

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. "BILL" ISELY,
individually and as the principal
of Gemtronics, Inc.

DOCKET No. 9330

Public Document

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS'
MOTION FOR MODIFICATION OF SCHEDULING ORDER

INTRODUCTION

Complaint Counsel opposes Respondents' belated Motion for Modification of Scheduling Order filed January 26, 2009 ("Motion for Modification"), which seeks to make significant changes to the Scheduling Order in this matter. First, Respondents seek 1) to reinstate discovery, which, per the Scheduling Order, concluded on January 21, 2009; 2) to issue third-party subpoenas, the deadline for which was December 16, 2008; and 3) to further extend the time for discovery through February 13, 2009. Second, Respondents seek to extend the date for filing Motions for Summary Decision through March 13, 2009. The deadlines for discovery and subsequent events established in the Scheduling Order already provided both sides with more than sufficient time to develop their evidence. In addition, Respondents have failed to carry their burden of demonstrating the existence of "good cause" to amend the Scheduling Order. Indeed, the justification for delay was clearly foreseeable at the time the Scheduling Order was entered and any need for a further extension of time is solely attributable to

Respondents' Counsel's own lack of diligence. As a result, Respondents' Motion for Modification should be denied.

ARGUMENT

I. Respondents' Motion Should Be Denied Because it Fails to Show Good Cause to Modify this Court's Scheduling Order

Pursuant to Rule 3.21(c)(2) of the Federal Trade Commission's Rules of Practice, a party seeking an extension must demonstrate "good cause" why modifications to the scheduling order are necessary, taking into account, *inter alia*, "the need to conclude the evidentiary hearing and render an initial decision in a timely manner." 16 C.F.R. § 3.21(c)(2). In the Motion for Modification, Respondents' Counsel now proffers the recent birth of his child on January 25, 2009, as the sole justification to substantiate his request to Modify the Scheduling Order.

Both parties agreed to the Scheduling Order at the scheduling conference held on October 28, 2008. Such a justification for delay was clearly foreseeable at the time the Scheduling Order was entered. Further, the discovery deadlines established in the Scheduling Order occurred well before January 25, 2009, allowing Respondents ample time to conduct their discovery and develop their evidence. This Court even noted in its Order Granting Complaint Counsel's Motion to Compel, that Respondents have offered a myriad of seemingly petty excuses to stall and delay the progress of discovery in this matter. In addition, as noted in detail below in Section II., Respondents have already failed to comply with virtually every provision of the Scheduling Order, while providing no justification for such failure. Moreover, as also detailed below, Respondents issued a third-party subpoena *duces tecum* several days ago – well outside the scope of the Scheduling Order. Thus, after the close of discovery, for Respondents' Counsel to now raise the specter of this new event as a justification to modify the Scheduling

Order to reopen discovery and serve third-party subpoenas is patently disingenuous.

Accordingly, Respondents have failed to demonstrate “good cause” why their proposed modifications to the Scheduling Order are necessary and their Motion for Modification of Scheduling Order should be denied.

II. Respondents’ Motion Should Be Denied Due to Their Consistent Lack of Diligence and Failure to Comply with the Scheduling Order

In assessing Respondents’ request, this Court should give particular consideration to Respondents’ lack of diligence to date. Respondents have failed to comply with the Scheduling Order virtually *ab initio* and have provided Complaint Counsel with no justification for their consistent failure. Specifically, with the exception of providing their preliminary witness list to Complaint Counsel, which was their first obligation under the Scheduling Order, Respondents, thereafter, have disregarded the Scheduling Order entirely. Respondents issued a third-party subpoena *duces tecum* to Tierra.net this week on January 27, 2009, when, per the Scheduling Order, such subpoenas were to be issued by December 16, 2008. (A copy of Respondents’ Subpoena is appended hereto as Attachment A.) Further, Respondents provided no expert witness list as required under the Scheduling Order by the designated date, December 29, 2008, nor have they notified Complaint Counsel whether they intend to use an expert witness. Similarly, Respondents’ revised witness list, which was due on January 13, 2009, was not provided to Complaint Counsel nor was any justification provided for this lapse. In addition, as this Court is aware, Respondents failed to comply with discovery which ended on January 21, 2009. In fact, Respondents’ Motion for Modification recites the due dates for discovery that were previously extended by mutual agreement of the parties and none of these dates has been met by Respondents as yet.

Complaint Counsel has been continually hampered its efforts to move this case forward and disadvantaged by Respondents' obstructionist tactics. Indeed, as noted above, Complaint Counsel continues to wait for Respondents to produce responses to discovery and make Respondent Isely available for deposition. More important, however, Respondents have not indicated the scope of their requested discovery to be propounded on third-parties.

Respondents should not be rewarded for their tactics, for their own lack of diligence, and for their lack of compliance with the Scheduling Order. Further, given such consistent delaying conduct on the part of Respondents, it is reasonably foreseeable that any modified dates to the Scheduling Order will be met with the same conduct, further delaying and prolonging the progress of this matter. Thus, Respondents Motion for Modification of Scheduling Order should be denied.

CONCLUSION

For the reasons set forth above, Respondents' Motion for Modification is unfounded and untimely, and presents the specter of continued delays in this matter. Therefore, Complaint Counsel respectfully requests that Respondents' Motion for Modification of Scheduling Order seeking to reopen discovery and issue third-party discovery through February 13, 2009; and extend the date for filing Motions for Summary Decision through March 13, 2009, be denied.

Dated: January 30, 2009

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Barbara E. Bolton', is written over a circular stamp or seal.

Barbara E. Bolton
Attorney for Complaint Counsel
Federal Trade Commission
225 Peachtree Street, Suite 1500
Atlanta, GA 30303

404-656-1362 (direct line)
404-656-1379 (facsimile)
bbolton@ftc.gov (email)

CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed and served **COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION FOR MODIFICATION OF SCHEDULING ORDER** upon the following as set forth below:

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 two (2) paper copies served by overnight mail delivery to:

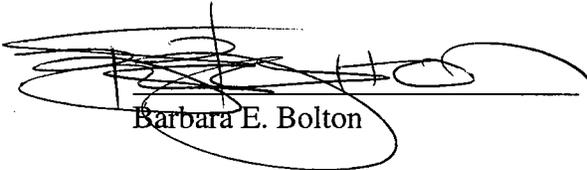
The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave., N.W. Room H-112
Washington, D.C. 20580
email: oalj@ftc.gov

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 27602
email: matthew@vanhornlawfirm.com

I further certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original, and that a paper copy with an original signature is being filed with the Secretary of the Commission on the same day by other means.

Dated: January 30, 2009


Barbara E. Bolton

ATTACHMENT A

MATTHEW I. VAN HORN
PROFESSIONAL LIMITED LIABILITY COMPANY
ATTORNEY AT LAW

16 WEST MARTIN STREET, SUITE 700
RALEIGH, NORTH CAROLINA 27601

TELEPHONE (919) 835-0880
FACSIMILE (919) 835-2121

POST OFFICE BOX 1309
RALEIGH, NORTH CAROLINA 27602

matthew@vanhornlawfirm.com

also licenced in VA, DC and OK

January 27, 2009

VIA FACSIMILE: (404) 656-1379
and United States Mail

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

Re: Gemtronics, Inc. and William H. Isely, FTC Docket Nop. 9330

Dear Barbara:

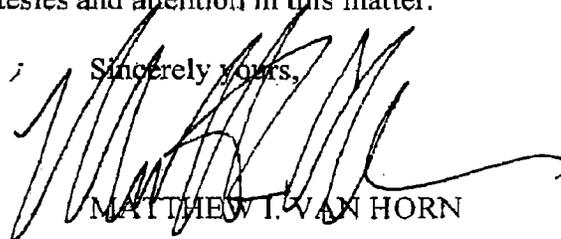
Enclosed herewith please find a copy of Notice of Deposition directed to Tierra.net (d/b/a DomainDiscover).

As you can see, we are calling for the custodian of records to appear via subpoena personally in my office on February 4, 2009. The subpoena *duces tecum* and Notice of Deposition were sent, however, with a transmittal letter offering to conduct the deposition via telephonic conference, as well as allow for production of the documents by overnight mail service.

We shall keep you advised as to the status of this matter, but wanted to give you as much notice as possible as to the event.

Thank you for all of your courtesies and attention in this matter.

Sincerely yours,



MATTHEW I. VAN HORN

MIVH:lr



SUBPOENA DUCES TECUM

Issued Pursuant to Rule 3.34(b), 16 C.F.R. § 3.34(b)(1997)

<p>1. TO ATTN: Pablo Velasco, for Tierra.net (d/b/a DomainDiscover) 14284 Danielson Street Poway, CA 92064</p>	<p>2. FROM UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things - or to permit inspection of premises - at the date and time specified in Item 5, at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

<p>3. PLACE OF PRODUCTION OR INSPECTION Van Horn Law Firm, PLLC 16 West Martin Street, Suite 700 Raleigh NC 27601 Fax: (919) 835-2121</p>	<p>4. MATERIAL WILL BE PRODUCED TO Attorney Matthew I. Van Horn</p> <p>5. DATE AND TIME OF PRODUCTION OR INSPECTION February 4, 2009 at 10:00 am</p>
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6. SUBJECT OF PROCEEDING

In the Matter of Gemtronics, Inc., et al., Docket No. 9330

7. MATERIAL TO BE PRODUCED

See attached Exhibit "A"

<p>8. ADMINISTRATIVE LAW JUDGE The Honorable D. Michael Chappell Federal Trade Commission Washington, D.C. 20580</p>	<p>9. COUNSEL REQUESTING SUBPOENA Matthew I. Van Horn 16 West Martin Street, Suite 700 Raleigh, NC 27601</p>
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<p>DATE ISSUED <i>December 17, 2008</i></p>	<p>SECRETARY'S SIGNATURE <i>Donald S. Clark</i></p>
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GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

Exhibit "A"
to Subpoena issued to Tierra.net (d/b/a DomainDiscovery) Attn. Pablo Velasco

1. Any and all documents, notes, phone slips, memoranda, electronically stored information (including but not limited to email, word processing, data base records, scanned or graphically stored images, electronic notes, etc.) or any other items in your possession or the possession of Tierra.net (d/b/a DomainDiscovery), including any of its offices, which in any way relate to the domain agaricus.net, the company Agarix International, or the individual George Otto.

2. Any and all documents, notes, phone slips, memoranda, electronically stored information (including but not limited to email, word processing, data base records, scanned or graphically stored images, electronic notes, etc.) or any other items in your possession or the possession of Tierra.net (d/b/a DomainDiscovery), including any of its offices, which in any way relate to the company Gemtronics, Inc. or the individual William H. Isely.

3. Any and all documents, notes, phone slips, memoranda, electronically stored information (including but not limited to email, word processing, data base records, scanned or graphically stored images, electronic notes, etc.) or any other items in your possession or the possession of Tierra.net (d/b/a DomainDiscovery), including any of its offices, which in any way relate to the domain agaricus.net, the company Gemtronics, Inc. or the individual William H. Isely, which have ever been provided to the United States Federal Trade Commission pursuant to a Subpoena or otherwise.

Note: Please indicate if you do not possess any information which is responsive to either item.

**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

**NOTICE OF DEPOSITION
OF PABLO VELASCO**

To: Pablo Velasco and/or Custodian of Records of:
c/o Tierra.net (d/b/a DomainDiscover)
14284 Danielson Street
Poway, California 92064

YOU ARE HEREBY notified that on Wednesday, February 4, 2009, beginning at 10:00 o'clock a.m., EST, the undersigned will take the deposition of Pablo Velasco. The deposition will be taken before a notary public or some other officer duly authorized by law to take depositions, at the Law Office of Matthew I. Van Horn, 16 West Martin Street, Suite 700, Raleigh, NC 27601, and may also be taken by videotape, telephonically and by other means.

The oral deposition will continue from day to day until its completion, or on dates otherwise mutually agreeable to the parties and their counsel.

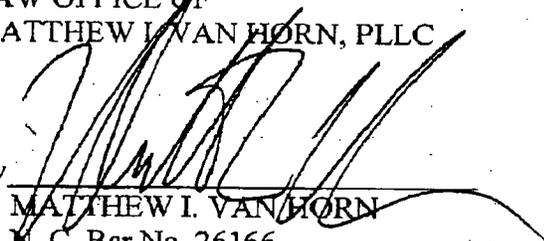
It is required that documents be produced at this deposition pursuant to the Subpoena Duces Tecum heretofore served upon you, which is attached hereto as Exhibit "A" and incorporated herein by referene.

This the 27th day of January, 2009.

Respectfully Submitted,

LAW OFFICE OF
MATTHEW I VAN HORN, PLLC

By



MATTHEW I. VAN HORN
N. C. Bar No. 26166
16 West Martin St., Suite 700
Raleigh, NC 27601
Telephone: (919) 835-0880
Facsimile: (919) 835-2121

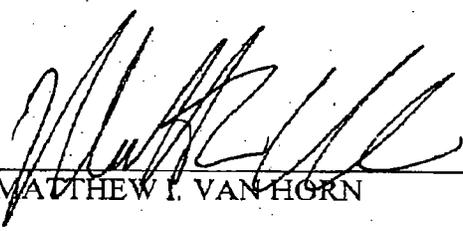
Attorney for Respondents

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this **NOTICE OF DEPOSITION AND THE ATTACHED SUBPOENA DUCES TECUM** 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.

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

This the 27th day of January, 2009.



MATTHEW I. VAN HORN