UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INFORMAL BRIEF

RE: Gemtronics Inc. and William H. Isely, v FTC, Docket 11-1301

1. **Jurisdiction**

   A. Commissioners of the Federal Trade Commission

   B. Date of the order for which review is sought: February 11, 2011

2. **Timeliness of notice of appeal or petition for review (for prisoners only)**

3. **Introduction**

FTC Docket 9330 is a case involving gross miscarriage of justice, where the Respondent was wrongly accused of making false advertising claims for the food supplement RAAX11 on a foreign owned website, www.agaricus.net The FTC, by mistake or otherwise, included this website in their cancer sweep program of 2008 where they filed complaints against a large number of persons and businesses, apparently with the intent of not bringing them to trial, but rather to coerce Respondents into settlements which would curtail their businesses and be a lesson to the industry. A maximum number of cases could be processed within their budget by making skimpy investigations, collecting little information, and that of a quality below what is normally needed for a judicial process, but sufficient to force settlements.

In the instant case, the FTC spent months of investigation of the business, Takesun, operating www.agaricus.net , a foreign company operating in Brazil. Takesun was found to have no assets in the US, and therefore forever out of their reach. To justify having invested considerable resources, the Respondents were settled on as replacement Respondents. William H. Isely was importing RAAX11 for his wholesale business from the Brazilian source, and a circumstancial case seemed possible to craft at little further expense.

The case was dismissed. One quote of the ALJ from the Initial Decision sums up the quality of the Complaint, "Drawing inferences from incomplete facts". The dismissal was not contested and became the position of the Commission. The Respondents applied for Award of Attorney's Fees and Other Expenses pursuant to Commissions rule 3.81, 16. Negotiations were ordered. An award amount was close to agreement but then the ALJ denied an award altogether. This action was appealed and then denied by the full Commission.

The appellant contends that the FTC should have awarded him and his co-Respondent Attorney's fees and other Expenses for any one of four reasons.

a. At the time the Complaint was filed a reasonable person would have believed that persons other than the Respondents were responsible for the advertising of RAAX11 on the foreign web site located in Brazil, www.agaricus.net.
b. *Hess* teaches that a Complaint Counsel is obligated to make 'some reasonable investigation before filing a complaint,' However in the instant case the investigation was shallow and lacked any merrit above the level of hearsay. *Hess* is from the 4th circuit and binding on the FTC.
c. The Commission Chairman authoring the Opinion of the Commission was unable to cite any Statute or case law that gives the FTC enforcement authority over the content or actions on any foreign web site operated by a foreign entity in a foreign country.
d. The second Respondent, Gemtronics, Inc. was a shell Corporation with no officers and was not shown to have committed any acts and was certainly due an award.

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4. **Issues for Review**

Issue 1.

Was the order of the Federal Trade Commission denying appellants' petition for attorney fees and expenses supported by substantial evidence? The respondents

would argue that the basis of the Complaint Counsel's information used in the Complaint did not substantially justify her actions. This information accepted by the Commissioners was from a single source, one foreign website, that the images put forward as evidence were not validated in any way, including cross examination, violating Respondents' due process rights.

Supporting Facts and Argument.

a. A very Narrow complaint

The Complaint Counsel crafted a very narrow complaint of three elements, in summary, "..disseminated advertising, for RAAX11, through an internet website, www.agaricus.net " Because RAAX11 was not sold before mid 2004, time also becomes a constraining element. To show an act to have liability, all four elements would need to be present, a very high bar the Complaint Counsel found it impossible to reach and fell back on trying to craft a case from individual elements in isolation by speculation and conjecture.

Since this was an internet case, the criteria for being Substantially Justified in bringing the Complaint would required that a reasonable person have a knowledge of the workings of Websites and the value of foreign website images when they could not be validated as to authorship, posting agent, or the truth of the message conveyed by the images. In trial the Complaint Counsel's chief investigator, Liggins, demonstrated he had website knowledge, but the Complaint Counsel acted as if she had taken no advantage of the knowledge that was known to her Chief Investigator.

b. Ownership and Control of advertising RAAX11 on www.agaricus.net.

To reach the bar of her complaint the Complaint Counsel had to show she had substantial justification for believing the Respondents owned or at least had a major role in formulating the advertising for RAAX11 on www.agaricus.net. Having no evidence whatever that the

Respondents were formulating the advertising, she concentrated on trying to prove their ownership of the website.. Salient facts, she knew or her investigator knew are:.

Facts in favor of ownership by Respondents

The Respondent Isely's name along with that of G Otto appeared on a WHOIS search of www.agaricus.net and the website proper ,as found by her Chief Investigator.

Facts against ownership by Respondents (Known and testified to by Liggins)

Ownership or control of a website requires an account name and password. The email addresses to make the registry changes belonged to G Otto and changes cannot be made without the account name and password. G Otto's email signature was left on all registry changes the FTC found and put on the record from 7-7-2007 onward. Any person's name can be entered in registry, even without their knowledge or permission. There was no evidence that Respondents had either the account name or password.

Isely's name was misspelled and the phone number attributed to him was wrong. G. Otto's address was shown as Isely's residence. It is unlikely that Respondent would make mistakes about his own personal data or have a South American living in his home.

A disclaimer on the WHOIS findings stated that the information might be incorrect or out of date.

The domain registrar of www.agaricus.net provided the Respondent with a letter which was passed on to the Complaint Counsel before the complaint was issued to the effect that the website from the time it was created had been owned by a Brazilian Company.

The contents of the pages of www.agaricus.net show it to be a multi-national website, operating in six languages. The home page includes a Brazilian phone number, so identified by its country code. Products are described as grown in Brazil as is the place of business as described on the label of the sample products bought be the investigator.

Before the formal complaint was brought, besides denying any involvement in the

advertising of RAAX11 on www.agaricus.net, the Respondents provided the Complaint Counsel with a copy of an email from G Otto which explained that the Respondent Isely's name appearing on the registry was the result of a mistake he, G Otto, had made.,

c. Superficial nature of Complaint Counsel's Investigation (Again from Liggins)

The investigation of G Otto and www.agaricus.net had begun with the FDA and was taken over by the FTC in August '07 .A warning letter, FTC 195-197, sent by email to the website in October 2007, included the statement, "If you are not located in the United States, we have referred the claims on your website to the customer protection agency that has jurisdiction in your locale." The chief investigator stated G Otto was abandoned as their target because no assets of his could be located in the US. A case was then crafted against the Respondents, at most taking a month to investigate the Respondents, which included the year end holidays. At trial, Liggin testified FTC resources were so constrained that nothing was done to corroborate the garnered website information:

He did not contact Domain Discover, the host for www.agaricus.net to ascertain the website ownership status.

He did not investigate the other organizations shown as selling RAAX11 in the US.

He did not contact the Respondent although he had his address and telephone no.

He did not contact the website www.agaricus.net besides the warning letter sent.

He claimed G Otto had no assets in the US, but he obtained two of his Pay Pal accounts and a merchant bank account when he made the undercover purchases . Pay Pal is an American Corporation and could be expected to cooperate with the FTC.

He did no further investigation of the Respondent, Gemtronics, Inc. after learning of its name's registration.

He placed no telephone orders

He did not follow up with learning more about the nature of the Takesun Business

d. Complaint Counsel's Argument That She was Substantially Justified.

In her Answer to the Respondent's Application the Complaint Counsel's argument does not rise to the bar she established in the Complaint. She is on very slippery ground as in her warning letter to the website she has conceded that if it is located outside the United States that she does not have jurisdiction. The Complaint is so narrowly worded that any acts that the Respondents might be liable for took place on a Brazilian website, outside the FTC Jurisdiction, but she proceeded as if the website were in the United States. The jurisdiction issues aside, the only marketing and sales of the Respondent on the website were of products other that RAAX11 in the time period before RAA11 was sold. The shopping cart put into evidence was from early 2004 and did not show RAAX11 for sale. The appearance of Respondent's name and tel. number on the website is not an act of advertising unless it can be shown it was done by the Respondent which is the burden of the Complaint Counsel which she did not accomplish.

Her Investigator knew, as he testified, that registration names have no meaning as to ownership and control of a website. The Complaint Counsel implies to those unfamiliar with website procedure, that they were evidence that the Respondents did own and control the website.

Drop shipping an order for RAAX11 for Takesun, placed with the Takesun company who also accepted the payment is a far cry from the Complaint of Advertising it..

The suggestion that simply registering a name for a corporation has any bearing on the complaint is also simply a distraction.

The ability of the Respondent to get his name removed from the website is a far cry from advertising RAAX11 on the website.

The "compelling evidence" the Complaint Counsel says she had to be substantially justified were odds and ends garnered from a foreign website which could not be

validated and from which the best the Complaint Counsel could do was to make inferences and speculations. At best she might have been justified in continuing her investigation, but certainly not in bringing a complaint.

In her summary, the Complaint Counsel gives credence to the idea that she was interested in reaching a negotiated settlement rather than preparing properly for a trial when she recalls her irritation at being unable to reach settlement with the Respondent when she had, in her opinion, made a very attractive offer. She omits mentioning that in all her offers she always required the Respondent to send a letter to all his past customers using a false letterhead combining Gemtronics Inc with www.agaricus.net and signing for himself, the shell corporation and the website. Draft of this letter is offered as Atachment A. When Respondent's objection was conveyed to her, her comment was 'No one will notice; it doesn't matter since it won't be done under oath.'

e. Ignored Information That Further Weakened Justification Of the Complaint.

The Complaint Counsel made no attempt to verify the veracity of the information that was purported to be conveyed by the web pages of www.agaricus.net.

In discussions of the WHOIS data base information the Complaint Counsel and her chief investigator, and the ALJ as well, passed over the importance of the email address used to change registry information on the web site, the importance being that the person with the email address has the account name and password to control the website. The address used was always that of G. Otto.

That G Otto had been investigated for 5 months and sent a warning letter, or that his name was also given in the registry information, or that www.agaricus.net was a foreign website were not mentioned in the Complaint, factors that might have given the Commission, in their oversight role, reason for not approving the Complaint, at least without further investigation. Other than looking for assets, the FTC investigation of G Otto

was a studied attempt to record nothing about G. Otto and his website in spite of the many clues available. In order to import food supplements into the United States, Takesun had filed a multi-page document with the FDA, describing his operations in detail. Every importation required filing an FDA Prior Notice under the Homeland Security regulations as well as engaging the services of a registered U. S. Agent. Each order passed through customs and the scrutiny of the FDA. G. Otto had registered the RAAX11 trademark with the. U. S. Trademark office. The two product purchases the investigator had made provided him with details of two Pay Pal accounts belonging to Takesun. Many of Takesun's thirteen or so web sites included sections describing their operations and even inviting visits to Brazil. www.agaricus.net had an active chat service where much could be learned about the Takesun operations.

The report of the expert witness, Dr. Omar Kucuk, was fatally flawed and the Complaint Counsel did nothing to correct it. This is another example of the superficial nature of the investigation. RAAX11 is a combination of two ingredients, Agaricus mushrooms and cocoa plum extract with the botanical name of chrysobalanus icaco. Dr. Kucuk reported that besides agaricus, he investigated icaco, and on the latter, found no information, which is not surprising since icaco as a substance does not exist. He did not report that he had investigated chrysobalanus icaco.

f. The ALJ's Initial Decision on Respondent's Application for Award of Attorney Fees

The ALJ erred in his Initial Decision on Respondents' Application for Award of Attorney Fees in that he stretches what a reasonable person could believe, which in this case Included the website savvy Mr. Liggins. The ALJ basically parrots the speculations of the Complaint Counsel which he had so thoroughly rejected in reaching his Initial Decision that the Complaint Counsel had not appealed.. To believe the

Complaint Counsel's position, a reasonable person would require some tangible evidence beyond speculation and possibilities balanced against real evidence in favor of the Respondent. *Pierson v. Underwood* teaches that the Congress in selecting the phrase substantially justified meant a **solid position** or a **position with a firm foundation** and warns against using reasonableness in its weaker sense.

No actions of any kind had been found regarding the Respondent, Gemtronics, inc. but the ALJ does not justify not giving the Respondent Gemtronics Inc. an Award.

The WHOIS data base data, while unusual, did not signify ownership and control while the Domain Registrar authoritatively gave ownership to G. Otto's company, Takesun . Since no evidence was found showing that Respondents had participated in the advertising of RAAX11 on the website, the only remaining path to imply advertising was through ownership, which was why the Complaint Counsel had hung on to the WHOIS data even though it was discredited even before the Complaint was brought.

That others, besides the owner, might have had control is not evidence against the Respondents. One might speculate that the investigator, who was web site savvy, was a better candidate for control of the website. The happenstance that WHOIS showed the Respondent's name and telephone number was explained by G Otto in an email which was conveniently ignored by the Complaint Counsel and the ALJ. The ALJ ignores the testimony and web images presented as regards to sales on the website. None show the Respondent offering RAAX11. He only sold other products there at an earlier time period before RAAX11 was available. Then he shifted to his website, www.our-agaricus.com

The ALJ explains that the trial was necessary to resolve inferences and conclusions of the Complaint Counsel, requiring testimony of the Respondent. However the same information to resolve these inferences and conclusions was given to the Complaint Counsel by the Respondent in a call in March 2008. A reasonable person would have

investigated the additional information given in the phone call, but she did not do so. The Complaint she brought in September was, in all important regards, the same as her draft in March, and was not modified by any information the Respondent had supplied.

g. The Opinion of The Commission in Rejecting the Respondents' Appeal

The Chairman of the Commission wrote the Rejection Of the Respondents Appeal, basically parroting the ALJ's findings and adding some comments that reflected his lesser understanding of the subtleties of the case. Like in approving the Complaint in the first place, he also exceeded his discretion in denying an award.

As done by the Complaint Counsel and the ALJ, he gives no justification for not giving an Award to the Respondent, Gemtronics, Inc. an inactive shell company, which committed no acts whatever

He joins the ALJ in using the term "evidence" to describe unverified information found on a foreign website, which could not be cross-examined as to authorship, or veracity, as a sufficient basis for bringing a complaint. It is curious that the FTC has built its whole case on unconfirmed information it has gleaned from one source, a foreign website, while at the same time it is accusing the same website of containing false and misleading information. The FTC does not show why some information found is believed while other information from the same source is not.

He does not show he has read either the Trial transcript or the depositions when he gives weight to the Respondent's use of "Takesun USA" which was for a partnership that had been dissolved years before the era of RAAX11 and subsequently only used in his wholesale business. The name is similar to Takesun do Brasil but name similarity is not proof of the complaint of false advertising of RAAX11 on www.agaricus.net. Using a similar name to sell his products in his own business is not charged in the Complaint.

The Chairman reverts to the WHOIS data base to support the idea that the

Respondent had control of the website, when the Chief Investigator before the Complaint was brought, knew it did not, a major reason the case was dismissed. This shows a lack of understanding by the Chairman. He also ignores the only reliable information in the WHOIS data, the email address of G. Otto used to input the information. This showed G. Otto had the account name and password required to control the website.

A principle of law that applies to all actions of government is that a person is liable for his acts. Finding the Respondent's name all over anything including a wall, a website or a newspaper, is not of itself an act of the Respondent. Since the Respondent was a wholesale customer of Takesun, it had all his contact information, and having control of the website, it was the only known entity who could act to post Respondent's name. Complaint Counsel has suggested, without any evidence, that the Respondents, besides G Otto, could have had control of the website. So could have anyone else. Fortunately, the FTC has not yet been empowered to bring cases on the basis of "could have".

The Chairman's recounting of the two undercover purchases deviates from the record. The purchases were *fulfilled* by Takesun who accepted payments. The Respondent's role was only one of delivery. The true purchase confirmation notice, cited for the second delivery, was from a Pay Pal account "Takesun Portugal Lda, Verkauf" and so confirmed by Liggins at trial. The website also did issue two bogus purchase confirmations from a merchant bank account, "TAKESUNPORT", and "GEMTRONICS SECURE PAYMENTS". Liggins testified Gemtronics was not the biller which the Chairman suggests. What Gemtronics Secure Payments might be was not established by the FTC and was not known to the Respondents.

The reference the Chairman makes to the product RAAX11/Agaricus OPC Protocol has no bearing on the case. As the Complaint Counsel admitted in trial, it is not a product listed in her Complaint and the ALJ eliminated its further consideration in the trial.

The Respondent enclosed some sales literature with the two deliveries of the undercover purchases, but no medical claims for RAAX11 or other material that might be classed as false advertising for RAAX11 were included and found by the ALJ in trial. Directing someone to go to a particular website for more information is not false advertising for some product they might find there as also ruled by the ALJ.

That the Respondent was able to get his name removed wherever it appeared on the website is not evidence that he controlled the advertising. If one must engage in speculation, like the Chairman, any number of explanations are more likely.

1) Takesun valued the Respondent as a valuable wholesale customer of 8 years. and agreed to his request to have his name removed, hoping for future sales.
2) Takesun did not want to be sued for identity theft which the Respondent had told Takesun he was considering.

That is all the Chairman has to offer to support "Substantially Justified", a few peripheral activities of the Respondent, but nothing a reasonable person would think could support the complaint that he disseminated false advertising of RAAX11 on the website www.agaricus.net.

The Chairman makes a point about an apparent self contradiction of the Respondent in deposition regarding credit card purchases that occurred in the deposition where the Respondent was confused about which websites and what time periods were under consideration. The Respondent sold RAAX11 from www.our-agaricus.com, his own website, to customers offering credit card payments. This incident should have no bearing on whether the Complaint Counsel was substantially justified in bringing the Complaint since, as the Chairman well knows, the deposition occurred well after the Complaint had been brought.

The Chairman admits bringing the Complaint in the face of conflicting evidence

without discrediting the "evidence" against the Respodents as unverifiable hearsay,. from a foreign website. The verifiable evidence, clearing the Respondent was from Domain Discover as well as the email signature left behind by G Otto on registration. Using hearsay was what the Complaint Counsel did, but not what a reasonable person would do. The least a reasonable person would do in such circumstances of having no credible evidence would be to investigate further, in this case making of a few phone calls.

The Chairman claims jurisdiction over foreign websites which is rebutted in issue 4

Issue 2.

In Law Do not the principles in *Hess Mechanical Corporation Vs NLRB* and *U S Government Vs. Hallmark* apply? *These cases* closely mirror the instant case in both pre-trial and trial aspects and hence should have been followed by the FTC Commission. From *Hess*

a. **Paragraph 19 When the defense has a strong case, "No reasonable party would have proceeded with the complaint without further investigation to ensure that the defense could be challenged."**
b. **Paragraph 20 that "The process of litigation presupposes some reasonable investigation before filing a complaint."**

From The U S Court of Appeals, 4th Circuit, *Hess* would be binding on the FTC. From *Hallmark*

The same principles of *Hess* are found in *U S Government Vs Hallmark.* Paragraph 9 is one which the Respondent urges the Court of Appeals to specially consider. The parallels between Hallmark and the instant case are very close. In Hallmark the government was particularly criticized for much of its evidence resting on speculation and conjecture. The ALJ in his Initial Decision

in the instant case , concurred in by the Commission by allowing the Initial Decision to become final, states,

"this case relies on circumstantial evidence and negative inferences."

Supporting Facts and Argument.

Hess

There is a striking similarity between *Hess* and the instant case. Both are cases where the Respondent prevailed in trial, but an award of attorney's fees and expenses was denied by the Board, in both cases claiming that the Complaint Counsel was substantially justified in bringing the complaint.

In *Hess* the Complaint Counsel chose to go forward with only a dubious affidavit against a strong defense that included written documents and testimony from numerous knowledgeable witnesses.

The instant case is more complex but the material the Complaint Counsel had to evaluate to determine her prospects before bringing the complaint was similarly poor:

Her investigative team knew her WHOIS information she planned to put forward to show that the Respondents controlled the website under scrutiny would show control was with G, Otto. This was a fatal weakness she would stay in denial over and do nothing to repair. She was apparently willing to risk her Chief Investigator having to testify against her position which he did in trial.

Her reliance on foreign website images to try and portray the Respondents as operators on the website could not be supported by testimony as the needed witnesses would be living abroad, not subject to subpoena. The images might be even be declared as hearsay by the ALJ and no longer support her case..

The attempt to develop liability by the Respondents with her sample purchases had bombed out when the payments for both were taken by George Otto Pay Pal accounts. The purchases had also revealed G. Otto's Merchant CC account. She should have been able to learn a great deal about George Otto, including that his last name was Kather, if she had followed up with these three accounts which she did not do..

The originally successful concealment of her long previous investigation of George Otto, which had ended in a dry hole for reasons of no attachable assets, came to light and gave the Respondent further reasons for deflecting attention away from himself. She and her investigator tried to make something of the bogus registrant and ignored that all registry inputs had been made with G Otto's email addresses, marking him as the owner and controller of www.agaricus.net

Her position with the second Respondent, Gemtronics Inc,. was worrisome as nothing on its activities had surfaced. She would carry it along as a Respondent and hope something would show up. If a settlement was reached it might have resources that could be tapped.

Her expert witness she had had to pay dearly for had produced a superficial report for lack of funds and had turned in a fatally flawed report she could not afford to correct. His report showed that he had not investigated the right key ingredient, chrysobalanus icaco, but something else. The error was buried in the report and few people read such things. Maybe it would not be noticed to make any difference, particularly if they didn't get to trial.

These risks were insurmountable, but risks only if the case proceeded into trial. But she never intended to get to trial as was the case in the ninety-five per cent of the other Cancer Sweep cases. She felt her case was no worse than many others which had been successfully steered or coerced into settlements that were advantageous to the FTC. Her evaluation was that the Respondent Isely, as an old man retired for twenty years and living on a mountain farm, did not have the resources to sustain his defense long enough to get to trial..

She had contacted the Respondent Isely by Telephone and with his strongly denying the charges she was planning to bring, she could expect him to make a vigorous defense and she had no potential witnesses available to counter the strong positions he would take. He had told her a great deal about George Otto Kather which she did not follow up.

As it turned out the case did get to trial and most of the Complaint Counsel's fears came through with a decisive decision for the Respondents of dismissal. One key to identifying control of a website is by the email of the person making website entry changes. Website ownership was clearly established by a letter and later the deposition given by the website hosting registrar. The ALJ did not rule the unverifiable web pages as hearsay and remove them from the category of evidence. If the ALJ had recognized these two other weakness of the Complaint, it is likely that the trial would have ended in an early dismissal or at least at Summary. Certainly knowledge of these two weaknesses of the Complaint Counsel should have affected the outcome of the award phase and still should be when considered in an impartial forum.

The Chairman in summarizing the Commission's position misrepresents the case when he says, "The Complaint was supported by evidence from numerous sources". The record shows that the only source, which was not corroborated, only hinted that the Respondents might be liable, was the website www.agaricus.net. and the WHOIS report about it. Due to its foreign nature it could not be substantiated or cross examined. To suggest such images as were captured by the Chief Investigator Liggins rise to the level of evidence stretches logic beyond that capable of a reasonable person.

In summary, in applying the teaching of *Hess,* the Complaint Counsel's position was so weak at the onset that if she had been sincere about going to trial she should never have initiated the Complaint. Therefore an award should be made. Even if the Court of Appeals finds she was not as weak as portrayed by the record, the balance against her was sufficient

that she should have paused and further investigated to see if she could improve her case as required by *Hess.*

There is no Information in the record that any significant investigations were made by the Complaint Counsel after the two sample purchases were made. Her chief investigator stated that he did not even make a single phone call for lack of resources.. Again for the very superficial investigation made in the face of substantiated contrary evidence, an award should be made.

Instead of further investigation, the Complaint Counsel turned her attentions to trying to force the Respondent to settle under burdensome terms, which was unrealistic, considering the weak state of the Complaint Counsel's case.

Hallmark

Hallmark is another case where the Respondent prevailed in trial, but was denied Award for Attorney fees and Other Expenses. In the *Hallmark* trial the Corps' conclusions were arbitrary and capricious because they were not based on relevant factors and evidence. Also their evidence rested on speculation and conjecture. In Hallmark, having found the government's case to have been so weak, the Appeal Court remarks that under such circumstances the government's entire litigation position through the entire proceeding must be examined, both in prelitigation and litigation. The circuit court particularly emphasizes that the government's prelitigation position must be sound without conflicting evidence on key points that will need to be proven in trial.

As the respondent has already detailed and won't repeat here, the Complaint Counsel had no concern for the weakness of her position since her objective was only to coerce the Respondent into settlement, and she never expected to go to trial..

Issue 3.

Should not the second Respondent, Gemtronics Inc, have been given Award for Attorney Fees and Expenses, since at the time the Complaint was filed and afterwards the Complaint Counsel had no evidence about any actions of the second Respondent. In addition that ALJ found in his Decision that led to the Dismissal, "Gemtronics, Inc. is an inactive corporate shell and had no officers or directors to take any action on its behalf"?

Supporting Facts and Argument.

During the time that the Respondent William Isely handled RAAX11, 2005 and ongoing, he had conducted his business under the name of Gemtronics. Briefly in 2006 he Considered the possibility of incorporating and went so far as to file for the corporate name, Gemtronics, Inc. The Complaint Counsel's investigator had located records that showed the Registration, but no other records regarding it. The costs of corporate taxes and accounting discouraged the corporate approach, and the corporation was never activated. Unfortunately, the names are easily confused, as it happened a number of times during the judicial process.

The next appearance of Gemtronics, Inc. in the case was when in disclosure the Respondent Counsel's clerical personnel, in final typing, changed the name of Gemtronics to Gemtronics, Inc, thinking they were correcting a mistake. What they changed was in a statement that Gemtronics had registered the business as a warehouse with the FDA, as was required by the homeland Security act. Since the registration, a copy of which was supplied to the FTC, was done 2 years before the Registration of Gemtronics as a corporation, the discovery information was an obvious mistake. The Respondent was not given a copy of the disclosure document before it was sent, so the correction could only be made after the fact. The Complaint Counsel had the dates of both actions. Never-the-less the Complaint Counsel

has continued to hold this as evidence that the corporation was active. It certainly has no bearing to support the justification for bringing the complaint against the Corporation and the Complaint Counsel found and cited no other actions attrributable to the corporation.

The other incident, with no bearing on bringing the complaint because it took place during the trial, is that the Respondent volunteered the information that he had obtained a credit card in anticipation of the Corporation being activated. It was in his name as well as the Corporation's. The card was never activated and was forgotten for years, lying in his dresser.

Yet the Respondent was forced to defend this shell throughout the proceedings as well as himself after arguments conducted unsuccessfully between the Respondent's Counsel and the Complaint Counsel who to the end stated that the Corporation was potentially active and dangerous. The wording in her proposed settlements would suggest that her thinking was that in any settlement the Corporation be enjoined forever from conducting any business.

Gemtronics. Inc has had its name thoroughly and permanently besmirched by the FTC; the registration has lapsed, having never been renewed.

The concern the Respondent William Isely has is that the Corporate Respondent be treated as it deserves, a Respondent against whom a complaint was filed without any justification whatever, a stronger position than just "Not Substantially Justified." The award for the Corporation alone should be ordered directly regardless of any further considerations involving the Respondent William Isely. Since the case against the Corporation was carried all the way, it would be fair for it to receive one half of the Attorney Fees and other expenses claimed in the Respondents' application discounted to the statute Cap. Also the FTC should be directed to engage in Rulemaking to adjust the Maximum Attorneys Fees rate in light of cost of living increases. An application for this Rulesmaking has already been filed with the FTC.

Issue 4.

In Law Did the FTC Commission exceed its authority when it assumed enforcement jurisdiction over the foreign website www.agaricus.net , located in a foreign country, owned and operated by a foreign entity, by:

a. bringing a complaint against the contents of that web site?

b. bringing a complaint on alleged actions that took place on that web site?

c. expending public funds in the above endeavors not authorized by The Congress?

Supporting Facts and Argument

There would appear to be no precedents in case law fitting the instant case, a case where the FTC brought a complaint against actions that took place on a foreign website operated by a business located in a foreign country. A reasonable understanding of Title 15 Sub Sec.45 would generally prohibit the FTC from engaging in the regulation of commerce with foreign nations, which would include foreign websites. The US Safe Web Act, enacted more recently, would allow the FTC the limited power of investigation and coordination in cases where damage to US citizens has been documented, but not enforcement. The foreign powers would still retain jurisdiction for enforcement actions.

The Complaint Counsel recognized this principle that enforcement goes with the geographical location of the business operating the web site, a practical approach, when in her warning letter to the website, which appears to be a standard form letter of the Commission, she states in her last paragraph, **"If you are not located in the United States, we have referred the claims in your website to the consumer enforcement protection agency that has jurisdiction in your locale."** She then ignored this principle when she drafted the complaint and in her subsequent acts.

The Commission, in their Opinion, authored by Chairman Leibowitz, also ignores the jurisdiction of other sovereign powers. He ignores Title 15 which prohibits regulating foreign commerce. The Chairman in fact does not cite a single statute or case in law that gives him enforcement powers over foreign websites. Instead he just assumes powers with no geographical limitations, when he says **"The Commission unquestionably has jurisdiction under the FTC Act to bring an enforcement action targeting unfair or deceptive acts or practices that harm U.S. consumers "** Here he is referring to the Safe Web Act. A reading of the Safe Web Act,, specifically addressing foreign web sites, authorizes the FTC only to expend funds to make investigations and coordinate their findings with foreign agencies. The safe web act does not give the FTC any additional enforcement power as claimed by the Chairman. It does not even come into play until U.S. customers have been damaged. There were no complaints by customers brought against the Respondents or even www.agaricus.net . The FTC in bringing this action illegally, expended public funds not authorized by The Congress and trampled on the sovereign rights of Brazil.

Congress, in establishing the FTC, denied it power over foreign commerce claimed by the Chairman. The need for such restriction is obvious in order to avoid foreign conflicts. What is objectionable to U S regulators on a U S web site may not be so to the appropriate foreign regulators on their web sites. To apply our standards and practices to foreign websites, particularly if they have different standards officially sanctioned by the appropriate foreign authority, could lead to a great deal of confusion and conflict. In the international market, if the FTC attitude were to be generally adopted, foreign governments might insist on jurisdiction over U.S. websites when we sell to their customers, which I am sure the Commission would resist vigorously. Sellers would be faced with the impossible task of simultaneously satisfying many diverse Jurisdictions. The Congress has left such conflicts to

be handled by means of trade agreements. Dangerous products can be interdicted at the borders by the U. S. Customs when trade agreements don't produce the desired results.

Issue 5

While the Constitution recognizes the need for various departments in the Executive Branch to effectively administer the laws passed by the Congress, is it unconstitutional to empower such departments to become sub-governments which also pass laws and maintain courts, powers in the Constitution reserved for the Legislative and Judicial branches respectively?

Supporting Facts and Arguments.

Most of the executive departments (bureaus, agencies, commissions, administrations) pass laws under the guise of 'Rules' and maintain courts administered by Administrative Law Judges (ALJ), making them complete sub-governments within the Executive Branch not anticipated in the Constitution. The Constitution carefully and clearly separates the three powers of government into three branches. Without this separation of powers, conflicts of interest and corruption are inevitable as the Founders foresaw. An administrator in a department acting in a judicial role can be biased in rendering a decision, such as are required in the EAJA, which might create a budget problem in his executive role. Alternately to meet objectives due to political pressures of the Executive Branch, the administrator might exert pressure on his legislative and judicial underlings to bring complaints and make findings not justified by either the facts or law. With political ambitions, an administrator, un-restrained by the Inspector General reporting to him, might expand his jurisdiction beyond that given him by The Congress. Such undue expansion is facilitated by the administrator having all three powers of government in his control. The "rules' may be written and executed in ways that

constrain due process as envisioned by the Founders to provide trial by jury, cross-examination of 'evidence', use of a grand jury to bring complaints, and avoidance of double jeopardy. Additionally the rule makers further dilute the concept of legislation by representation as none of the rule makers are elected by the citizenry and at best only their top administrators are appointed are by the President, making the path of accountability to the citizenry a very tenuous one.

5 . Relief Requested

A. Reverse and Remand the case against the Respondent Isely for Award of Attorney fees and other Expenses with instructions to the Commission to continue the negotiations for the award amount that were discontinued.

B. Instruct the FTC Commission to initiate Rulemaking responding to the request of the Respondent Isely on Maximum Rates for Attorneys to allow for cost of living.

C. Reverse and Remand the case against the Respondent Gemtronics, Inc. for award of Attorney Fees and other Expenses with instructions to the Commission to make an Award of $30,250.

D. Instruct the FTC Commission to initiate Rulemaking responding to the Request of the Respondent Gemtronics, Inc. on Maximum Rate for Attorneys to allow for cost of living.

E Rule that the Executive Branch of the U. S. Government is acting outside of the Constitution when its departments exercise legislative and judicial powers. Further that the Court direct The Congress to pass laws to re-organize the Executive Branch to return the usurped powers of the Legislative and Judicial

Branches.

Other than Rulemaking on the Maximum for Attorney fees, no further deliberations should be required by the FTC for the Respondent Gemtronics, Inc. for whom there was not even a hint of liability and no basis for being included in the complaint.

For the Respondent Isely *Pierson v Underwood* teaches that the award process should not be extended into the equivalent of a full additional trial, and yet that has happened in the instant case. Because in the award phase past, the ADJ had ordered the two parties to enter into negotiations on the award amount, further long protractions should be avoided by taking up the negotiations in good faith where they were left off.

The Court in *Pierson* suggested that the Congress had not meant that awards should take the cost of living increases into account. History however questions whether this was a valid interpretation since the Congress acted to bring the award into line with the cost of living at the time they acted. A more logical explanation of why the Congress suggested rulemaking to increase awards was their recognition that costs would increase regularly with time and the Cap imposed by Congress would get behind a fair settlement as they have with over a decade having passed since the cap was reset.

The cost to the Respondents resulting from the FTC action was over $100,000. In response to what the Respondent thought might be acceptable to the FTC, the Respondent removed his own expenses, reduced the attorney fee rate to the cap of $125/hr as well as expenses incurred before the second complaint was brought, removed all his Counsel's travel costs, reduced the paralegal hours by 15% as being spend on clerical duties, and reduced his Counsel's office expenses by 20%, making his negotiating position $62,500.

The Complaint counsel had made an approved offer of $35,000 which she raised to $40,000. The Respondent then offered to settle at $50,000 if the FTC would agree to it.

There was no move by the FTC before the time period allowed for negotiations closed. The Complaint Counsel during negotiations felt the parties were close enough to agreement that she filed a formal request to the ALJ, requesting a mediator to facilitate settlement. It is curious that the ALJ denied the award on a case he said in his initial decision was based on 'speculation and negative inferences', and after he had ordered negotiations which had resulted in an offer by the FTC of $40,000.

Prorating all costs from the $62,500 to a $50,000 level leaves Attorney hours at 243.8.

6 . Respondents have not filed any other cases with the U S Court Of Appeals, 4th Circuit.

Signature

_____

(Print) William H. Isely Date 4-13-2011
Appellant, *pro se*

CERTIFICATE OF SERVICE

****

I certify that on_4-13-2011, I served a complete copy of this Informal Brief on all parties, addressed as shown below:

Patricia S. Connor, Clerk
U. S. Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517

Donald S. Clark
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Atlanta, GA, 30303

Signature William H. Isely

William H. Isely
Appellant, *pro se*

ATTACHMENT A

LETTER TO BE SENT BY FIRST CLASS MAIL

(To be printed on letterhead of Gemtromnics, Inc./www.agaricus.net)

To Whom it may concern: Date

Our records show that you bought RAAX11 from our website agaricus.net. We are writing to tell you that the Federal Trade Commimssion ("FTC") has found that our advertising claims for these products were false or unsubstantiated, and has issued an Order prohibiting us from making these claims in the future. The Order entered against us also requires that we send you the following information about the scientific evidence on these products.

No scientific research has been done concerning the product RAAX11 as a preventive, treatment, or cure for cancer in humans. Very little scientific research has been done concerning either of the ingredients in RAAX11, *chrysobalanus Icaco* extract and *Agaricus blazei Murill* mushroom extract, as a preventative, treatment, or cure for cancer in humans. The scientific studies that have been done do not demonstrate that RAAX11, or the ingredients in RAAX!!, are effective when used as a treatment for cancer.

It is very important that you talk to your doctor or health care porovider before using *any* alternative or herbal products, including RAAX11. Speaking with your doctor is important to make sure that all aspects of your medical treatment work together. Things that seem safe, such as certain foods, herbs, or pills, may interfere or effect your cancer or other medical treatment, or other medicines you might be taking. Some herbs or other complementary or alternative treatments may keep your medicines from doing what they are supposed to do, or could be harmful when taken with other medicines or in high doses. It is also very important that you talk to your doctor or health care provider before you decide to take any alternative or herbal product, including RAAX11, instead of taking conventional cancer treatments that have been scientifically proven to be safe and effective in humans.

If you would like further information about complementary and alternative treatments for cancer, the following Internet web sites may be helpful.

3. The National Cancer Institute. www.cancer.gov/cancertopics/pdq;
4. The National Center for Complementary and Alternative Medicines: www.nccam.nih.gov

You also can contact the Natiohal Cancer Institute's Cancer Information Service at 1-8004-CANCER or 1-800-422-6237.

Sincerely,

William H. "Bill": Isely
Gemtronics, Inc./www.agaricus.net