

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



In the Matter of

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

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

PUBLIC

DOCKET NO. 9330

**COMPLAINT COUNSEL'S MEMORANDUM IN OPPOSITION
TO RESPONDENTS' MOTION FOR SUMMARY DECISION**

Complaint Counsel opposes Respondents' Motion for Summary Decision ("Respondents' Motion"). For the reasons set forth below, Complaint Counsel respectfully requests that Respondents' Motion be denied.

I. Introduction

In their Motion for Summary Decision, Respondents Gemtronics, Inc. and William H. Isely ("Respondents") seek to have this Court dismiss the complaint issued by the Federal Trade Commission ("FTC" or "Commission") despite the overwhelming evidence that Respondents violated Sections 5(a) and 12 of the Federal Trade Commission Act ("FTC Act") by making false and unsubstantiated advertising claims through the Internet website www.agaricus.net that the herbal product, RAAX11, is effective in preventing, treating, or curing various types of cancer and that these claims are proven by reliable scientific evidence.

Respondents' apparent sole claim in their Motion for Summary Decision for the dismissal of the Commission's complaint is:

Respondents were not the owners of the alleged offending website and likewise had no ability to control the content of any advertisement or any other information disseminated through the alleged offending website.¹

Respondents do not challenge either the content or interpretation of the advertisements at issue in the Commission's complaint,² but refuse any liability for the dissemination of the contested advertising claims for RAAX11 by denying their association with the website www.agaricus.net. However, Respondents' Motion fails to state that Respondents participated in the challenged acts and practices as part of a lucrative scheme to defraud sick and vulnerable consumers and that, during the four years they sold RAAX11, Respondents' sales were estimated between \$115,000 and \$136,000.³ Further, contrary to their assertions, and as evidenced by their actions, Respondents had the ability to control the website to the extent that the challenged claims ceased after Respondents received two notices of potential law violations from the FTC and the Food and Drug Administration ("FDA").

Complaint Counsel will, herein, address the issues raised by Respondents' Motion namely: (1) Respondents' liability for FTC Act violations by virtue of their participation in and/or control over the acts and practices challenged in the Commission's complaint;⁴

¹ Respondents' Motion, p. 2.

² Respondents' Motion, p. 4; Answer to Complaint ¶5. Sections II.B., and III of the Memorandum in Support of Complaint Counsel's Motion for Summary Decision ("Complaint Counsel's Motion") provide a detailed discussion of the deceptive advertising claims and the lack of scientific evidence to support the claims.

³ Respondent Isely's Answers to Interrogatories No. 5, appended to Complaint Counsel's Motion as Exhibit ("Ex.") 1.

⁴ Sections II.A. and V. of the Memorandum in Support of Complaint Counsel's Motion, respectively, discuss in detail Respondents' business and the separate standards for liability for the Corporate Respondent Gemtronics as well as the individual liability of Respondent Isely as the owner of the corporation and

(2) Respondents' repeated and misplaced citation to the Deposition of Pablo Velasco, a customer service supervisor for Tierra.net, to support Respondents' Motion; and (3) Respondents' failure to meet the standard for the granting of their Motion for Summary Decision.

Thus, Complaint Counsel respectfully requests that Respondents' Motion for Summary Decision be denied. In addition to seeking denial of Respondents' Motion, Complaint Counsel requests that its Motion for Summary Decision be granted to permanently enjoin Respondents from making any health-related false and/or unsubstantiated claims for RAAX11 or other similar products.

II. Respondents Directly Participated in the Acts in Question

As set forth below, the website www.agaricus.net exclusively advertised Respondents' sale of RAAX11 to consumers in the United States. Since at least April or May 2004 and continuing through 2008, the website www.agaricus.net advertised to consumers in the United States that they could purchase RAAX11 by calling telephone numbers belonging to Respondent Isely and/or through credit card payments made directly to Gemtronics on this website.⁵ Respondent Isely admitted in his deposition that consumers could purchase RAAX11 from Gemtronics through credit card payments made on the website www.agaricus.net.⁶ During this time, Respondents were apparently the sole outlet on the website www.agaricus.net in the United

doing business under the assumed name "Gemtronics." For brevity's sake, this memorandum will address Respondents' liability collectively in terms of their participation and/or control in the challenged practices.

⁵ Supplemental Declaration of Michael S. Liggins ("Liggins Supp. Dec.") ¶ 5, Attachment ("Att.") M, appended hereto as Ex. 6; Deposition of William Isely ("Isely Dep.") pp. 120, 123 -24, appended to Memorandum in Support of Complaint Counsel's Motion as Ex. 3; Complaint Counsel's Statement of Material Facts ("CCSF") ¶¶ 7 - 10.

⁶ Isely Dep. pp. 120 (Respondents' Ex. 6 to the deposition), 123 -24.

States for sales of RAAX11.⁷ Thus, no other company or individual in the United States, other than Respondents, stood to benefit from the claims on the website www.agaricus.net for RAAX11.

The apparent participation of Respondents in the website was further evidenced when, in January 2008, Respondents filled two FTC undercover purchases of RAAX11 made on the website www.agaricus.net and each package delivered to the FTC was from Respondents and contained Respondents' own invoices for each purchase.⁸ In addition, Respondents' own literature specifically directed consumers to go the website www.agaricus.net. In their promotional materials included in the packages of RAAX11 that they shipped to the FTC, Respondents instructed consumers to go the website www.agaricus.net and "click on USA sales."⁹ Respondents' Distributor Introductory Package also directed potential distributors to go to www.agaricus.net for product information.¹⁰

Accordingly, Respondents' participation in challenged practices was deliberate: Respondent Isely must have been aware of the representations on the website and Respondents' exclusive position on the website for sales in the United States. Not only, as noted above, was Respondent Isely cognizant that consumers could purchase RAAX11 from Gemtronics on the website, but he also admitted going to www.agaricus.net to check its prices on occasion.¹¹

⁷ Ex. 6, Liggins Supp. Dec. ¶¶ 4, 5; CCSF ¶¶ 7-10.

⁸ CCSF ¶¶ 12-17.

⁹ CCSF ¶ 17.

¹⁰ The first page of Respondents' Distributor Package containing the reference to www.agaricus.net is appended hereto as Ex. 7.

¹¹ Isely Dep. p. 54.

Respondent Isely further admitted getting consumer calls regarding participation in a study of RAAX11 in the United States that was advertised on this website.¹² Thus, Respondents directly participated in conduct that violated the FTC Act.

III. Respondents' Ability to Control the Acts in Question

Since at least 2006, if not earlier, the registrant, administrative, technical, and zone contact for the domain "agaricus.net" was Respondent Isely at his address.¹³ Here, too, Respondent Isely had to have been aware that this domain was registered to him, because he admitted that he received and, in fact, produced a renewal for the domain "agaricus.net" that had been mailed to him.¹⁴ On or about March 26, 2008, Respondents received from the FTC via Federal Express a package containing a proposed complaint and consent, and a letter indicating that advertising claims for RAAX11 found on the website www.agaricus.net were in violation of Sections 5 and 12 of the FTC Act.¹⁵ About a month later, on or about April 18, 2008, Respondents received a "Warning Letter" from the FDA also via Federal Express that claims for, *inter alia*, RAAX11 found on the website, www.agaricus.net, were in violation of provisions of the Federal Food, Drug, and Cosmetic Act.¹⁶

Thereafter, in May 2008, Respondents, through their counsel, notified Complaint Counsel: 1) that Mr. Isely had himself removed from the domain registration for

¹² Isely Dep. p. 57.

¹³ Ex. 6, Liggins Supp. Dec. ¶ 4, Att. L; CCSF ¶ 20.

¹⁴ Isely Dep. p. 28; CCSF ¶ 41; Ex. 5. Respondent Isely also received various notices in the mail regarding other domains that were registered in his name. Isely Dep. pp. 28, 81-84.

¹⁵ Isely Dep. pp. 48-49; Ex. 8 FTC-00354-55.

¹⁶ Isely Dep. p. 106 (Respondents' Ex. 2 to the deposition).

www.agaricus.net; 2) that the website no longer contained cancer-related claims for RAAX11; and 3) that the product RAAX11 was no longer available through the website to consumers in the United States.¹⁷ It was only after the Respondents received such notification that they took constructive steps to transfer the registrant, technical and administrative contact on the “agaricus.net” domain registration, cease the challenged claims on the website, and cease sales of the RAAX11 product in the United States. Thus, Respondents had the apparent ability to control the domain registration and the website to the extent that the challenged claims were discontinued on the website after Respondents received notice of potential law violations from the FTC and the FDA.

IV. The Velasco Deposition Does Not Support Respondents’ Motion

Respondents’ reliance on the Deposition of Pablo Velasco, a customer service supervisor for Tierra.net, dba Domain Discover, to support Respondents’ contention that Respondents had no participation in and/or control over the website and the challenged advertising claims for RAAX11 is misplaced. Although Mr. Velasco testifies in his deposition that “legal owner” of the domain name “agaricus.net” is currently Agarix International,¹⁸ he is unable to provide testimony or otherwise confirm such key issues as: (1) the parties who may have or have had access to change the domain registration or the contents of the website www.agaricus.net;¹⁹

¹⁷ Ex. 9 FTC 00356-358; 361-62. The domain registration was transferred to George Otto, the owner and operator of Takesun do Brasil, who manufactures RAAX11 and supplied the product to Respondents. Ex. 9, FTC-00356; Isely Dep. pp. 15-19.

¹⁸ Deposition of Pablo Velasco (“Velasco Dep.”) p. 13. A copy of the Velasco Deposition is appended hereto as Ex. 10.

¹⁹ Ex. 10, Velasco Dep. pp. 14-16.

(2) who paid for the domain name and website;²⁰ and (3) who controls the website.²¹ Further, while Mr. Velasco cannot confirm who has access to domain registration and the website, he certainly could not know who participated in, had control over, or otherwise exercised any influence over the claims and information contained in the website www.agaricus.net. Thus, Respondents have yet to present evidence that confirms the statements in Respondents' Motion regarding the control of the website www.agaricus.net, and Respondents have not demonstrated that they did not participate and/or have control over the acts and practices as alleged in the Commission's complaint.

V. Respondents Have Not Met Their Evidentiary Burden

Commission Rule of Practice 3.24(a)(2) provides that summary decision "shall be rendered . . . if the pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law." The party moving for summary judgment must satisfy the evidentiary burden that it would bear at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

As set forth, herein, Complaint Counsel has demonstrated that Respondents Gemtronics and William Isely have not met the requisite evidentiary standard to satisfy the requirements for granting their Motion for Summary Decision. In fact, Complaint Counsel has set forth compelling evidence that counters the assertions in Respondents' Motion and, therefore, Respondents' Motion for Summary Decision should be denied.

²⁰ Ex. 10, Velasco Dep. pp. 14-15.

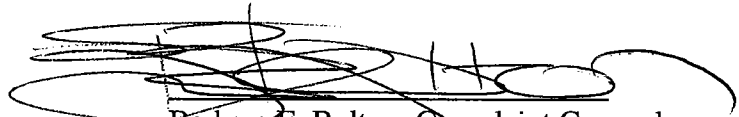
²¹ Ex. 10, Velasco Dep. pp. 13-16, 20-22.

VI. Conclusion

Complaint Counsel respectfully requests that Respondents' Motion for Summary Decision be denied. Complaint Counsel also hereby requests that its Motion for Summary Decision be granted to permanently enjoin Respondents from making any health-related false and/or unsubstantiated claims for RAAX11 or other similar products.

Dated: May 27, 2009

Respectfully submitted,



Barbara E. Bolton, Complaint Counsel
Federal Trade Commission
Southeast Region
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Atlanta, GA 30303
(404) 656-1362
Bbolton@ftc.gov

CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed and served the attached:

1. **COMPLAINT COUNSEL'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY DECISION; and**
2. **ATTACHED EXHIBITS 6 THROUGH 10;**

upon the following as set forth below:

The original and one (1) paper copy via overnight delivery and one (1) electronic copy via email to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room H-159
Washington, D.C. 20580
email: secretary@ftc.gov


One (1) email copy and two (2) paper copies served by overnight mail delivery to:

The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave., N.W. Room H-112
Washington, D.C. 20580
email: oyalj@ftc.gov

One (1) electronic copy via email and one (1) paper copy via overnight delivery to:

Matthew I. Van Horn
16 W. Martin Street, Suite 700
Raleigh, NC 27602
email: matthew@vanhornlawfirm.com

Dated: May 27, 2009



Barbara E. Bolton, Complaint Counsel
Federal Trade Commission

EXHIBIT 6

SUPPLEMENTAL DECLARATION OF MICHAEL S. LIGGINS
Pursuant to 28 U.S.C. § 1746

I, Michael S. Liggins, hereby state that I have personal knowledge of the facts set forth below. If called as a witness, I could and would testify as follows:

1. I am a citizen of the United States and am over the age of 21. I am employed by the Federal Trade Commission (“FTC” or “Commission”) in the Southeast Region as an Investigator. My qualifications and duties as an FTC investigator and my employment history are set forth in detail in Paragraphs 1 and 2 in the Declaration of Michael S. Liggins appended as Exhibit 2 to Complaint Counsel’s Motion for Summary Decision filed on March 16, 2009.

2. As an FTC Investigator, I participated in the investigation of the activities and business practices of Gemtronics, Inc. (“Gemtronics”) and William Isely (“Isely”) (collectively “Respondents”) involving the advertising, marketing, and sale of the herbal product RAAX11.

3. As part of my investigation, on December 20, 2007, I performed an Internet search of the corporate records database of the North Carolina Secretary of State at www.secretary.state.nc.us for the name William Isely. My search revealed a filing for a corporation, Gemtronics, Inc. The filing, which I printed out that day, showed that in September 2006, Mr. Isely incorporated a company named Gemtronics, Inc., with its principal place of business located at 964 Walnut Creek Road, Franklin, North Carolina 28734. Mr. Isely is listed as the company’s registered agent. Copies of these pages are appended hereto as **Attachment K** (FTC Bates #s (“FTC-”) FTC-000351 - 0353).

4. As part of my investigation, on or about January 28, 2008, the Food and Drug Administration (“FDA”) provided the following documents to the Southeast Region:

A. A WHOIS search for the domain “agaricus.net” dated July 27, 2007, showing the registrant, administrative, technical, and zone contact for this domain as William

Isely, 964 Walnut Creek Rd., Franklin, NC 28734. A copy of the WHOIS pages are appended hereto as **Attachment L** (FTC-00310 - 311); and

- B. Webpages printed on August 15, 2007, from the website www.agaricus.net concerning the product RAAX11. My examination of these webpages revealed:
- (1) A webpage that provides only one telephone number, 828-369-7590, to call in the USA for information about RAAX11. This telephone number belongs to Respondent Isely.¹ This webpage also contains the statement “if you are living in the US, just call Mr. Isely and he will explain how it works.” A copy of this webpage is appended hereto as **Attachment L** (FTC-00305 - 06).
 - (2) A webpage containing statements directing consumers to call another telephone number belonging to Respondent Isely: “Chemo and Radiation not working. This could be the alternative treatment. Call now 1 866 944 7359 for US information” and “USA only Order Information call 866 944 7359.” (**Attachment L**, FTC-00307.)

5. As part of my investigation, on various dates, noted below, I conducted searches for the website www.agaricus.net on the Internet archive website “web.archive.org.” Among a number of archival webpages that I printed out for www.agaricus.net are the following:

- A. On January 30, 2008, I printed out an archived webpage for www.agaricus.net from the date April 2, 2004 (**Attachment M**, FTC-00202), containing statements indicating that consumers could purchase products from Respondents directly by

¹ See Paragraph 4, Declaration of Michael S. Liggins, Exhibit 2 to Complaint Counsel’s Motion for Summary Decision.

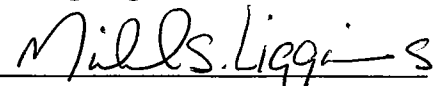
telephone or through the website:

- (1) "Agaricus blazie Murill Product Shopping Cart for USA only. You buy direct from registered manufacture at the FDA in Brazil with FDA registered Warehouse in NC/USA;"
- (2) "Retail prices valid only for USA. Phone 1 828 369 7590 (other countries contact the national agent);" and
- (3) "Note: By pressing the ORDER confirmations button below, I agree to pay Takesun do Brasil (GEMTRONICS) For any question call 1 828-369-7590."

B. On or about January 30, 2008, I printed out an archived webpage advertisement for RAAX11 on www.agaricus.net from the date February 10, 2005 (**Attachment M**, FTC-00203) that indicates that consumers could purchase RAAX11 from Respondents via the website: "Note: By pressing the ORDER confirmations button below, I agree to pay Takesun do Brasil (GEMTRONICS) For any question call 1 828-369-7590;" and

C. On February 19, 2008, I printed out an archived webpage that advertises RAAX11 from www.agaricus.net dated May 9, 2004 (**Attachment M**, FTC-00347), containing the statement: "FDA registered Manufacture in Brazil and FDA registered Warehouse in USA to guarantee you best quality."

I declare under penalty of perjury that the foregoing statement is true and correct.
Executed this 20th day of May 2009.


Michael S. Liggins, Investigator
Federal Trade Commission
Southeast Region

