

In the Matter of Gemtronics, Inc., and William H. Isely
Docket No. 9330

OPINION OF THE COMMISSION

By LEIBOWITZ, Chairman, for a Unanimous Commission:

Upon consideration of the record and the briefs submitted in connection with this matter,¹ the Commission denies Respondents' appeal and affirms the Chief Administrative Law Judge's Initial Decision on Respondents' Application for an Award of Attorney Fees and Other Expenses.

I. BACKGROUND AND PROCEEDINGS BELOW

The Commission issued the Complaint in this matter on September 16, 2008 against Gemtronics, Inc. and William H. Isely ("Isely") (collectively, "Respondents"). The Complaint alleged that Respondents engaged in deceptive acts or practices, in or affecting commerce, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a) and 52, by disseminating, or causing the dissemination of, false advertisements for a purported herbal cancer cure, RAAX11, through an Internet website, www.agaricus.net. Complaint ¶¶ 3-5, 11. Respondents denied these allegations. In particular, Respondents asserted that they had no authority over or ability to control the content of www.agaricus.net, and that a Brazilian company, Takesun do Brasil, and its agents or other individuals not named in this action owned and exclusively controlled that website and caused the dissemination of the advertisements challenged in the Complaint. Answer ¶¶ 3, 5.

The parties conducted discovery, at the conclusion of which each side submitted a motion for summary decision under Rule 3.24 of the Commission Rules of Practice, 16 C.F.R. § 3.24. Chief Administrative Law Judge ("ALJ") D. Michael Chappell, who presided over the pretrial proceedings and the trial, denied each side's motion for summary decision because, upon consideration of the evidence submitted by the parties, he could "not conclude that there is no genuine dispute of fact as to any material issue or that either party is entitled to judgment as a matter of law." FPC Tr. at 6.²

¹ In addition to the parties' briefs, an *amicus curiae* brief supporting Respondents was submitted by S.M. Oliva.

² References to the record are abbreviated as follows:

ID	Initial Decision (Sept. 16, 2009)
IDF	Initial Decision Finding of Fact (Sept. 16, 2009)
EAJA ID	Initial Decision on Respondents' Application for Attorney Fees (Apr. 27, 2010)
FPC Tr.	Transcript of Final Pre-trial Conference (June 24, 2009)
Tr.	Transcript of Testimony before the ALJ (June 24-25, 2009)
JX	Joint Exhibit
RAB	Respondents' Initial Appeal Brief

The final pre-trial conference was held on June 24, 2009, with trial commencing immediately thereafter. Following trial, Respondents and Complaint Counsel submitted post-trial briefs, proposed findings of fact and conclusions of law, and replies to each other's post-trial briefs and proposed findings. The ALJ heard closing arguments on July 30, 2009.

The ALJ issued his Initial Decision on September 16, 2009. The ALJ determined that there was insufficient evidence to hold Respondents liable for deceptive advertising of RAAX11. ID at 8. The ALJ found, among other things, that Complaint Counsel had failed to prove by a preponderance of the evidence that Respondents exercised control over the website www.agaricus.net or were otherwise responsible for disseminating the challenged advertisements on www.agaricus.net. *Id.* at 38-51.³ Because the ALJ concluded that the facts as demonstrated at trial did not permit a finding of liability under the applicable case law, he dismissed the Complaint. ID at 51-56. Complaint Counsel did not appeal the Initial Decision, and it became the Decision of the Commission on November 9, 2009.

On December 2, 2009, Respondents submitted an application for attorney fees and other expenses under the Equal Access To Justice Act ("EAJA") and Commission Rules 3.81 through 3.83, 16 C.F.R. §§ 3.81-3.83.⁴ On December 23, 2009, Respondents submitted a Petition to the Commission for Rulemaking on Maximum Rates for Attorney Fees as Provided under Rule 3.81(g).⁵ On April 27, 2010, the ALJ issued his Initial Decision denying Respondents' application for attorney fees, finding that Complaint Counsel's position in the prior adjudicative proceeding was substantially justified.⁶ The ALJ did not rule on the Petition for Rulemaking, which is a matter for the Commission, not the ALJ, to decide.

Respondents filed a timely appeal of the ALJ's decision denying their application for attorney fees. The decision of the ALJ is subject to *de novo* review by the Commission. *See* 16 C.F.R. § 3.54.

³ Because the ALJ found that Complaint Counsel failed to prove that Respondents were responsible for dissemination of the advertisements on www.agaricus.net, he found it unnecessary to reach the question whether the challenged advertisements were false or misleading. ID at 8.

⁴ Respondents submitted a supplement to their application on December 23, 2009, seeking attorney fees for a bill that had not yet issued at the time of their initial application.

⁵ Also, on December 23, Respondents notified the ALJ that they had terminated their counsel's representation. Since then, Respondents have proceeded *pro se*.

⁶ In addition, on February 26, 2010, Respondents submitted a Motion to Sanction Complaint Counsel for allegedly improper actions in this action. The ALJ denied the motion, finding that neither the ALJ nor the Commission had the authority to assess such monetary sanctions. Respondents have not appealed the denial of their motion for sanctions.

II. ANALYSIS

A. Standard for Award of Attorney Fees under EAJA

The Equal Access to Justice Act provides in pertinent part:

An agency that conducts an adversary adjudication shall award, to a prevailing party . . . , fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1).⁷ Section 504(c)(1) further directs that “each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses.” 5 U.S.C. § 504(c)(1). Commission Rules 3.81 through 3.83, 16 C.F.R. §§ 3.81-3.83, implement the EAJA.

In addition to the requirement that an applicant for attorney fees be a prevailing party (which nobody disputes Respondents are), the criteria for eligibility include that the petitioning party be (1) an individual with a net worth of not more than \$2 million, or (2) the sole owner of an unincorporated business, or any corporation or organization, with a net worth of not more than \$7 million and not more than 500 employees. 5 U.S.C. § 504(b)(1)(B); 16 C.F.R. § 3.81(d)(2). Respondents submitted verified net worth exhibits demonstrating they satisfy these eligibility criteria. *See* EAJA ID at 6.

The critical question raised by this appeal is whether the position taken by Complaint Counsel in the prior adjudicative proceedings was “substantially justified.” If it was, Respondents are not entitled to an award of attorney fees under the EAJA, notwithstanding the fact that they ultimately prevailed. “The EAJA is not” – after all – “a ‘loser pays’ statute.” *Morgan v. Perry*, 142 F.3d 670, 685 (3d Cir. 1998). Nevertheless, “[t]he burden of proof that an award should not be made to an eligible prevailing applicant is on complaint counsel.” 16 C.F.R. § 3.81(e)(1)(i).

The Supreme Court has held that the government’s position is “substantially justified” in the context of a petition for attorney fees under the EAJA “if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.” *Pierce v. Underwood*, 487 U.S. 552,

⁷ This provision of the EAJA applies to administrative litigation such as the instant matter. Another provision of the EAJA applies to civil litigation arising from government action. *See* 28 U.S.C. § 2412.

566 n.2 (1988);⁸ *see* 16 C.F.R. § 3.81(e)(1)(i) (“[C]omplaint counsel . . . may avoid an award by showing that its position had a reasonable basis in law and fact.”). Stated another way, substantial justification exists when there is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,” “if there is a genuine dispute,” or “if reasonable people could differ as to the appropriateness of the contested action.” *Pierce*, 487 U.S. at 565 (internal quotation marks and brackets omitted). We “cannot assume that the government’s position was not substantially justified simply because the government lost on the merits.” *Morgan*, 142 F.3d at 685; *accord SEC v. Fox*, 855 F.2d 247, 252 (5th Cir. 1988); *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988). Determination of this issue requires that we examine both Complaint Counsel’s prelitigation and litigation positions. *Morgan*, 142 F.3d at 685; *Fox*, 855 F.2d at 252 (“[W]e must examine whether the agency had sufficient information to support a decision to prosecute, and whether the arguments at trial and in pleadings were reasonable in law and fact.”).⁹

B. Support for Complaint Counsel’s Position

Applying this standard, we must decide whether there was a “reasonable basis in law and fact” for Complaint Counsel’s position that Respondents were responsible for making the challenged cancer-cure claims regarding RAAX11 on www.agaricus.net, in violation of Sections 5 and 12 of the FTC Act. The ALJ answered this question in the affirmative, because he found that “reasonable minds” might accept Complaint Counsel’s evidence as adequate to support a conclusion that Respondents participated in the dissemination of the advertisements on www.agaricus.net. EAJA ID at 10-11. The ALJ noted that he had denied both sides’ motions for summary judgment in the prior adjudicative proceeding because there was a “genuine dispute” about the facts, and the existence of such a “genuine dispute” satisfies the “substantial justification” standard articulated in *Pierce*, 487 U.S. at 565. EAJA ID at 11-12.

We agree with the ALJ. Complaint Counsel presented evidence tying Respondents to the challenged advertisements on www.agaricus.net. This included evidence that: Isely formed a corporation in the name of “Gemtronics, Inc.” in 2006, with its principal place of business at Isely’s home address, and prior to that time did business under the unregistered trade name “Gemtronics,” IDF 2, 13-14, 16-17; Isely also did business under the trade name Takesun USA (identifying it with products manufactured by Takesun do Brasil), IDF 20-21, 23-27; Isely was listed as the domain registrant and administrative, technical, and zone contact for Takesun do

⁸ Although *Pierce* decided the meaning of “substantially justified” in 28 U.S.C. § 2412(d)(1)(A) (the part of the EAJA applicable in civil litigation), the language is identical to that in 5 U.S.C. § 504(a)(1) (the part of the EAJA applicable to attorney fees in administrative litigation). Courts have therefore relied on *Pierce* when evaluating the meaning of “substantially justified” in the context of administrative litigation. *See, e.g., Blaylock Elec. v. NLRB*, 121 F.3d 1230, 1233 (9th Cir. 1997); *First Nat’l Monetary Corp. v. CFTC*, 860 F.2d 654, 657 (6th Cir. 1988).

⁹ *See* 5 U.S.C. § 504(b)(1)(E).

Brasil's website www.agaricus.net, IDF 154-55; Isely's name and telephone number were listed throughout www.agaricus.net, and the website directed U.S. consumers to call Isely for product information and ordering, IDF 93-94, 96, 100, 104-05, 108, 111-13, 119-21; two undercover purchases of RAAX11 made by an FTC investigator through www.agaricus.net were fulfilled by Isely, under the name Gemtronics, and a purchase confirmation webpage from the second order identified Gemtronics as the biller, IDF 124, 131, 143-45; and promotional literature that Isely included in one of the packages referred to cancer studies showing a "positive response" to "the RAAX11/Agaricus OPC Protocol,"¹⁰ contained Isely's telephone number and e-mail address (under the name Gemtronics), and directed consumers to go to www.agaricus.net for more information and U.S. sales, IDF 147-48, 152. Reasonable people could certainly view this evidence as supporting a conclusion that Respondents sold RAAX11 through www.agaricus.net and participated in the dissemination of cancer-cure claims regarding RAAX11 on that website.¹¹

Although Respondents disputed the FTC's allegations and offered evidence that other persons or entities owned and controlled www.agaricus.net, that evidence did not negate Complaint Counsel's evidence indicating Respondents' apparent participation in the advertising and sale of RAAX11 on that website. For example, although a representative of the domain registration company testified that the owner of the account for www.agaricus.net was an individual named George Otto (also known as George Otto Kather) located in Brazil, he further testified that others could possess the username and password required to control the website's content. JX 4 at 14-16. Moreover, Respondents' evidence showing that Isely's name and contact information had been removed from the website and domain registration as of April 2008 (after the FTC contacted Isely) did not establish who owned or controlled the website prior to that time. *See* EAJA ID at 10 n.6. Indeed, as the ALJ observed, the fact that Respondents apparently were able to cause these changes to the content of and domain registration information for www.agaricus.net was a reasonable basis for concluding that Respondents exercised some control over that website. *Id.* at 11.

Furthermore, while Isely testified at his deposition that he fulfilled the FTC's undercover purchases made through www.agaricus.net only as a favor to George Otto, and that he did not sell RAAX11 through that website, he seemingly contradicted himself when he testified, later in the deposition, that if the purchases of RAAX11 through www.agaricus.net had been paid for by credit card (rather than using PayPal), he would have received those payments. JX 12 at 124. Reasonable people could come to different conclusions from this testimony about the extent of

¹⁰ The other package sent by Isely also included a brochure entitled "RAAX11/Agaricus OPC Protocol," but it was largely illegible because the package was damaged in transit. EAJA ID at 26 n.4; JX 47.

¹¹ Indeed, when the Commission voted to issue the complaint, it found – based on this evidence – that there was "reason to believe" that Respondents had engaged in violations of the FTC Act. *See* 15 U.S.C. § 45(b) (providing that the Commission may issue a complaint "[w]hensoever the Commission shall have reason to believe that such a person . . . has been or is using any . . . unfair or deceptive act or practice in or affecting commerce")

Respondents' participation in the challenged conduct. Had Complaint Counsel's interpretation of the evidence been borne out at trial, FTC precedent would have supported holding them liable under Sections 5 and 12 of the FTC Act, notwithstanding that other persons not named in the complaint might also have been liable in connection with the dissemination of the challenged advertisements.¹²

It is precisely because there was a "genuine dispute" about the facts that the ALJ denied the parties' motions for summary judgment. *Id.* at 11-12; FPC Tr. at 6. Given the commonality between that inquiry and the standard for substantial justification under the EAJA, *Pierce*, 487 U.S. at 565 (substantial justification exists if there is a "genuine dispute"), there is a presumption that a government case strong enough to survive a motion for summary judgment is substantially justified. *See, e.g., United States v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378, 381-82 (7th Cir. 2010); *FTC v. Magazine Solutions, LLC*, No. 7-692, 2010 U.S. Dist. LEXIS 108332 at *6 (W.D. Pa. Oct. 12, 2010). That presumption is not undermined here by the fact that the ALJ ultimately determined that the evidence adduced at trial did not support the inferences urged by Complaint Counsel. As the ALJ noted in his decision dismissing the complaint, this outcome depended largely on his assessment of Isely's credibility during his testimony at trial. *Id.* at 38. *See Blaylock Elec.*, 121 F.3d at 1235-36 (affirming NLRB's determination that its counsel was substantially justified in pursuing the case through trial, where "the power of [respondent's] rebuttal case depended in substantial part on the ALJ's decision . . . whether to credit [the witness's] testimony"). Under these circumstances, we find that Complaint Counsel was substantially justified both in bringing this action against Respondents and in pursuing the case through trial.¹³

¹² *See, e.g., In re Porter & Dietsch, Inc.*, 90 F.T.C. 770, 874-76 (1977), *aff'd and modified*, 608 F.2d 294 (7th Cir. 1979) (holding liable both the advertising agency that created deceptive advertisements and the retailer that distributed advertisements); *Standard Oil Co. v. FTC*, 577 F.2d 653, 659-60 (9th Cir. 1978) (affirming liability of advertising agency that actively participated in preparation of advertisement that it knew or should have known was deceptive); *Mueller v. United States*, 262 F.2d 443, 445-46 (5th Cir. 1958) (affirming liability where defendant's false advertisements were disseminated by others); *Schafe v. FTC*, 256 F.2d 661, 664 (6th Cir. 1956) (same).

¹³ The record here distinguishes this case from the two cases principally relied on by Respondent. *See* RAB at 15-16, 19. Unlike *Hess Mechanical Corp. v. NLRB*, 112 F.3d 146 (4th Cir. 1997), in which the agency filed a complaint based on only "a single, uncorroborated affidavit and in the face of a wall of adverse evidence," *id.* at 150, the FTC's complaint was supported by evidence from numerous sources that pointed to Respondents as participants in the challenged conduct, and this evidence was not negated by Respondents' evidence implicating George Otto. And unlike *United States v. Hallmark Construction Co.*, 200 F.3d 1076 (7th Cir. 2000), in which the court faulted the ALJ for failing to evaluate the reasonableness of the government's decision to proceed with litigation in the face of conflicting evidence, we have considered this question (as did the ALJ) and find that Complaint Counsel was justified in proceeding with this action, notwithstanding the existence of certain conflicting evidence.

Respondents argue that the Commission acted unreasonably in bringing this action against them because it lacks jurisdiction over foreign websites, failed to enlist the assistance of Brazilian authorities to pursue perpetrators in that country under the authority of the U.S. SAFE WEB Act,¹⁴ and generally failed to conduct a thorough investigation. None of these arguments has merit. The Commission unquestionably has jurisdiction under the FTC Act to bring an enforcement action targeting unfair or deceptive acts or practices that harm U.S. consumers – and here there is no dispute that the challenged claims regarding RAAX11 on www.agaricus.net were disseminated, and sales were made, to U.S. consumers.¹⁵ The fact that the website may have been hosted in a foreign country does not deprive the Commission of jurisdiction. Moreover, although the U.S. SAFE WEB Act provides the Commission with enhanced tools for investigating cross-border fraud, nothing in the Act prescribes the manner in which investigations are to be conducted or obligates the Commission to investigate potential foreign defendants in lieu of domestic defendants or respondents.

Furthermore, we find no inconsistency between the ALJ’s finding, in the prior adjudicative proceeding, that the investigation in this matter “could have [been] better,” IDF 104, and our (and the ALJ’s) conclusion that this action was substantially justified. Where, as here, ample evidence pointed to Respondents as parties responsible for the challenged conduct, the Commission was justified in bringing an action against them, notwithstanding that there may have been unresolved questions about certain aspects of the scheme, including other potential defendants. Although Complaint Counsel ultimately did not succeed in proving its case against Respondents, Complaint Counsel’s position had a reasonable basis in both law and fact, making an award of attorney fees and costs under the EAJA unwarranted.

III. CONCLUSION

Accordingly, for the reasons stated above, we affirm the decision of the ALJ denying Respondents’ application for attorney fees and other expenses. Because the application for attorney fees is denied, there is no need for us to address the merits of Respondents’ petition for a rulemaking to increase the maximum rates for attorney fees, and that petition is also denied.

¹⁴ Undertaking Spam, Spyware, and Fraud Enforcement With Enforcers beyond Borders Act of 2006, Pub. L. No. 109-455, codified to the FTC Act, 15 U.S.C. §§ 41 *et seq.*

¹⁵ Respondents rely on Section 5(a)(3), 15 U.S.C. § 45(a)(3), in support of their jurisdictional argument, but that provision does not apply to unfair or deceptive acts or practices.