

ORIGINAL



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May 27, 2009

Honorable Donald S. Clark  
Secretary  
Federal Trade Commission  
H135  
600 Pennsylvania Ave., NW  
Washington, D.C. 20580

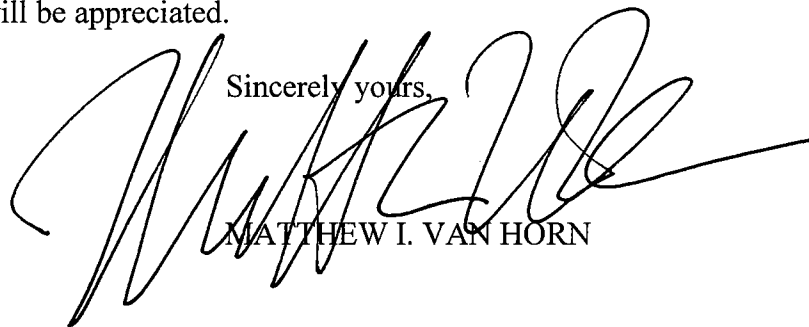
**Re: Gemtronics, Inc. and William H. Isely, FTC Docket No. 9330**

Dear Mr. Clark:

Enclosed herewith please find the original and one copy of Respondents' Counsel's Opposition to Complaint Counsel's Motion for Summary Decision in the above referenced matter. Would you be kind enough to please file the same.

Your cooperation will be appreciated.

Sincerely yours,

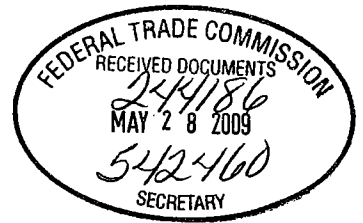


MATTHEW I. VAN HORN

MIVH:lr

Enclosures:  
As Stated

**ORIGINAL**



**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' OPPOSITION TO COMPLAINT  
COUNSEL'S MOTION FOR SUMMARY DECISION**

Respondents GEMTRONICS, INC., and WILLIAM H. ISELY hereby submit their Opposition to Complaint Counsel's Motion for Summary Decision and respectfully request that Complaint Counsel's Motion for Summary Decision be denied and respectfully move for an order dismissing the FTC's Complaint.

**II. Introduction**

The FTC's Complaint alleges that the Respondents violated Sections 5(a) and 12 of the Federal Trade Commission Act on the *single* basis that the Respondents disseminated or caused to be disseminated misleading advertisements for the vitamin supplement RAAX11 through an Internet website [www.agaricus.net](http://www.agaricus.net). Upon discovering over the past several months that the actual facts do not support the allegations in the Complaint, Complaint Counsel has moved for

Summary Decision on revised theories that barely resemble the original Complaint. To that end, addressing the allegations in Complaint Counsel's Motion requires addressing a moving target.

In any event, Complaint Counsel has not met its burden of proof that the Respondents committed any of the alleged offending acts or omissions set forth in the FTC's Complaint. Thus, it is proper for Complaint Counsel's Motion to be denied and, further, that Respondents' Motion for Summary Decision be granted.

**II. The FTC's Complaint should be dismissed because the Respondents are not the proper parties and any acts by the Respondents are strictly *de minimis* and no possible public policy could possibly be served by continuing this case.**

Counsel's Motion is based on theories outside the scope of the Complaint and should not be considered. Even if Complaint Counsel had properly sought to amend its Complaint to include new theories and facts, and even if the new theories were true, Complaint Counsel's Motion for Summary Decision should be denied.

Before this case was filed, Complaint Counsel stated to Respondent Isely in a telephone conference that the FTC was not interested in extracting money from Respondents. Complaint Counsel stated that the sole intent of the FTC was to shut down the alleged offending website [www.agaricus.net](http://www.agaricus.net). Until the FTC contacted the Respondents, Respondent Isely possessed no knowledge that his name or information was being disseminated through [www.agaricus.net](http://www.agaricus.net).

Since learning [www.agaricus.net](http://www.agaricus.net) is owned and controlled by a Brazilian company, and not the Respondents, Complaint Counsel has pursued alternative theories of liability. The fact remains that [www.agaricus.net](http://www.agaricus.net) is a foreign website owned by a company outside the jurisdiction of the United States Courts. In 2006, recognizing the rise and influence of foreign owned websites, FTC policy makers supported passing of the United States Safe Web Act by the United States Congress. The purpose of the Safe Web Act legislation was to police foreign websites

violating United States law with the assistance of countries where foreign websites originate. To that end, the FTC's warning letter it sends to potential violators of FTC regulations, the same letter sent to Respondent Isely, recognizes that some recipients of the letter may be foreign entities outside the scope of the FTC's regulatory authority. See Respondents' Undisputed Facts ("RUF") ¶ 22.

Complaint Counsel's attempt to pursue other theories could not be more evident considering that Complaint Counsel did not mention the deposition testimony and results of a subpoena served on the domain company which sold the rights of www.agaricus.net. In fact, Complaint Counsel has presented an Affidavit from an FTC investigator who researched www.agaricus.net but failed to determine that Respondents were not the owners of www.agaricus.net; information discovered through a subpoena served by Respondents upon the domain company.

Instead of acknowledging the Respondents' assistance it has provided to identify the true owner of www.agaricus.net, the FTC has attempted to prove its case through Respondents' open and forthright actions as the case progressed. In fact, because of his knowledge of the identity of the true owner of www.agaricus.net, Respondent Isely successfully convinced the owner of www.agaricus.net to cease permitting United States customers to purchase products from www.agaricus.net.

As Respondents' Statement of Undisputed Facts show, Respondent Isely's identity was utilized without his permission and he immediately and with full disclosure to Complaint Counsel, demanded and successfully eliminated any association, with or without his consent, from the owner of www.agaricus.net. In addition, Respondents' Statement of Undisputed Facts show that Respondent Isely played no part in the business which owns www.agaricus.net.

### **III. No basis of liability exists under Complaint Counsel's Theory That the Corporate Shell of Gemtronics, Inc. Should Be Pierced.**

Throughout this action, Complaint Counsel has carelessly utilized the name of the corporate Respondent Gemtronics, Inc. interchangeably with the assumed name "Gemtronics". Respondent Gemtronics, Inc. is a North Carolina corporation formed on September, 2006. The uncontroverted direct evidence shows that Respondent Gemtronics, Inc. has never been an active corporation. It has never obtained a tax identification number, filed taxes, issued shares, had a board of directors, or elected officers. It is a legal impossibility that Gemtronics, Inc. can be culpable for any acts because it has never taken any acts or possessed the authority to do so.

Complaint Counsel's Motion for Summary Decision attempts to establish Respondent Isely's individual liability through his acts as the owner and manager of Respondent Gemtronics, Inc. However, Respondent Isely has never been an owner, shareholder, manager of Gemtronics, Inc., nor has he ever had any other role, except as Incorporator, with respect to Gemtronics, Inc. Complaint Counsel's citation to deposition testimony by Respondent Isely is misplaced. See CCSF ¶ 5. Respondent Isely was the Incorporator of the North Carolina corporation Gemtronics, Inc. as defined under N.C. Gen. Stat. § 55-2-1, Incorporators. Respondent Isely's only role with respect to Gemtronics, Inc. was as the Incorporator of Gemtronics, Inc. The Comment to the North Carolina General Statute § 55-2-1 states that "the only functions of incorporators. . . are to (1) sign the articles of incorporation, (2) to deliver them for filing with the Secretary of State, and (3) to complete the formation of the corporation. . ." Respondent Isely, as the incorporator of Gemtronics, Inc., is not individually liable for any acts, if any, committed by Gemtronics, Inc.

### **IV. CONCLUSION**

Complaint Counsel's request for summary decision should be denied based on the fact that the Respondents did not disseminate or cause to be disseminated advertisements for

RAAX11 through the alleged offending website----which is the FTC's sole alleged wrong doing and sole basis of the Complaint.

This action is ripe for adjudication. Discovery in this action has concluded and all material evidence is before the Court, excepting perhaps ascertaining the truth and veracity of the witnesses through testimony at trial (which has not been raised as an issue). As such, the significant expenses and costs of judicial resources associated with a trial can be avoided.

Rule 3.24(a)(2) of the Commission's Rules of Practice states that a party is entitled to summary decision if the "pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law." The uncontroverted record plainly demonstrates that Respondents have not violated Sections 5(a) and 12 of the FTC Act through any dissemination of false and unsubstantiated claims. Accordingly, the Respondents' respectfully requests that the Presiding Law Judge deny Complaint Counsel's Motion for Summary Decision and grant summary decision in favor of the Respondents and dismiss Complaint Counsel's Complaint.

Respectfully Submitted:

THE LAW OFFICE OF  
MATTHEW I. VAN HORN, PLLC

By 

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Raleigh, NC 27601

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*Counsel for Respondents*

This the 26th day of May, 2009.

**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this date served this **RESPONDENTS'**  
**OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR SUMMARY DECISION**  
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.

***One (1) e-mail copy and two (2) paper copies served by United States mail delivery to:***

Honorable D. Michael Chappell  
Chief Administrative Law Judge (Acting)  
Federal Trade Commission  
H106  
600 Pennsylvania Ave., NW  
Washington, D.C. 20580

***The original and one (1) paper copy via United States mail delivery and one (1) electronic copy  
via e-mail:***

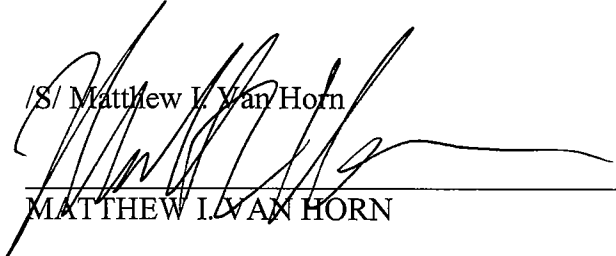
Honorable Donald S. Clark  
Secretary  
Federal Trade Commission  
H135  
600 Pennsylvania Ave., NW  
Washington, D.C. 20580

***One (1) electronic copy via e-mail and one (1) paper copy via United States mail delivery to:***

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

This the 26th day of May, 2009.

/s/ Matthew I. Van Horn

  
MATTHEW I. VAN HORN