

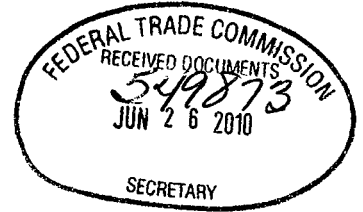
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William H. Isely, Respondent July 22, 2010

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' REPLY TO COMPLAINT COUNSEL'S ANSWER TO
RESPONDENTS' APPEAL OF THE INITIAL DECISION ON RESPONDENTS'
APPLICATION FOR AN AWARD OF ATTORNEY FEES AND OTHER
EXPENSES.

It is requested that the Complaint Counsel's Answer dated July 14, 2010 be rejected for reasons of being submitted 4 days late, and the default rule 3.83(b) be implemented with the Commission implementing Respondent's appeal as submitted.

Your consideration will be greatly appreciated.

Respectively Submitted

William H. Isely

William H. Isely July 22, 2010

201 Finsbury Street, # 103.
Durham, NC, 27703

b.isely@ftpmailbox.com

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

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS:

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

I	In the Matter of	I	PUBLIC DOCUMENT
I		I	
I	GEMTRONICS INC	I	DOCKET NO 9330
I	a corporation and,	I	
I		I	
I	WILLIAM H. ISELY	I	
I		I	

**RESPONDENTS' REPLY TO COMPLAINT COUNSEL'S ANSWER TO
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TABLE OF CONTENTS

	page
I. INTRODUCTION	3
II BRIEF HISTORY	4
III ARGUMENT	5
IV CONCLUSIONS	14

TABLE OF AUTHORTIES

1. <i>Hess v National Labor Relations Board</i>, 112 F.3d 146 4th Cir.(2000)	3, 6, 7
2. <i>Pierce v Underwood</i>, 487 U.S. 552 (1988)	6
3. <i>U. S. Gov. v Hallmark Construction Company.</i>, 200 F.3d (7th Cir. 2000)	6, 7

STATUTES

EAJA	4, 12
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COMMISSION RULES OF PRACTICE

page

Title 15	6
Title 16 Rule 3.83(b)	1

ABBREVIATIONS USED FOR CITATIONS

EAJA ID - INITIAL DECISIONJ
EAJA IDFF - EAJA Initial Decision of Findings of Fact
IDPAP – Initial Decision Findings of Fact
INPAPCOL – Conclusion of Law in the INPAP
JX - Joint exhibit item from the Prior Adjudicative Proceedings
Tr – Transcript of the Prior Adjudicative Proceeding
RAB – Respondents’ Appeal Brief
CCAB – Complaint Counsel’s Appeal Brief Answer
REAJA – Respondents’ Application for Award under EAJA
CCAAA – Complaint C. Answer to the Award Application
RRCCAAA – Respondents Reply to CCAAA

I Introduction

Respondent has chosen to reply not only to object to the Complaint Counsel’s Answer (CCAB) because it was submitted in an untimely manner by being late by a number of days, but also because her answer is without merit. Not limiting her brief to the questions the Respondent posed in his Appeal Request, the Complaint Counsel has repeated her previous arguments that lost her the case in the initial decision. She does not cite a single case that deals with the regulation of the content of foreign websites and makes little of the case cited by the Respondent that is binding in the instant case, *Hess v National Relations Board* because was decided by the 4th Circuit and it is most applicable.

The Complaint Counsel’s weakest position results from citing as “evidence” information found on a foreign website which was never investigated as to its veracity, author, or source.

She and her investigator made no effort to learn anything about the website and its owner George Otto¹ Such information could not be classed as evidence so it never rises above the level of hearsay. The Complaint Counsel throughout her Answer refers to such information as evidence. It is an established principle that just because something appears in print does not make it so. Even more so is to suspect information found on a foreign wet site. Such information should only be used as the starting point of an investigation, not its conclusion as the Complaint Counsel has done throughout her case.

Even though the ALJ denied an award largely on the basis that he had denied Summary Judgment and gave weight to a misquote of the Respondent by the Complaint Counsel², the ALJ implied that the Respondent was deserving of an award by the fact that he suggested that the parties engage in award negotiations. That the Complaint Counsel believed an award was justified is indicated by the fact that she made an award offer of \$40,000.

II Brief History

After concentrating on George Otto, owner of the website www.agaricus.net for 5 months, the FTC in its cancer sweep brought a Complaint instead against The Respondent in Sept, 2008. In Sept, 2009 the case was dismissed by the ALJ, the Honorable Michael Chappell, and not being appealed, was made final In November 2009. The Respondent filed for award of Attorney fees under EAJA

¹ CA Tr 21. Complaint Counsel said she didn't even know if George Otto existed

² Tr 313 – Respondent gave testimony regarding the phone conversation with the Complaint Counsel on March 28, 2008 which was not contested, stating he would try to get his name removed from the website. Without being cross examined the Complaint Counsel has entered into her record that Respondent said he could change the website. The ALJ used this incorrect version in reaching the EAJA ID.

which was rejected by the ALJ in March of 2010. The Respondent then appealed the initial decision to the full Commission in June, 2010 which was answered by the Complaint Counsel in July 2010.

III Arguments

The argument for award of Attorneys Fees under EAJA will be presented along the lines of the five questions the Respondent requested the Commission to consider in his Appeal Application.

A. Jurisdiction

The Complaint Counsel dodges the issue of how the FTC has been granted authority of jurisdiction over the content of Foreign websites by her distraction of what constitutes foreign commerce. Rather, the burden is on her to show that such authority exists, which she never did throughout the case. She has cited no statute that gives the FTC such authority and none of the cases she cited involves the FTC regulating the content of foreign websites. No doubt it is a sensitive issue involving the rights of other sovereign nations she want to avoid.

Without proof she says that www.agaricus.net was directed at the US. In fact the website www.agaricus.net services 6 languages and the English version also services all English speaking countries, the UK, Ireland, Canada, South Africa, Australia, New Zealand, and others as English is the major commercial language of the internet. The Complaint Counsel herself recognized that she did not have jurisdiction in the face of sovereign rights of other nations when her warning letter

to the website³ states that if it was located outside the U.S, that the complaint would be referred to the regulatory agency in the country having jurisdiction. Such a letter could only be just a bluff and no action followed through from it.

Complaint Counsel in her June 3, 2009 Findings of Facts and Conclusions Of Law, Page 10 par. 1, 2nd sentence. Cites Title 15 that the regulatory power given to the FTC is “National wide advertising, marketing, and sales activity”. This therefore excludes the foreign activities of www.agaricus.net

B. The FTC’s position was not Substantially Justified”.

The relevant case law is from *Pierce v Underwood*, *Hess v. National Labor Relations Boards* and *U.S. Government v Hallmark Construction Company*. .

Pierce is important because it came before the US Supreme Court and also some of the issues in *Pierce* are also found to be appropriate in the present case.

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 for the government to be substantially justified. It 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.” The instant case is one where the government did not determine easily verifiable critical factors, did

³ FTC 195, 196, & 197. Warning letter sent to website www.agaricus.net in October, 2007

not appeal the case being recognized as weak, and had almost no chance of success because it was based on hearsay rather than facts.

Hess teaches predominately that the government cannot deny an award to a prevailing party when the government did not have adequate evidence. While in her answer the Complaint Counsel cites “evidence” to justify the bringing of the Complaint, all this “evidence” was hearsay, taken from the internet without any substantiation. Further, much of this “evidence” was discredited by actual evidence⁴ prior to the bringing of the Complaint, such as the evidence on who had actual control of the website as was provided by the Domain Registrar⁵ or other relevant documentation provided by the Respondent’s Counsel. There is no argument that the ALJ did not make a lengthy and well reasoned opinion. He did examine all the **information**, although little of that supplied by the Complaint Counsel could be classed as evidence, but rather was hearsay.

Hallmark teaches that an award may be given where there is lack of merit in either the government’s pre-litigation position or its litigation position. It also teaches that an award may be justified when 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 assess that evidence⁶. The Complaint Counsel and her Chief Investigator knew, starting in August 2007, that one, George Otto, was the major player in determining the content of the website www.agaricus.net and only

⁴ Tr 155 Liggins testifies that the veracity of website information is uncertain.

⁵ FTC 000358 – Letter from Valesco of DomainDiscover in May of 2008 giving true owner of website.

⁶ Tr 110, 111, 112 –From his experience managing his own website Liggins knew that the WHOIS information could be entirely wrong and yet he admitted he did not attempt to contact the Registrar for reliable information. Also he was familiar with the disclaimer posted by the WHOIS site. He was aware that G. Otto had registered the website because his email had been used to do so.

suspected later, based on hearsay, that the Respondent might have some role, yet the Respondent was charged without further investigation since no assets for George Otto could be located in the U. S.⁷, and assets for the Respondent were. Numerous clues in the form of contact information were available, but the Chief Investigator admitted that no follow-up investigations were made⁸, including no attempt to contact the Respondent to determine his role on the website. Later, when contacted by the Complaint Counsel, denials of any role by the Respondent were ignored and not investigated. Again the Complaint Counsel asserts that the FTC proffered a significant amount of evidence, again not distinguishing between evidence and unverified information. Even at trial her chief investigator was unable to characterize the nature of the information he had gathered on the internet as to its veracity. A reasonable person would not believe anything found on the internet without confirmation from a reliable source and would certainly not use it in a judicial procedure unsubstantiated.

The Complaint Counsel quotes a statement in REAJA in her CCAA and elsewhere that the Respondents believed the FTC was substantially justified in bringing the Complaint. This was a typographical error of leaving out a “not”, committed in the Respondents’ Attorney’s office but not reviewed by the Respondents. In the context of the statement it was an obvious error. This error was corrected in the RRCCAA, but the the Complaint Counsell continues to refer to this as substantiation of her position.

⁷ Tr 177 – Liggins stated that the investigation of G. Otto was terminated when no assets could be found.

⁸ Tr 105,106,161 – Liggins said no attempt was made to contact any phone numbers on the website and indicated he was involved in a very skimpy investigation that lacked resources even to make phone calls.

The Complaint Counsel says the FTC had ample evidence that the Respondent had the ability to control the web site and had amassed considerable evidence that all pointed to Isely and his company⁹. All the so-called evidence was hearsay and speculation from the internet, the same source that the FTC was complaining was promoting lies and misinformation. The FTC did hold valid evidence it did not disclose, such as location of Takesun, Country of the manufacture of RAAX11, that www.agaricus.net was located in Brazil, and the country of the telephone number on the home page, all of which pointed away from the Respondent to George Otto, the Principal of the Takesun Company, owner of the website.

The Complaint Counsel tried to make her case by citing a false receipt that was sent out by some mistake by the website suggesting that the Respondent had consummated the undercover sale. She did not mention that the correct receipt attributed to George Otto was also sent out and confirmed by her Chief Investigator to be the one that actually charged his credit card.¹⁰ Again presenting misinformation as evidence. The enclosed brochures¹¹ did not contain the RAAX11 advertising information found on the website as claimed by the Complaint Counsel. The ALJ also found at trial the brochures were free of such advertising. He also found that there were other suppliers of RAAX11 in the US besides the Respondent.¹² contradicting the assertions of the Complaint Counsel.

⁹ Tr 74, 92, 97 – Based on Liggins telling of his investigation, 3 times as much time was spent investigating G. Otto compared to the Respondent.

¹⁰ JX43, JX44 are the Pay Pal documentation for the undercover buys. Money paid to Takeun accounts

¹¹ JX 57, JX 58 - Images of both sides of Respondents brochure show no cancer cure claims for RAAX11.

¹² Tr 159, Liggins answer on questioning by the ALJ.

Even the work of the expert witness was so shallow and poorly supported that it was also flawed, and had it become an issue would have lost the case for the Complaint Counsel. In the report, JX01, Dr. Kucuk says he could find nothing on one of the two ingredients of RAAX11, icaco. The ingredient he was supposed to have researched was *Chrysobalanus icaco*. Apparently no one at the FTC bothered to read his report and screen it for such an obvious error.

When it was brought to his attention, the Respondent was able to get his name and contact information removed from the website by suggesting the website was liable to an identity suit. Complaint Counsel has not even been able to quote hearsay which would suggest that the Respondent had any control over the advertisements, which is the subject of the Complaint. The quote of the ALJ on this subject is based on a report by the Complaint Counsel about her phone conversation with the Respondent. Her version of this phone call is not part of the record, while the Respondent's version, which is quite different and uncontested, was given under oath at trial¹³.

In the May time period the Respondent did not refuse to communicate with the Complaint Counsel, but was simply waiting for her to withdraw her unreasonable demand in negotiating for the Respondent to author a letter containing untruths¹⁴. Her position, which the Respondent rejected, was that signing untruths was of no consequence if it was not done under oath.

¹³ Tr243, Tr270, Tr313, Tr315, Tr367 provide details relating to the phone call with the Complaint Counsel.

¹⁴ Proposed Letter is duplicated as Attachment C, Page 64 of Respondents' Appeal Brief (RAB)

The Respondent had provided the Complaint Counsel solicitations for website hosting. She has misrepresented these solicitations as renewal notices which is not the case as they were not sent from DomainDiscover, the host for www.agaricus.net,

C. Complaint Counsel's Misconduct

In her answer the Complaint Counsel does not explain or justify her numerous actions of misconduct during both the pre-litigation and the litigation phases which taint the government's position as not having merit.

She brought a case against a foreign entity which would involve regulating Foreign Commerce while her own Jurisdiction claims limit the FTC to regulating National Commerce.

She abandoned investigating George Otto against whom all the evidence pointed, not for lack of evidence, but because an incorrect name for him was used when searching data bases, resulting in finding no assets of his.

She concealed the exculpatory evidence of the five month investigation of George Otto and its foreign nature from the Commission (he is never mentioned in the Complaint) as well as from the Respondent. Had the Commission known, exercising oversight, they would probably not have approved the complaint. Had the Respondent known, his Counsel would no doubt have filed for dismissal at the onset.

She misrepresented Respondent's statement in a phone call regarding his ability to change material on the website, www.agaricus.net.

In proposed settlements, during both pre-litigation and litigation she required the Respondent to make untruthful statements in a letter to be sent to past customers, including using a fictitious letterhead.

She negotiated in bad faith by offering terms not approved by the Commission which she was later forced to retract. This ploy gave her business records not associated with the complaint to which she was not entitled.

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

The Complaint Counsel claims Respondent and his Counsel unreasonably protracted the proceedings and obstructed the legal process by thwarting the Complaint Counsel's discovery efforts, thus constituting Special Circumstances that justify the reduction or denial of an award under EAJA. Such a claim is invalid and unsupported by the record.

As crafted by the Complaint Counsel, the Complaint was limited to allegations that the Respondent had a predominate and active role in the advertising found on www.agaricus.net. Since in fact, as later determined at trial, the Respondent had no such role. there was no discovery material covered by the Complaint to divulge to the Complaint Counsel. Respondent's records consisted of sales invoices of his retail business, the records of his orders for products from his supplier in Brazil, and his retail sales tax reports. On advice of his Counsel these records were not covered by the Complaint. While early on when he was still learning the Respondent's business, his Counsel had promised that discovery would be forthcoming while actually there was nothing to disclose.

Some sales and volume records not pertinent to the Complaint were actually eventually disclosed in an attempt to achieve settlement. The alleged discovery delays and obstruction were the result of the Complaint Counsel's insistence to obtain records that did not exist.

The difficulty in arranging a deposition was not due to any active intention on the part of the Respondent, but conflicts with the needs to care for his ailing wife. The greatest delays was caused by each of the Counsels, each of whom canceled at least one scheduled deposition meeting. When the deposition of the Respondent did take place, he fully cooperated and gave nearly 6 hours of testimony. So no special circumstances took place that should be a basis for reductions in the award.

The Respondent originally claimed the total costs of defending himself from an unjustified suit by the FTC and loss of his business at a total of \$140,305. In negotiations with the Complaint Counsel at the direction of the ALJ, the Respondent removed his costs and loss of business which was \$42,902 leaving his Attorney costs of \$97,403. This was further reduced by limiting attorney fees to \$125/hr., eliminating attorney charges before the filing of the complaint which included the several hours sending the FDA a letter. Also some attorney hours that were claimed by the Complaint Counsel to be duplicates were eliminated as well as Counsel's trip expenses for which no receipts were provided. Further eliminations were copying costs and some paralegal costs that might appear to be have been clerical tasks leaving a net amount of \$62,458. The Complaint Counsel had proposed \$35,000 in her email

of March 25, 2010. Respondent offered to settle at \$50,500 if the offer was accepted that day. Complaint Counsel made a final offer several days later at \$40,000 and negotiations were terminated.

E. Rulemaking to Increase the Maximum Allowed for Attorney's Fees.

The Respondent made a separate request on Dec, 23, 2009 to the Commission for Rulemaking to Increase the Maximum allowed for Attorneys Fees. This motion is pending and provides a rationale for both cost of living and special attorney capabilities. The Complaint Counsel argues against the proposed rulemaking without giving any rational reasons.

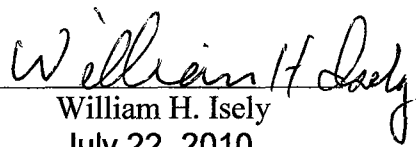
Conclusions

For the reasons set forth above, the Respondent respectfully requests that the Commission reverse the ALJ's Initial Decision finding that the ALJ's position in the Prior Adjudicative Proceeding was not substantially justified, not having a reasonable position in law and fact, and move forward in awarding of attorney fees and expenses to Respondents under the Equal Access to Justice Act.

Respectively Submitted.

GEMTRONICS, INC & WILLIAM H. ISELY

Respondents

By 
William H. Isely
July 22, 2010

CERTIFICATE OF SERVICE

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

**RESPONDENTS' REPLY TO COMPLAINT COUNSEL'S ANSWER TO
RESPONDENTS' APPEAL OF 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.

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

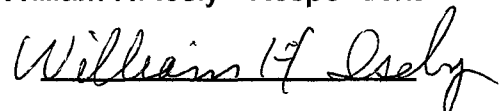
The original and twelve (12) paper copies via United States mail delivery and one (1) electronic copy via e-mail:

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 22 day of July, 2010