

**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 REPLY TO  
RESPONDENTS' POST-TRIAL BRIEF**

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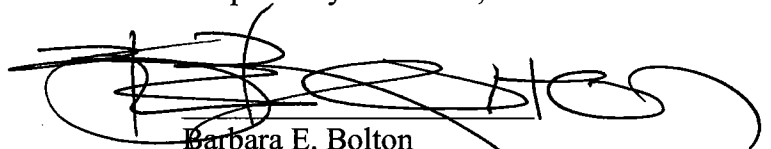
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RESPONDENTS' POST TRIAL BRIEF**

Pursuant to the Court's Order on Post Trial Briefs dated July 1, 2009, Complaint Counsel  
Hereby submits its Reply to Respondents' Post Trial Brief and Reply to Respondents' Proposed  
Findings of Fact.

Respectfully submitted,



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Dated: August 4, 2009

**TABLE OF CONTENTS**

Complaint Counsel’s Reply to Respondents’ Post Trial Brief ..... TAB 1

Complaint Counsel’s Reply to Respondents’ Proposed Findings of Fact..... TAB 2

# **TAB 1**

**UNITED STATES OF AMERICA  
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**I. INTRODUCTION**

The Federal Trade Commission (“FTC” or “Commission”) has brought this action to remedy violations by Respondents Gemtronics, Inc. (“Gemtronics”) and William H. Isely (“Isely”) of sections 5(a) and 12 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 45, 52, in connection with the dissemination of cancer-related advertising claims for the herbal dietary supplement product RAAX11 on the Internet website [www.agaricus.net](http://www.agaricus.net). Respondent Isely has admitted that he has advertised, offered for sale, sold, and distributed the product, RAAX11 through various Internet websites.<sup>1</sup> Respondents have not denied either the content or interpretation of the challenged webpages that are the exhibits to the Commission’s complaint. Rather, the crux of Respondents’ defense to the FTC’s action is that Respondents “have forever lacked the authority or ability to disseminate any information or alter the content” of the website [www.agaricus.net](http://www.agaricus.net).

The record of evidence in this case demonstrates that Respondents were an integral part

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<sup>1</sup> JX 8 (Respondents’ Answer) ¶ 3; CCPF ¶ 12, 14, 72.

of a deceptive advertising scheme to sell a phoney cancer cure over the Internet. Respondents were participants in, if not the driving force behind, this scheme, and had the ability to control the dissemination of the challenged claims. Respondents' denial of liability cannot stand in the face of strong evidence that they, not only, reaped the benefits of these deceptive claims through exclusive sales and direct referrals from the website to Respondents, but also advertised this website themselves in promotional and distributor materials disseminated to consumers.

Accordingly, Complaint Counsel request that this Court issue the proposed order attached to the Commission's Complaint enjoining Respondents from making false and unsupported claims for RAAX11 and other health-related products, and requiring Respondents to notify customers who purchased RAAX11 that scientific studies do not demonstrate that the product is effective and clinically proven to be effective in the prevention, treatment or cure cancer.

**II. RESPONDENTS HAD THE AUTHORITY OR ABILITY TO CONTROL THE CONTENT OF THE WEBSITE WWW.AGARICUS.NET**

In their post trial brief, Respondents claim that they had no authority or ability to control the content of the website www.agaricus.net, and that, as a result, the FTC issued its Complaint against the wrong parties. This claim is not backed by the evidence. As explained below, the parties were, and had been for some time, (A) the name and address on the domain registration for agaricus.net, and (B) the website's exclusive source for RAAX11 sales and information in the United States. Further, as shown below, Respondents had knowledge of these facts, and had the authority and ability to remove their information from the domain registration and website at any time.

**A. The Domain Registration for Agaricus.net**

Since 2004, Respondent Isely and, since 2006, Respondent Gemtronics have advertised and sold the dietary supplement RAAX11 to consumers nationwide through the telephone and Internet websites, including, *inter alia*, the website [www.agaricus.net](http://www.agaricus.net). (CCPF ¶ 14). Since at least 2006, Respondent Isely's name, address and telephone number have been listed in the domain registration for the domain "agaricus.net" as the domain's registrar, and its administrative and technical contact. (CCPF ¶ 13).

Respondent Isely testified that he had authorized at least two domain names to be registered in his name at his address: "our-agaricus.com" and "our-agaricus.us." (CCPF ¶ 64; JX. 12 (Isely, Dep.) at 26-28, 34-36, 42-46). From correspondence Respondent Isely received at his home from various companies soliciting domain registration renewal notices and annual website search engine listings, Respondent Isely knew that agaricus.net and other website domain names were also registered in his name at his address. (CCPF ¶¶ 63-65)<sup>2</sup> However, according to Respondent Isely's testimony, he did not act to remove his name from these domain registrations. (CCPF ¶¶ 63-65). Further, although Respondent Isely testified that he was unaware that the domain name agaricus.net and, another domain, "takesun.com," were ever registered to him, he nonetheless advertised these websites as late as January 2008 in his Takesun USA<sup>3</sup> brochure and Distributor Introductory Package that he disseminated to consumers. (CCR

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<sup>2</sup> JX 70, an email from George Otto to Mr. Isely dated March 28, 2008, suggests that Respondent Isely's identification on the domain registration for agaricus.net was previously input with the agreement of Respondent Isely. (CCR ¶ 45; JX 70)

<sup>3</sup> "Takesun USA" was a dba used by Respondent Isely to sell and distribute RAAX11 and other dietary supplements manufactured by Takesun do Brasil ("Takesun"). (CCPF ¶¶ 6, 57, 82-84).

¶¶ 9, 11, 12, 17, 51; JX 16, JX 17, JX 57, JX 73, pp. 1, 6).

**B. Exclusive Website Source for RAAX11 Sales**

Since at least 2004, the website [www.agaricus.net](http://www.agaricus.net) has advertised Respondents as the only source for products, including RAAX11, in the United States. (CCPF ¶¶ 38, 44). Respondent Isely was prominently featured throughout the website: his name and telephone numbers were included on a number of the webpages as a contact for consumers to purchase RAAX11, to obtain RAAX11 product information, and to participate in an “ongoing study in the USA” of RAAX11. (CCPF ¶ 68). Respondent Isely testified that he received consumer calls in response to the website’s deceptive solicitation to call “Mr. Isely” about participating in a medical study of RAAX11 in the United States. (Isely, Tr. 271-72; JX 12 (Isely, Dep.) at 57, 69). He also testified that he knew there was no such medical study of RAAX11 and that this claim was just a “sales ploy.” (Isely, Tr. 271-72; JX 12 (Isely, Dep.) at 57, 69).

Respondent Isely also admitted that he frequently visited the website [www.agaricus.net](http://www.agaricus.net) – going to the site’s homepage and navigating to the sales pages to check its prices for RAAX11. (Isely, Tr. 233-37; JX 12 (Isely, Dep.) at 54, 66-67). The evidentiary record contains ample evidence that, since at least January 2006, [www.agaricus.net](http://www.agaricus.net) homepages advertising RAAX11 contained statements such as “RAAX11 helps many people. Prostate cancer patient now cancer free. Call Bill at [telephone number] to know more details” and that these homepages listed Respondents’ telephone numbers only. (JX 15, JX 25, JX 28, JX 31, JX 34, JX 40). Respondent Isely testified that he authorized the dissemination of his name, telephone numbers, personal information, and health history on the website [www.agaricus.net](http://www.agaricus.net) and that he knew that this information continued to be disseminated. (CCR ¶ 18; CC PF ¶ 69). However, here too,

according to Respondent Isely's testimony, he did not act to revoke this authorization. (CCPF ¶ 69).

Gemtronics and Takesun USA were also prominently featured in the website. (CCPF ¶¶ 39, 42, 46). The website advertised that credit card payments for orders on the website would be made directly to Gemtronics or to Takesun USA by name. (CCPF ¶¶ 39, 42, 46). Some webpages on www.agaricus.net provided only Respondents' telephone number for ordering RAAX11 in the United States. (CCPF ¶¶ 38-51, 72; JX 27; JX 30; JX 33-34). In fact, Respondent Isely admitted that consumers could purchase RAAX11 on the website www.agaricus.net using a credit card, and that Isely would receive the payment. CCPF ¶ 72.

It was not until March 2008, when the FTC sent a letter to Respondents Gemtronics and Isely notifying them of potential law violations concerning cancer-related advertising claims for RAAX11 on their website www.agaricus.net, that Respondent Isely acted to remove his name from the domain registration agaricus.net. (CCPF ¶¶ 66, 67). Similarly, Respondent Isely did not revoke the authority to disseminate his personal and contact information on the website until after he received the FTC's notice letter of proposed law violations. (CCPF ¶ 69).

After receiving the FTC's notice, Respondents notified Complaint Counsel that they took affirmative steps to 1) remove Respondent Isely's name and address from the domain registration; 2) remove Respondent Isely's name and information off of the website; and 3) cease sales of RAAX11 and other products in the United States from the website. (CCPF ¶ 67; JX 9 (Isely Ints.) # 13; JX66; JX 67; JX 70). Respondents' letter to Complaint Counsel dated May 15, 2008, explained that at Respondent Isely's initiation, "the contents of the website have changed dramatically and now no United States citizen can purchase any items from the alleged

offending website.” (JX 67, p. 3).

Such remedial action demonstrated that Respondents had the authority or ability to control the content of the website [www.agaricus.net](http://www.agaricus.net) and exercised that control only after they were notified of their potential liability for the deceptive practices. (CCR ¶¶ 24, 25).<sup>4</sup> As further support for this proposition, Complaint Counsel cites JX 66, an email to Respondents dated April 30, 2008, from the webhosting service for the website which states, in part:

If whomever is concerned wishes to have the website shut-down they should send all relative information to [abuse@propersupport.com](mailto:abuse@propersupport.com) the case will then be investigated and if indeed the content of the website is found in violation of any laws applying to the state of California (where the website is hosted). (JX 66, p. 4).

Thus, not only did Respondents have the website’s content changed after the FTC’s notice to Respondents, but Respondents could have requested that action be taken by the webhost to control this content prior to that time. (CCR ¶¶ 24, 25).

### **C. Respondents Mischaracterize Velasco Testimony**

Respondents’ repeatedly mischaracterize the Deposition of Pablo Velasco, a customer service supervisor for Tierra.net, dba Domain Discover, to support their contention that Respondents had no participation in and/or control over the website and the challenged advertising claims for RAAX11. First of all, Mr. Velasco, an employee of a domain registration company, did not testify to any proposition other than identifying the registrant, owner, and contact information for the domain name agaricus.net after March of 2008. In his deposition,

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<sup>4</sup> Evidence of subsequent remedial measures can demonstrate proof of ownership, control, or feasibility of precautionary measures. *See, e.g., Boeing Airplane Co. v. Brown*, 291 F.2d 310 (9<sup>th</sup> Cir. 1961) (evidence of subsequent design changes allowed to show safeguards were previously feasible); *Powers v. J.B. Michael & Co.*, 329 F.2d 674 (6<sup>th</sup> Cir. 1964) (Defendant’s post accident, posting of signs allowed to show control over portion of road in question).

Mr. Velasco testified that George Otto was listed as the administrative contact as of April 29, 2008. (JX 4 (Velasco, Dep.) at 10). Mr. Velasco also testified that, as of April 15, 2008, the “legal owner” of the domain name “agaricus.net” listed on the domain registration was Agarix International. (CCR ¶ 25; JX 4 (Velasco Dep.) at 13).

Contrary to Respondents assertions, Mr. Velasco testified that he was not able to provide testimony or otherwise confirm such key issues as: (1) the parties who may have, or may have had, access to change the domain registration or the contents of the website www.agaricus.net; (2) who paid for the domain name and website; and (3) who controls the website. (JX 4 (“Velasco Dep.”) at 13-16, 20-22). Further, Mr. Velasco testified that he had no way of knowing who exactly had the user name and password to change the domain registration, and that a domain registration in no way determines who controls a website using that domain name. (JX 4 (Velasco, Dep.) at 15-16, 20). Finally, Mr. Velasco testified that the administrative contact information for the domain name agaricus.net changed on March 28, 2008. (JX 4 (Velasco, Dep.) at 11; JX 64). This date was three days after the FTC sent its notice letter to Respondents. (JX 64).

Since Mr. Velasco cannot confirm who has access to either the domain registration or the website, he certainly could not know or testify as to who participated in, had control over, or otherwise exercised any influence over the claims and information contained in the website www.agaricus.net.

### **III. RESPONDENTS DISSEMINATED OR CAUSED TO BE DISSEMINATED THE CHALLENGED WEBSITE REPRESENTATIONS**

As noted above, in Section II, Respondent Isely had knowledge that the domain agaricus.net was registered to him, that the website www.agaricus.net was advertising

Respondents as a contact for information and sales for RAAX11. Moreover, Respondent Isely knew that the website was making misrepresentations to consumers about RAAX11. For instance, as noted above, Respondent Isely knew about the website's misrepresentation to call him about a medical study of RAAX11, because consumers had called him about it. (Isely, Tr. 271-72; JX 12 (Isely, Dep.) at 57, 69). In addition, Respondent Isely testified knowing that Takesun was promoting RAAX11 as a medicine and as a cancer cure. (CCPF ¶ 86). However, Respondent Isely admitted that he thought that he could avoid any liability for being associated with such claims by having no formal, legal ties with Takesun. (CCPF ¶ 86). Further, prior to receiving the FTC's notice letter, Respondent Isely had declined to take any action to remove his name from the domain registration and the website. (CCPF ¶ 86).

Despite his knowledge of the deceptive claims on [www.agaricus.net](http://www.agaricus.net), Respondent Isely disseminated materials actively promoting the website and specifically directing consumers to go to the website for product information. (CCR ¶ 11). As late as January 2008, Respondent Isely disseminated a Takesun USA<sup>5</sup> brochure that he created and mailed to consumers to advertise RAAX11 and which he included in product shipments to customers. (CCPF ¶¶ 55, 57, 82). The brochure stated "for more information . . . go to [www.agaricus.net](http://www.agaricus.net)." (CCPF ¶¶ 55, 57). In addition, Respondent Isely disseminated a Takesun USA Distributor Introductory Package for his wholesale business in which he sought to sign up distributors to sell Takesun products, such as RAAX11. (CCPF ¶ 84). This package also directed consumers to go to the [www.agaricus.net](http://www.agaricus.net)

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<sup>5</sup> Although Respondent Isely testified that he stopped using the name Takesun USA before he began selling RAAX11, voluminous evidence in the record indicates otherwise. (CCR ¶ 11).

website for product information. (CCPF ¶ 89).<sup>6</sup>

Accordingly, Respondents are liable for disseminating or causing to be disseminated the challenged website claims because they controlled or had the ability to control the website as evidenced by their actions after receiving the FTC's letter (*i.e.*, they ceased the challenged representations on the website and transferred domain registration). Alternatively, liability for dissemination of false advertisements can be found against Respondents for their participation in the dissemination or causing to be disseminated the challenged claims. The Commission has held that parties can be found liable for their role in making or disseminating deceptive claims in cases where parties have 1) actively participated in the preparation of the advertisement and 2) knew or should have known that the advertisement was deceptive. *Bristol-Myers Co.*, 102 F.T.C. 21, 364 (1983); *Standard Oil Co.*, 84 F.T.C. 1401, 1475 (1974), *aff'd and modified*, 577 F.2d 653 (9th Cir. 1978); *ITT Continental Baking Co.*, 83 F.T.C. 865, 968 (1973), *aff'd as modified*, 532 F.2d 207 (2d Cir. 1976).

In the recent case of *FTC v. Direct Marketing Concepts, Inc.*, 569 F. Supp. 2d 285 (D. Mass. 2008), the court granted summary judgment against a media company which only arranged for buying TV air time for a deceptive calcium supplement commercial. The court, noting that defendant, King Media, had “too narrow a view of what participation in deceptive practices may be reached and regulated by the FTC,” held that “even on an excessively narrow definition of ‘dissemination,’ King Media may still be held responsible under § 52 for *causing*

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<sup>6</sup> Respondents mention JX 59, a promotional piece for RAAX11 disseminated by Respondents in their shipments of RAAX11 to the FTC. To the extent that the distribution of this piece reflects the dissemination of similar, if not identical, claims for RAAX11 that are found on the website, this demonstrates consistent behavior on the part of Respondents. Thus, JX 59 is relevant and admissible evidence pursuant to Rules of Practice § 3.43(b).

the dissemination.” 569 F. Supp. 2d at 309-10.

Respondents can arguably be found liable for providing the means and instrumentalities for engaging in deceptive conduct. *See, e.g., Castrol North America Inc.* 128 F.T.C. 682 (1999) (consent order), and *Shell Chemical Co.*, 128 F.T.C. 729 (1999). In this case, Respondents created promotional materials that directed consumers to the [www.agaricus.net](http://www.agaricus.net) website so that the deceptive cancer claims for RAAX11 could be disseminated. (Liggins, Tr. 89-90, 146-47; Isely, Tr. 294-96, 356-58; JX. 12 (Isely, Dep.) at 18, 34; JX 57; JX 58). Respondents also advertised the website in the Takesun USA Distributor Introductory Package. (CCPF ¶ 89).

Further, the Commission has held other parties such as catalog marketers, retailers, infomercial producers, home shopping companies, and payment processors liable for their role in making or disseminating deceptive claims or engaging in deceptive trade practices. *See, e.g., FTC v. State of Illinois, State of Iowa, State of Nevada, State of North Carolina, State of North Dakota, State of Ohio, and State of Vermont, Plaintiffs, v. Your Money Access, LLC*, (E.D. Pa. Dec. 11, 2007) FTC File No. 052-3122 (complaint filed) (charging a payment processor with violating federal and state laws by debiting consumers’ bank accounts on behalf fraudulent telemarketers and online merchants); *FTC v. Modern Interactive Technology, Inc.*, No. CV 00 09358 GAF (CWx) (C.D. Cal. Mar. 1, 2005) (stipulated final order for permanent injunction) (holding infomercial producer and two principals of the company liable for deceptive weight loss claims made for the Enforma system); *FTC v. First American Payment Processing, Inc.*, No. CV 04-0074 PHX SRB (D. Az. Nov.3, 2004) (stipulated permanent injunction) (\$1.5 million redress for electronic payment processor’s role in assisting fraudulent telemarketers by electronically debiting consumers’ bank accounts in violation of the Telemarketing Sales Rule and the FTC Act); *FTC v. No. 1025798 Ontario, Inc., d/b/a The Fulfillment Solutions Advantage, Inc.*, No.: