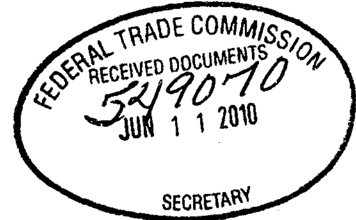
William H. Isely, Respondent

b.isely@ftpmailbox.com
964 Walnut Creek Rd.
Franklin, NC, 28734

Original

Tel/FAX 828-369-7590
June 9 , 2010



Commissioners of the Federal Trade Commission

Jon Leibowitz, Chairman
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

Federal Trade Commission
H135
600 Pennsylvania Ave, NW
Washington DC, 20580

Re: ***Gemtronics, Inc and William H. Isely, FTC Docket No 9330***

Enclosed is My

RESPONDENTS' INITIAL BRIEF ON APPEAL ON THE INITIAL DECISION ON RESPONDENTS' APPLICATION FOR AN AWARD OF ATTORNEY FEES AND OTHER EXPENSES.

Your consideration will be greatly appreciated.

Respectively Submitted

William H. Isely June 9, 2010

964 Walnut Creek Rd.
Franklin NC, 28734

828-369-7590 b.isely@ftpmailbox.com

CC: Ms. Barbara E. Bolton
Honorable Donald S. Clark
Honorable D. Michael Chappell
Chief Administrative Law Judge (Acting)

Original

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Jon Leibowitz, Chairman
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

In the Matter of GEMTRONICS INC a corporation and, WILLIAM H. ISELY	PUBLIC DOCUMENT DOCKET NO 9550

To: The Commission

RESPONDENTS' INITIAL BRIEF ON APPEAL ON THE INITIAL DECISION ON RESPONDENTS' APPLICATION FOR AN AWARD OF ATTORNEY FEES AND OTHER EXPENSES.

Pursuant to Rule 3.52(b) of the Commission's Rules of Practice, Respondents Gemtronics, Inc. and William H. Isely, individually , hereby file their initial brief on appeal on the Initial Decision on Respondents' Application for an Award of Attorney Fees and other Expenses, entered into this proceeding on April 27, 2010, and served on Respondents on April 27, 2010. Respondents request that the standard of this case be "de novo".

This is a very simple case wherein the Respondent should prevail in receiving an award because of three simple truths. In Law, the FTC is prohibited by Title 15 from regulating the type of Foreign Commerce involved, case law favors the Respondent that Complaint Counsel was not Substantially Justified in bringing the Complaint in the absence of any factual evidence that the Respondents was liable as charged, and that the Complaint Counsel committed acts of misconduct warranting that the application for the award not be denied.

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(2) CONCISE STATEMENT OF THE CASE

Respondent is an aerospace engineer, retired for 23 years, living in Western North Carolina. To augment his income he engaged in the part time importation and mail order retail of rain forest herbs from Brazil, starting in the year 2000. While he developed the necessary relationship with the seller of the products, Takesun do Brasil, in order to conduct his business, he was careful not to have any other ties to his supplier, or become involved with the sellers business in any other capacity than that of a wholesale buyer and importer to the US. The products are recognized by the FDA as GRAS and the Respondent complied with all appropriate regulations, such as to register his business as a FDA registered warehouse, pay assessed duty to US Customs, and sales taxes to the State of North Caroline. He monitored his import shipments to assure that the proper Prior Notice was given to the FDA by the Brazilian shipper, The Respondent took the first step to register his business as a corporation, but it was never activated and remained just a shell corporation to this day.

An investigation of the Brazilian website, www.agaricus.net , was initiated by the Atlanta Regional Office of the FTC in the Summer of 2007[1] when selected images from the website were provided to the FTC by the FDA. George Otto was identified as the principal, at least the next few months by the FTC were spent looking for assets of his in the US[2], and a warning letter was sent to the website in late October[3]. In late December of 2007 and early January of 2008, the FTC investigation was intensified by more gathering of images from the website[4], WHOIS data[5], and the ordering of two sample buys[6] of the suspect product RAAX11, Respondent's name was found on some of the captured images[7] and on WHOIS registration[8] information of

[1] FTC cover letter of Complaint from Atlanta, dated March 25, 2008 signed by Complaint Counsel, B Bolton.
[2] Tr 74, Tr 92-7 – George Otto Kather was investigated for five months before the Respondents.
[3] FTC 195. 196, 197 - Warning letter was allegedly sent to the website www.agaricus.net by email
[4] Tr 49 –56 – Chief Investigator Liggins archived images from www.agaricus.net and other websites.
[5] Tr 63, Tr 64, Tr 67 – Chief Investigator Liggins archived WHOIS information on website registrations

the website. The Respondent was involved in the delivery of the two sample purchases[9] but was not involved in their sale or advertising[10]. With the inability of the investigators to locate any assets of George Otto in the US[11], at some level of the FTC it was decided to abandon pursuit of him and build a case against the Respondent who was found to have assets in the US[12].

The FTC brought a complaint against the Respondents, dated March 25, 2008, from the Atlanta office[13] and opened negotiations for a settlement agreement on March 28, 2008[14]. Because the Complaint Counsel insisted that any settlement would include the Respondent sending a letter[15] to his customers, including untruthful material, a settlement could not be reached, and the Complaint Counsel then brought the Complaint from the Washington Headquarters of the FTC on Sept. 15, 2008 with His Honor D. Michael Chappell as the ALJ.[16] The draft of the objectionable letter attached to the Washington complaint was the most odious of all proposed in that it required a letterhead reading, "Gemtronics, Inc/www.agaricus.net. A copy of the proposed letter, which varied in detail over time, is shown as Attachment C. Except for some problems with discovery, the pretrial activity proceeded along expected lines, with negotiations for a settlement continuing. The Complaint Counsel refused to disclose any details of the six months investigation of George Otto[17], and the Respondents disclosed no information about their alleged activities of advertising on the website since none had taken place[18]. Negotiations to settle continued to be unproductive[19] for the same reason with the

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[6] Tr 75 thru Tr 90 – Under cover purchases made from www.agarisuc.net paying with Pay Pal.
[7] Tr 54, Tr 58, - Respondent's contact information was found on a number of website images.
[8] JX 18 – Respondent's and George Otto's contact information were found on WHOIS information.
[9] Tr 88 – Respondents' brochure documents and invoice found in drop shipments he made.
[10] Initial Decision of Dec 15, 2009 Page 52, 2nd paragraph. ALJ found advertising in Respondent's drop shipments did not contain the cancer claims objected to on the website www.agaricus.net
[11] Tr177 -- Investigation of George Otto Kather was dropped when no assets of his could be located in the US.
[12] Tr 60,-- Respondents were found to have a Corporation and a residence in the US.
[13] FTC cover letter of complaint dated March 25, 2008 signed by Complaint Counsel, B Bolton.
[14] FTC cover letter of suggested settlement dated March 28,2008
[15] Respondents' Reply of January 20, 2010, Attachment A, includes the letter to be issued with a faked letterhead.
[16] JX 07 – Complaint and Complaint exhibits dated September 16, 2008.
[17] Complaint Counsel's Response to Interrogatories and Request for Documents, items 2 and 3 stated there was no exculpatory evidence or evidence which would tend to or negate the guilt of the Respondents.
[18] Respondent William H. Isely's response to First Set of Interrogatories dated February 3, 2009, Items 8 & 10

Complaint Counsel still insisting on issuance of a letter requiring the Respondent to sign for the website www.agaricus.net..

Material provided by the Complaint Counsel included a report from Her expert witness[20] who claimed to have investigated the subject product RAAX11. A report of her Chief Investigator regarding his findings on the website www.agaricus.net. was also provided. Depositions were taken from the Respondent Isely[21], and from Pablo Velasco, a Supervisor of the website Domain registrar, DomainDiscover[22]. Velasco gave evidence regarding the ownership and control of the subject website which substantiated a letter sent by DomainDiscover in May 2008[23], Both the Complaint Counsel and the Respondent's Counsel requested Summary Judgments, which were denied.

The only witnesses in the trial, which occurred on June 24-25, 2009, were Respondent Isely and Chief Investigator Liggins. The report of the Expert Witness, and the depositions of Isely and Pablo Velasco were accepted among the exhibits at the trial. Closing arguments were postponed to July 30, 2009. The initial Decision was rendered by the ALJ on September 16, 2009, dismissing the case against the Respondents. In his summary of liability he concluded[24],

> " 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.nt 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, 127777-28,155, 159, 174-75, 196), Otto was not part of these proceedings. In fact, Complaint Counsel maintained

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pages 8, 9, 10

19 Proposed Consent Order dated April 14. 2009.

20 JX 01 – Report of Dr. Omar Kucuk, Exhibits and Accompanying Studies dated January 28, 2009.

21 JX 12 – Deposition of Respondent Isely, taken February 4, 2009 in Franklin, NC.

22 JX 04 – Deposition of Valasco taken by phone February 4, 2009 from Franklin, with both Counsels present..

23 JX 05 – Other Documentation received from DomainDiscover

24 ALJ Initial Decision dated September 16, bottom half of page 56.

at closing arguments, "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 for the www.agaricus 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. According the Complaint is DISMISSED."

In his Summary for Conclusions on Law[25] the ALJ also listed 17 items supporting his decision. but failed to deal with the issue of how the FTC had jurisdiction over foreign websites. Notable of his findings was, **"that liability requires, at a minimum, some participation in the creation of the advertisements or the dissemination of the challenged advertisements."**

The ALJ's Initial Decision became the Final Decision of the Commission on Nov. 9, 2009, without being appealed by the Complaint Counsel or modified by the Commission.

The Respondents' Application for an Award under EAJA[26] was followed by the Answer of Complaint Counsel with amendments[27], which was subsequently replied to by the Respondent[28] who at this point was no longer represented by Counsel and was representing himself. The Respondent also requested Sanctions against the Complaint Counsel[29] which were denied. The ALJ directed both parties to attempt to negotiate a settlement on the amount of the award, but agreement could not be reached as reported by status reports and the ALJ then issued his Initial Decision rejecting the Respondent's EAJA Award request on April; 27, 2010

Respondent brings his appeal on both grounds of the Law and the Facts. He shows that the FTC was not justified under the law because under the Foreign Commerce clause of Title 15, the FTC is prohibited from regulating offshore aspects of foreign commerce[30] which would

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[25] ALJ initial Decision dated September 16, Pages 57 and 58.
[26] Respondents' Application for an Award of Attorney Fees and Other Expenses dated Dec, 2, 2009
[27] Complaint Counsel's Answer and Amendments to Respondents Application for an Award were filed on January 6 and February 3rd and 4th respectively of 2010.
[28] Respondents rely to Complaint Counsel's answer was filed on Jan 20, 2010..
[29] Respondent filed sanctions against the Complaint Counsel on February 26, 2010.
[30] Quote from Title 15, chapter 2, subchapter 1, sec 45 .

45. - Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1)

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2)

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 et seq.), except as provided in section 406(b) of said Act (7 U.S.C. 227(b)), from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3)

This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless -

(A)

such methods of competition have a direct, substantial, and reasonably foreseeable effect -

(i)

on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii)

on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B)

such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

include the advertising material found on a foreign website. He will show that the Complaint Counsel failed to raise her case to a level above hearsay and speculation and that she based her case on information she found on the same foreign website she had already alleged was full of misrepresentations and distortions because it contained the misrepresented advertising. Finally, the Respondent will show that Acts of Misconduct by the Complaint Counsel rose to such a level that the Commission is not warranted in granting her request that the Respondent not be given an Award under EAJA. Thus the Complaint she had brought does not qualify as being substantially justified. The standard of review of this appeal should be "de novo".
and granted on any one of the three grounds presented herein.

(3) SPECIFICATION OF THE QUESTIONS TO BE URGED....................................

(A). Should the Initial Decision be rejected given the Federal Trade Commission lacked any jurisdiction over the content of the website www.agaricus.net under 15 U.S.C. § 45(c)?

(B). Should the Initial Decision be rejected given the Federal Trade Commission's position in the prior adjudicative proceeding was not "substantially justified" under relevant case law?

C). Should the Initial Decision be rejected given Complaint Counsel's misconduct during the prior adjudicative proceeding?

D). What award are Respondents entitled to under the EAJA?

(E) Will the Commission increase the maximum allowable award under the EAJA?

(4) Arguments Supporting the Questions Specified in Section (3) above.

(A) Arguments of Law and Fact Rejecting the Initial Decision, given the Federal Trade Commission lacked any jurisdiction over the content of the website www.agaricus.net under 15 U.S.C. § 45(c)?

A compelling reasons for reversing the ALJ's initial decision of April 27, 2010, in both Law and Fact, Is that the **Federal Trade Commission lacked any jurisdiction over the content of the website** www.agaricus.net **under 15 U.S.C. § 45(c)?** (quoted in detail in footnote 30

Under Law, Complaint Counsel initially recognized this prohibition of the FTC with regard to regulating foreign commerce when in her warning letter she sent by email to the website www.agaricus.net on Oct. 23, 2007 (FTC 195, 196, &197) as her last sentence the following:

> **"If you are not located in the United States, we have referred the claims on your website to the consumer protection enforcement agency that has jurisdiction in your locale."**

The Facts show that later, when she redirected her attention to Respondents, she did her best to conceal the existence of the letter and only gave it up as if it was the warning letter to the Respondent. As implied by the Complaint Counsel's statement, If the website is located in a foreign country, which it was, the acts the Respondent allegedly committed were done in a foreign sovereign country. Brazilian authorities are the ones empowered to decide whether the material displayed on their websites is appropriate, not the FTC. and Brazilian experts are the ones to rule on whether they contain false and misleading advertising. A reasonable person, as intent as Complaint Counsel said she was[31] to shut down the website, would have turned to the only practical alternative allowed under US law, the US SAFE WEB ACT. No reasonable person to get around dealing with a foreign website would have invented a hybrid case that fits no law anywhere, that of holding a person in one country liable for acts committed in another country

[31] Tr 313 – Respondent's recounting of first telephone conversation with Complaint Counsel on March 28, 2008

under the laws of the first country. This hybrid approach has had no significant effect on the operations of www.agaricus.net. but has expended significant resources not appropriated for by the Congress.

Subsequently, in support of Respondent's assertion that the Complaint Counsel knew she was out of bounds in bringing the complaint over foreign commerce, it is noted that she cited title 15 where the regulatory power given to the FTC is "National wide advertising, marketing and sales activity."[32] This demonstrates she knew that the FTC charter only covers "National Commerce". Even the relief sought by the Complaint Counsel required the Respondent to sign a document for the foreign website[33].

The Respondent brought up the argument of the lack of jurisdiction, particularly in his Reply to the Complaint Counsel's Answer, and neither she nor the ALJ have been willing to present counter arguments that the FTC does have authority to regulate the content of a foreign website which would then be regulating foreign commerce. In the trial opening statement, made by the Complaint Counsel, she demonstrates her ignorance of the FTC law, Tr 27, where she tries to explain the strange circumstances of the case by saying the US SAFE WEB ACT was designed for cases like she was proceeding with, showing she had never read the US SAFE WEB ACT. It Clearly does not provide for bringing such cases before the FTC, but in a small way addresses the problem by empowering the FTC in such cases to contact foreign regulatory agencies, as mentioned in the warning letter of October, 2007, so that if the foreign agencies agrees that some corrective action is warranted, that it will be provided by the country which is hosting the offending website. There is no evidence that the Complaint Counsel moved in the direction of contacting any Brazilian Regulatory Agency as promised by the wording of her letter.

It is noteworthy that neither the Complaint Counsel nor the ALJ cited any case law that

[32] Complaint Counsel's June 3, 2009 Findings of Fact and Conclusions of Law, Page 10, Para. 1. 2nd sentence.
[33] Respondent's Jan 20, 2010 Reply to Complaint Counsel's Answer, Page 28, Attachment A, Attachment C of this document.

Involved the FTC bringing complaints against a foreign website.

(B) Arguments for Rejecting the Initial Decision given the Federal Trade Commission's position in the prior adjudicative proceeding was not "substantially justified" under relevant case law?

(i) Standard for a reasonable person's actions should be precise, fitting the case,."

The Respondent agrees with the Complaint Counsel and the ALJ[34] that rule 3.81(a) (1) on establishing a standard for an award means what a reasonable person would do in law and fact. Rather than leave it in general terms, the Respondent urges two considerations should be used in applying what a reasonable person would do. A reasonable person would phrase the language of the Standard to fit the Complaint, as well as make an analysis of the information available to Complaint Counsel at the time the Complaint was brought.

Since the critical issue was what control, if any, the Respondent had of the website www.agaricus.net in relationship to the Complaint, the Standard should be stated more precisely as

"Would a reasonable person have reason to believe that the Respondent could add to or modify the advertising material on www.agaricus.net."

A reasonable standard to show liability must include an act or acts by the respondent. The Complaint Counsel used a standard not fitted to the Complaint,

"the respondent being able to modify the website",

and didn't explicitly state it because it was a lower standard than what was in the Complaint and only by inference this would include advertising. Actually the evidence only showed that the Respondent was able to get his name removed from the website[35], not an act charged in the Complaint Counsel's Complaint. She has over-reached and put in her brief, and the ALJ then

[34] First legal standard cited by the ALJ in his Preliminary Decision of April 27, 2010, page 8, *Pierce v Underwood*
[35] Tr 315. Tr 316 Respondent contacted George Otto to remove name after Telephone call with Complaint Counsel

quoted her, that he" **had the ability"** to control the website. There is no testimony with this terminology. Even then it is only by inference that the Respondent controlled advertising.

The Respondent will argue in that the quality of information available to the Complaint counsel, strongly bears on what is reasonable and what is not. For example, a reasonable person would not reach a conclusion in the absence of any verifiable material facts regardless of the quantity of the hearsay present, and would insist on further investigations to uncover verifiable material,

(ii) Merits of the Government's Litigation Position are of Extreme Importance

Examination of the facts of the case as a whole show that the Respondent did not prevail at Summary Judgment was not because Complaint Counsel brought a reasonable case, but because the A:LJ did not consider the important issues of Law regarding jurisdiction over a foreign website[36] and made the error of treating hearsay as evidence.[37]

A Case. *United States of America v Hallmark Contraction Company,* from the seventh district concludes that winning or not winning at Summary Judgment is only one factor in the decision in giving an award under EAJA. The case came from the original complaint by the Army Corps of Engineers that the Respondent had improperly filled some wetlands. The case was poorly prepared by the government and the decision went in favor of the Respondent but he was denied an award under EAJA and then he moved into the appeal proceedings. The case findings are very instructive as the various factors to be considered in determining if in the original complaint substantial justification existed.,. Several factors are given importance that carry over into the instant case in Para. 10.: The discussion gives more importance to merits of the government's litigation position than other factors, particularly the prelitigation stage. Also the district court's analysis should contain an evaluation of the factual and legal support for the

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[36] Pertinent to law is title 15 > chapter 2 > subchapter 1 > sec 45 > a) > 3 that prohibits the FTC from regulating Foreign Commerce.

[37] Tr 65, that boat had sailed. A written record of ALJ's findings on Summary Judgment was not issued.

government's position throughout the entire proceeding. Later, in the brief is a particular admonishment that has critical application to the instant case where the Complaint Counsel and her investigator knew the information from WHOIS was without merit and made no effort to correct it. *USA v Hallmark Construction Company* reads. "we have held that an EAJA award may be justified where an agency knows before trial that there is conflicting evidence on a key point it is required to prove and fails to take adequate measures to asses that evidence. *(underline added)* Also addressed in this case was the reason winning or loosing in Summary Judgment is not conclusive to whether an Award under EAJA can be given was because Summary Judgment deals only with issues of law whereas the EAJA award proceeding considers issues of both law and facts.

(iii) In the Preliminary Decision of April 27, 2010, the ALJ should have discounted arguments of Complaint Counsel that were based on hearsay, speculation, and lack of an adequate investigation, and find that she did not have and did not reach a reasonable standard for substantial justification of the Complaint.

In contrast to his thorough examination of the overall case in reaching a dismissal, in reaching his preliminary decision of April 27, 2010 in consideration of the award for Attorney Fees and other expenses, the ALJ erroneously accepted the Complaint Counsel's position in being substantially justified in bringing the Complaint which was based on hearsay, speculation, and a lack of an adequate investigation.

(iv) The Case Law Cited by ALJ does not justify Reversing His Previous Position[38]

The cases the ALJ chose to reference from the prior Adjudicative Proceeding show that the Respondent's acts did not reach the level that qualifies as being liable. The Complaint.

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[38] In his decision of Sept. 16, 2008, Page 55, 2nd Para. the ALJ had found when discussing *Rizzi* regarding acts allegedly committed by the Respondent with respect to www.agaricus.net that "there is no suggestion and no evidence, yet this is not his position in consideration of substantial justification. The facts are past and can't be changed, so it is puzzling what has changed about the ALJ.

Counsel had access to the same cases and should have acted accordingly, and not filed the Complaint. The applicability *In re Dobbs Truss Co* .No, 5808.deals with distributors and it is clear distributors were not an issue in the instant case. Respondent concurs in the ALJ's finding *In re Rizzi,* No, 8937 that a respondent for whom there was no evidence that he engaged in or participated in false advertisement was not liable. The applicability of *Standard Oil Company v FTC,* 577 continues to show that actual acts must be present to show liability *Mueller v United States,* 262 deals with a defendant's liability when his false advertisements were disseminated by others, not an issue for the Respondent. *In re Porter & Dietsch, Inc,* No. 9047 is a classical FTC case against a dietary supplement company and would have been applicable against the Takesun do Brasil company had it been located in the United States. The Respondent did not use the supplier's advertising, so it did not cover him.. Finally *In re Colgate-Palmolive Co.,* No. 7736 is a complex case involving both a client and advertising agency, demonstrating that multiple parties can be liable when they have a formal relationship. In the instant case the Respondent was simply a wholesale buyer and importer of the Takesun Company products.

The cases the ALJ cited to support his position that the Complaint Counsel was substantially justified in bringing the complaint, do not do so for two reasons, The first reason is that the cases cited were ones where the alleged actions took place domestically rather than as with the instant case they would have involved the FTC regulating foreign commerce. The second is that the cases the ALJ cited involved a Respondent about whom there was factual evidence at the time the complaints were brought. There was no factual evidence of actions by the Respondent in the instant case. There was only speculation and unsupported allegations.

In his argument about being substantially justified, the ALJ starts from the high ground that for liability there must be some participation in the creation of the advertisements or their dissemination, in other words there must have been some act, or acts. THE ALJ then goes

on to justify the original dismissal as no acts were shown to have been committed. To apply the case law he takes *Pierce v Underwood's* position that to find the Government's position substantially justified only requires that a reasonable person could think it correct. We think of ourselves and the majority of the public as reasonable and equate a reasonable person with an average person. There is too much discretion given when the ALJ substitutes with the use of the word "might". Might allows a conclusion far from average, maybe only one of a hundred persons **might** hold a certain view as correct and that would then still be substantially justified using the "might" standard. To justify the actions of the Complaint Counsel. The ALJ has to lean very far in the "Might" direction to allow justification based on speculation alone and not require that there is factual evidence of the alleged detrimental actions.

The cases the ALJ cites for the award proceeding are few and, beside the Supreme Court, are from jurisdictions that are advisory, not binding. None deal with a case involving a foreign website.

Stein and Sullivan is a very limited appeal in which the Plaintiff is contesting a ruling in which he had been denied an award for legal activity that had taken place before the adjudication had been initiated, That is a different issue from whether the Complaint Counsel was substantially justified in bringing the Complaint.

Pierce was cited by the ALJ in the prior adjudicative proceeding as well and involved a case where the government's position was found not to be substantially justified and an award had been made. In the findings, importance was given to be substantially justified the government is under an obligation to determine critical factors that are easily verifiable. It further states that the government's lack of appealing an initial decision is an indicator of a "feeble case" Also, to be substantially justified the government in bringing the complaint must have "some substance and a fair possibility of success."

(v) The process of Litigation assumes some Reasonable Investigation Before Filing

Another case which the Respondent offers for consideration most closely fits the instant case with the only exception, as with all other cases, the actions in *Hess* took place in the USA, not a foreign country...The case is **Hess v National Labor Relations Board**. The Hess case was an appeal before the United States Court of Appeals, Fourth Circuit, for denial of an award under EAJA. The finding reversed the Board's ALJ and the Board's subsequent sustaining of the denial of the award on the grounds that the original complaint had been brought without adequate evidence to be Substantially Justified. The terminology used in the discussion of what constitutes "Substantially Justified" is **could** rather than **might.** The conclusion was that the ALJ and the N. L. R. Board had erred in accepting uncorroborated information in the face of evidence to the contrary without requiring a further investigation. To substantiate this position in summation was the following statement "As exemplified in the EAJA and Fed R. Civ. 11, however, the process of litigation presumes some reasonable investigation before filing a complaint". On reversal, the case was remanded to the Board to establish an appropriate fee award. *Hess* being from the 4th district is binding on the FTC.

(vi) The ALJ Simplified the Choices Open to the Complaint Counsel

Perhaps apropos to *Hess* is a shortcoming of the ALJ's, in that he simplified the choices the Complaint Counsel was faced with, when the complaint was bought, to the choice to bring or not bring the Complaint. Life is generally not so simple, and in this case there was an overwhelming third choice that should have been obvious to the Complaint Counsel that a reasonable person would have made. The hard facts showed that George Otto was the prime mover behind www.agaricus.net. Some unsubstantiated hearsay on the website indicated the Respondent might be playing some role but no evidence of **acts committed by the respondent** were in evidence or likely to be, considering the foreign nature of the website. There were many

unanswered questions and clues lying around to delve into.. The reasonable person would have taken the third choice to continue the investigation and take the case wherever the verifiable facts led to. This is what the Supreme Court meant in *Pierce* when it stated that **"the government is under an obligation to determine critical factors that are easily verifiable"**.

(vii) The ALJ made a Mistake of Accepting the Complaint Counsel's Brief as Factual

The ALJ accepted that the evidence from DomainDiscover precludes that the Respondent had direct control of the website[39] and yet he argues that the Complaint Counsel had circumstantial evidence to the contrary. Any conclusions about the significance to be drawn from Respondent's name and contact information appearing on some WebPages is only speculation and does not rise to the level of circumstantial evidence, which still requires a basis in fact. The acts that the Respondent might or could have committed by just inspecting mute websites are pure speculation and unworthy of a reasonable person,

The ALJ gave undue weight as evidence to the Complaint Counsel's report of her telephone conversation with the Respondent on March 28-'08 that the Respondent **was able** to modify the website[40]. Respondent clearly stated in trial that he had no more influence than a request which had to be repeated before his name and contact information were removed. Complaint Counsel's version of the conversation of March 28, '08 is a distortion not documented in the record. . Under Rule 3.41 (c), Respondent should have been given the opportunity of cross-examination, make objections, and argument regarding the reported content of the phone conversation of March 28 on which he had testified on and Complaint Counsel had not. Respondent had expected to have this opportunity during the teleconference hearing of March 2, 2010, based on the published agenda, which was truncated without discussion by the ALJ.

[39] In his summary of liability, page 56 next to last Para of his Decision of Sept, 15 ALJ writes, "The evidence failed to establish that the Charged Respondents were responsible for the www.agaricus.net website and the representations."

[40] Tr 315 - Respondent recites sequence of his name removal.

This is of particular note because apparently the ALJ gave this phone conversation significant weight in his finding of April 2, 2010. The Complaint Counsel's version of the content of the phone call was essentially the only so called evidence that had not been considered in the trial proper.

(viii) The Respondent was Denied the Rights Delineated in Rule 3.41 (c) in Regard to the Image Material Captured from the Website www.agaricus.net

The Complaint Counsel built her whole case of misleading advertising on the basis of images captured by her Chief investigator from the website www.agaricus.net. While the Respondents' Counsel could not and did not challenge that the images had existed at the time of capture, since they were taken from a foreign website he had no way of challenging the truth of the content of the images or determine how the images came to be posted. Had they been from a domestic website, the webmaster could have been subpoenaed to validate or otherwise explain how they had come to be on his website. When asked as to the validity of the material he had captured, the Chief Investigator was uncertain.[41]. The Complaint Counsel said she did not even know if the apparent webmaster was George Otto or even if he existed[42] and certainly he was beyond her subpoena power. The Respondent's Counsel. stated he had invited George Otto Kather to attend the trial, but he had declined to do so, and as a German national, living in Brazil, could not be forced to testify. The burden of validating the significance of this information brought into the trial by the Complaint Counsel is hers, but since she has done nothing to validate them[43], all the images and their content must be treated as no better than hearsay.

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[41] Tr 155, Tr 156 Liggins testifies regarding the veracity of the images captured off of www.agaricus.net.

[42] CA Tr, page 21. ALJ "Well I think we could have cleared up a lot if Mr. Otto had been testifying. Don't you agree? Don't you agree Mr., Otto could have cleared up a lot?" Complaint Counsel, "I have no idea. I don't even know If Mr. Otto exists, Your Honor."

[43] Tr 37 Complaint Counsel says, "Your Honor, Mr. Otto is beyond subpoena power for us, so we'd never be able to
subpoena him." She knew from the beginning of the trial her web page information could never be validated.

Some of them are known to be untrue because of inconsistencies between various images. The fact that the Complaint Counsel's case is that the medical claims on this website are untrue and misleading does not suggest that anything else found on the website should be taken as valid either without independent validation, apparently not possible.

(ix) Information On Which the Complaint Was Brought Was Not Factual.

Information that the Complaint Counsel had at the time of the bringing of the Washington Complaint and based on the case records has been charted in time-line fashion in Attachment A. The quality of the information is also tabulated with significant comments. Analyzing the presented information. there was no factual evidence shown to justify the main charge in the Complaint "Respondents disseminated or caused to be disseminated advertisements for RAAX11 through an internet website, www.agaricus.net.". This is a lesser charge than had been brought in the Atlanta Complaint, but still states that the Respondents committed acts which are not evident from the facts that the Complaint Counsel had. Both Complaints used some of the same images taken off the internet.[44] The only facts she had were of acts by G. Otto. All the information about the Respondents was speculative . There were many loose ends for an investigator to follow up as tabulated in Attachment B. However by not doing so, the Complaint Counsel and her Chief Investigator had only an investigation which was shallow and so incomplete that they were ill prepared to bring the Complaint either on March 25, 2008 or September 15, 2008. The important things she knew should have dissuaded her from filing;

Attachment A is a summary of what the Complaint Counsel knew September 15, 2008 when she brought the Complaint, The duty of an investigator is to inform the Counsel what he finds. So what is known to the chief investigator is assumed to be known by the Complaint

[44] Tr 47 – Tr 54 Mr. Liggins, chief investigator, explains his methods of capturing website images

Counsel. Their strange behavior in the case and abbreviated investigation is only explained if they were looking for assets for the FTC to attach rather than justice. All the evidence in the case pointed to G Otto as the person liable for the actions described in the Complaint. They knew from Liggin's experience with website management that the WHOIS information was valueless in identifying the person having control of the website except for the person whose email was left behind any time the registration was updated. gotto@takesun.com had the critical account name and PIN number of. www.agaricus.net because images they captured showed his email used from one or another email address of the Takesun company. Its name, business. and products are shown on the websites the changes were made from. Redundant evidence comes from the two sample buys of the product made in January where the payments were taken by some branch of the Takesun company with G Otto's involvement. Also the product labels they acquired showed the country of origin to be Brazil with Takesun the manufacturer. Finally in May came the letter from the registrar of the website, DomainDiscover, confirming Takesun Control and G Otto's involvement. The email exchange between G Otto and Respondent added further evidence.

The problem for the Complaint Counsel was that she had located no assets of Takesun or G. Otto in the United States that they could attach[45] which had been her objective.. The situation came to a head when Takesun ignored the warning letter sent in late October, 2007[46], because just to abandon the case for lack of jurisdiction, which should have been determined at the start before significant resources had been spent on the case, would probably have a negative influence on both of their careers. A possible out to recoup the investment already made was to shift their attention to the Respondent whose name appeared on some of the website images and the domain registration, but importantly he had assets in the United States[47]. The only

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[45] Tr 177 –Liggins could find no assets for George Otto and terminated his investigation of him, Dec.2007.
[46] FTC 195, 196, 197
[47] Tr 59, Tr 60, Liggins finds a corporation registered by William Isely and his home address in Franklin, NC.

evidence against the Respondent was hearsay on a foreign website which would probably not stand up in a judicial procedure, but that was of no concern because the Complaint Counsel never expected to have to go to trial. Her objective was just to have enough information to bring a Complaint and then force a settlement. From past experience her odds were only 1 in 100 of ending up at trial which was only a slight career risk compared to dropping the investigation.

In regard to the facts for the award proceedings, the Complaint Counsel has abandoned the thoroughly discredited position she had taken in the Complaint that the Respondent had direct control of the advertising on the website www.agaricus.net ,.and substituted the notion that he had indirect control by some undisclosed method.. This claim is based on hearsay information gathered from the website which cannot by its foreign nature ever be validated. In her latest approach, advanced by the ALJ, is alleged content of a phone call she had with the Respondent on March 28, 2008 The true details of the phone call were brought into the trial[48] by the testimony of the Respondent at a number of points. At the time, the Complaint Counsel did not contest the Respondent's report of the telephone conversation or show there were any material omissions. The trial transcript does not mention discussion about the Respondent saying **he was able** to control the website. The ALJ says she alleges he said as a prediction that "**he was able**" to have his name and contact information removed from the website[49]. While the Complaint Counsel uses circumstantial information to reach the same conclusion about Respondents ability to control the website, the record does not show that the Respondent used this language in their telephone conversation.[50] The Respondent did not make this statement and even the Complaint Counsel quotes him without this language[51]. The

[48] Tr 353 , Tr 243, Tr 270, Tr 313, Tr 315,
[49] ALJ's Initial Decision on Respondent's Application for an Award page 7, 4th Para., fourth line.
[50] Complaint Counsel's Answer to Respondent's Application for an award pages 7, 9, 10.
[51] Tr 315 Respondent uses the language, referring to Takesun, "that they might be cooperative and remove my name". Tr 327 same under cross-examination

Respondent has not had the opportunity to cross-examine the version presented by the ALJ, as allowed for by Rule 3.41 (c). Normally the Complaint Counsel does not also act as a witness, but if she is allowed to, the Respondent still should have had the right of cross examination . However. getting the misuse of his name removed, a form of identity theft, is a far cry from what was in the Complaint,

disseminated or caused to be disseminated advertisements for RAAX11 through an internet website, www.agaricus.net

The Complaint Counsel has no credible evidence that Respondent could get more done on the Website than get his name and contact information removed under a threat of suite for ID theft.

(x) Investigation of Respondent was Negligent By Being Shallow and Lacking Facts

Attachment B in tabular form summarizes the critical items that were not investigated but should have been to qualify as an adequate investigation. If only settlement was the objective, there was no need to investigate all the leads available to understand the case, These items fall in the category that the ALJ was referring to in his decision[52] where he says a consideration in deciding the award includes not only the actions of the Agency, but its failures to act (in gathering evidence).

The warning letter to the website was sent to some unknown email address unknown to the Respondent without delivery verification. Liggins could have called the telephone number on the home page of the website and obtained a proper address, but did not.[53] The Respondent's telephone number shown on the website could have been called to see if he would respond to provide information or accept a sale and this was not done.

Rather than depend on the WHOIS information, which contained a disclaimer on accuracy of the information displayed, Liggins could have contacted the registrar of the website which was

[52] The ALJ's Initial Decision, April 27, 2010, page 9, first paragraph, last three lines.
[53] Tr 105, Tr 106, Tr 161 Liggins never called any telephone numbers found in his searches.

displayed as DomainDIscover as the only reliable source for the website ownership information, but he did not do so[54].

Information about the website could have been obtained by sending the website an inquiry to the email address displayed on WHOIS, gotto@takesun.com but there is no record of such action. It appears that the warning letter was sent to **support@ashnow.com** by gross mistake[55] because www.ashnow.com .is a general health site unrelated to the Respondent or Takesun.

The product bought at the website on its label[56] contained contact information as to the place of manufacture, but that source was not followed up.

The two purchases made from the website resulted in emails giving Takesun contact information and telephone numbers which could have been used to obtain more information.,

The two purchases made from the website also resulted in emails showing two different Pay Pal accounts to which the purchases were paid. Pay Pal is an American corporation and, if properly requested by the FTC, would have had to provide all the information they had about George Otto, including that his last name was Kather and Pay Pal assets of his.

Liggins claimed that no assets of George Otto could be found in the US, but the Pay Pal accounts to which he had paid for his purchases would be under the jurisdiction of the US company, Pay Pal, and those accounts could have been attached if the FTC had had reason to do so.

Because of the provisions of the homeland security act, a competent investigator would have known that a foreign company, like Takesun, could not import dietary products to the US without having registered a comprehensive application and paid a fee to the FDA to do so, and that information would readily have been available to the FTC.

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[54] Tr 110, Tr 111, Tr 112. Liggins describes his lack of interest in contacting the Registrar of www.agaricus.net.

[55] FTC 195, 196, 197 The email address on the warning letter, supposedly sent to the website www.aaricus.net, was through gross carelessness sent to some website unrelated to the case,

[56] Tr 74 – Tr 97 Report of the under cover purchases. In 23 pages of testimony no information was introduced from the label of tie purchased products or report to follow up on the financial documents obtained which gave contact information for Takesun and George. Otto.

If the FTC had really been concerned about the sale of RAAX11 in the United States, Liggins would have investigated the other suppliers besides the Respondent that were displayed on the website images, but he did not do so[57]. Neither did he say that he had done any kind of web search to locate actual distributors with legal ties to Takesun.

There was a cancer study using RAAX11 in the US reported on the website and Liggins did not report that he tried to get any information through that channel.

Neither Liggins nor the Complaint Counsel made any effort to contact the Respondent or even send him a warning letter required by FTC rules before originating the first Complaint from the Atlanta Regional Office of the FTC on March 25, 2008. On April 16, 2008,[58], Respondents' Attorney received by FAX from the Atlanta Office a copy of the warning letter still addressed to www.agaricus.net , 3 weeks after the Atlanta Complaint had been issued. This still does not qualify as a warning to the Respondent as it was not timely nor addressed to him,

Liggins testified that there were not enough resources even to make domestic phone calls.[59] Such a statement is ludicrous, as phone calls would no doubt be charged to burden accounts and not charged to the investigation. Having spent their budget on George Otto over a five-month period, they were probably over budget when they shifted to the Respondent. Evidence of that is that except for the preparation of the Complaint, investigation of the Respondent took place over at most a period of a month. Even the expert witness investigation was flawed in that he reported he investigated "Icaco" and found nothing[60], which is not surprising since the ingredient he should have investigated was "Chrisobalanus Icaco". He may not have been given time to check his report...To further economize, the Complaint was limited to only one product and to only one of many websites Takesun maintained.

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[57] Tr 92, Tr 159-60. Liggins did not show any interest in investigating other suppliers of RAAX11 in the US

[58] FAX to Matt Van Horn from B, Bolton, April 16, 2008 with original warning attached and original address redacted,

[59] Tr 161 Liggins explains that he didn't have adequate resources.

[60] Complaint Counsel's Proposed Findings of Fact and Law. June 3, 2009, Page 8 item 66, lists Dr. Kucuk's study was of the combination of icaco and agaricus, the wrong ingredients for RAAX11.

There is, of course, the consideration that the investigation was carefully limited to be sure it did not uncover exculpatory evidence which a thorough investigation would have done since all the hard evidence pointed to G. Otto, which the Complaint Counsel did her best to conceal.

(xi) In Her Complaint, Complaint Counsel Cited as Facts Unsubstantiated Hearsay and Speculation. -- Rebuttal to Complaint Counsel's brief in her Answer

The respondent will deal with the Complaint Counsel's claims in the order she presented them In her Answer of Jan 6, 2010.. The respondent will show that she had no relevant evidence that the Respondent committed the acts claimed by the Complaint Counsel. Instead, there is only hearsay information that he could have or might have done the acts which does not rise to a level that would be accepted by a reasonable person[61]. A reasonable person would have recognized that the hearsay information could be explained in a number of different ways.. In his findings the ALJ erred by equating hearsay evidence to circumstantial evidence. Circumstances of fact are a higher bar to achieve than a collection of hearsay information. Images found on www.agaricus.net stated the following on pages advertising RAAX11.

> "If you are living in the US just call Mr. Isely and he will explain how it works."
>
> "If you would like to find out how you too can participate in our on-going study in the USA, call 828-369-7590."

The Respondent does not argue that these images did not exist, but he argues that the Complaint Counsel has not shown that she had any reason to believe that he took any action that placed these statements on the website. Who placed them or why the Complaint Counsel knoweth not. Further she has not shown any reason to believe that the statements were true or that the Respondent even knew about them, which he denied in the trial and earlier before the Complaint in a phone call between himself and the Complaint Counsel.

[61] Respondent concurs in the ALJ's finding *In re Rizzi,* No, 8937 that a respondent for whom there was no evidence that he engaged in or participated in false advertisement was not liable

A reasonable person knows that hearsay evidence is not fact. One speculation on why the Respondent's name and contact information appeared on the web site is as good as another and none is usable as fact. She could just as well have speculated that G. Otto thought by displaying a contact in the United States he could build confidence in US potential customers and increase his USA sales. Or alternatively he wanted to deflect attention from himself. He might even have thought, as a foreigner not knowing the opposition he would get from the FTC and the FDA, that he was doing the Respondent a favor by trying to bring him more business so the Respondent would then order more products from Brazil. The possibilities are endless and no one speculation is justified without independent verification, which the Complaint Counsel did not have. Instead she chose one explanation that supported her case, that the Respondent consciously and actively participated in the advertising on www.agaricus.net. In other words we are to believe the Complaint Counsel just because she says **she** believed it. Knowing what she knew about G. Otto, even she could not have believed the Respondent was liable as charged in the Complaint. This simple believe without reason is below the bar the Complaint Counsel has to reach which is factual basis for her beliefs. With the Respondent denying these statements on www.agaricus.net , which are pure hearsay, before bringing the Complaint, she was obligated to search for supporting evidence for her claims which she did not do.

She next makes a false statement, but it is not clear how the statement relates to the case.

> "Mr. Isely was the only source listed on the website for product information and ordering for US consumers."

Other sources were shown, Green Pharmacy and Dr. Steve Hall[62] on other images that the Complaint Counsel herself brought in as evidence. This in lay language for shooting yourself in the foot..

Next she tries to make something out of the WHOIS findings[63] which were clearly hearsay

[62] Tr 159. The ALJ asks about another supplier in the US shown on an image captured by Liggins.

by their own disclaimer[64], and of no consequence in showing Respondent controlled the website.

The Complaint Counsel says;

"In addition, the WHOIS registration[65] for the website domain listed Mr. Isely at his residential address as the registrar (registrant), administrative, technical, and zone contact"

The Complaint Counsel would have us believe that this information means the Respondent had control of the website[66]. She knew at the time this was not true because her chief investigator had experience managing his own website and knew control was not related to names in the registration, which can be anyone, even without their permission, but control only goes with the person holding the account name and PIN number. Not even a hint was turned up by the investigator that the Respondent had either the account name or PIN number, let alone both. The only reliable information from the WHOIS was the email[67] used to make the registration which was gotto@takesun.com, a fact that the Complaint Counsel chooses not to mention in the Complaint. Again the Respondent in his telephone conversation with the Complaint Counsel denied knowing his name had been used in the registration renewal of the web site[68]. In May 2008, the Complaint Counsel was provided with a letter from the Domain Registrar, DomainDiscover, stating ownership and control of the website had always been by two Brazilian companies since its inception in 1998[69]. Also in May of 2008 the Complaint Counsel was provided with an email exchange between the Respondent and G. Otto showing how he, G. Otto had made a mistake in the renewal of the website registrations which accounted for the Respondent's information being on the registration records. In spite of these

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63 JX 16, JX 17 These are actually one image from the WHOIS, but bifurcated by the FTC downloading software.

64 Tr 110 Liggins reads the WHOIS disclaimer, "Network Solutions, therefore, does not guarantee its accuracy or completeness"

65 Tr 108 Liggins testimony shows website control requires the account name and PIN number.

66 Tr 121, 122, 123, Liggins testimony – False and meaningless information may be put into Domain registrations.

67 JX 17 FTC 000310 – Last item in the image shows the email address used to make the registration,

68 Tr 313, 314 Respondents testimony about phone call with the Complaint Counsel

69 FTC 000358 Letter from Pablo Valasco of DomainDiscover confirming Brazilian Ownership of www.agaricus.net

facts, countering the Complaint Counsel's beliefs about the website ownership, she persists in insisting there is importance in her WHOIS findings.

In her next paragraph, bottom of Page eight and the top of Page 9, the Complaint Counsel continues her use of hearsay on foreign websites, speculation and misinformation in the telling of the two product buys that were made on the website www.agaricus.net . She omits to relate that Respondent's only role in the transaction was the delivery of the products which was not an act of advertising[70]. She also does not say that the payment for both orders was made to Pay Pal accounts belonging to the Takesun Company[71]. Finally she states that

> "promotional literature included in the package, which also bore the name Gemtronics, repeated the cancer claims for RAXX11 found on the website"[72],

a prevarication that was confirmed as such by the ALJ In his Initial Decision pf Sept 15, 2009. . In actuality, only a photograph of a RAAX11 bottle is shown in the brochure, its price for $119, and the caption, "An extract blend of Chrysobalanus Icaco & Agaricus – 100ml".(JX 58). No cancer claims for RAAX11 whatever existed on the brochure...

With the above information, as at the middle of her page 9, the Complaint Counsel believed she had a reasonable basis to bring a complaint, which she brought on March 25, 2008 from the Atlanta Regional Office. This was based on four things, Cancer Claims on a website, located and owned by a company in Brazil over which she did not have jurisdiction, Respondent's name and contact information appearing on some of the pages of the website, WHOIS hearsay information regarding names associated with the website registration which her Chief Investigator knew did not indicate any ability to control the website, and a buy of two samples of the Product RAAX11 which did not provide any evidence of the Respondent's involvement in advertising RAAX11, on or off the website. What was left standing was speculation as to why

[70] Tr 293 – Respondent relates that the sample orders in question were simply drop shipments
[71] JX43, JX 44, FTC 30 Pay Pal statements of receipt of payments from FTC undercover agent,
[72] JX 57 & JX 58 Both sides of Respondents' Brochure shown with no cancer advertisement for RAAX11 evident .

Respondent's name and contact information was displayed on the website. A reasonable person would have found an answer to that hearsay information before bringing a complaint that would commit the US. Government to a legal action, prohibited by statute.

Against bringing the Complaint was five months of investigating G Otto. which had produced firm evidence that he was at the center of the activity surrounding www.agaricus.net , His email was used to make registration changes at WHOIS[73]. His email was part of the Brazilian Takesun company from which the sample products were bought from and paid to. The sample product label shows Brazil as the place of manufacture[74]. The trademark[75] of RAAX11 was registered to Takesun Portugal Lda. A reasonable person, stating as strongly as the Complaint Counsel did to the Respondent on March 28, 2008 that her only interest was the "shutting down" of the website[76], would have turned to the US SAFE WEB ACT for relief. She would have known that pursuing the Respondent would have had no effect on the operations of www.agaricus.net, which he told her, and it has not. Shutting down the website was just a charade, her real motivation had never changed; it was finding assets to confiscate.

Three days after the Complaint filed from Atlanta was when the telephone call occurred between the Complaint Counsel and the Respondent, so its alleged content could not have contributed to the decision to file a complaint which was on of before March 25, 2008, the date of the accompanying cover letter. On the remainder of page 9 through the top of page 10 the Complaint Counsel reviews what transpired before she brought the complaint now from Washington DC. Information provided by the Respondent's attorney should have discouraged her from proceeding with the Washington DC complaint since the information continued to show her that G. Otto was her proper target, not the Respondent. At this point in time and also reflected in the text of her Answer, she demonstrates that she is not of reasonable mind (the

[73] JX 16, JX 17 Registration emails came from gotto@takesun.com
[74] JX 55 is a poor image of the label. The actual product in the possession of the FTC has a readable label.
[75] Item 00001 of Respondents' reply in providing documents is an image of the RAAX11 Trademark registration.
[76] Tr 313. Tr 314

ALJ's expression) when she shows an attitude contradicting the Rules of the FTC and the ALJ.. In his view of applicable law in his decision. The ALJ states, and this is mirrored in Rule 3.81(e) (i)

> "The burden of proving that its position was substantially justified is on the Complaint Counsel".

Her mindset was backwards, that the Respondent was liable unless he proved he was innocent. Her statement in the top third of page 10 says,

> "Respondent did not provide Complaint Counsel with any valid evidence that they did not control the contents of the website."

This is not a rational basis for bringing a Complaint in the United States, guilty until proven innocent. It is also not true since Complaint Counsel had been presented with Valaco's letter.

Because the burden of proof was on the Complaint Counsel when she only had hearsay and speculation in the affirmative against the Respondent, it didn't matter whether he proved his innocence or not. This same distortion of reality prevailed with the Complaint Counsel when she repeatedly stated in the telephone call with the Respondent, that she would pursue Respondent until he proved he was not liable.[77] Also her memory of the phone call is defective in that Respondent repeatedly stated that he had nothing to do with the website www.agaricus.net during the time period RAAX11 was sold, including making sales from the web site.

Then on the bottom of her page 10 and well into page 11 of her Answer She goes into a highly distorted telling of the negotiations towards a settlement that never could be achieved.. While she states the Respondent was offered no admission of liability and no relief was sought, Respondent's Counsel reported the Commission did not approve her offer and it was withdrawn. Labeling her offers reasonable is a distortion because the obstacle to the Respondent's settling

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[77] Tr 313 - Phone call with Complaint Counsel March 28, 2008.

was her insistence in all offers that the Respondent issue a letter[78] that was a prevarication of the truth, including issuing a letter to all his past customers with a fictitious letterhead of a non-existent company. When this objection was conveyed to the Complaint Counsel her response was that it didn't matter because the letter would not be issued under oath. Such proposed prevarication violated the Respondent's standard of telling the truth at all times, not just when it is convenient or under oath.

The Complaint Counsel winds down her argument for justification by relating information that was irrelevant to the bringing of the Complaint because it occurred after the Complaint was filed, specifically she was not given documents she had demanded. She was so insistent that the Respondent had been involved in advertising on the website that she could not accept that there were no documents pertaining to that activity. She just could not accept that the only documents the Respondent had were his wholesale importing records and his retail sales, neither of which were a subject of the Complaint or involved in advertising,

A critical review of the status of the information the Complaint Counsel had in the instant case would categorize it as unverifiable hearsay, just speculation with important missing critical information that was easily obtainable..

(xii) The ALJ's Erred in his Review of the Brief on Three Counts. First, he gives the Complaint Counsel credit for having a circumstantial case when in fact it was a case fabricated on hearsay and speculation when at the same time the Complaint Counsel knew and concealed, even from the Commission, that the liable party was George Otto in Brazil[79].and the responsible company was Takesun do Brasil. Such egregious misconduct taints the

[78] Attachment A of Respondents' Reply to Complaint Counsel's Answer to Respondents Application for Award. Complaint Counsel has tried to conceal this letter. She did not reproduce it as it was as part of the Complaint.

[79] JX 07 Complaint – It is remarkable that the Complaint could be brought against www.agaricus.com without a single mention of the name of the company represented on that website or the manufacturer of its products as if a website representing a large international, foreign business, existed in a vacuum without an operating base.

government's entire case as unreasonable. Second, he gives weight to the Complaint Counsel's unsubstantiated version of the March 28, 2008 telephone call which was at odds with the Respondent's given under oath and subjected to cross examination. Thirdly he did not recognize that the investigation was so shallow and incomplete as to disqualify the Complaint Counsel from being Substantially Justified in bringing the Complaint. Even the ALJ questioned the Chief Investigator extensively in the trial to try to find out why he had no answers to the many questions that were open[80] the Chief Investigator admitted to the ALJ on questioning that he did not do an adequate investigation because he was resource limited,

(xiii) That the Complaint Counsel Knew During Prelitigation That the Critical Proof in Support of the Complaint Was Flawed and did Nothing to Correct it, Is a Basis By Itself for the Making of an Award Under EAJA.

This same condition existed in *United States of America v Hallmark Construction Co.* and the court ruled that finding itself in that condition the government should not have proceeded into trial. Having done so they were obligated to make an Award under EAJA. This was also true in the instant case where the Complaint Counsel was relying on the WHOIS information to prove that the Respondent controlled the advertising on www.agaricus.net. During prelitigation she would have learned from her Chief investigator that WHOIS information was not valid. She then was given the proper information from the registrar of the website that proved the Respondents were not liable. Continuing the case without proof obligates payment of the award. The ALJ comfirmed she had no proof[81]. in his initial decision of September 15, 2009.

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[80] Tr 124, 125, 128, 129, 138, 145, 159, 160 161, 172, 175, 176-179 are pages of the trial transcript on which the Chief investigator had to answer "I don't know": or "I didn't do it" when asked about his investigation.

[81] Initial Decision of September 15, 2010, bottom Para on Page 56, "Complaint Counsel failed to carry its burden of proving that Respondent disseminated or cause to be disseminated the Challenged Advertisements on the www.agaricus.net website. Accordingly, the Complaint is DISMISSED,

(xiv) The Complaint Counsel's prelitigation and litigation positions were not justified, Warranting the giving of an award for Attorney Fees and expenses under EAJA.

While treating both Respondents together was dubious in finding them not liable as charged in the Complaint, doing so during the Award phase of the litigation makes the litigation process by both the Complaint Counsel and the ALJ quite improper under *Morgan v Perry. Morgan* says, " We must scrutinize both the government's prelitigation position and its litigation Position. Both positions must be substantially justified and if litigation positions of either is not, attorney's fees should be awarded to the prevailing party." In the Decision of September 15, 2009 the ALJ found Gemtronics Inc. was an inactive Corporation and had never conducted business. As such it was incumbant that it have been reviewed seperately and not doing so by both the ALJ and the Complaiont Counsel constitutes an improper litigation position warranting giving the award.

(C) Arguments why the Initial Decision should be rejected given Complaint Counsel's misconduct during the prior adjudicative proceeding?

While the various acts of misconduct of the Complaint Counsel were summarized in a motion to Sanction which was rejected by the ALJ on grounds that he did not have jurisdiction, they should still be considered as a basis for finding that she was not substantially justified.

(i) Acts of misconduct are Summarized below

1, The Complaint Counsel .did not follow FTC law to seek a remedy against www.agaricus.net , a foreign owned and operated website, with the US SAFE WEB Act.

2. Shifting the target of the investigation away from G Otto, against whom all the evidence pointed, and even to whom a warning letter had been sent, instead to the Respondents, based on no valid evidence, but because no assets of G. Otto could be located in the US. pursuing the Respondent after getting a letter from DomainDiscover absolving Respondent of liability for www.agaricus.net. .,thus bringing the Complaint in the face of having no proof for a critical item needed to make her case.

3. . Concealing the exculpatory evidence from the Respondents and the Commission, that an investigation of G. Otto had been mounted as the prime suspect, and its only coming to light in the questioning at Trial of her Senior Investigator, Mr. Liggins. Said concealment that www.agaricus was a foreign website, prevented the Commission from exercising it oversight to prevent abuse and unauthorized expenditure of funds.

4. Misrepresented her phone call with the Respondent introducing words he had not spoken that he was able to control the website www.agaricus when in fact he said in trial that he would attempt to have his contact information removed.

5. Requiring in proposed Orders that the Respondent, William H. Isely, to produce and sign a letter containing false statements, with the letter be on the letterhead of a fictitious entity, "Gemtronics, Inc./www.agaricus.net", and for Respondent to sign for this fictitious entity.

6. Not providing any information on the G. Otto investigation when in Discovery Complaint Counsel was requested to provide the following information:

a.."Identify to Counsel for Representative the existence of any evidence which tends or may tend to negate the guilt of the Respondents, mitigate the degree set forth in the complaint herein, or reduce the requested penalty and/or punishment."
b.."Identify to Counsel for Respondents any and all exculpatory and impeaching evidence or information."

7. Negotiating a settlement in bad faith by offering terms that were not approved by the Commission and extracting financial information not related to the Complaint by offering the unapproved settlement which later had to be withdrawn.

(ii)Law Supporting Respondent's Claims of Misconduct of the Complaint Counsel

Prosecutorial misconduct is an act which violates ethical standards of law practice.

1. Title 15. § 45 prohibits the FTC from regulating those aspects of foreign commerce which do not take place in the United States. While jurisdiction issues of the internet have been evolving, foreign owned and operated websites are clearly off shore of the United States.

2. The U S SAFE WEB ACT was enacted to provide funding and authorization to coordinate with foreign regulatory agencies problems arising for U S customers taken advantage of by foreign websites. The regulation of foreign websites still falls on the sovereign foreign power.

3. Federal Rules of Civil Procedure, Chapter III, Rule 11 " provides for sanctions against the Attorney or client for harassment, frivolous arguments, or a lack of factual investigation."

4. *US Gov. vs. Sen. Ted Stevens.* Prosecutors sanctioned for over $600,000 for, among other misconduct, for withholding key evidence.

5. *In US vs. Ranger Electronic Communications Inc.* the court ordered the federal government to pay attorney's fees to the attorneys for the corporate criminal defendant as a sanction for the prosecution's failure to disclose exculpatory evidence,

6. *.In Jay E, Lentz vs. U S Government* – District court in Alexandria. Mistrial declared when prosecutors apparently provided jury with banned evidence.

7. Federal Rules of Civil Procedure, Chapter 15, Rule 28 deals with the general provisions of discovery

8. In Federal Rules of Civil Procedure Rule 37 deals with sanctions for not complying with the rules of discovery. Specifically Rule 37 (a) (3) deals with evasion[82] and Rule (c) (1) deals with failure to disclose[83]9.

9. *Brady vs. Maryland,* 373 U.S. 83 (1963),* was a United States Supreme Court case. The court held that withholding exculpatory evidence violates due process "where the evidence is material either to guilt or to punishment";

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[82] Rule 37 (a) (3)Evasive or Incomplete Disclosure, Answer, or Response.

For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

[83] Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

* A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

10. *In US vs. Ranger Electronic Communications Inc.* the court ordered the federal government to pay attorney's fees to the attorneys for the corporate criminal defendant as a sanction for the prosecution's failure to disclose exculpatory evidence, after the criminal case was dismissed.

(iii) Facts Supporting Respondents' Claims Of Complaint Counsel Misconduct

The case for finding the Complaint Counsel committed acts of misconduct is clear and can be made without developing any further evidence beyond that which is already in the record. Although the major acts of misconduct are related in that they all involved the basic theme of finding the Respondent liable for acts done by another party, each involves a separate aspect which will be analyzed separately. Most of Complaint Counsel's actions of misconduct were committed in her role as an investigator rather than as a prosecutor.

1. When the Complaint was brought against the Respondent, it consisted wholly of alleged misrepresentations and advertising found on the website, **www.agaricus.net** , a foreign website. Inherent in the bringing of the Complaint was the assumption of the Complaint Counsel that the basic charter of the FTC, granting it the authority to regulate **national** commerce, including advertising, marketing, or sales, could be stretched to cover activity taking place on a foreign website which falls in the category of **international** commerce

2. The Complaint Counsel abandoned her prosecutorial duty to make a through investigation before bringing the complaint, and also picked the information she brought as evidence to suit her motivation to garner assets rather that follow the evidence wherever it might lead, She ignored the letter from DomainDiscover absolving the Respondent's of liability for operations of the website **www.aaricus.net**.

3. The case had originally been opened and some information had been gathered against George Otto by the FDA and turned over to the FTC around Aug 15 of 2007[84](Tr 92). George Otto (Kather) was the target and apparently Liggins spent several months searching US data bases for any assets of George Otto's that could be located in the United States[85]. Not finding any assets in the US, the Complaint Counsel decided in October to send him a warning letter, directed to the website www.agaricus.net to see if that would flush him out[86]. With no response from the website, Liggins turned his attention to gathering more information from the several websites managed by George Otto in the late December 2007[87] and early January 2008 and Liggins must soon have recognized Otto was not in the US and was beyond the FTC reach.

Respondent's name appeared linked to one of George Otto's websites in particular, and the Complaint Counsel realized that there was a possibility she could build a circumstantial case against the Respondent, if the information displayed on the images related to George Otto was entirely ignored and only information linked to the Respondent's name was highlighted. Because there was more information linked to George Otto, no substantiating research was done as it would likely have turned up more exculpatory evidence that would have spoiled the whole plan. A lame excuse for not even making a few phone calls was given in Liggin's testimony that he was resource limited[88].

4. The Complaint Counsel provided no discovery material in response to either of the requests quoted at the beginning of this section, giving the same unreasonable reason to both requests which might best be characterized as deceitful, considering the extent of the

[84] Liggins testimony (Tr92)
[85] Liggins testimony (Tr 177)
[86] FTC warning letter, (FTC 00195, 00196, & 00197)
[87] Liggins testimony (Tr47)
[88] Liggins testimony (Tr 161)

investigation of George Otto (Kather) that the Complaint Counsel had participated in during the last half of 2007. .To both requests the answers were the same and are on the bottom of page 2 and the top of page 3 of her **Complaint Counsel's Response to Respondent's Interrogatories and Request of Production of Documents**[89]**,**

"Complaint Counsel objects to Respondents' Interrogatory to the extent that it requires Complaint Counsel to undertake legal research for Respondents or organize the factual evidence for them. Without waiving and subject to these objections, Complaint Counsel is not in possession, custody, or control of any such evidence requested."

Since Complaint Counsel already had done the research on George Otto and **www.agaricus.net** , and would have it on file, no research or organization of evidence would have been needed to provide it. It existed and was in her possession, which she flatly denied, even though it was investigated, per Liggins[90] at trial for the last part of 2007,

5. .Complaint Counsel misrepresented her phone call with the Respondent introducing words he had not spoken that he was able to control the website www.agaricus when in fact he said in trial that he would attempt to have his contact information removed.

6. Complaint Counsel Required in proposed Orders that the Respondent, William H. Isely, produce and sign a letter containing false statements, with the letter be on the letterhead of a fictitious entity, "Gemtronics, Inc./www.agaricus.net", and for Respondent to sign for this fictitious entity. This draft letter is duplicated as Attachment C. When Respondent's Counsel objected to the false statements in the draft letter he reported he was told it did not matter because the signature was not done under oath. The letter varied over time but always included

[89] Interrogatory No. 2 and Interrogatory No 3
[90] Liggins testimony (Tr 74, 106, 114, 115, 116, 117, 125, 130, 135, 140,142, 161, 163,177, 178

some aspect that was untruthful such signing for www.agaricus.net. or including a false letterhead.

7. Towards a settlement the Complaint Counsel negotiated in bad faith by offering terms that were not approved by the Commission. She extracted financial information from the Respondent that was not related to the Complaint by offering the unapproved settlement which later had to be withdrawn. While in her Answer she says that the offer was reasonable, at no time did she offer a version of the letter that did not contain untruths. In summary is a quote from Berger vs. US, 295 U.S. 78. Judge Justice Sutherland , said the duty of the prosecution was "not that it shall win a case, but that justice shall be done

(D). Arguments on the Award that Respondents are entitled to Under EAJA

The respondent considered there to be some merit in the Complaint Counsel's arguments on the Reward amount. It had been agreed with the Complaint Counsel that the billings for Attorney Fees and expenses at the cap rate for Attorneys fees were $64,977. Respondent reduced his claim as reported in his Status Report of March 23, 2010 to **$60,050.85** by conceding some paralegal hours were clerical tasks, some attorney hours were poorly described, some office supplies were excessive, and all travel expenses of the attorney which lacked receipts other than car miles were removed.. Respondent feels **$60,050.85** would be a fair settlement award at the cap rate.,. . Complaint Counsel concerns about the details of his Counsel's description of his expenses is just her opinion since she did not cite any case law that establishes a standard for the accounting.

Respondent also requests that the Commission considers awarding the attorney hours he paid for between the Atlanta Complaint and the one from Washington. It is very unusual to

have to reply to two complaints, both without warning letters. On the Atlanta complaint the Respondent was told he had three days to engage a lawyer so that the Complaint Counsel would have an attorney to begin negotiations with

Finally, Respondent requests consideration of his own expenses that he would not have encountered if the Complaint had not been brought. A careful reading of EAJA shows that the Expenses are those of the Respondent, including his attorney's expenses passed through to him, The specific expenses listed are those that are typical in litigation. But the word "including" is not exclusive of other expenses. For example if you say your shopping list includes eggs, does not mean there are no other items on the list.

Complaint Counsel makes a non-valid issue of Special Circumstances for delay in providing discovery which was caused by Complaint Counsel's demanding nonexistent evidence of the records of the Respondent's advertising activities on the website which were non-existent,.

(E) Arguments for the Commission Increasing the Maximum Allowable Award Under EAJA

On 12-23-2009 Respondent petitioned the Commission to proceed with rulemaking pursuant to Rule 2.81 (g) to raise the award for Attorney Fees to $225/hr. The Respondent requests that this rulemaking be scheduled on the Commission's docket.

Respondent pointed out in his petition that the special abilities of His Counsel in understanding the operation of website management was a critical factor in winning the case. In his search for a suitable attorney who was internet savvy, the Respondent was surprised to find that the vast majority of attorneys leave such details to others. In his search he found only one Legal firm in the country specializing in internet issues, and that one was located in San Francisco.

Conclusions

Under both the law and the facts, the Complaint Counsel was not substantially justified In bringing the complaint.

Under the law she knew that for the FTC to regulate a foreign website was prohibited by Title 15, and to do so would expend funds not authorized by the Congress. Examination of case law Justifies the giving of the Award.

With regard to the facts. Respondent has shown that in no respect did the Complaint Counsel reach the bar set by the wording of the Complaint she authored.

"Respondents disseminated or caused to be disseminated advertisements for RAAX11 through an Internet website, www.agaricus.net ."

The closest she has been able to come to this standard is to state that **she** believed he could. A reasonable person could only speculate that he might have. She did not proclaim a specific standard of her own that mirrored the Complaint as did the Respondent..

In addition, by combining both Respondents into one consideration in the litigation process of the award phase, both the ALJ and the Complaint Counsel fatally compromised their litigation processes and under *Morgan* would be required to award attorney fees, and expenses.

Without the Complaint Counsel having a reason for bringing the Complaint either in Law or Fact, the Commission should reverse the Preliminary Decision of the ALJ and proceed promptly to complete the processing of the Respondent's Application for an Award for Attorney Fees and Other Expenses as well as consideration of Rulemaking to raise the maximum Attorney Fees.

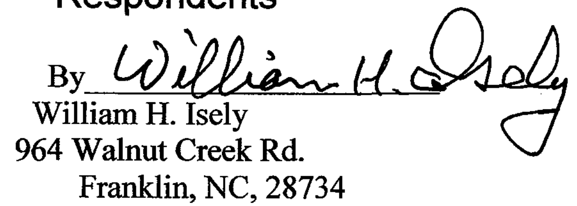
Besides providing Justice, the Commission is responsible to maintain its reputation of not preying on the weak and innocent nor giving foreign governments reason to believe that it is the policy of the United States to move in the direction of becoming an empire that would interfere in the internal affairs of other countries or by reciprocal action, set a precedent that foreign powers have the right to regulate United States commerce.

Dated: June 9 , 2010

Respectfully Submitted:

GEMTRONICS, INC & WILLIAM H. ISELY

Respondents

By 
William H. Isely
964 Walnut Creek Rd.
Franklin, NC, 28734

(5) PROPOSED DRAFT ORDER FOR THE COMMISSION'S CONSIDERATION

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS Jon Leibowitz, Chairman
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

PUBLIC

DOCKET NO 9330

In the Matter of
GEMTRONICS, INC.
a corporation and
WILLIAM, H. ISELY
individually and as owner
Of Gemtronics, Inc.

ORDER OF THE COMMISSION ON RESPONDENTS' APPEAL OF THE INITIAL DECISION OF THE ALJ ON RESPONDENTS' APPLICATION FOR AN AWARD OF ATTORNEY FEES AND OTHER EXPENSES.

The initial decision of the ALJ, the Honorable D, Michael Chappell on the application of the Respondents for an Award of Attorney Fees and other Expenses pursuant to Rules 3.83 (h) and 3.52 is hereby reversed. The reward request made by the Respondent of $60,050.85 is hereby granted. The Commission will schedule Rulemaking to consider revising the Maximum Rate for Attorney Fees awarded under EAJA proceedings of the FTC.

ORDERED

____
Jon Leibowtz
Chairman

Date July , 2010

Attachment A

Chronological History of Complaint Counsel's Knowledge and Actions Before Complaint Was Filed

Item / Event	Source	Date Known	Quality	Comments
1. Commencement of the investigation of Takesun do Brasil, G. Otto and www.agaricus website by the Atlanta regional office of the FTC on referral From the FDA	Tr 47, 48 Tr 91	Mid 2007 Aug 15, 2007	Liggins Testimony	Evidence Evidence, Started investigation with material provided by the FDA
2. Warning letter sent to website www.agaricus.net by email	FTC 195-197	Oct 23, 2007	Trial Exhibit	Evidence Includes statement that if foreign, FTC does not have jurisdiction
3. Investigation of Respondents Initiated	Tr 47	Dec, 2007	Liggins Testimony	Evidence
4. www.agaricus.net home page Tel. Number in Portuguese giving the country code of Brazil. Other statements on home page tie it to the Takesun company that say the products for sale are produced in Brazil.	Tr 105 –Tr106	Dec 2007	Liggins Testimony	Evidence
5 Takesun, G Otto, and email address gotto@takesun.com Identified in association with each other.	Tr 115-116	Dec, 2007	Liggins Testimony	Evidence
6. Liggins captured a WHOIS Image of the re-registration of www.agaricus.net , Domain registrar is DomainDiscover. Shows both Respondent's and George Otto's names, Registration was done using George Otto's email address, gotto@takesun.com.	TX 16 (FTC 158)	Dec, 2007	Image – Factual Information – Hearsay	Image includes a disclaimer statement that the information may be inaccurate or out of date. No information on possession of account name or PIN needed to control website content is shown.

7. Liggins captured a number of images from www.agaricus.net, of which this is an example, showing the name of the respondent, his telephone no., and a statement that information could be had by calling the Respondent.	JX 24	Dec., 2007	Image -- Factual Information content, who posted it, and why is hearsay, and per Complaint Counsel Tr 37-1, 2, 3, "Your Honor, Mr. Otto is beyond subpoena power for us. We'd never be able to subpoena him."	Respondent had given G. Otto permission to use his cancer history as a testimonial in a time period before RAAX11 was sold. Without Respondent's knowledge or permission. Otto expanded use of Respondent's name & contact information. Tr.200-24,25
8. Liggins captured a number of images from the archival system, this one a shopping cart on www.agaricus.net in April 2004 before the time RAAX11 was sold. RAAX11 does not appear on the list of products.	JX 35	Mid to end of 2007	Image – Factual Information content, who posted it, and why is hearsay	While the Complaint was limited to the product RAAX11,The Complaint Counsel did not take care to segregate what happened before and after the respondent began to sell RAAX11. He left www.agaricus.net before he sold RAAX11 Tr 197 -
9. A named registrant of a website may not be the owner or have control of the website or even know he has his name listed as the registrant	Tr 122-Tr 123	Dec, 2007	Liggins Testimony	Evidence
10. Liggins never contacted the Domain Registrar Company to confirm the owner of www.agaricus.net	Tr 124-22,23,24	Dec. 2007	Liggins Testimony	Evidence
11. Liggins had his own web site and Understood control requires both a user name and PIN number without which there is no control	Tr 108	Dec. 2007	Liggins Testimony	Evidence
12. Liggins searched for information on George Otto but not outside of the United States	Tr 125	Dec 2007	Liggins Testimony	Evidence

13. Both orders of sample products bought from www.agaricus.net were paid for to some branch of the Takesun Company by Pay Pal	Tr 134 - Tr 145 JX34, JX 52	Jan 2008	Liggins Testimony	Evidence
14. Product RAAX11, obtained by sample order from www.agaricus.net, shows on label it is manufactured by Takesun, located in Brazil.	FTC 00198 JX 55	Jan 2008	Trial Exhibit	Evidence
15. FTC received two orders drop-shipped by Gemtronics. Brochures enclosed did not advertise RAAX11 for healing cancer.	Tr 77-Tr 91	Jan 2008	Liggins Testimony	Evidence
16. Liggins investigated Gemtronics Inc but learned nothing about it besides it had been Incorporated by Respondent	Tr 127,128	Jan 2008	Liggins Testimony.	Evidence
17. Liggins never found Respondent's email address associated with Takesun Websites in his investigations.	Tr 151,152	Jan 2008	Liggins Testimony	Evidence
18. Liggins never called Isely's phone number	Tr 160	Jan 2008	Liggins Testimony	Evidence
19. Liggins never investigated other phone numbers on www.agaricus.net such as Green pharmacy or foreign contact Information.	Tr 160,161	Jan 2008	Liggins Testimony	Evidence

20. Liggins didn't know who Takesun was	Tr 162	Jan 2008	Liggins Testimony	Evidence
21. When questioned by the Judge Liggins Said "I could have done a better investi-gation".	Tr 161	Jan 2008	Liggins Testimony	Evidence
22. Liggins said he was investigating G Otto to find assets of his in the US. Abandoned the search when none were found	Tr 177	Jan 2008	Liggins Testimony	Evidence
23. Complaint Counsel brought Federal District Court Complaint against Respondent From Atlanta Regional Office	Cover Letter JX 64	March 25, 2008	Signed by B. Bolton Complaint signed by William Blumenthal, FTC Gen Counsel	Complaint was very broad stating respondent was responsible for marketing, advertising & sales
24. Respondent called Complaint Counsel as suggested in her Cover letter. Later the same day She sent Respondent personal infor-mation forms to return as part of starting a negotiated settlement	Cover Letter	March 28, 2008	Signed by B Bolton	Respondents report of phone call in Tr 313, Tr 314. Complaint Counsel's version used in her Answer is a fabrication & has not been vetted or cross-examined.
25. Letter from Registrar of domain www.agaricus.net given to the Complaint Counsel showing www.agaricus.net had always been owned and controlled by the Takesun Company and its agent gotto@takesun.com	FTC 358	May, 2008	On Company Letterhead	Same company as shown to be registrar on FTC WHOIS investigation
26. Complaint Counsel files second Complaint from Washington D.C. FTC Headquarters	JX 7	Sept. 15, 2008	Signed by Commissioners	

Attachment B

Investigation of Respondent was Negligent By being Shallow and Lacking Facts showing Respondent Liable

Item	Source	Comments
1, Liggins commented in trial that "I could have done a better investigation" and used the lame excuse that he was resource limited.	Tr 177	This is an understatement. Liggin limitted his investigation to unsubstantiated information he could find on the inter-net, two sample purchases of thie subject product, and search of public U.S. data bases. He made no phone calls or otherwise validated what the internet yielded,
2. Warning letter was sent to website wwwagaricus.net by email.	FTC 195, 197	The warning letter was sent by ordinary email without complying with proof of service per Rule 4.4 (c)
3. Liggins never called www.agaricus.net home page tel. Number or any other tel. numbers listed to confirm assumptions he and the Complaint Counsel were making from the displayed information.	Tr. 105, 106 Tr 161	Chief investigator LigginsTestimony
4. Complaint Counsel did not send the Respon-dent a warning letter or otherwise contact him until after she sent him the Complaint drafted from the Atlanta regional office of the FTC.	JX 64	Complaint Counsel incorrectly claims that the email message sent to www.agaricus.net on Oct. 23, 2007 constituted a warning to Respondent, while her chief investigator had Responden'ts home address.
5. Liggins knew from experioence managiing his own website that domain registration information does not indicate the owner and controller of a website. He had no evidence that Respondent had the ower account or PIN for www.agaricus. and did not contact the Registrar, DomainDiscver, to get reliable information,	Tr 110.111.112.	Liggins testimony

6.

In May, Respondent's Cousel sent the Complaint Counsel a letter from the Registrar of the Domain www.agaricus.com that the subject website was owned and operated by Takesun do Brazil. Neither the Complaint Counsel or Liggins contacted Domain Discover to authenticate the information.

JX5, 66
Tr 110-11, 122

Liggins Testimney

6.

Liggins claimed he could find nothing on Geoirge. Otto.. When the sampe products were paid for Liggins received telephone numbers at Pay Pal which no doubt could have yielded information leading to George Otto but he never called them. Also he had George Otto's last name, Kather, but admitted he never searched on his last name

Tr 84-85, 138.
Tr 143-44.
Tr 178, Tr 179

Liggins Testimony

7.

Liggins did not investigate two other suppliers of RAAX11 in the United States mentioned on the Website www.agaricus., Green Pharmacy, and Dr, Steven Hall. Green Pharmacy was shown to be a Distributor for Takesun on one web page.

Tr 92, !59-60.
JX 30, JX 41

Liggins Testimony

8,

Respondent's attorney presented emails to the Complaint Counsel in May of 2008 between Respondent and George Otto which supported Respondent's explanations about how Respondent's name appeared on the WHOIS information, the result from a mistake G Otto made in registration. The discussion on dates that took place during the orals was because Respondent later found his name on other websites and requested his name be removed from them as well.

Respondent's Interogatoroies items 31 & 33.

Complaint Counsel states that because Respondent was able to get his name removed from the registration of the website and some of the web pages that he controled its content. The leverage was a threat for a suit of identity theft. This is very different than being able to have any influence on the advertising material.

9. Liggins captured a WHOIS Image of the re-registration of www.agaricus.net , Domain registrar is DomainDiscover. Shows both Respondent's and George Otto's names, Registration was done using George Otto's email address, gotto@takesun.com.	TX 16 (FTC 158)	Image includes a disclaimer statement that the information may be inaccurate or out of date. No information on posessor of account name or PIN needed to control website content is shown.
10. The Complaint was only about the product RAAX11 The Complaint Counsel was not accurate in her understanding and brought in information from the time period before RAAX11 was even sold.	JX 35	Evidence Complaint Counsel did not understand the case,

ATTACHMENT C

"

LETTER TO BE SENT BY FIRST CLASS MAIL

(To be printed on letterhead of Gemtronics, Inc./www.agaricus.net)

To Whom it may concern: Date

Our records show that you bought RAAX11 from our website agaricus.net. We are writing to tell you that the Federal Trade Commission ("FTC") has found that our advertising claims for these products were false or unsubstantiated, and has issued an Order prohibiting us from making these claims in the future. The Order entered against us also requires that we send you the following information about the scientific evidence on these products.

No scientific research has been done concerning the product RAAX11 as a preventive, treatment, or cure for cancer in humans. Very little scientific research has been done concerning either of the ingredients in RAAX11, *chrysobalanus Icaco* extract and *Agaricus blazei Murill* mushroom extract, as a preventative, treatment, or cure for cancer in humans. The scientific studies that have been done do not demonstrate that RAAX11, or the ingredients in RAAX!!, are effective when used as a treatment for cancer.

It is very important that you talk to your doctor or health care provider before using *any* alternative or herbal products, including RAAX11. Speaking with your doctor is important to make sure that all aspects of your medical treatment work together. Things that seem safe, such as certain foods, herbs, or pills, may interfere or effect your cancer or other medical treatment, or other medicines you might be taking. Some herbs or other complementary or alternative treatments may keep your medicines from doing what they are supposed to do, or could be harmful when taken with other medicines or in high doses. It is also very important that you talk to your doctor or health care provider before you decide to take any alternative or herbal product, including RAAX11, instead of taking conventional cancer treatments that have been scientifically proven to be safe and effective in humans.

If you would like further information about complementary and alternative treatments for cancer, the following Internet web sites may be helpful.

1. The National Cancer Institute. www.cancer.gov/cancertopics/pdq;
2. The National Center for Complementary and Alternative Medicines: www.nccam.nih.gov

You also can contact the National Cancer Institute's Cancer Information Service at 1-800-4-CANCER or 1-800-422-6237.

Sincerely,

William H. "Bill": Isely
Gemtronics, Inc./www.agaricus.net "

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this

RESPONDENTS' INITIAL BRIEF ON APPEAL ON THE INITIAL DECISION ON RESPONDENTS' APPLICATION FOR AN AWARD OF ATTORNEY FEES AND OTHER EXPENSES.

In the above entitled action upon all other parties to this cause by depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, properly addressed to the attorney or attorneys for the parties as listed below.

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

Honorable D. Michael Chappell
Chief Administrative Law Judge (Acting)
Federal Trade Commission, H113
600 Pennsylvania Ave., NW
Washington, D.C. 20580

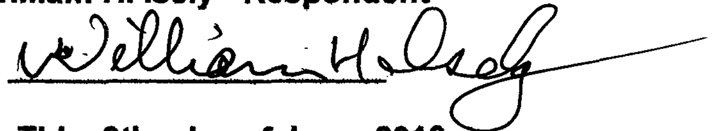
The original and twelve (12) paper copies via United States mail delivery and one (1) electronic copy via e-mail:

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

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

Ms. Barbara E. Bolton-
FTC, .. Suite 1500
225 Peachtree Street, N.E
Atlanta, GA 30303

William H. Isely - Respondent



This 9th day of June. 2010