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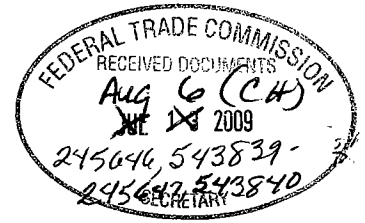
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August 4, 2009

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

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

Dear Mr. Clark:

Enclosed herewith please find the original and one copy each of Respondents' Reply and Opposition to Complaint Counsel's Post-Trial Brief and Respondents' Response to Complaint Counsel's Proposed Findings of Fact in the above referenced matter. Would you be kind enough to please file the same.

Your cooperation will be appreciated.

Sincerely yours,

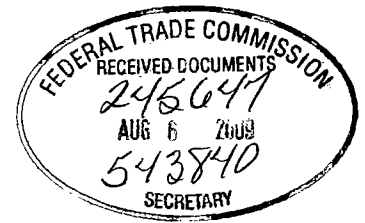
A handwritten signature in black ink that reads "Matthew I. Van Horn". The signature is written in a cursive style.

MATTHEW I. VAN HORN

MIVH:lr

Enclosures:  
As Stated

**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' REPLY AND OPPOSITION TO  
COMPLAINT COUNSEL'S POST-TRIAL BRIEF**

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Pursuant to the Order On Post Trial Briefs, entered on July 1, 2009, by Chief Administrative Law Judge D. Michael Chappell, the Respondents respectfully submit their Reply and Opposition to Complaint Counsel's Post Trial Brief.

**I. COMPLAINT COUNSEL'S INTRODUCTION**

See Respondents' Post Trial Brief and Post Trial Findings of Fact and Conclusions of Law. See also Respondents' Response to Complaint Counsel's Post Trial Findings of Fact.

**II. COMPLAINT COUNSEL'S STATEMENT OF FACTS.**

See Respondents' Post Trial Brief and Post Trial Findings of Fact and Conclusions of Law. See also Respondents' Response to Complaint Counsel's Post Trial Findings of Fact.

**III. NO SCIENTIFIC EVIDENCE SUPPORTS THE RAAX11 CANCER CLAIMS**

See Respondents' Post Trial Brief and Post Trial Findings of Fact and Conclusions of

Law. See also Respondents' Response to Complaint Counsel's Post Trial Findings of Fact.

**IV. COMPLAINT COUNSEL HAS FAILED TO SUBMIT ANY AUTHORITY THAT SUPPORTS ITS CLAIM OR PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT RESPONDENTS VIOLATED SECTION 5 AND 12 OF THE FTC ACT.**

See Respondents' Post Trial Brief and Post Trial Findings of Fact and Conclusions of

Law. See also Respondents' Response to Complaint Counsel's Post Trial Findings of Fact.

**V. RESPONDENT ISELY DID NOT CONSENT TO THE USE OF HIS NAME, LIKENESS OR CONTACT INFORMATION AS THE SOURCE FOR RAAX11 IN THE UNITED STATES----ISELY ONLY PERMITTED THE OWNER OF THE WEBSITE TO USE INFORMATION RELATED TO ISELY'S PRIOR CONSUMPTION OF OTHER HERBAL REMEDIES YEARS BEFORE RAAX11 EXISTED.**

See Respondents' Post Trial Brief and Post Trial Findings of Fact and Conclusions of

Law. See also Respondents' Response to Complaint Counsel's Post Trial Findings of Fact.

**VI. COMPLAINT COUNSEL HAS FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT RESPONDENTS ARE LIABLE FOR ANY FTC ACT VIOLATIONS.**

**A. The Documents Contained in the Product Shipments to FTC Inspector Liggins Possess No Evidentiary Value in Support of the Allegation That Respondents Disseminated or Caused to Disseminate Any Offending Advertisements.**

Complaint Counsel contends that documents contained within the two product shipments received by FTC inspector Liggins somehow show that Respondents are liable under the Complaint for disseminating offending advertisements. (CC Post-Trial Brief, 13-15, 20; CCPF ¶¶ 52, 53, 55-57, 62, 82, 84, 87, 90, 91; JX 47, JX 48, JX 57, JX 58, JX 59). Complaint Counsel's contention fails to support the Complaint or possess any nexus to the allegation that Respondents disseminated or caused to disseminate any offending claims.

No evidence exists and it is uncontested that the literature contained in the drop shipments to Liggins was immaterial to the purchasing decision of Liggins or any other consumer, as the literature was delivered with the product after the purchases were consummated. Irrespective of how distant the subject literature is connected to the Complaint, Complaint Counsel contends that the literature supports liability because it possesses offending claims and because it references the website agaricus.net. (CC Post-Trial Brief, 13-15, 20; CCPF ¶¶ 52, 53, 55-57, 62, 82, 84, 87, 90, 91; JX 47, JX 48, JX 57, JX 58, JX 59). Complaint Counsel's contentions fail.

Liggins made two single bottle purchases of RAAX11 through agaricus.net. The purchases by Liggins occurred on January 3, 2008, and January 23, 2008. (Liggins Tr., 74-75, 84-85). Some days after Liggins made the first purchase, the first purchase mailing was shipped from an FTC office to Liggins on January 16, 2008. (Liggins Tr., 74-75; JX 2, ¶¶ 1-5, JX 45). There is no dispute that Liggins received the purchase mailing generated by the first purchase; however, there is no evidence that shows what day Liggins actually received and reviewed the contents of the first purchase mailing.

The first purchase mailing received by Liggins contained, in pertinent part, documents appearing to be a brochure and invoice. (Liggins Tr., 80-81; JX 47, JX 48). The documents were damaged as a result of liquid spilled from the bottle of RAAX11 during shipping. The damage to the documents rendered them virtually illegible. (Liggins Tr., 80-81; JX 47, JX 48).

Some days after Liggins made the second purchase, the second purchase mailing generated by the second purchase was shipped from an FTC office on January 31, 2008. (Liggins Tr., 84-85; JX 3, ¶¶ 1-5; JX 53). Again, there is no dispute that Liggins received the purchase mailing generated by the second purchase; however, there is no evidence which shows

what day Liggins actually received and reviewed the contents of the first purchase mailing. The second purchase mailing received by Liggins contained, in pertinent part, a shipment invoice and literature related to herbal products and a price list for products. (Liggins Tr., 88-91; JX 56, JX 57, JX 58, JX 59).

**1. The Brochure Identified as JX 57 Does Not Support the Complaint Or Present Any Evidence that Respondents Disseminated or Caused to Disseminate any of the Challenged Advertisements.**

Complaint Counsel has contended that the brochure identified as JX 57 constitutes evidence that Isley disseminated or caused to disseminate offending advertisements because brochure JX 57 refers to [agaricus.net](http://agaricus.net). The brochure identified as JX 57 contains language stating that “[f]or more information go to the web site: Go to [www.agaricus.net](http://www.agaricus.net) Click on USA sales, or [www.our-agaricus.com](http://www.our-agaricus.com)”. (JX 57). To the extent this statement somehow amounts to Isley adopting the information provided through [agaricus.net](http://agaricus.net), there is no evidence showing that Liggins, the only known individual to have reviewed JX 57, visited the website when he received and reviewed the product mailing containing the brochure JX 57. Moreover, there are no relevant archived webpages from [agaricus.net](http://agaricus.net) captured from dates on or after the purchases were which contain any challenged claims.

Complaint Counsel introduced archived webpages through Liggins’s testimony at trial. The various archived webpages demonstrate the obvious fact that information disseminated through a web site can change on a daily basis. Here, the evidence shows that the information within the homepage for [agaricus.net](http://agaricus.net) changed at least on a weekly basis. (Isley, Tr. 277). Thus, in addition to there being no evidence to show that Liggins reviewed [agaricus.net](http://agaricus.net) at the direction of the language in JX 57 there is no evidence to show what, if any, information was being disseminated on [agaricus.net](http://agaricus.net) at any time Liggins visited [agaricus.net](http://agaricus.net) after receiving JX 57.

Complaint Counsel introduced only four captured webpages from agaricus.net from a date on or after the date the purchases were made. (JX 28, JX 29, JX 30, JX 31). To the extent Liggins reviewed agaricus.net after he made the purchases, the captured webpages from dates on or after the purchase fail to support any claims that Isely disseminated or caused to disseminate any offending advertisements.

The documents received in the first purchase mailing were illegible, and no document has been introduced received from the first purchase that contained any reference to agaricus.net. Complaint Counsel introduced a captured webpage from January 3, 2008, the date Liggins made the first purchase through agaricus.net. (JX 28). This captured webpage from January 3, 2008, occurred on the date Liggins made the first purchase. Since he received the purchase mailing generated from the first purchase sometime after January 3, 2008, it is impossible that Liggins reviewed this captured webpage when he received the first purchase mailing containing JX 57 made on January 3, 2008, even if the documents had contained any reference to agaricus.net. Moreover, the only reference to Isley within the relevant web page captured from January 3, 2008, was for a testimonial by Isely based on his previous personal use of herbal remedies in attempt to cure his prostate cancer, not any challenged statements evaluated by Complaint Counsel's expert witness. (JX 28; JX 1 at p.3).

Complaint Counsel also introduced two captured webpages from agaricus.net from the date January 30, 2008. (JX 29, JX 30). As is the case with the captured webpage identified as JX 28, it impossible that Liggins reviewed the webpages captured and identified as JX 29 and JX 30 after the date he received the second purchase mailing, because the date JX 29 and JX 30 were captured, January 30, 2008, is a date prior to the date Liggins received the purchase mailing generated from the second purchase, *see infra*. (Liggins Tr., 84-85; JX 3, ¶¶ 1-5; JX 53).

Moreover, the information contained in JX 29 and JX 30 is limited only to testimonial information regarding Isley's personal consumption of herbal remedies to treat his prostate cancer and his telephone number, not any challenged statements evaluated by Complaint Counsel's expert witness. (JX 29, JX 30; JX 1 at 3). It appears that Complaint Counsel captured the webpage archives at the outset of its case only to prove what was on the webpages for agaricus.net on the date under cover purchases were made.

Complaint Counsel also introduced a captured webpage from agaricus.net from the date March 27, 2008. (JX 31). This document was introduced along with all joint trial exhibits. (JX 31). However, Liggins offered no testimony at trial about JX 31. (See index of trial transcript for indication that Liggins did not testify about JX 31; JX 31). As such, there is no evidence that he captured the webpage from agaricus.net from the date March 27, 2008, and likewise no evidence that he ever visited this captured webpage after receiving either of the purchase mailings, if ever. (See index of trial transcript for indication that Liggins did not testify about JX 31; JX 31).

Thus, JX 31 offers no support to the Complaint or allegation that Respondents disseminated or caused to disseminate the alleged offending advertisements by referring to agaricus.net within JX 59 . Also, the information contained in JX 31 is limited only to testimonial information regarding Isley's personal consumption of herbal remedies to treat his prostate cancer and his telephone number, not any challenged statements evaluated by Complaint Counsel's expert witness. (JX 31; JX 1 at p.3). In addition, Respondent Isely provided the only testimony related to JX 31. (Isely, Tr. 276-78). Isely testified that he had no recollection of viewing the web page and that JX 31 did not appear to be the homepage for agaricus.net. (Isely, Tr. 276-78; JX 31)

**2. None of the Documents Mailed Within the Purchase Mailings Contain Any Challenged Advertisements or Misrepresentations.**

The information contained in the documents identified as JX 56, JX 57, JX 58 and JX 59 do contain any language challenged in the Complaint, or that is deceptive or addressed or challenged by the Expert Report introduced by Complaint Counsel. (JX 1 at p. 3). The Expert Report did not address or challenge any statements within JX 57, JX 58 and JX 59 because no substantive offending claims were made within the same relating to RAAX11.

The brochures identified as JX 57 and JX 58 do not contain any alleged offending claims and fail to support any claims against Respondents. Moreover, the brochure identified as JX 59 contains only information related to a different combination of herbal extracts than RAAX11, identifying a different product/protocol than RAAX11. (Isely, Tr. 299-305; JX 59). To that end, the information within the brochure identified JX 59 fails to support any allegations of the Complaint. At trial the Court ordered Complaint Counsel not to refer to JX 59 in any posttrial brief. (Isely, Tr. 305-06; JX 59). To the extent Complaint Counsel has relied on JX 59 in support of the Complaint, the contents of the document should be stricken or at a minimum not be used for the truth they assert. (Isely, Tr. 305-06; JX 59).

**B. Complaint Counsel Wrongfully Contends That The Brochures Are Nationwide Advertising, Marketing or Sales Activity That Satisfy the “Commerce” Requirement under FTC Act.**

In order to prosecute the Complaint and the allegations against Respondents, Complaint Counsel has relied on the authority that “Nationwide advertising, marketing or sales activity of the sort that Respondents engaged in constitutes “commerce” under the FTC Act. *See, e.g., P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 272 (6<sup>th</sup> Cir. 1970); *see, e.g., Ford Motor Co. v. FTC*, 120 F.2d 175, 183 (6<sup>th</sup> Cir. 1941). (CCPCL, ¶ 1). The advertisements attached to the Complaint,

however, were created by foreign citizens and disseminated through a website owned and controlled by foreign citizens and businesses, entities outside the reach of the FTC. (Complaint, Exhibits “A” – “D”).

Thus, the advertisements upon which the Complaint was brought are not those contemplated as the “nationwide advertising, marketing or sales activity” necessary to satisfy the “commerce” requirement of the FTC Act. Now, however, Complaint Counsel is seeking to prosecute Respondents for information within the brochures identified as JX 57, JX 58, and JX 59 after electing to not bring a Complaint against George Otto, the party the Complaint Counsel knew or should have known prior to filing the Complaint was the owner of the [agaricus.net](http://agaricus.net).

Complaint Counsel sent the first warning letter via email to [www.agaricus.net](http://www.agaricus.net), not to Respondents Isely, by way of the contact email address for [agaricus.net](http://agaricus.net), the email for George Otto ([gotto@takesun.com](mailto:gotto@takesun.com)). (RX 1; JX 16). Before filing the Complaint, Complaint Counsel was made aware that George Otto was named as an “Administrative Contact, Technical Contact”, and “Zone Contact” of [agaricus.net](http://agaricus.net) through the WHOIS search results for [agaricus.net](http://agaricus.net) and was the owner of [agaricus.net](http://agaricus.net) through correspondence from Respondents’ counsel. (JX 16; JX 66). Liggins testified that he investigated the identity of George Otto prior to when the Complaint was filed. (Liggins, Tr. 177). Thus Complaint Counsel concealed intentionally concealed the identity of and the notion that any case could be brought against George Otto.

At end, Complaint Counsel has boot strapped her way to the brochures identified as JX 57, JX 58, and JX 59 by prosecuting the advertisements attached to the Complaint that were known to have been created and disseminated by George Otto when the Complaint was filed. For these reasons alone, this Complaint should be dismissed for lack of jurisdiction.

**C. The Partnership Takesun USA and the Distribution Agreement By the Partnership Takesun USA Possess No Evidentiary Value in Support of the Allegation That Respondents Disseminated or Caused to Disseminate Any Offending Advertisements.**

Complaint Counsel contends that at a partnership formed by Isely named Takesun USA and a distributor agreement under the name Takesun USA somehow shows that Isely is liable under the Complaint for disseminating offending advertisements. (CC Post-Trial Brief, 20; CCPF ¶¶ 82, 84; JX 73). Complaint Counsel's contention fails to support the Complaint or possess any nexus to the allegation that Isely disseminated or caused to disseminate any offending claims.

The relevant testimony shows that Isely did form a partnership in named Takesun USA for the purpose of importing herbal products. (Isely, Tr. 214-16). The evidence shows, however, that the partnership did little business and dissolved approximately eight months after it was formed in the year 2001, years before the time period when the Complaint alleges any offensive advertisements were disseminated. (Isely, Tr. 214-16).

Complaint Counsel also introduced a distributor agreement at trial which was allegedly prepared through the Takesun USA partnership for the purpose of hiring third parties to sell herbal products, including RAAX11. (Isely, Tr. 214-16; JX 73). However, the distribution agreement does not contain any claims with respect to the effects of RAAX11 or any other products and there is no evidence that the distribution agreement was ever disseminated to any third party, particularly any consumer. (Isely Tr. 214-16; JX 73).

Although the distribution agreement identifies the website [www.agaricus.net](http://www.agaricus.net) as a source of additional information about "Agaricus blazei mushroom products", there is no evidence suggesting what information was posted on [agaricus.net](http://www.agaricus.net) on or about the date the distributor agreement was created or, again, that any individual, other than Isely, has ever seen the

