

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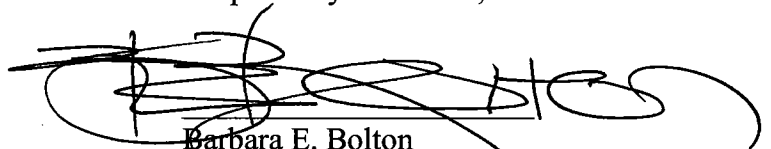
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**COMPLAINT COUNSEL'S REPLY TO  
RESPONDENTS' POST TRIAL BRIEF**

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

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# **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](http://www.agaricus.net). Respondent Isely has admitted that he has advertised, offered for sale, sold, and distributed the product, RAAX11 through various Internet websites.<sup>1</sup> 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](http://www.agaricus.net).

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

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<sup>1</sup> 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)<sup>2</sup> 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 USA<sup>3</sup> brochure and Distributor Introductory Package that he disseminated to consumers. (CCR

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<sup>2</sup> 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)

<sup>3</sup> "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](http://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](http://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](http://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](http://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](http://www.agaricus.net) and exercised that control only after they were notified of their potential liability for the deceptive practices. (CCR ¶¶ 24, 25).<sup>4</sup> 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](mailto: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,

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<sup>4</sup> 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 (9<sup>th</sup> Cir. 1961) (evidence of subsequent design changes allowed to show safeguards were previously feasible); *Powers v. J.B. Michael & Co.*, 329 F.2d 674 (6<sup>th</sup> 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](http://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 USA<sup>5</sup> 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](http://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](http://www.agaricus.net)

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<sup>5</sup> 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).<sup>6</sup>

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*

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<sup>6</sup> 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](http://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



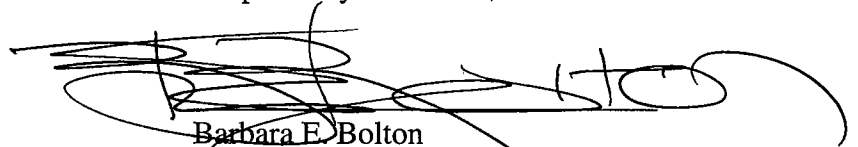
using the corporation to deceptively advertise its products. The proposed order is therefore appropriate against both Respondent Gemtronics, Inc. and Respondent Isely.

## 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**

**UNITED STATES OF AMERICA  
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1. The Complaint in this matter issued on September 18, 2008. (JX-7; Complaint date found at [www.ftc.gov](http://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](http://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](http://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](http://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](http://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](http://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](http://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](http://www.agaricus.net), [www.our-agaricus.com](http://www.our-agaricus.com), and [www.our-agaricus.us](http://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](http://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](http://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](http://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](http://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](http://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](http://www.our-agaricus.com), and [www.our-agaricus.us](http://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](http://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](http://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](http://our-agaricus.com) and it was a USA-only website. (Isely, Tr. 193). The shopping cart on [our-agaricus.com](http://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](http://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](http://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.

