

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
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I. RESPONDENTS' COUNSEL'S PROPOSED FINDINGS OF FACT

A. Respondents Gemtronics, Inc. Has Never Had an Owner or Shareholder and is Not A Proper Party to this Action

1. Respondent Gemtronics, Inc. was formed on September 20, 2006, by the Respondent William H. Isely. Gemtronics, Inc. has never had a shareholder, board members, officers or an employee and has never been activated. Moreover, Gemtronics, Inc. has never engaged in any business or entered into any contracts. See Gemtronics, Inc.'s Answers to Complaint Counsel's Interrogatories (Complaint Counsel's Trial Exhibit 4 ("RX 4"); Isely Depo., pp. 98-105 (RX 24); Articles of Incorporation for Gemtronics, Inc. (RX 15); Isely's Answers to Interrogatory no. 2 (RX 3).

2. Gemtronics, Inc. has never applied for or obtained a federal tax identification number and has never filed taxes. Gemtronics, Inc. has since its inception always been an inactive corporate shell. Mr. Isley is not the owner of Gemtronics, Inc. and no other individual is the owner of Gemtronics, Inc. Gemtronics, Inc. has never applied for or received a designation

as a closely held s-corporation or as a c-corporation. See Gemtronics, Inc.'s Answers to Complaint Counsel's Interrogatories (RX 4); Isely Depo., pp. 98-105 (RX 24); Articles of Incorporation for Gemtronics, Inc. (RX 15); Isely's Answers to Interrogatory no. 2 (RX 3).

B. Respondent Isely Has Only Operated "Gemtronics" a Sole Proprietorship Business Under the Assumed Name "Gemtronics"

3. Respondent William H. Isely is 83 years of age and resides with his wife at 964 Walnut Creek Road, Franklin, North Carolina. For approximately 30 years, Mr. Isely operated a mail order vitamin supplement business. See Complaint, ¶1 (RX 1); Isely's Answer to Interrogatory no. 4 (RX 3).

4. During the time period relevant to this case, Mr. Isely operated his mail order vitamin supplement business under the name "Gemtronics". When he operated his mail order vitamin supplement business under the name "Gemtronics", Mr. Isley solely handled all aspects of his mail order business and never had any employees. Since the Federal Trade Commission initiated the above-captioned action, Mr. Isely has ceased operating or owning any mail order dietary supplemental business. See Complaint, ¶1 (RX1); Isely Depo. pp. 41, 135-137 (RX 24); See sales and use tax identification document for "Gemtronics", as an assumed name (RX 27).

C. The Alleged Internet Website www.agaricus.net is Owned and Controlled by a Third Party----Not the Respondents

5. During the year 1990, Mr. Isely was diagnosed with prostate cancer. In an effort to fight prostate cancer, Mr. Isley began purchasing and consuming herbal products from the Brazilian company Takesun do Brasil and its owner Mr. George K. Otto, the owner of the alleged offending website www.agaricus.net. In the year 2000, Mr. Isely eventually began purchasing products, including RAAX11 from Takesun do Brasil and Mr. Otto in larger quantities to sell the products to Mr. Isely's retail customers of his mail order vitamin business.

See Isely's Answer to Interrogatory no. 7 (RX 4); Invoice between isely and Takesun do Brazil (RX 22); Isely Depo. pp. 14-19 (RX 24)

6. Mr. Isley's purchases from Takesun do Brasil have each been individually negotiated on a stand-alone basis regarding price, quantity, method of shipment and delivery, and the purchases were not made on an account. The products purchased by Mr. Isely from Takesun do Brasil and Mr. Otto for Mr. Isely's personal consumption and for re-sale included the herbal product RAAX11, which is the subject of this action. See Isely's Answer to Interrogatory no. 1 (RX 3); Isely Depo. pp. 19-21 and 91 (RX 24); Invoice between Isely and Takesun (RX 34).

7. Complaint Counsel has alleged that the Respondents violated Sections 5(a) and 12 of the Federal Trade Commission Act when they disseminated or caused to be disseminated deceptive advertisements for the product RAAX11 through an alleged offending Internet website, www.agarius.net. See Complaint ¶ 5 (RX 1). Complaint Counsel's sole allegation that the Respondents violated Sections 5(a) and 12 of the Federal Trade Commission Act is that "Respondents dissemination or caused to be disseminated advertisements for RAAX11 through the alleged offending website www.agaricus.net." See Complaint, ¶¶ 1-10 (RX1).

8. The alleged offending website www.agaricus.net is owned and controlled by a third party, Takesun do Brasil and George Otto, who used Mr. Isely's name and contact information without his permission. Neither of the Respondents have ever been the legal owner of the alleged offending website, www.agaricus.net; nor have they ever possessed the authority to control nor have they controlled the content of the alleged offending website, www.agaricus.net. Accordingly, the Respondents have never disseminated or caused to be disseminated any advertisements through the alleged offending website, www.agaricus.net. See Isely Answer to Interrogatory No. 11 (RX 4); Isely Depo. pp. 52 (RX 24); Document

production from subpoena issued to web hosting company for www.agaricus.net (RX 6, 7, 23, 25, and 26); Ex. E, Velasco Depo., pp. 10-22 (RX 8)

9. The alleged offending website, www.agaricus.net, was registered and created on June 13, 1998, by George Otto, the owner of Takesun do Brasil, through the domain registrant and maintenance company Tierra.net (d/b/a DomainDiscovery). See WHOIS results for www.agaricus.net (RX 10) (indicating the email address gotto@takesun.com); Document production from subpoena issued to web hosting company (RX 6, 7, 23, 25 and 26), Velasco Dep., pp. 10-22 (RX 8).

10. The company Tierra.net (d/b/a Domain Discovery) is the domain registrant company which registers and maintains the alleged offending website, www.agaricus.net. See Document production from subpoena issued to web hosting company; (RX 6, 7, 23, 25 and 26), Velasco Dep., pp. 10-22 (RX 8).

11. According to Tierra.net (d/b/a Domain Discovery), the legal owner of the alleged offending website, www.agaricus.net, is Agarix International, a Brazilian company with an e-mail contact of gotto@takesun.com.br, the e-mail address for Mr. Otto. See WHOIS results for www.agaricus.net (RX 10) (indicating the email address gotto@takesun.com); Document production from subpoena issued to web hosting company (RX 6, 7, 23, 25 and 26), Velasco Dep., pp. 10-22 (RX 8).

12. George Otto is the individual who has the user name and password to the alleged offending website, www.agaricus.net, because he is the individual that set up the Administrative Contact, Technical Contact and Billing contact. See Document production from subpoena issued to web hosting company (RX 6, 7, 23, 25 and 26); Velasco Dep., pp. 10-22 (RX 8); WHOIS results for www.agaricus.net (RX 10).

13. According to Tierra.net (d/b/a Domain Discovery), whoever registers a domain can identify the Registrant Contact, Technical Contact, and Zone Contact as any third party chosen by the person who registers the domain. See Document production from subpoena issued to web hosting company (RX 6, 7, 23, 25 and 26); Velasco Dep., pp. 10-22 (RX 8).

14. According to Tierra.net (d/b/a Domain Discovery), a person could not create a website for the alleged offending website, www.agaricus.net, or control its contents, without access to the domain as provided to the individual who formed the website. See Document production from subpoena issued to web hosting company (RX 6, 7, 23, 25 and 26); Velasco Dep., pp.10-22 (RX 8).

15. According to Tierra.net (d/b/a Domain Discovery), the Registrant Contact for the alleged offending website, www.agaricus.net, is who the owner of the domain and website chooses to identify as the Registrant, but the Registrant Contact is not necessarily the legal owner of the domain name itself. The Registrant Contact is the published owner of the domain name, selected by the legal owner of the domain name, but not necessarily the legal owner of the domain. See Document production from subpoena issued to web hosting company (RX 6, 7, 23, 25 and 26); Velasco Dep., pp. 10-22 (RX 8).

16. According to Tierra.net (d/b/a Domain Discovery), the person who possesses the user name and password for the alleged offending website, www.agaricus.net, is not the Respondents, but an individual named George Otto. See WHOIS results for www.agaricus.net (RX 10) (indicating the email address gotto@takesun.com); Document production from subpoena issued to web hosting company (RX 6, 7, 23, 25 and 26); Velasco Dep., pp. 10-22 (RX 8).

D. Mr. Isely's Name and Information Was Utilized Without his Consent

17. During the time period prior to and immediately after the Federal Trade Commission initiated this action, Respondent Isely and his contact information was utilized without his consent as the Registrant, among other items, for the alleged offending website, www.agaricus.net. See Isely Depo. pp. 37-38; 49-57 (RX 24); Complaint (RX 1). Mr. George Otto or Agarix International caused Respondent Isely to be identified as the Registrant for the alleged offending website, www.agaricus.net, without the consent of Mr. Isely. See Isely Depo. pp. 37-38, 49-57 (RX 24); Emails between Isely and G. Otto (RX 28, 30, 31 and 35); WHOIS results for www.agaricus.net (RX 10); See Document production from subpoena issued to web hosting company (RX 6, 7, 23, 25 and 26); Velasco Dep., pp. 10-22 (RX 8).

18. Mr. Isely's name and contact information was utilized without his consent for other domain's that Mr. Otto owns and controls. See Isely Depo. pp. 37-38, 49-57 (RX 24); Emails between Isely and G. Otto (RX 28, 30, 31 and 35); WHOIS results for www.agaricus.net (RX 10).

19. Takesun do Brazil or George Otto also used Mr. Isley's name, address and telephone number on the alleged offending website, www.agaricus.net, and for the purpose of registering the alleged offending website without Mr. Isely's knowledge or permission. Mr. Isely gave George Otto permission to use Mr. Isley's information, but not his name, about Mr. Isely's own health records and his use of RAAX11 to battle cancer. However, Mr. Isely never permitted Mr. Otto to utilize his name for the purpose of marketing United States sales on the website or for showing Mr. Isely as a Registrant or any other title for www.agaricus.net. See Isely Depo. pp. 37-38, 49-57 (RX 24); Emails between Isely and G. Otto (RX 28, 30, 31 and 35); WHOIS results for www.agaricus.net (RX 10).

20. Learning that his identity was being used without his consent, Mr. Isely immediately contacted Mr. George Otto and demanded that Mr. Isely's name and contact

information be removed from the website and as any contact for the alleged offending website, www.agaricus.net, and any other websites where Mr. Isley's name had been utilized without his consent. Mr. Isley sent emails to Mr. Otto asking why Mr. Isely's name had been used without his permission. Mr. Otto emailed to Isely explaining that Mr. Otto was the owner of the website was a company owned by George Otto and that the Mr. Isely's name and address was used only as the contact information for the website. See Isely Answer to Interrogatory no. 7 (RX 3); Emails between Isely and G. Otto (RX 28, 30, 31 and 35).

21. In addition, after learning of the misuse of his identity, Mr. Isely ceased purchasing any products from Takesun do Brasil or Mr. Otto. Mr. Otto removed Mr. Isely's name and address from the website as well as a Registrant of www.agaricus.net and other domains where Mr. Otto had utilized Mr. Isely's name and address without the consent of Mr. Isely. See Isely Depo. pp. 37-38; 49-57 (RX 24); See Isely Answer to Interrogatory no. 7 (RX 3); Emails between Isely and G. Otto (RX 28, 30, 31 and 35).

22. On or about March 28, 2008, after Mr. Isely made demands to Mr. Otto regarding Mr. Otto incorrectly identifying Mr. Isley as a Contact for the website www.agaricus.net, the contact information for domain www.agaricus.net was changed and Mr. Isely's name was removed. See Document production from subpoena issued to web hosting company (RX 6, 7, 23, 25 and 26); Velaseo Dep., pp. 10-22 (RX 8); E-mails between Isely and G. Otto (RX 28, 20, 31 and 35)

23. After the Federal Trade Commission initiated this action, Mr. Isely was informed that the Federal Trade Commission had sent a Warning Letter to the website www.agaricus.net. Mr. Isely never received the subject Warning Letter because the contact email for the website www.agaricus.net is gotto@takesun.com.br, the email address for Mr. Otto, the owner of the website www.agaricus.net. As a result of identified without his permission as a Registrant for

www.agaricus.net, Mr. Isely also received a Notice from the United States Food and Drug Administration (“FDA”) at his home address because the FDA did not send the notice via email. After Mr. Isely spoke with the FDA representative, the FDA elected to not bring any action against Mr. Isely or Respondent Gemtronics, Inc. See WHOIS results for www.agaricus.net (RX 10); See Isely Depo. pp. 109-112 (RX 24), and Notice letters from FTC and FDA (RX 16 and RX 17).

E. Mr. Isely Did Not Sell Products Through the Website www.agaricus.net

24. As part of his vitamin supplement business, Mr. Isely operated his own website selling herbal supplements, including RAAX11. However, Complaint Counsel has not alleged and, in fact, Mr. Isely has never disseminated any misleading advertisements for RAAX11 or any other supplements through his own Internet website. See Complaint (RX 1). Likewise, Mr. Isley has not sold any product from RAAX11 products sold on www.agaricus.net. Isely Deposition pp. 119-124 (RX 24); Respondent Isely’s Responses to Complaint Counsel’s Interrogatories Nos. 11 and 12. (RX 3).

25. On or about January, 2008, about nine months before the FTC initiated this action, the FTC apparently made two separate undercover purchases through www.agaricus.net. The purchases were each for a single bottle of the RAAX11 product. The purchases have produced several documents that Complaint Counsel is using in an attempt to show that Mr. Isley was selling products through the website www.agaricus.net. Many of the documents apparently printed from the webpages of www.agaricus.net at the time of the purchase and produced as part of the purchases contain Mr. Isely’s name, telephone number and refer to “Gemtronics”---not to be confused with the entity Gemtronics, Inc. The references to Mr. Isely were made on the website and on Paypal receipts were made without his consent. See RCPP ¶¶ 17-23; Isely Depo.

pp. 37-38; 49-57 (RX 24); See Piece Miles' documents for PayPal Order for RAAX11 and Dana Long PayPal order documents (CX 9 - 27).

26. The under cover purchases for the single bottle orders were paid to PayPal accounts for Takesun do Brazil, not on any account for or directed to either of the Respondents. When the orders were apparently made by the under cover FTC agents, Mr. George Otto sent an email to Respondent Isely, requesting that Mr. Isely ship the single bottles of the RAAX11 purchased by the under cover agents. Respondent Isely mailed the single bottle product to the purchasers and included with the mailing a receipt and literature related to RAAX11. See Piece Miles' documents for PayPal Order for RAAX11 and Dana Long PayPal order documents (CX 9 - 27); Isely Deposition pp. 119-124 (RX 24); Respondent Isely's Responses to Complaint Counsel's Interrogatories Nos. 11 and 12. (RX 3).

27. Neither Respondent received any money, proceeds or tangible financial benefit from the purchase made by the under cover FTC agents. Moreover, neither of the under cover agents relied on any information mailed with the single products orders by Respondent Isely when they made their purchases through the website www.agaricus.net See Piece Miles' documents for PayPal Order for RAAX11 and Dana Long PayPal order documents (CX 9 - 27); Isely Deposition pp. 119-124 (RX 24); Respondent Isely's Responses to Complaint Counsel's Interrogatories Nos. 11 and 12. (RX 3).

Respectfully Submitted,

LAW OFFICE OF
MATTHEW I. VAN HORN, PLLC

By

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Attorney for Respondents

This the 11th day of June, 2009.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this **RESPONDENTS'**

COUNSEL'S PROPOSED FINDINGS OF FACT in the above entitled action upon all other parties to this cause by depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, properly addressed to the attorney or attorneys for the parties as listed below.

One (1) e-mail copy and two (2) paper copies served by United States mail delivery to:

Honorable D. Michael Chappell
Chief Administrative Law Judge (Acting)
Federal Trade Commission
H106
600 Pennsylvania Ave., NW
Washington, D.C. 20580

The original and one (1) paper copy via United States mail delivery and one (1) electronic copy via e-mail:

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

One (1) electronic copy via e-mail and one (1) paper copy via United States mail delivery to:

Ms. Barbara E. Bolton
Federal Trade Commission
225 Peachtree Street, N.E.
Suite 1500
Atlanta, GA 30303

This the 11th day of June, 2009.



MATTHEW L. VAN HORN