and testimony indicated that Otto and/or affiliated companies owned www.agaricus.net. *E.g.*, Respondents' Motion for Summary Decision, Exhibit D (DomainDiscover documents) and Exhibit E (Deposition of Pablo Velasco).

As noted above, both motions for summary decision were denied because neither side's evidence established an absence of disputed material facts, and it could not be concluded that either side was entitled to judgment as a matter of law. Among other things, there was substantial dispute regarding what inferences and conclusions should be drawn from the documentary and other circumstantial evidence presented. Complaint Counsel's theory of liability required concluding from the documents and other circumstantial evidence indicating some connection between Respondents and www.agaricus.net that Respondents participated in the dissemination of the challenged

[8] Complaint Counsel also submitted an expert report with its Motion for Summary Decision and at trial regarding its claim that the advertising disseminated through www.agaricus.net was misleading in that the advertising made unsubstantiated claims that RAAX11 could treat or cure cancer. IDFOF 5; Complaint ¶¶ 5-10. Because the evidence in the Prior Adjudicative Proceeding did not sufficiently prove that Respondents were legally responsible for the dissemination of advertisements on www.agaricus.net, the issue of whether the advertisements were misleading was not reached. Moreover, Respondents did not litigate that issue.

advertising on the website. Respondents disputed this conclusion, through deposition testimony and documents indicating that individuals and entities other than Respondents were responsible for the content of the website. Where, as here, there is a genuine dispute regarding evidence, there is substantial justification for proceeding with the action. *Pierce*, 487 U.S. at 565 (holding that substantial justification exists where "there is a 'genuine dispute'"; or "if reasonable people could differ as to the appropriateness of the contested action"); *Stein v. Sullivan*, 966 F.2d 317, 320 (7th Cir. 1992) (affirming finding that agency's position was substantially justified where genuine dispute of fact existed as to disability determination in prior adjudication).

Ultimately, the inferences and conclusions that were required to establish Respondents' liability were rejected because the documentary and other circumstantial evidence upon which Complaint Counsel relied was explained and rebutted by credible testimony at trial from Mr. Isely, and such testimony stood uncontradicted by Complaint Counsel. IDPAP at 8, 51. It was also determined that, as acknowledged by Complaint Counsel's investigator, the investigation that resulted in the Prior Adjudicative Proceeding "could have been better." IDFOF 194. To be substantially justified under the EAJA, however, "[t]he government need not demonstrate that its position was substantially correct . . . ." *Pierce*, 487 U.S. at 565 n.2. In addition, "[t]he inquiry into reasonableness for EAJA purposes may not be collapsed into [the] antecedent evaluation of the merits, for EAJA sets forth a distinct legal standard." *Morgan*, 142 F.3d at 685; *see* 16 C.F.R. § 3.81(e)(1)(i). Applying that standard, the position taken in the Prior Adjudicative Proceeding had a reasonable basis in law and fact, and therefore, was substantially justified within the meaning of the EAJA.

D. Conclusion

Respondents have demonstrated that they are prevailing parties eligible for an award of attorney fees and other expenses under the EAJA. Complaint Counsel has demonstrated that the agency's position taken in the Prior Adjudicative Proceeding was substantially justified, having a reasonable basis in law and fact.

Because it has been determined that the agency's position taken in the Prior Adjudicative Proceeding was substantially justified, Respondents are not entitled to any award of attorney fees and other expenses under the EAJA. Thus, whether "special circumstances make an award unjust" under 5 U.S.C. § 504(a)(1) and Commission Rule 3.81(a), and whether an award should "be reduced or denied [because] the applicant has unduly or unreasonably protracted the proceedings," under 5 U.S.C. § 504(a)(3) and Commission Rule 3.81(e)(1)(ii), as argued by Complaint Counsel, are not at issue. Therefore, no findings or conclusions on Complaint Counsel's contentions on those issues are included in this Initial Decision. *See* 16 C.F.R. § 3.83(g)(1). Similarly, because Respondents are not entitled to any award, whether the Application seeks an unreasonable amount of fees and expenses, or categories of fees and expenses beyond those authorized by the EAJA, as contended by Complaint Counsel, need not, and will not, be addressed.

For the above stated reasons, Respondents' Application for an Award of Attorney Fees and Other Expenses pursuant to Commission Rules 3.81 *et seq.* is denied.

V. SUMMARY OF FINDINGS AND CONCLUSIONS UNDER RULE 3.81(g)

1. Respondents are eligible parties under 5 U.S.C. § 504(b)(1)(B) and Commission Rule 3.81(d)(1), and (d)(2)(i), (ii) and (v).

2. Respondents were the prevailing parties in the prior adjudication resulting from the Commission's Administrative Complaint against Respondents, issued September 16, 2008, within the meaning of 5 U.S.C. § 504(a)(1) and Commission Rule 3.81(a)(1)(i).

3. The position taken by the agency with regard to the prior adjudicative proceeding was substantially justified, within the meaning of 5 U.S.C. § 504(a)(1), and had a reasonable basis in law and fact within the meaning of Commission Rule 3.81(a)(1)(i) and (e)(1)(i).

4. Respondents are not entitled to an award of attorney fees and other expenses under 5 U.S.C. § 504 and Commission Rules 3.81 *et seq.*

VI. ORDER

Respondents' Application for an Award of Attorney Fees and Other Expenses pursuant to Commission Rules 3.81 *et seq.* is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: April 27, 2010