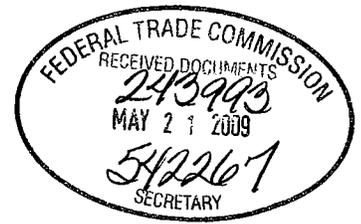


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of
GEMTRONICS, INC.,
a corporation, and
WILLIAM H. "BILL" ISELY,
individually and as the owner
of Gemtronics, Inc.

PUBLIC

DOCKET No. 9330

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO STRIKE

Complaint Counsel respectfully submits this Opposition to Respondents' Motion to Strike eleven (11) exhibits from Complaint Counsel's proposed trial exhibit list.¹ In their Motion to Strike, filed on May 13, 2009, Respondents seek to exclude Complaint Counsel from using documents relating to various Internet websites connected to Respondents by stating that these exhibits identify websites: 1) that "are not identified in the [Commission's] Complaint;" 2) that "possess names which are similar to or contain the word 'agaricus;" and 3) that the introduction of such exhibits "at trial would increase the estimated time allotted for trial, would likely confuse the Court and would, thus, prejudice the Respondents."

However, Respondents' Motion conveniently fails to mention that not only are these various websites referenced in Respondents' Answer to the Complaint, Answers to Interrogatories, and Document Production, but, more important, Respondents' **own trial exhibits** are replete with the same documents they seek to preclude Complaint Counsel from using. As set forth below, Respondents' Motion and argument are fraught with contradiction,

¹ Respondents seek to strike Complaint Counsel's Exhibit Numbers 2, 4, 5, 6, 7, 8, 62, 63, 64, 65, and 66.

are at best disingenuous, and serve no purpose except to attempt to confuse the Court and waste the Court's time. Respondents' Motion should therefore be denied.

I. The Website "www.our-agaricus.com" is in Respondents' Answer, Discovery Materials & Trial Exhibits

In Paragraph No. 3 of Respondents' Answer to the Commission's Complaint,² Respondents introduce the fact that they used an Internet website "www.our-agaricus.com" to sell the challenged product RAAX11.³ Respondents further refer to this website (and other websites) in their Answers to Interrogatories propounded to Respondent Isely and Production of Documents.

Moreover, Respondents have included in their proposed trial exhibit list⁴ these and other documents that reference "www.our-agaricus.com" such as: (1) their Answer to the Complaint (Respondents' Exhibit 2 ("RX. ___")); (2) Answers to Interrogatories propounded to Respondent Isely (RX. 3); (3) Complaint Counsel's Production of Documents (RX. 5.); (4) a WHOIS search (RX. 9); (5) an email to Respondent Isely (RX. 34); and (6) Respondents' Distributor Introductory package (RX. 39). For Respondents to seek to preclude Complaint Counsel from using evidence that they themselves have repeatedly cited during this matter and fully intend to use at trial, serves only to prejudice Complaint Counsel.

II. Respondents' Trial Exhibits Reference at Least 5 Additional Websites

Respondents' attempt to preclude Complaint Counsel from using evidence at trial

² A copy of Respondents' Answer is appended hereto as **Exhibit A**.

³ Moreover, Respondent Isely, in his deposition, admits to selling RAAX11 through at least two other websites. *See, e.g.*, Isely Deposition Transcript pp. 34 - 35 ("agaricus.us"); pp. 120 - 24 (Resp. Dep. Ex. 6) ("agaricus.net").

⁴ A copy of Respondents' proposed trial exhibit list is appended hereto as **Exhibit B**.

concerning other websites that “possess names which are similar to or contain the word ‘agaricus’” smacks of hypocrisy in light of the fact that their proposed trial exhibit list is replete with exhibits concerning such other websites, including, but not limited to, “our-agaricus.us” (RX. 11); “raaxagaricus.com” (RX. 12, RX. 16); “our-agaricus.net” (RX. 30); and “opc-agaricus.net” (RX. 14). Even more surprising, Respondents want to exclude Complaint Counsel from using information regarding yet another website “takesun.com,” which **identical information** Respondents fully intend to use at trial (*see* RX. 13, RX. 36). Thus, Respondents’ Motion to strike from Complaint Counsel’s proposed trial exhibit list the very exhibits they seek to use at trial appears to serve no purpose other than to attempt to confuse the Court and waste the Court’s time.⁵

III. The Court Should Not Exclude Relevant Evidence

Commission Rule 3.43(b) provides that:

Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Further Commission Rule 3.43(c) provides:

Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by counsel representing the Commission when necessary in connection with adjudicative proceeding and may be offered in evidence by counsel representing the Commission in any such proceeding.

In this instance, the evidence challenged by Respondents is relevant, material, and

⁵ Respondents’ Motion also appears to be somewhat selective in that it fails to comprehensively seek the exclusion of all Complaint Counsel’s exhibits referring to other websites.

reliable. As noted, *infra*, not only has the issue of alternate websites been raised by Respondents' in their defense, it is also a pivotal component of Respondents' trial exhibits. As such, Complaint Counsel's evidence is certainly of probative value, that is not outweighed by any danger of unfair prejudice to either party, and should not lead to confusion of the issues or undue delay. Further, since several of the exhibits that Respondents seek to strike were in fact produced by Respondents to Complaint Counsel, there is a rebuttable presumption that those documents are reliable. *See* Commission Rule 3.43(c)(2); *Lenox, Inc.*, 73 F.T.C. 578, 604 (1968).

IV. Conclusion

Respondents, in their Motion to Strike, seek to exclude evidence that is relevant, material, reliable, and of probative value to the issues to be tried in this matter. Indeed, as noted herein, Respondents challenge the very evidence they themselves have raised as playing a crucial role in their defense. Accordingly, Complaint Counsel respectfully requests that the Court deny Respondents' Motion to Strike in its entirety.

Dated: May 20, 2009

Respectfully submitted,



Barbara E. Bolton, Complaint Counsel
Federal Trade Commission
Southeast Region
225 Peachtree Street, Suite 1500
Atlanta, GA 30303
(404) 656-1362
Bbolton@ftc.gov

CERTIFICATE OF SERVICE

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

1. **COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO STRIKE;**

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

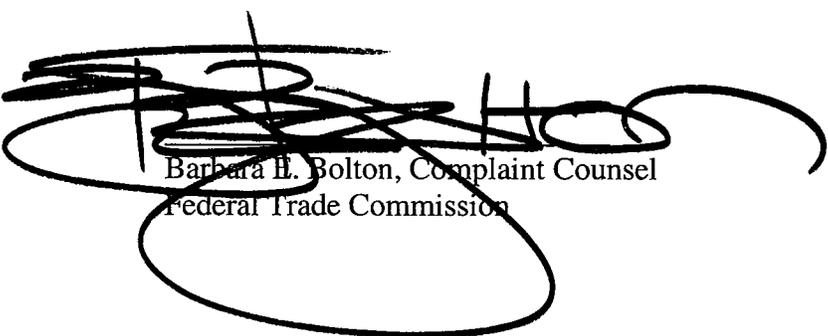
One (1) email copy and two (2) paper copies served by overnight mail delivery to:

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

Dated: May 20, 2009



Barbara H. Bolton, Complaint Counsel
Federal Trade Commission

EXHIBIT A

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



0823080

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

ANSWER TO COMPLAINT

COME NOW the Respondents, GEMTRONICS, INC., a corporation and WILLIAM H. ISELY, individually, by and through undersigned counsel, and in response to the Complaint on file in the above captioned matter allege and state as follows:

FIRST DEFENSE

The Federal Trade Commission's Complaint fails to state any claim upon which relief can be granted.

SECOND DEFENSE

Respondents plead that to the extent a party committed acts or omissions which violate the Federal Trade Commission Act as alleged in the Complaint, said acts and omissions were committed by a party other than the Respondents.

THIRD DEFENSE

1. Respondents admit the allegation contained in Paragraph 1 of the Complaint. Respondents further state that as the organizer of Gemtronics, Inc. ("Gemtronics"), William H. Isely ("Isely") formed Gemtronics. Respondents further state that the Articles of Incorporation for Gemtronics speak for themselves. Respondents further state that Gemtronics has remained an inactive corporation since its inception. Respondents state that Gemtronics has no shareholder or board members and has never been activated. Moreover, Gemtronics has never conducted any business or entered into any contracts. Respondents further state that Gemtronics has never obtained a federal tax identification number and has never filed taxes.

2. Respondents deny all allegations contained in Paragraph 2 of the Complaint. Respondents incorporate herein by reference their response to Paragraph 1 of the Complaint. Respondents admit that Isely's home address is 964 Walnut Creek, Franklin, North Carolina 28734.
3. Respondent Gemtronics denies all allegations contained in Paragraph 3 of the Complaint. Respondent Isely admits that he has offered for sale, sold and distributed the herbal product, RAAX11. Respondent Isely admits that he has offered for sale, sold and distributed the product RAAX11 through the Internet website www.our-agaricus.com. However, the Federal Trade Commission has not alleged in its Complaint that the Internet website www.our-agaricus.com is the offending website. Respondent Isely denies that he promoted, or disseminated or caused to be disseminated any advertisements for RAAX11 through the Internet website www.our-agaricus.com or in any other way that violates any provisions of the Federal Trade Commission Act. Respondent Isely admits that the "product label" and Sections 12 and 15 of the Federal Trade Commission Act speak for themselves. Respondent Isely denies all remaining allegations within Paragraph 3 of the Complaint.
4. Respondents deny the allegations contained in Paragraph 4 of the Complaint.
5. Respondents deny the allegations contained in Paragraph 5 of the Complaint. Respondents further state that Exhibits A through D attached to the Complaint and the Internet website www.agaricus.net speak for themselves. Respondents further state that they have forever lacked the authority or ability to disseminate any information or alter the content of the alleged offending website www.agaricus.net. Respondent Isely further states that through his investigations, he has attempted to determine the identity of the owner and who controls the content of the website www.agaricus.net. However, Respondent Isely has been denied access to that information by the owner of the web hosting company. However, upon information and belief, Respondents state that a third party, not named in this action, disseminated or caused to be disseminated advertisements through the alleged offending Internet Website www.agaricus.net. Upon information and belief, Respondents state that a Brazilian company, operating under the name Takesun do Brasil, and its agents and/or other individuals caused the alleged offending website to be formed, and have forever possessed the authority, exclusive of the Respondents, to securely and exclusively control all content disseminated on the alleged offending website.
6. Respondents deny the allegations contained in Paragraph 6 of the Complaint. Respondents incorporate herein by reference their response to Paragraph 5 of the Complaint.
7. Respondents deny the allegations contained in Paragraph 7 of the Complaint.
8. Respondents deny the allegations contained in Paragraph 8 of the Complaint. Respondents incorporate herein by reference their response to Paragraph 5 of the Complaint.
9. Respondents deny the allegations contained in Paragraph 9 of the Complaint. Respondents incorporate herein by reference their response to Paragraph 5 of the Complaint.
10. Respondents deny the allegations contained in Paragraph 10 of the Complaint. Respondents incorporate herein by reference their response to Paragraph 5 of the Complaint.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this **ANSWER TO COMPLAINT** 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
Suite 1500
225 Peachtree Street, N.E.
Atlanta, GA 30303

This the 10th day of October, 2008.

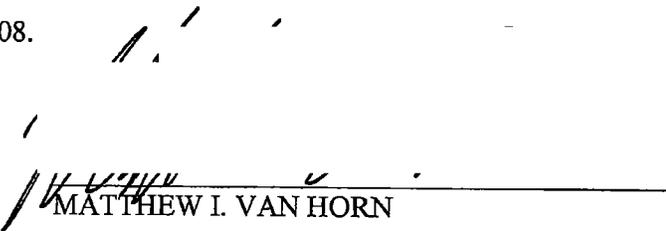

MATTHEW I. VAN HORN

EXHIBIT B

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

COMMISSIONERS: William E. Kovacic, Chairman
Pamela Jones Harbour
Jon Leibowitz
J. Thomas Rosch

PUBLIC

In the Matter of

GEMTRONICS, INC.,
a corporation, and

WILLIAM H. ISELY,
individually and as the owner
of Gemtronics, Inc.

DOCKET NO. 9330

RESPONDENTS' COUNSEL'S EXHIBIT LIST

No. of Exhibit	Description	Date Identified	Date Admitted
RX 1.	Complaint		
RX 2.	Answer to Complaint		
RX 3.	Respondent's Counsel's Answers To Complaint Counsel's First Set Of Interrogatories To Respondent William H. Isely		
RX 4.	Respondent's Counsel's Answers To Complaint Counsel's First Set Of Interrogatories To Respondent Gemtronics, Inc.		
RX 5.	Complaint Counsel's Response to Respondents' Interrogatories and Request for Production of Documents		

No. of Exhibit	Description	Date Identified	Date Admitted
RX 6.	Subpoena Duces Tecum served on Tierra.net (d/b/a DomainDiscover) (ATTN: Pablo Velasco) with attached Exhibit "A". and all documents responsive to Subpoena Duces Tecum.		
RX 7.	Typewritten statement of Pablo Velasco, TierraNet Customer Service Supervisor.		
RX 8	Transcript of Deposition of Pablo Velasco, including executed Certificate of Deponent and executed Oath of Deponent.		
RX 9	Copy of captured website WHOIS for Our-Agaricus.com. (R-06-07)		
RX 10	Copy of captured website WHOIS for agaricus.net. (R-028-030)		
RX 11	Copy of captured website Whois.Net regarding our-agaricus.us. (R-037-038)		
RX 12	Copy of document entitled "Internet Corporation Listing Service" regarding domain name: raaxagaricus.com. (R-051-052)		
RX 13	Copy of captured website WHOIS regarding takesun.com. (FTC-00190-00192)		
RX 14	Copy of captured website WHOIS regarding opc-agaricus.net. (FTC-00032-00034)		

No. of Exhibit	Description	Date Identified	Date Admitted
RX 15	Copy of captured website North Carolina Secretary of State regarding corporate information pertaining to Gemtronics, Inc. (R-00053-00056).		
RX 16	Copy of letter from U.S. Food and Drug Administration addressed to William Isely, Gemtronics, Inc. dated April 17, 2008. (FTC-00001-00003).		
RX 17	Copy of e-mail addressed to www.agaricus.net from Federal Trade Commission, dated October 23, 2007. (FTC-00195-00197)		
RX 18	Copy of captured website of United States Patent and Trademark Office regarding RAAX11. (R-001).		
RX 19	Copy of PayPal e-mail to Riece Miles. (FTC-00013-00016).		
RX 20	Copy of product order from Takesun do Brasil. (FTC-00029-00031).		
RX 21	Copy of invoice from Takesun do Brasil to William H. Isely. (R-00034).		
RX 22	Copy of statement of Pablo Velasco, TierraNet Customer Service Supervisor, DomainDiscover.		
RX 23	Transcript of Deposition of William H. Isely, February 4, 2009.		
RX 24	E-mail from Pablo Velasco to Matthew I. Van Horn dated April 29, 2008.		

No. of Exhibit	Description	Date Identified	Date Admitted
RX 25	Letter from Matthew I. Van Horn to Pablo Velasco dated January 22, 2009.		
RX 26	1999 Sales and Use Tax Report from Gemtronics to North Carolina Department of Revenue. (R-00).		
RX 27	E-mail from Respondent Isely to George Otto dated April 25, 2008. (R-031).		
RX 28	WHOIS search results for agaricus.net. (R-028-030).		
RX 29	E-mail from George Otto to Respondent Isely dated March 28, 2008, 5:21 P.M. (R-033).		
RX 30	E-mail from George Otto to Respondent Isely dated March 28, 2008, 6:26 P.M. (R-032).		
RX 31	Captured webpage from Company Takesun Portugal Lda. (R035-036).		
RX 32	Literature captured from the website for Memorial Sloan-Kettering Cancer Center website. (R-039-050).		
RX 33	Newspaper article from Macon County News & Shopping Guide. (R-056).		
RX 34	E-mail from George Otto to Respondent Isely dated May 12, 2008. (R-063).		

No. of Exhibit	Description	Date Identified	Date Admitted
RX 35	Citibank Corporate Card receipt. (FTC-0027).		
RX 36	WHOIS Search Results for Takesun.com. (FTC- 0190-0192).		
RX 37	WHOIS search results for Agaricus.net (R-0157-0160)		
RX 38	RAAX11 Bottle Label.		
RX 39	Distributor Introductory Package by TakesunUSA.		