

**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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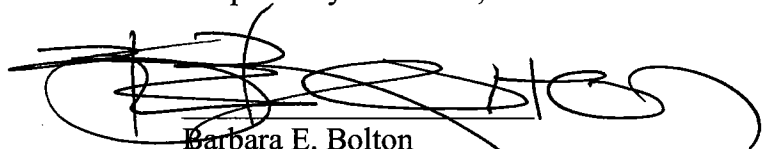
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**COMPLAINT COUNSEL'S REPLY TO
RESPONDENTS' POST TRIAL BRIEF**

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. Respondent Isely has admitted that he has advertised, offered for sale, sold, and distributed the product, RAAX11 through various Internet websites.¹ 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.

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

¹ 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. (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)² 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 USA³ brochure and Distributor Introductory Package that he disseminated to consumers. (CCR

² 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)

³ "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 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 – 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 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 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 and exercised that control only after they were notified of their potential liability for the deceptive practices. (CCR ¶¶ 24, 25).⁴ 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 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,

⁴ 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 (9th Cir. 1961) (evidence of subsequent design changes allowed to show safeguards were previously feasible); *Powers v. J.B. Michael & Co.*, 329 F.2d 674 (6th 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, 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 USA⁵ 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." (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

⁵ 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).⁶

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*

⁶ 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 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.:

03-CV-910A (W.D.N.Y. Oct. 12, 2004) (stipulated final order) (holding fulfillment company liable for its role in marketing of deceptively advertised weight loss products).

IV. ISELY BENEFITTED FROM THE FULFILLMENT OF ORDERS FOR RAAX11 OFF THE WEBSITE WWW.AGARICUS.NET

Contrary to his trial testimony, Respondent Isely testified in his deposition that he not only fulfilled the two “drop shipments” for the orders made through www.agaricus.net by the FTC, but that he filled such orders for other customers who purchased from the website. (JX 12 (Isely, Dep.) at 63-66; 69-72; CCR ¶ 60). Respondent Isely testified he routinely made the drop shipments not only as a good faith gesture for Takesun, but also because he was making a profit on the products he able to buy from Takesun. (Isely, Tr. 287; *See also* JX 12 (Isely, Dep.) at 61-63). Despite his assertions to the contrary, Respondent Isely benefitted from the fulfillment of sales of RAAX11 through the website www.agaricus.net. Indeed, Respondents took these drop shipments as an opportunity to solicit potential customers to purchase RAAX11 and other products directly from Respondents. (CCR ¶ 48; JX 57; JX 73). Included with each order he fulfilled from www.agaricus.net, Respondent Isely would send an invoice, a brochure, and promotional materials that directed consumers to buy directly from Respondents in the future. (CCPF ¶¶ 57, 87, 89; Liggins, Tr. 88-89; Isely, Tr. 215, 287-288; JX 12 (Isely, Dep.) at 60-61, 88-89, Ex. 6; JX 56; JX 57; JX 73).

V. THE PROPOSED ORDER IS APPROPRIATE RELIEF

The proposed order attached to the Commission’s Complaint is the appropriate relief against Respondents, despite Respondents’ assertions that they made dramatic changes to the www.agaricus.net website and that Gemtronics, Inc. is an inactive corporation. (CCR ¶ JX 67, p. 3).

A. Cessation of a Deceptive Practice Is Not a Defense to a Violation of the FTC Act or a Bar to an Appropriate Remedy

The Courts and the Commission have held that voluntary cessation of a deceptive practice is not a defense to a violation of the FTC Act nor a bar to an appropriate remedy. *In re American Home Products Corp.*, 98 F.T.C. 136, 406 (1981) (voluntary cessation of an advertising campaign not a defense to a Section 5 action); *Fedders Corp. v. F.T.C.*, 529 F.2d 1398, 1403 (2d Cir.), *cert denied*, 429 U.S. 818 (1976) (that Respondents “may have discontinued the offending practice before the Commission issued the complaint in this case, however, does not bar a cease-and-desist order where the public interest otherwise requires it.”); *see also Guaranty Veterinary Co. v. F.T.C.*, 285 F. 853 (1992); *American Medical Ass’n v. F.T.C.*, 1980-2 (CCH) TRADE CAS. ¶ 63,569 at 77,028 (2nd Cir.) (1980); *Giant Food Inc. v. F.T.C.*, 322 F.2d 977 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 967 (1964).

B. The proposed order is appropriate against Respondents

The proposed order is appropriate against Respondents and in the public interest. Even if the offensive conduct has ceased, the FTC has the authority to impose an appropriate remedy where the public interest so requires. *In re American Home Products Corp.*, 98 F.T.C. 136, 406 (1981). Furthermore, had Respondents dissolved the corporation, dismissal of Respondent Gemtronics, Inc. may have been appropriate. (*See Galter v. F.T.C.*, 186 F.2d 810 (1951) (refusing to apply a remedy against a dissolved corporation despite statutory authority extending corporate liability two years after dissolution.) However, Respondents have not dissolved Gemtronics, Inc. (Isely, Tr. 205, 213, 324; JX 12 (Isely, Dep.) at 17-18). Further, Respondent Isely obtained a corporate credit card for Gemtronics, Inc. (Isely, Tr. 223). Although Respondent Gemtronics practices may have ceased, nothing prevents Respondent Isely from

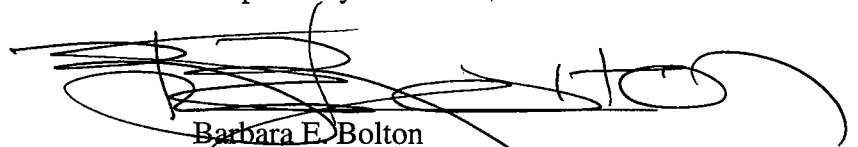
using the corporation to deceptively advertise its products. The proposed order is therefore appropriate against both Respondent Gemtronics, Inc. and Respondent Isely.

VI. CONCLUSION

The evidence in the record demonstrated that Respondents violated Sections 5 and 12 of the FTC Act by making false and unsubstantiated claims on the website www.agaricus.net that RAAX11 is effective in preventing, treating, or curing various types of cancer and that these claims are proven by reliable scientific evidence. Complaint Counsel requests that this Court issue the proposed order attached to the Commission's Complaint.

Dated: August 4, 2009

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Barbara E. Bolton', is written over the typed name and title.

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TAB 2

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1. The Complaint in this matter issued on September 18, 2008. (JX-7; Complaint date found at www.ftc.gov _____).

Complaint Counsel's Response to Respondents' Proposed Finding No. 1:

Complaint Counsel has no specific response to this proposed finding.

2. Respondents filed their Answer on October 10, 2008. (JX 8; Answer date found at www.ftc.gov _____).

Complaint Counsel's Response to Respondents' Proposed Finding No. 2:

Complaint Counsel has no specific response to this proposed finding.

3. An initial Scheduling Order was issued by Administrative Law Judge D. Michael Chappell on October 28, 2008.

Complaint Counsel's Response to Respondents' Proposed Finding No. 3:

Complaint Counsel has no specific response to this proposed finding.

4. Trial commenced in this matter pursuant to 16 C.F.R. § 3.41 on June 24, 2009.

Complaint Counsel's Response to Respondents' Proposed Finding No. 4:

Complaint Counsel has no specific response to this proposed finding.

5. The last day in which testimony was received was June 25, 2009.

Complaint Counsel's Response to Respondents' Proposed Finding No. 5:

Complaint Counsel has no specific response to this proposed finding.

6. Oral arguments are scheduled to occur on July 30, 2009, according to an Order issued by Administrative Law Judge D. Michael Chappell.

Complaint Counsel's Response to Respondents' Proposed Finding No. 6:

Complaint Counsel has no specific response to this proposed finding.

7. Isely entered the retail vitamin supplement business in 1993, and during the same year registered the assumed name "Gemtronis" [sic] in the state of North Carolina for the purpose of collecting sales tax. (Isely, Tr. 181).

Complaint Counsel's Response to Respondents' Proposed Finding No. 7:

Complaint Counsel has no specific response to this proposed finding.

8. Isely learned of Takesun do Brasil and contacted it through the subject website agaricus.net (Isely, Tr. 183). Isley [sic] began doing business with Takesun do Barsil [sic] in the year 2000. (Isely, Tr. 182).

Complaint Counsel's Response to Respondents' Proposed Finding No. 8:

Complaint Counsel has no specific response to this proposed finding.

9. Isely dealt with Mr. George Otto Kather [a/k/a George Otto] when he did business with Takesun do Brasil. (Isely, Tr. 184). Isley's [sic] purchases from G. Otto were wholesale cash transactions and were placed by Isely through e-mails. (Isely, Tr. 201). Isley [sic] would receive invoices from Takesun do Brasil from the products he ordered. (Isely, Tr. 225, 337; JX 69).

Complaint Counsel's Response to Respondents' Proposed Finding No. 9:

Complaint Counsel adds the following explanatory facts to this proposed finding: In 2000, Respondent Isely began purchasing dietary supplements wholesale from Takesun do Brasil ("Takesun"). (CCPF ¶ 5) Until some point in 2008, Respondent Isely had a profitable business relationship with Takesun; purchasing \$5,000 to \$8,000 per month of various dietary

supplements for import into the United States and resale to consumers. (CCPF ¶ 76). Each order that Respondent Isely placed would require multiple emails to Takesun to coordinate the shipments. (CCPF ¶ 77). Respondent Isely did not import products from any company other than Takesun. (CCPF ¶ 78). He registered his home as an FDA warehouse to receive and store Takesun products. (CCPF ¶ 78). Further, to highlight his business association with Takesun, Respondent Isely also did business under the dba "Takesun USA." (CCPF ¶ 82; Complaint Counsel's Response to Respondents' Proposed Finding No. 11 ("CCR ¶ ___")). He prominently displayed the name Takesun USA in a brochure that he created and mailed to consumers to advertise RAAX11 and included in product shipments to customers so that they would recognize his affiliation with Takesun. (CCPF ¶¶ 57, 82). Takesun USA was also the business name that Respondent Isely used in his Distributor Introductory Package for his wholesale business in which he sought to sign up distributors to sell Takesun products, such as RAAX11. (CCPF ¶ 84). Both Respondents' brochure and the Distributor Introductory Package advertised the website www.agaricus.net. (CCPF ¶¶ 57, 89).

10. In 2003, Isely applied for and registered an FDA approved warehouse under the Homeland Security Act which required importers to register their facilities. (Isely, Tr. 202). Beginning in 2004, Isley [sic] ordered and purchased RAAX11 for the first time from Takesun do Brasil and Isely's first sale of RAAX11 was in September of 2004. (Isely, Tr. 182, 207).

Complaint Counsel's Response to Respondents' Proposed Finding No. 10:

Complaint Counsel adds the following explanatory facts to this proposed finding: In 2004, Respondent Isely began to offer for sale and sell the Takesun product, RAAX11, to consumers and importing RAAX11 from Takesun about every four months. (CCPF ¶ 11). In 2004, Respondent Isely sold 19 bottles of RAAX11 at the price of \$400 per bottle. (CCPF ¶ 12).

Based on Respondents' proposed finding No. 10, in addition to other evidence in the record, Respondents, therefore, would have sold 19 bottles of RAAX11 at \$400 per bottle from September through December 2004. (CCR ¶ 10).

11. By way of background, in 2001, Isley [sic] and another individual formed a partnership under the name Takesun USA which was designed to import herbal products. (Isely, Tr. 204). The partnership dissolved after approximately eight months. (Isely, Tr. 204). Isley [sic] did not do business under the name Takesun USA at a time when RAAX11 was available to the public. (Isely, Tr. 259).

Response to Respondents' Proposed Finding No. 11:

Complaint Counsel disputes this proposed finding as contrary to the evidence in the record. Respondent Isely continued to do business under the name Takesun USA well into 2008. (CCR ¶¶ 9, 11). Respondent Isely advertised RAAX11 in his Takesun USA brochure that he created and included in the FTC's undercover RAAX11 purchase fulfilled by Respondents in late January 2008 (CCPF ¶¶ 55-57; JX. 12 (Isely, Dep.) at 18, 60-61, 66-68, 75-77; JX 57-58). Takesun USA was also used in Respondent Isely's Distributor Introductory Package sent to potential distributors in which he identified himself as the General Manager of Takesun USA. (JX 73 at p. 1). Both Respondents' brochure and the Distributor Introductory Package advertised the website www.agaricus.net. (CCPF ¶¶ 57, 89; JX 57-58; JX 73). Despite Respondent Isely's trial testimony that he stopped recruiting distributors in 2003 before the sale of RAAX11, the Takesun USA Distributor Introductory Package contains a price list that includes prices for RAAX11 dated October 1, 2007. (Isely, Tr. 215; JX 73 at p. 4). In addition, in his deposition, Isely testified that he sold RAAX11 wholesale. (JX. 12 (Isely, Dep.) at 86-87). Further, the Takesun USA Distributor Introductory Package directs consumers to the website www.Takesun.com, another domain name registered to Isely, which solicited distributors for

Respondents as late as December 20, 2007 and April 18, 2008. (Liggins, Tr. 71-72; JX 20; JX 21; JX 73 at p. 6). Respondent Isely fulfilled an FTC undercover purchase of RAAX11 made through the www.agaricus.net website and included in the package of RAAX11 an invoice dated January 10, 2008, that identified William Isely as the General Manager of Takesun USA. (CCPF ¶¶ 55-57; JX 48). In fact, Respondent Isely directly contradicts the testimony proffered in Respondents' proposed finding by testifying at trial that he did keep using the name Takesun USA during the time when RAAX11 was available to the public. (Isely, Tr. 287-88).

12. Isely sold his products over the telephone and through e-mails. (Isely, Tr. 187). The most common sales method was over the telephone where Isely's customers would provide their credit card number and Isely would charge it at his home. (Isely, Tr. 217, 282). Isely opened and utilized a PayPal account for the sole purpose of receiving funds from G. Otto on the occasion that G. Otto would refund funds overpaid by Isely for wholesale product shipments ordered by Isely from G. Otto. (Isely, Tr. 219-20).

Complaint Counsel's Response to Respondents' Proposed Finding No. 12:

Complaint Counsel disputes portions of this proposed finding as contrary to the evidence in the record. Starting in at least 2004, Respondent Isely was operating a business from his residence that advertised and sold dietary supplements to consumers nationwide through mail order, telephone, the Internet. (CCPF ¶ 3). Respondents used a number of Internet websites to sell RAAX11, such as www.agaricus.net, www.our-agaricus.com, and www.our-agaricus.us. (CCPF ¶ 72; Isely, Tr. 193-94, 264, 275, 282-84, 296-97, 364; JX. 12 (Isely, Dep.) at 26-28, 34-36, 42-46, 70). The Internet website www.agaricus.net advertised Respondents as the only source for RAAX11 in the United States and instructed consumers to call Respondent Isely personally and/or through telephone numbers belonging to Respondent Isely for purchasing RAAX11 or for information about the product. (CCPF ¶ 38). The website also indicated that

credit card payments for orders on the website would be made directly to Gemtronics or to Takesun USA. (CCPF ¶¶ 39). Isely admitted that he would receive payment when consumers purchased RAAX11 by credit card through the website www.agaricus.net (CCPF ¶ 72). While Respondents fulfilled orders for RAAX11 over the telephone, Respondent Isely testified that he did not know from which website consumers got his telephone number. (CCR ¶ 58; JX. 12 (Isely, Dep.) at 35-40, 46, 55). Further, Respondent Isely did not keep records concerning how he got his sales. (JX. 12 (Isely, Dep.) at 41-42, 46). Respondents also advertised and sold RAAX11 through their brochure disseminated to consumers which advertised the website www.agaricus.net. (Liggins, Tr. 89-90, 146-47; Isely, Tr. 294-96, 356-58; JX. 12 (Isely, Dep.) at 18, 34; JX 57-58). The FTC twice purchased RAAX11 through the website www.agaricus.net and both orders were fulfilled by Respondents. (CCPF ¶¶ 52-57; JX 43-60).

13. Because Isely was a wholesale customer of Takesun do Brasil, G. Otto provided and registered a website for Isley [sic] at no cost. (Isely, Tr. 188-89). The web site was www.our-agaricus.com. (Isely, Tr. 193). Isely did not give G. Otto permission to use Isely as the contact person for the website and did not know he was the same until informed by Complaint Counsel. (Isely, Tr. 247-48).

Complaint Counsel's Response to Respondents' Proposed Finding No. 13:

Complaint Counsel disputes this finding as contrary to the evidence in the record. Respondent Isely testified that he had authorized at least two websites to be registered in his name at his address: www.our-agaricus.com, and www.our-agaricus.us. (CCPF ¶ 64; JX. 12 (Isely, Dep.) at 26-28, 34-36, 42-46). Based on correspondence Respondent Isely received at his home from domain registration companies regarding domain renewal notices and annual website search engine listings, Respondent Isely knew that www.agaricus.net and other website domain names were also registered in his name at his address, but he did nothing to remove his name

from these registrations. (CCPF ¶¶ 63-65). Respondent Isely authorized the dissemination of his name, telephone numbers, personal information, and health history on the website www.agaricus.net and testified that he had knowledge of this dissemination. (CCR ¶ 18; CCPF ¶ 69). However, Respondent Isely did not revoke the authority to disseminate his personal and contact information on the website until late March 2008, after he received the FTC's notice of proposed law violations. (CCPF ¶ 69).

14. Isely had a shopping cart on our-agaricus.com and it was a USA-only website. (Isely, Tr. 193). The shopping cart on our-agaricus.com was a separate shopping cart from George Otto's shopping cart. (Isely, Tr. 193). The first time Isley [sic] sold RAAX11 through our-agaricus.com [sic] was in September, 2004. (Isely, Tr. 194).

Complaint Counsel's Response to Respondents' Proposed Finding No. 14:

Complaint Counsel disputes portions of this finding as contrary to the evidence in the record. Despite Respondent Isely's trial testimony that the first purchase of RAAX11 was made from him in September 2004, he does not recall whether the sale was made through the internet or by telephone. (Isely, Tr. 194). As the evidence shows, the Internet website www.agaricus.net advertised Respondents for sales in the United States in 2004, directing consumers to call Respondent Isely personally and/or telephone numbers belonging to Respondents for product ordering or information. (JX 35; JX 39; CCPF ¶¶ 40-46). When consumers would call Respondents to order RAAX11 over the telephone, Respondent Isely testified that he did not know from which website consumers got his telephone number. (JX. 12 (Isely, Dep.) at 35-40; Isely, Tr. 187, 199). Further, Respondent Isely did not keep records concerning how he got his sales. (JX. 12 (Isely, Dep.) at 41-42, 46).

Complaint Counsel adds the following facts to this proposed finding: In 2004, Respondent Isely sold 19 bottles of RAAX11 at the price of \$400 per bottle. (CCPF ¶ 12). Based on Respondents' proposed finding No. 10, in addition to other evidence in the record, Respondents, therefore, would have sold 19 bottles of RAAX11 at \$400 per bottle from September through December 2004.

15. When Isely sold products through the internet, the purchases were made through our-agaricus.com, not agaricus.net. (Isely, Tr. 232). In an effort to offer products at competitive prices, Isely would occasionally visit agaricus.net to determine the price of products being sold through agaricus.net.

Complaint Counsel's Response to Respondents' Proposed Finding No. 15:

Complaint Counsel disputes portions of this finding as contrary to the evidence in the record. Since 2004, Respondent Isely and, since 2006, Respondent Gemtronics have advertised and sold the dietary supplement RAAX11 to consumers nationwide through telephone and Internet websites, including, *inter alia*, the website www.agaricus.net. (CCPF ¶ 14). Respondent Isely admitted fulfilling orders for RAAX11 made through the website www.agaricus.net. (CCPF ¶¶ 61, 62, 72; JX. 12 (Isely, Dep.) at 69-70; *see also* CCPF ¶ 52 (regarding respondent Gemtronics)). Respondent Isely admitted that he frequently went to the home page of www.agaricus.net and navigated to the website's sales pages to check its prices for RAAX11. (Isely, Tr. 233-37; JX 12 (Isely, Dep.) at 54, 66-67).

16. Isley [sic] had webpages on the website agaicus.net [sic], but only before the product RAAX11 was being sold. (Isely, Tr. 197). The web site our-agaricus.net is not the subject of the Complaint and is not identified in the Complaint. (JX 7).

Complaint Counsel's Response to Respondents' Proposed Finding No. 16:

Complaint Counsel has no specific response to this proposed finding.

17. No orders made by customers through our-agaricus.com came directly to Isley [sic] . (Isely, Tr. 351). All orders went through G. Otto. (Isely, Tr. 351). Whether a customer purchased products from agaricus.net or our-agaricus.com to purchase, the order never went to Isely, it went to George Otto. (Isely, Tr. 350-51).

Complaint Counsel's Response to Respondents' Proposed Finding No. 17:

Complaint Counsel adds the following explanatory fact to this proposed finding:

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). The FTCs two undercover orders of RAAX11 made on the website www.agaricus.net were fulfilled by Respondents. (CCPF ¶¶ 53-56). Respondents would regularly fulfill such orders from the agaricus.net website. (JX 12 (Isely, Dep.) at 63-66; 69-72). The packages of RAAX11 received by the FTC included Respondents brochure, and invoices indicating that payment had been made to Respondents. (CCPF ¶ 55, 57). Further, if all orders for RAAX11 made via www.agaricus.net and other websites had to go first through Takesun, when Respondents fulfilled these orders, they would not know from which website the orders were made. (CCR ¶ 58; Isely, Tr. 292, 350-52).

18. After consuming herbal products to treat his own cancer, Isley [sic] gave G. Otto permission to use Isley's [sic] testimonial with respect to consuming herbal products from G. Otto. (Isely, Tr. 260-62, 269). However, Isely's personal use of herbal products did not include the use of RAAX11 and RAAX11 was not available during the time period Isely gave G. Otto permission to use Isley's [sic] testimonial. (Isely, Tr. 260-62, 269).

Complaint Counsel's Response to Respondents' Proposed Finding No. 18:

Complaint Counsel disputes portions of this finding as contrary to the evidence in the record. Respondent Isely authorized the dissemination of his name, telephone numbers, personal information, and health history on the website www.agaricus.net. (CCPF ¶ 69). He

testified that he had knowledge of this dissemination. (CCPF ¶ 69). In addition, Respondent Isely testified that he received consumer calls in response to the website's deceptive solicitation to consumers to call Mr. Isely about participating in a medical study of RAAX11 in the United States and that he knew there was no such study and that this claim was a just a "sales ploy." (Isely, Tr. 271-72; JX 12 (Isely, Dep.) at 57, 69). Further, Respondent Isely testified that he would check the homepage of www.agaricus.net and navigated to the website's 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, the www.agaricus.net homepages advertising RAAX11 contained statements such as "RAAX11 helps many people. Prostate cancer patient now cancer free. Call Bill at . . . to know more details" and that these homepages listed Respondents' telephone numbers only. (JX 25; JX 28; JX 29; JX 31; JX 34; JX 40). Yet, despite his knowledge, Respondent Isely did not revoke the authority to disseminate his personal and contact information on the website until late March 2008, after he received the FTC's notice of proposed law violations. (CCPF ¶ 69; Isely, Tr. 309-12; JX 64).

19. Isely learned that his likeness and telephone number was on [agaricus.net](http://www.agaricus.net) only after he was contacted by telephone from Complaint Counsel prior to the date the Complaint was issued. (Isely, Tr. 199). Isely testified that he was unaware and did not know why George Otto was putting Isely's cell phone number and toll-free number on [agaricus.net](http://www.agaricus.net). (Isely, Tr. 353).

Complaint Counsel's Response to Respondents' Proposed Finding No. 19:

Complaint Counsel disputes this finding as contrary to the evidence in the record. Respondent Isely's testimony directly contradicts Respondents' Proposed Finding No. 19. Indeed, Respondent Isely testified that he was aware of the use of his name, telephone numbers, personal

information, and health history on the website www.agaricus.net. (CCR ¶ 18; CCPF ¶ 69; Isely, Tr. 262-63; JX 29). Further, the evidentiary record is replete with examples demonstrating that Respondent Isely had actual knowledge of the use of his name, telephone numbers, personal information, and health history on the website www.agaricus.net or that he had a reckless indifference to or an intentional avoidance of the truth regarding these representations. (CCR ¶ 18).

20. Isely was not aware that he was identified as the registrant, administrative contact, technical contact and zone contact for agaricus.net until he was informed by Complaint Counsel prior to the issuance of the Complaint. (Isely, Tr. 241-43; JX 16).

Complaint Counsel's Response to Respondents' Proposed Finding No. 20:

Complaint Counsel disputes this finding as contrary to the evidence in the record.

Respondent Isely's testimony directly contradicts Respondents' proposed finding No. 20.

Respondent Isely testified 1) that he received notice that the domain name "agaricus.net" as well as other domain names were registered in his name and at his home address through domain renewal notices and annual website search engine listings mailed to his home; and 2) that he ignored these notices. (CCPF ¶¶ 63, 65).

21. It is noteworthy that the homepage for agaricus.net contained what appeared to be an international phone number with which an individual could order products from agaricus.net. (Liggins, Tr. 106-07). When Isely was informed by Complaint Counsel that his name was being used without his permission, he emailed G. Otto demanding that G. Otto remove any reference to Isley [sic] on any webpages of agaricus.net and as the contact person for agaricus.net. (Isely, Tr. 327-29; JX 70; JX 71; JX 72).

Complaint Counsel's Response to Respondents' Proposed Finding No. 21:

Complaint Counsel adds the following explanatory facts to this proposed finding and disputes portions of this finding as contrary to the evidence. The only contact telephone number

in the United States on the www.agaricus.net website belonged to Respondent Isely. (CCPF ¶¶ 38-51). Moreover, Respondent Isely testified that international calls by consumers on the web were quite rare. (JX 12 (Isely, Dep.) at 38-39). Respondent Isely's testimony is full of statements that his dietary supplement business was profitable. (CCPF ¶¶ 75, 76). Indeed, his sales of RAAX11 alone, over the four year period from 2004 through 2008 were well over \$100,000. (CCPF ¶ 12). Respondent Isely testified that he had knowledge of the use of his name, telephone numbers, personal information, and health history on the website www.agaricus.net before the FTC sent him notice of this fact and that he had not previously acted to remove this information from the website. (CCR ¶¶ 18, 19; JX 29). Respondent Isely also testified that he had knowledge of the use of his name and address on the domain registration for the domain name "agaricus.net" before the FTC sent him notice of this fact and that he had not previously acted to remove this information from the domain registration. (CCR ¶ 20; CCPF ¶¶ 63, 65).

22. Isely's [sic] name and contact information appears on the webpage advertisements from agaricus.net which are the subject of this case and attached as Exhibits "A" and "C" to the Complaint. (JX 7, at Exs. A and C). Isely did not give G. Otto permission to use his name, contact information or any likeness or representation appearing to originate from Isely on the webpages attached as Exhibits "A" and "C" to the Complaint. (Isely, Tr. 266-69, 271; JX 7, at Exs. A and C).

Complaint Counsel's Response to Respondents' Proposed Finding No. 22:

See Complaint Counsel's Responses, *supra*. (CCR ¶¶ 18, 19).

23. 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).

Complaint Counsel's Response to Respondents' Proposed Finding No. 23:

Per JX 64, the FTC's letter to Respondents dated March 25, 2008, the proposed complaint and a proposed settlement proffered were for filing in a "federal district court." (JX 64).

Therefore, contrary to Respondents' Proposed Finding No. 23, the complaint was not the complaint filed in this instant administrative matter.

24. 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).

Complaint Counsel's Response to Respondents' Proposed Finding No. 24:

Complaint Counsel disputes this finding as contrary to the evidence in the record. First, Complaint Counsel's proposed federal district court complaint and stipulated order are not in evidence in this matter. Secondly, Complaint Counsel states that neither the proposed district court stipulated order or the proposed Order that Complaint Counsel seeks to have entered in this administrative litigation refer to or otherwise mention www.agaricus.net. Regarding Respondents' letter and the attachments: the first attachment to Respondents' letter is an undated letter from Pablo Velasco, TierraNet Customer Service Supervisor, DomainDiscover ("Velasco Letter"), which confirms who is the registrant for the domain name "agaricus.net" as last updated on April 15, 2008. (JX 66, p. 3). The second attachment is an email from Yan Ashton, Support@DuoServers.com ("Ashton email"), dated April 30, 2008, stating that "Georg [sic] Kather" is paying for the hosting services and is therefore, responsible for the content. (JX 66, p. 4). The Ashton email further states:

If whomever is concerned wishes to have the website shut-down they should send all relative information to abuse@probersupport.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).

In light of the assertions in Respondents' letter that Respondent Isely had taken steps to remove his name from the domain registry and website, neither of these documents supports Respondents' proposition that, prior to the time these attachments were written, that Respondents were not the owners or did not have the ability to control the content disseminated through this website. (JX 66, pp. 3, 4) In fact, this evidence would appear to demonstrate, as per Respondents' letter, that Respondents took active steps to remove Respondent Isely's name from the domain registration and website content after receiving notification from the FTC and FDA of potential law violations. (JX. 64, JX 65, JX 66). Further, as noted *supra*, Respondents already had knowledge of the domain registration in Respondent Isely's name and website's content listing Respondent Isely's name and telephone numbers before the FTC and FDA letters, and had taken no action to have his name and information removed prior to this time. (CCR ¶¶ 18-19).

25. Enclosed with the Respondents' Counsel's May 6, 2008, letter to Complaint Counsel was a document provided by DomainDiscovery [sic], 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 [sic] 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).

Complaint Counsel's Response to Respondents' Proposed Finding No. 25:

The evidence cited does not support the proposition that Respondents did not own or have the ability to control the content of www.agaricus.net. First, the undated Velasco Letter

(DomainDiscover) does nothing more than state the owner and registrant information for the domain “agaricus.net” as of April 15, 2008 (JX 66), three weeks after Respondents received the FTC warning letter. (JX 64). This document provides no evidence of who was listed as owner and registrant prior to April 15, 2008. (JX 66, CCR ¶ 24).

After receiving a warning letter from the FTC (JX 64), Respondents had 1) Respondent Isely’s name and address removed from the domain registration; 2) Respondent Isely’s name taken off of the website; and 3) the website cease sales of RAAX11 in the United States. (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 provides evidence that, in fact, Respondents exercised some degree of ownership and control over the website, or at the very least, could have feasibly taken precautionary measures prior to the FTC’s notice, to have his name removed from the domain registration and website. *See, e.g., Powers v. J.B. Michael & Co.*, 329 F.2d 674 (6th Cir. 1964) (defendant’s post accident, posting of signs allowed to show evidence of control over portion of road in question); *Boeing Airplane Co. v. Brown*, 291 F.2d 310 (9th Cir. 1961) (evidence of subsequent design changes allowed to show safeguards were previously feasible).

26. Respondents’ Counsel’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).

Complaint Counsel's Response to Respondents' Proposed Finding No. 26:

The evidence cited does not support the Respondents' proposed finding No. 26. These propositions have been responded to in CCR ¶¶ 13, 15, 18-21, 23-25.

27. Despite possessing this information from DomainDiscovery [sic] 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 [sic] 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).

Complaint Counsel's Response to Respondents' Proposed Finding No. 27:

The evidence cited does not support the Respondents' proposed finding No. 27. These propositions have been responded to in CCR ¶¶ 13, 15, 18-21, 23-25.

28. Complaint Counsel never instructed investigator Liggins to conduct a comprehensive investigation into the foreign corporate entity or G. Otto. (Liggins, Tr. 161).

Complaint Counsel's Response to Respondents' Proposed Finding No. 28:

Complaint Counsel has no specific response to this proposed finding other than to refer to the transcript of Investigator Liggins. (Liggins, Tr. 177-78).

29. 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).

Complaint Counsel's Response to Respondents' Proposed Finding No. 29:

Complaint Counsel has no specific response.

30. 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's Response to Respondents' Proposed Finding No. 30:

Complaint Counsel has no specific response other than to state that Respondents' proposed finding is without merit and not supported by the record.

31. In support of the charge that Isely disseminated deceptive advertisements through [agaricus.net](http://www.agaricus.net), Complaint Counsel offered the testimony of Inspector Michael Liggins. 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](http://www.agaricus.net). (Liggins, Tr. 115; JX 16).

Complaint Counsel's Response to Respondents' Proposed Finding No. 31:

Complaint Counsel has no specific response.

32. 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](http://www.agaricus.net). (Liggins, Tr. 115; JX 16).

Complaint Counsel's Response to Respondents' Proposed Finding No. 32:

Complaint Counsel has no specific response other than CCR ¶ 33.

33. 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).

Complaint Counsel's Response to Respondents' Proposed Finding No. 33:

The WHOIS search results indicate not only that Respondent Isely was the registrant for the domain agaricus.net, but also the administrative, technical and zone contact. (CCPF ¶ 13). The WHOIS search results also provided Respondent Isely’s address and phone number. (JX 16; JX 17). The address for George Otto is listed as the same as that for Respondent Isely: Franklin, North Carolina. (JX 16; JX 17). The WHOIS search results revealed that the only email provided as the contact person for the domain name agaricus.net was a takesun.com email address. (JX 16; JX 17). However, the takesun.com domain name was also registered to Respondent Isely. (JX 20). The WHOIS search results of takesun.com provided only Respondent Isely’s address as the means to contact the domain registrant. (JX 20). No contact email address was provided on this registration. (JX 20). As discussed at length, *supra*, Respondent Isely had knowledge that he was the registrant and contact person for the agaricus.net domain registration (CCR ¶ 19; CCPF ¶ 65).

34. 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).

Complaint Counsel's Response to Respondents' Proposed Finding No. 34:

Complaint Counsel disputes this finding as contrary to the evidence in the record. Investigator Liggins testified that an individual with a pin number or password would have

access to control the content of a website, but did not testify that only those with such pin number would be able to control the contents of the site. (Liggins, Tr. 108). As Respondent Isely himself admitted, one may have the ability to control the content of a website without direct access to site's technical features. (Isely, Tr. 254-55, 352; JX 12 (Isely, Dep.) at 79-80). Further, Respondent Isely was able to exercise control over the www.agaricus.net website through his acts taken after he received the FTC's letter in March 2008 (CCPF ¶ 67; JX 9 (Isely Ints.) # 13, JX 64; JX 67, p. 3 JX 70).

35. The WHOIS search results for agarcus.net identified Isley [sic] as the "Registrant" of agarcus.net, but this is no indication that Isely possessed the PIN number which would allow someone to control the content of agarcus.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).

Complaint Counsel's Response to Respondents' Proposed Finding No. 35:

Complaint Counsel has no specific response to this proposed finding other than CCR ¶¶ 33-34.

36. Mr. Liggins also agreed that the representative of DomainDiscovery [sic] testified that Isely was not the owner of agarcus.net. (Liggins, Tr. 133). It is noteworthy that the Complaint alleges agarcus.net is the only website alleged to be an offending website. (Liggins, Tr. 131).

Complaint Counsel's Response to Respondents' Proposed Finding No. 36:

Complaint Counsel disputes this finding as contrary to the evidence in the record. Respondents' proposed finding No. 36 mischaracterizes the record. Respondents' counsel attempted to solicit testimony from Investigator Liggins regarding the meaning of statements in the deposition transcript of Mr. Velasco, the representative of Domain Discover. Mr. Velasco

only testified as to who was listed as the owner of the agaricus.net domain registration as of April 15, 2008, and not who was the owner prior to that date. (CCR ¶ 25).

37. Pablos [sic] 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).

Complaint Counsel's Response to Respondents' Proposed Finding No. 37:

Complaint Counsel has no specific response to this proposed finding.

38. Velasco further testified that “[t]he legal owner, as it appears on our [DomainDiscovery] [sic] 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).

Complaint Counsel's Response to Respondents' Proposed Finding No. 38:

Complaint Counsel has no specific response to this proposed finding.

39. 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).

Complaint Counsel's Response to Respondents' Proposed Finding No. 39:

Complaint Counsel has no specific response to this proposed finding.

40. 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).

Complaint Counsel's Response to Respondents' Proposed Finding No. 40:

Complaint Counsel disputes this proposed finding as contrary to the evidence in the record. Mr. Velasco did not testify to any proposition other than the registrant, owner, and

contact information for the domain name agaricus.net after March of 2008. Mr. Velasco testified that George Otto was listed as the administrative contact as of April 29, 2008. (JX 4 (Velasco, Dep.) at 10). However, Velasco testified that the administrative contact information for the domain name agaricus.net changed in March 28, 2008, three days after the FTC sent a warning letter to Isely. (JX 4 (Velasco, Dep.) at 11; JX 64). Mr. Velasco testified that he had no way of knowing who exactly had the user name and password, 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).

41. 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).

Complaint Counsel's Response to Respondents' Proposed Finding No. 41:

Complaint Counsel disputes this proposed finding as contrary to the evidence in the record. The evidence cited in Respondents proposed finding does not confirm or otherwise support the proposition that Respondent Isely's name was used without his permission. This testimony supports only the proposition that it is possible for a person to publicly register another person as the administrative, technical and billing and /or zone contact of a domain name.

42. 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).

Complaint Counsel's Response to Respondents' Proposed Finding No. 42:

Complaint Counsel disputes this proposed finding as contrary to the evidence in the record. The testimony of Mr. Velasco does not confirm or otherwise support Respondents' proposed finding No. 42. (CCR ¶¶ 24, 25, 36, 40).

43. 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 [sic] responding to a complaint by Isley [sic] to G. Otto that Isley's [sic] name and contact information had been used without his permission by G. Otto. (JX 70, 71, 72).

Complaint Counsel's Response to Respondents' Proposed Finding No. 43:

Complaint Counsel has no specific response to this proposed finding.

44. 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 [sic] [DomainDiscovery] [sic] 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] [sic] to send an official letter to my lawyer..." (JX 72).

Complaint Counsel's Response to Respondents' Proposed Finding No. 44:

Complaint Counsel has no specific response to this proposed finding..

45. George Otto responded to Isley [sic] 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 [sic]. (JX 70, 71; RX 4).

Complaint Counsel's Response to Respondents' Proposed Finding No. 45:

Complaint Counsel notes that JX 70, the email from George Otto to Mr. Isely suggests that the domain registration information was previously input with the agreement of Respondent Isely: "we did this during the registration of our-agaricus.net" and that "no further webpage is in your name registered." (JX 70).

46. 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 accuracy warning on the WHOIS search result. (Liggins, Tr. 110; JX 16). Neither inspector Liggins or Complaint Counsel took any steps to contact the domain registrar Domain Discovery [sic]. (Liggins, Tr. 110; JX 16).

Complaint Counsel's Response to Respondents' Proposed Finding No. 46:

Both the FDA and the FTC sent notice letters to Respondents of potential law violations for website claims for www.agaricus.net. (JX 64; JX 65) In fact the FDA's letter listed another website in addition to www.agaricus.net as also containing claims that may violate the law. (JX 65).

47. The purchases of RAAX11 conducted by FTC agent Liggins were drop shipment sales consummated by G. Otto through agaricus.net. (Isely, Tr. 195). After the FTC purchases were

made from G. Otto, G. Otto asked Isely to ship the single bottles purchases of RAAX11 product and Isley [sic] mailed the bottles of RAAX11. (Isely, Tr. 195-96).

Complaint Counsel's Response to Respondents' Proposed Finding No. 47:

Complaint Counsel disputes this finding of fact insofar as it suggests Isely's only involvement with the fulfillment of the FTC undercover purchases was to mail the bottles of RAAX11. (See CCR ¶¶ 11, 12, 17, 60).

48. Isely did not sell the product RAAX11 on the website www.agaricus.net. (Isely, Tr. 197). Isley [sic] did not receive any money for the FTC purchases and mailed the single bottle orders of RAAX11 as a favor for Takesun do Brasil. (Isely, Tr. 286-87, 292).

Complaint Counsel's Response to Respondents' Proposed Finding No. 48:

Complaint Counsel disputes this proposed finding as contrary to the evidence in the record. (See CCR ¶¶ 11, 12, 14, 15, 17, 21; CCPF ¶ 72). Furthermore, a shopping cart webpage for "USA & Asia" on www.agaricus.net, dated December 13, 2007, selling RAAX11 and other products, gives only Respondents' telephone number for telephone orders. (Liggins, Tr. 55-56; JX 26). Other webpages on www.agaricus.net provide only Respondents' telephone number for ordering RAAX11 in the United States or indicate that credit card charges will go to Respondents. (CCPF ¶¶ 38-51, 72; JX 27; JX 30; JX 33-34; JX 39). Respondents admit that they would receive payment for credit card purchases of RAAX11 made through the internet website www.agaricus.net. (CCR ¶¶ 12, 17; CCPF ¶ 72).

Answering further, when Respondent Isely fulfilled orders for customers who placed their order on the www.agaricus.net website, he used this opportunity to solicit new business and sent these customers invoices and other documentation instructing them to buy RAAX11 directly from him by phone in future transactions. (CCPF ¶ 87; Liggins, Tr. 88-89, 144, 151; Isely, Tr.

292-93; JX 56). Isely also admitted that he fulfilled orders made through www.agaricus.net in part to keep positive relationships with Takesun and in consideration of the profits he received from selling herbal products including RAAX11. (Isely, Tr. 287; JX 12 (Isely, Dep.) at 62-63). Finally, Respondent Isely testified that he thought that it was “perfectly fair” for him to charge consumers' credit cards for fulfilling orders made through the www.agaricus.net website. (JX 12 (Isely, Dep.) at 124; Isely, Tr. 364).

49. As testified by the FTC’s investigator Liggins, the money paid for RAAX11 in the purchase under the name “Riece Miles” went to gotto@takesun.com, the email address for G. Otto. (Liggins, Tr. 148; JX 43). The credit card statement memorializing the purchase by inspector Liggins indicated that payment was made to “PayPal Takesunport. (Liggins, Tr. 143; JX 60).

Complaint Counsel's Response to Respondents' Proposed Finding No. 49:

Complaint Counsel disputes this proposed finding as contrary to the evidence in the record. Investigator Liggins did not testify as to where payment for RAAX11 in his undercover purchases actually went. (Liggins, Tr. 148). Rather, he only testified that the Paypal receipt for the first undercover order says that payment went to gotto@takesun.com and that the credit card statement went to Paypal. (Liggins, Tr. 143, 148; JX 60). Mr. Liggins did not testify that this email address belongs to G. Otto. He did however testify that the domain takesun.com was registered to Respondent Isely. (CCR ¶ 33; Liggins, Tr. 71-72; JX 20).

50. Also, the receipt produced from an email memorializing the purchase stated specifically that this “confirms that you have paid Takesun Portugal Lda.” (Liggins, Tr. 144; JX 52). As best understood by inspector Liggins, with respect to the FTC’s undercover purchases, he testified that he thought he was making a purchase “from whoever was at the North Carolina address [on the webpage]. . .,” but that “with the email addresses you can’t really tell.” (Liggins, Tr. 162).

Complaint Counsel's Response to Respondents' Proposed Finding No. 50:

Complaint Counsel disputes this proposed finding as contrary to the evidence in the record. Respondents' findings mischaracterize Mr. Liggins testimony. Mr. Liggins testified that he believed he was purchasing RAAX11 from the person at the North Carolina address. (Liggins, Tr. 162). He did not believe that the existence of an email address should suggest that he was purchasing RAAX11 from anyone other than the resident of the North Carolina address listed on the receipt. (Liggins, Tr. 162).

51. When Isely mailed the RAAX11 product as a result of the undercover purchase, Isely [sic] included literature within the mailings he sent to the FTC undercover agents. (Isely, Tr. 300; JX 59; JX 60). The literature contains information which Isely provided to customers who typically already ordered RAAX11 from him and was never published to the general public or for any potential consumers [sic] to review. (Isely, Tr. 300).

Complaint Counsel's Response to Respondents' Proposed Finding No. 51:

Complaint Counsel disputes this proposed finding as contrary to the evidence in the record. When Respondent Isely fulfilled orders of RAAX11 placed on the www.agaricus.net website, he included his Takesun USA promotional brochure in the package. (CCPF ¶ 57, 82; JX 57; JX 58). He testified that this would include customers who had not yet purchased directly through Respondent Isely, but rather those who purchased RAAX11 for the first time through www.agaricus.net. (Liggins, Tr. 90-91; JX 59). Furthermore, Isely testified that the purpose of the brochure in this case was to offer customers who had previously purchased RAAX11 from someone else, a method of buying from him directly (Isely, Tr. 293).

52. Moreover, the information provided within the literature identified as JX 59 referred to a different combination of herbal extracts and was referring to a product/protocol other than RAAX11. (Isely, Tr. 301; JX 59). The literature mailed by Isely to the FTC investigators is not part of the Complaint and was not identified in any portion of the Complaint. (Isely, Tr. 303).

Complaint Counsel's Response to Respondents' Proposed Finding No. 52:

JX 59 is a promotional piece for RAAX11 disseminated by Respondents in their shipments of RAAX11 to the FTC. (CCPF ¶ 90). To the extent that this item contains cancer-related product claims for RAAX11, that are similar, if not identical, to the website claims for RAAX11, it provides evidence of consistent behavior on the part of Respondents. (CCPF ¶ 90). Therefore, JX 59 is relevant, admissible evidence in this matter pursuant to Rules of Practice § 3.43(b).

53. The evidence shows that Respondent Gemtronics, Inc. was an inactive corporation that has never engaged in any business activity. Respondent Gemtronics, Inc. was formed on September 20, 2006, by the Respondent William H. Isely. (JX 13); (Isely, Tr. 215-17, 223, 323-24); (JX 9 at 4-5). Gemtronics, Inc. has never had a shareholder, board members, officers or an employee and has never been activated. (Isely, Tr. Tr. 215-16, 223, 323-24); (JX 9 at 4-5). Moreover, Gemtronics, Inc. has never engaged in any business or entered into any contracts. (Isely, Tr. Tr. 215-16, 223, 323-24); (JX 9 at 4-5).

Complaint Counsel's Response to Respondents' Proposed Finding No. 53:

Complaint Counsel disputes this as finding as contrary to the evidence in the record. Respondent Isely opened a corporate credit card for Gemtronics, Inc. (Isely, Tr. 223). Respondents have also done business selling herbal products including RAAX11 under the name Gemtronics. (CCPF ¶¶ 1, 4, 10, 14, 39, 42, 46, 52-57).

54. Gemtronics, Inc. has never applied for or obtained a federal tax identification number and has never filed taxes. (JX 13); (Isely, Tr. 215-16, 223, 323-24); (JX 9 at 4-5). Gemtronics, Inc. has since its inception always been an inactive corporate shell. (JX 13); (Isely, Tr. 215-16, 223, 323-24); (JX 9 at 4-5). Mr. Isley [sic] is not the owner of Gemtronics, Inc. and no other individual is the owner of Gemtronics, Inc. (JX 13); (Isely, Tr. 215-16, 223, 323-24); (JX 9 at 4-5).

Complaint Counsel's Response to Respondents' Proposed Finding No. 54:

Complaint Counsel has no specific response to this proposed finding.

55. Gemtronics, Inc. has never applied for or received a designation as a closely held s-corporation or as a c-corporation. (JX 13); (Isely, Tr. 215-16, 223, 323-24); (JX 9 at 4-5). Moreover, Complaint Counsel has not proffered any evidence to the contrary. Consequently, Gemtronics, Inc. should be dismissed for these reasons as well as the other reasons applicable to Isely.

Complaint Counsel's Response to Respondents' Proposed Finding No. 55:

Complaint Counsel disputes this proposed finding as contrary to the evidence in the record. In September 2006, Isely incorporated Gemtronics, Inc., a North Carolina corporation, whose principal place of business is located in Franklin, North Carolina, at Isely's residence. (CCPF ¶¶ 1, 6). Respondent Isely is the owner, registered agent, and general manager of Gemtronics. (CCPF ¶ 10). After incorporating Gemtronics, Isely continued his business advertising and selling dietary supplements. (CCPF ¶ 9). Isely also opened a credit card in the name Gemtronics, Inc. (Isely, Tr. 324).

56. Isely is completely out of the business of selling any herbal products under the name "Gemtronics" or any other name. (Isely, Tr. 200, 349). Isely never manufactured herbal products and there has never been a claim by the FTC that he has ever manufactured herbal products. (Isely, Tr. 346-47).

Complaint Counsel's Response to Respondents' Proposed Finding No. 56:

Complaint Counsel has no specific response to this proposed finding.

57. When Isely began the business of selling herbal products, his customer base originated his personal consumption of herbal products, his friends and grew through word of mouth. (Isely, Tr. 188, 334-36).

Complaint Counsel's Response to Respondents' Proposed Finding No. 57:

Complaint Counsel has no specific response to this proposed finding.

58. While in business, Isely's revenue source from the internet was negligible as only approximately 95% of his orders originated from sources other than the internet and approximately only 5% of his orders were off of the internet. (Isely, Tr. 334-35).

Complaint Counsel's Response to Respondents' Proposed Finding No. 58:

Respondent Isely admitted that when consumers would telephone him to order products, he had no way of knowing from what website consumers got his telephone number. (Isely, Tr. 198-99, 267, 300; JX 12 (Isely, Dep.) at 36-37, 39-40, 46, 55). Further, Respondent Isely did not keep records concerning how he got his sales. (JX. 12 (Isely, Dep.) at 41-42, 46).

59. Isely ceased purchasing any products from George Otto after learning from Complaint Counsel that G. Otto used Isely's name and contact information without his permission. (Isely, Tr. 200-01). Isely revoked any permission he ever gave G. Otto to use Isely's testimonial after learning from Complaint Counsel that G. Otto was using Isely's information without Isely's permission. (Isely, Tr. 269-70).

Complaint Counsel's Response to Respondents' Proposed Finding No. 59:

Complaint Counsel disputes this proposed finding as contrary to the evidence in the record. Respondent Isely knew or intentionally avoided any knowledge of his business's continued identification on the website www.agaricus.net and the cancer-related advertising claims for RAAX11 contained in this website. (CCR ¶¶ 18-19; CCPF ¶ 88). He frequented the www.agaricus.net website and was familiar with the homepage. (CCR ¶¶ 18-19; CCPF ¶ 88; JX 12 (Isely, Dep.) at 67).

60. The two drop shipments that Mr. Isely made at the request of George Otto to the FTC investigators were the only two shipments of that type made during the last two years. (Isely, Tr. 353-54). Moreover, Isely made the shipments as a good faith gesture because Isely was a wholesale customer of Takesun do Brasil and G. Otto. (Isely, Tr. 353-54).

Complaint Counsel's Response to Respondents' Proposed Finding No. 60:

Complaint Counsel disputes this proposed finding as contrary to the evidence in the record. Contrary to Isely's testimony at trial, in his deposition Respondent Isely suggested that he not only fulfilled the two drop shipments through www.agaricus.net in response to the FTC undercover order, but that he would do so occasionally for other customers who would purchase from that website. (JX 12 (Isely, Dep.) at 63-66, 69-72). Further, Isely testified he made the drop shipments not merely as a good faith gesture for Takesun but rather "in recognition of the profit [Respondents were] making on the products that [Respondents were] able to buy from him." (Isely, Tr. 287; *See also* JX 12 (Isely, Dep.) at 61-62). He also took the drop shipments as an opportunity to direct potential customers to purchase RAAX11 directly from Isely. (CCR ¶ 48; JX 12 (Isely, Dep.) at 65-66). Along with the product, Isely would send an invoice, brochure and Distributor Introductory Packet directing consumers to buy directly from Respondents in the future and provide only Respondents contact information. (CCPF ¶¶ 57, 87, 89; Liggins, Tr. 88-89; Isely, Tr. 215, 287-288; JX 12 (Isely, Dep.) at 60-61, 88-89, Ex. 6; JX 56; JX 57; JX 73).

CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed and served the attached:

- 1) COMPLAINT COUNSEL'S REPLY TO RESPONDENTS' POST-TRIAL BRIEF; and
- 2) COMPLAINT COUNSEL'S REPLY TO RESPONDENTS' PROPOSED FINDINGS OF FACT

The original and one (1) paper copy via overnight delivery and one (1) electronic copy via email to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room H-159
Washington, D.C. 20580
email: secretary@ftc.gov

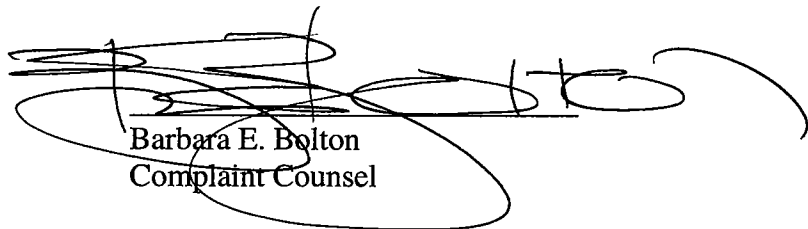
One (1) email copy and four (4) paper copies served by overnight mail delivery to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., N.W. Room H-112
Washington, D.C. 20580
email: ojl@ftc.gov

One (1) electronic copy via email and one (1) paper copy via overnight delivery to:

Matthew I. Van Horn
16 W. Martin Street, Suite 700
Raleigh, NC 27601
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Dated: August 4, 2009


Barbara E. Bolton
Complaint Counsel