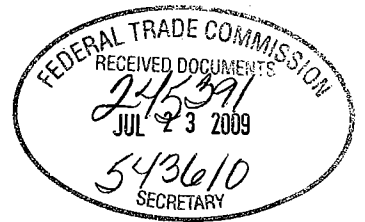


ORIGINAL



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

COMMISSIONERS: William E. Kovacic, Chairman
Pamela Jones Harbour
Jon Leibowitz
J. Thomas Rosch

PUBLIC

In the Matter of

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

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

DOCKET NO. 9330

RESPONDENTS' POST-TRIAL BRIEF

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**I. INTRODUCTION, SUMMARY OF THE ARGUMENT AND THEORIES
ADVANCED BY COMPLAINT COUNSEL.**

This case arises out of the sale of an herbal product, RAAX11. The sale of RAAX11 by Isely or any other person was perfectly legal and the Complaint does not claim to the contrary. The Complaint in this case contends that Respondents Gemtronics, Inc. and William H. Isely violated Sections 5(a) and 12 of the Federal Trade Commission Act (“FTC Act”) by making false and unsubstantiated claims for the herbal product RAAX11.

Complaint Counsel’s sole basis for this contention is that “the Respondents disseminated or caused to be disseminated advertisements for RAAX11 through the internet website, www.agaricus.net.”¹ To prove its case, Complaint Counsel must prove by a preponderance of the evidence that Respondents are the individuals who actually disseminated the alleged offending advertisements through the website www.agaricus.net.

This case has been marked by continuing shifts in the various theories that Complaint Counsel has advanced. Complaint Counsel brought this case under the assumption that the “Registrant” of a website is the owner and controller of the website. Similarly, Complaint Counsel named Respondent Gemtronics, Inc. as a party under the assumption that a “registered agent” of a corporation is also a shareholder, officer, director or manager of a corporation.

Both assumptions were wrong and could have been corrected with very little effort. In fact, the undersigned and Respondents provided information to Complaint Counsel well before the Complaint was issued that showed Complaint Counsel that the said assumptions were false or at least warranted further investigation. Now, Complaint Counsel is attempting to find Respondents liable under theories which barely resemble the allegations in the Complaint.

¹ The alleged offending advertisements are attached as Exhibits “A” through “D” to the Complaint.

Assuming the evidence supporting the new theories was admissible for the truth it asserts, Complaint Counsel does not meet the burden of proving its case by a preponderance of the evidence.

II. COMPLAINT COUNSEL’S COMPLAINT WAS BROUGHT BASED ON INFORMATION KNOWN TO BE UNRELIABLE OR FALSE WHEN THE COMPLAINT WAS ISSUED.

A. Before the Complaint was Issued and Served on the Respondents.

On March 25, 2008, Complaint Counsel sent a demand letter and a copy of the Complaint to Respondent Isely. (JX 64). Complaint Counsel’s letter requested that Isely and Gemtronics, Inc. enter into a settlement with the FTC “regarding Internet advertising for the product RAAX11 on the website www.agaricus.net.” (JX 64). Approximately six weeks later, on May 6, 2008, more than three months before the Complaint was filed, the undersigned sent a letter to Complaint Counsel providing direct evidence to Complaint Counsel that the Respondents were not the owners of agaricus.net and that they did not possess the ability to control the content disseminated through agaricus.net. (JX 66; JX 7). Consequently, they could not enter into a settlement to agree to change the content of the website agaricus.net. (JX 66; JX 7).

Enclosed with the undersigned’s May 6, 2008, letter to Complaint Counsel was a document provided by DomainDiscovery, the domain registry company for agaricus.net, that showed that the Respondents in fact did not own or have the ability to control the content of agaricus.net. (JX 66; JX 5). Indeed, the document from DomainDiscovery showed that a company from Brazil and a man named George Otto possessed the ability to alter the identity of the contact persons for agaricus.net and control the content of agaricus.net. (JX 66; JX 5).

In addition, the undersigned’s May 6, 2008, letter informed Complaint Counsel that Isely’s name and contact information had been used without his permission as the “Registrant”

of agaricus.net and within web pages of agaricus.net and that Isely could not enter into a settlement on behalf of agaricus.net because he lacked any ownership rights in or control over the contents of agaricus.net. (JX 66; JX 5).

Despite possessing this information from DomainDiscovery which at least confirmed that the Respondents were not the owners of agaricus.net, on September 18, 2009, Complaint Counsel issued and served the same Complaint against the Respondents that it originally mailed on Respondents on May 6, 2008. (JX 66; JX 5). In fact, despite possessing the information from DomainDiscovery which showed that Isely was no longer the “Registrant” for the agaricus.net and that agaricus.net was controlled by Takesun do Brasil and a man named George Otto, Complaint Counsel’s investigator, Michael Liggins, was never instructed to contact DomainDiscovery. (Liggins, Tr. 124). Moreover, with this information, Complaint Counsel never instructed investigator Liggins to conduct a comprehensive investigation into the foreign corporate entity or G. Otto. (Liggins, Tr. 161). In fairness to inspector Liggins, he testified that he could have done a better job investigating provided he had been given sufficient resources. (Liggins, Tr. 161).

B. After the Complaint was Issued and Served on Respondents.

In December, 2008, Complaint Counsel was asked through Respondents’ Interrogatory No. 16 to identify all evidence in support of paragraph 5 of the Complaint which states that “Respondents disseminated or caused to be disseminated advertisements for RAAX11 through an internet website, www.agaricus.net, including, but not limited to, the attached Exhibits A through D”. (JX 11 at 6-8; JX 7 at 2).

In response to Respondents’ Interrogatory No. 16, Complaint Counsel provided the following response:

Publicly available information, already in the possession of Respondents, includes corporate filings with the North Carolina Secretary of State showing that in 2006, Respondent Isely incorporated Gemtronics, Inc., with its principal place of business at 964 Walnut Creek Road, Franklin, North Carolina 28734, and that Respondent Isely is its registered agent. Publicly available information from the Macon County Register of Deeds shows Respondent Isely is the owner of the property located at 964 Walnut Creek Road, Franklin, North Carolina, 28734. (JX 11 at 7).

In response to two separate undercover purchases of the product RAXX11 from the website www.agaricus.net, Respondents mailed product literature, and the product RAXX11 to the FTC's undercover mailboxes. Complaint Counsel further states that publicly available information on WHOIS domain registration for the domain [agaricus.net](http://www.agaricus.net) listed Respondent Isely as the domain's registrar and the administrative and technical contact. Further, Respondent Isely's name, as well as his telephone and fax numbers appeared on various web pages of the website www.agaricus.net. (JX 11 at 8).

Complaint Counsel answered Respondents' Interrogatory No. 16 with full knowledge of all the facts and evidence it presented at trial, including the results of the investigation of Liggins and the results of the undercover purchases from the website [agaricus.net](http://www.agaricus.net). Complaint Counsel's answer to Respondents' Interrogatory No. 16 summarizes and underscores what little and unreliable evidence Complaint Counsel has relied upon and has possessed in support of the Complaint.

Moreover, it demonstrates that Complaint Counsel has relied completely upon the search results from WHOIS to support its theory of liability. (JX 16). Faced with the reality that the information in WHOIS was inaccurate at best, Complaint Counsel has attempted to prove its case through literature mailed by Respondent Isely with RAAX11 product purchased by FTC undercover agents through [agaricus.net](http://www.agaricus.net). Under this new theory, Complaint Counsel still fails to prove its case by a preponderance of the evidence.

III. RESPONDENTS DID NOT OWN WWW.AGARICUS.NET OR POSSESS ANY AUTHORITY TO CONTROL ANY ADVERTISEMENTS DISSEMINATED OR CAUSED TO BE DISSEMINATED THROUGH WWW.AGARICUS.NET.

In support of the charge that Isely disseminated deceptive advertisements through agaricus.net, Complaint Counsel offered the testimony of Inspector Michael Liggins. Mr. Liggins' testimony can be summarized as a process of authenticating exhibits that were otherwise available to the public over the internet and a description of his undercover purchases. For the most part, the results of Liggins's internet searches and the documents produced from his RAAX11 purchases lacked a nexus to the Complaint. Likewise, Liggins's testimony failed to support Complaint Counsel's contention that Isely disseminated the advertisements attached as Exhibits "A" through "D" to the Complaint or any other advertisements through agaricus.net.

Mr. Liggins testified about his results from online searches through WHOIS, an online database which provides information to the public about domains such as agaricus.net. (Liggins, Tr. 115; JX 16). The search results from WHOIS indicate who the "Registrant" for a domain is. (Liggins, Tr. 70-71; JX 16). Mr. Liggins produced the search results from WHOIS for agaricus.net. (Liggins, Tr. 115; JX 16). The WHOIS search results for agaricus.net stated that the "Registrant, Administrative Contact, Technical Contact, and Zone Contact" for agaricus.net was Isely. (Liggins, Tr. 115; JX 16). The WHOIS search results showing Isely as the contact person for agaricus.net also included the email address for G. Otto as the email contact for agaricus.net, gotto@takesun.com. (JX 16).

According to Liggins, WHOIS search results identify who the "Registrant" is for a domain, but the WHOIS search results do not actually list who actually paid for the website or who is the owner. (Liggins, Tr. 70-71; JX 16). In order to access a website and control the content of a website, a person must possess a PIN number or password. (Liggins, Tr. 108). The WHOIS search results for agaricus.net identified Isely as the "Registrant" of agaricus.net, but this is no indication that Isely possessed the PIN number which would allow someone to control

the content of agaricus.net. (Liggins, Tr. 110-11). Further, Liggins testified that he personally owns a domain and website and that he could identify the undersigned's name, address, telephone number and email as the "Registrant" of his website without the undersigned's permission. (Liggins, Tr. 122-23). Mr. Liggins also agreed that the representative of DomainDiscovery testified that Isely was not the owner of agaricus.net. (Liggins, Tr. 133). It is noteworthy that the Complaint alleges agaricus.net is the only website alleged to be an offending website. (Liggins, Tr. 131).

The results of a Subpoena Duces Tecum served on DomainDiscovery, and the sworn testimony from Pablo Valesco, a representative of DomainDiscovery, expanded the understanding as to who is the owner of and who controls the content of agaricus.net.

Pablos Velasco testified that "[t]he registrant, as it appears on the WHOIS database, is who the person that holds the domain name wants to show as the owner of the domain, but is not necessarily the legal owner of the domain name itself." (JX 4 (Velasco, Dep. at 12). "That's [the Registrant] the published owner of the domain name, but not the actual owner." (JX 4 (Velasco, Dep. at 12).

Velasco further testified that "[t]he legal owner, as it appears on our [DomainDiscovery] system, is never shown on the WHOIS database or is never made available to the public unless, of course, owner of the domain name wants to show who the -- wants the actual published owner and legal owner." (JX 4 (Velasco, Dep. at 13). Continuing, Velasco stated that "[i]n this case, or in this specific case, the legal owner as it appears in our system is the same as the published registrant, which is Agarix International." (JX 4 (Velasco, Dep. at 13; JX 5). The address of the owner of the domain name is "a foreign address in Brazil," and the contact e-mail is

gotto@takesun.com.br., which appears to correspond to the e-mail contact from the WHOIS search results for agaricus.net (JX 4 (Velasco, Dep. at 13; JX 5); (Liggins, Tr. 115-16; JX 16).

Mr. Velasco further explained that “[i]n this case [of agaricus.net], the administrative contact will be the one that has the password and the user name. The administrative contact in this case is listed as George Otto.” (JX 4 (Velasco, Dep. at 15; JX 5). The following exchange from the deposition of Mr. Velasco explains how Mr. Isely’s name was used without his permission:

Q. Okay. So, for instance, following your example, I could, I could call you, buy a domain for my website and my brother, I could identify him as the registrant; correct? That is correct?

A. That is correct, yes. When you register a domain name by default, whoever the administrative contact is will show as the administrative, technical, billing and/or zone contact, which is public register.

Q. Okay.

A. Then after you're done with the registration, there is an option in our system, you can go and specify each contact separately. You can have one person listed as the administrative and billing contact, and a totally different person listed as the organizational or registrant and technical contact.

Q. Okay. And specifically with this example, if I called you and set up one for my law firm and paid for it, but became the legal owner, obtained my user name and domain name, I could identify my brother as the registrant, which is shown to the public, and I could put his address and his e-mail as a contact?

A. That is correct.

Q. Okay. Secondly, with the second category, on the document administrative contact, technical contact and zone contact, I could also put my brother or any third party there as -- just like the registrant. I could put my brother or any third party there as the -- and put their name and their contact information and their e-mail; is that correct?

A. That is correct.

(JX 4 (Velasco, Dep. at 18-19).

In further testimony, Mr. Velasco explained that the most recent update to the contact information for “registrant, . . . administrative contact, technical contact and zone contact” for agaricus.net was on March 28, 2008. (JX 4 (Velasco, Dep. at 10-11; JX 6). Demonstrating that the changes were made by G. Otto, the update to the contact information for agaricus.net was initiated from an IP address belonging to Deutsche Telekom AG in Germany. (JX 4 (Velasco, Dep. at 10-11; JX 6).

This date of March 28, 2008, when information for agaricus.net was updated from a German owned IP, corresponds directly with the date emails were sent from George Otto to Isley responding to a complaint by Isley to G. Otto that Isley’s name and contact information had been used without his permission by G. Otto. (JX 70, 71, 72). Isely’s email to G. Otto, dated April 25, 2009, complaining about the use of Isely’s name without his consent stated:

What really counts is who has control and real ownership. That person is the one who had the account and PIN number all that time. This the registrar [DomainDiscovery] will not give out, only to you. Since I did not know you had done this I think it is your responsibility to get your registrar [DomainDiscovery] to send an official letter to my lawyer...” (JX 72).

G. Otto responded to Isley in emails on March 28, 2008, the date agaricus.net was edited from the German IP address, denying any wrong doing but stating that Isely’s name had been removed from agaricus.net’s registrar DomainDiscovery. (JX 70, 71; RX 4). This evidence demonstrates that indeed Mr. Isley had not given permission to G. Otto to use his name, that Isley had no ability to control the content of agaricus.net and that G. Otto was the owner of and possessed the user name and password to agaricus.net.

Notably, the WHOIS results for agaricus.net contains a warning which states that “This WHOIS database is provided for information purposes only. We do not guarantee the accuracy of this data.” (Liggins, Tr. 110; JX 16). Unexplainably, Complaint Counsel ignored the

