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 ANSWER IN OPPOSITION TO RESPONDENTS' APPLICATION FOR AN AWARD OF ATTORNEY'S FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT

I. INTRODUCTION

Respondents Gemtronics, Inc. and William H. Isely (collectively "Respondents") have filed an Application for an Award of Attorney Fees and Other Expenses in the above-captioned matter pursuant to Commission's Rules of Practice, 16 C.F.R. 3.81, *et seq.*, and the Equal Access to Justice Act, 5 U.S.C. 504 ("EAJA" or the "Act"). Respondents seek an award of close to $135,000, which includes: 1) $89,331 for attorney's fees and expenses; and 2) $42,902 for Mr. Isely's various personal expenses including $36,902 for lost business income and profits; $3,590 for credit card interest; $1,246 for office supplies, postage, money transfers, mileage, broadband Internet, and telephone charges; and $1,164 for travel.

Complaint Counsel herewith files its Answer in Opposition to Respondents' Application and states that the Application should be denied for three reasons: 1) the Commission's position in the proceeding was substantially justified; 2) special circumstances make such an award unjust; and 3) Respondents seek an award for fees and expenses not allowed under EAJA.

II. BACKGROUND

This matter stems from an action brought by the Federal Trade Commission ("FTC" or "Commission") against Respondents Gemtronics, Inc. and William H. Isely for violations of Sections 5(a) and 12 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45, 52, in connection with the advertising and sale of a purported herbal cancer cure, RAAX11, on the Internet website www.agaricus.net.

As part of an agency-wide enforcement effort targeting bogus Internet cancer cures, in July 2007, FTC staff began investigating advertising claims on the website www.agaricus.net that RAAX11 could prevent, treat, and cure many forms of cancer. Evidence obtained during the investigation pointed to Mr. Isely and his company, Gemtronics, Inc., as the parties responsible for the marketing and the sale of RAAX11 from the website. Mr. Isely's name and telephone numbers were listed throughout the website. The registration for the website's domain name listed Mr. Isely at his residential address as the domain's registrar and contact. Two separate FTC undercover purchases of RAAX11 from the website were fulfilled by Mr. Isely, under the name Gemtronics, from Mr. Isely's residence. Corporate records from the North Carolina Secretary of State's office showed that Mr. Isely had incorporated Gemtronics, Inc. in September 2006, with its principal place of business at Isely's residence.

As a result of what appeared to be compelling evidence, in March 2008, the FTC notified Respondents Isely and Gemtronics about the problematic cancer cure claims being made on the website. The FTC provided Respondents with a proposed federal court complaint and proposed stipulated order to provide explicit and detailed notice of the FTC's claims and to facilitate possible settlement.

Respondents refused to discuss settlement of this matter or provide the FTC with any

information or documents about their business operations. Respondents instead asserted that even though they did not control the website, Mr. Isely had taken remedial action to cease the challenged website claims and cease further U.S. sales from the website. Respondents further asserted that assuming they *could* control the website, the cancer-related claims for RAAX11 were supported by reliable scientific evidence.[1]

From the evidence available, it was reasonable to conclude that Respondents had the authority to control both the website's content and sales. This control was demonstrated by virtue of the fact that as soon as Respondents were contacted by the FTC, they instituted significant changes to the website and to its domain registration. Respondents also had the apparent ability to also control the website's sales – having fulfilled both of the FTC's undercover website purchases, and having instituted the suspension of all product sales to U.S. customers from the website. Respondents looked like they were in control, acted like they were in control, and exercised apparent authority to control the website. Given Respondents' apparent authority to control the website coupled with Respondents' insistence that the website's outrageous cancer claims for RAAX11 were substantiated, the Commission had a reasonable basis upon which to issue its complaint.

As the litigation progressed, Respondents again refused to provide the FTC with any information about their business operations. After this Court granted Complaint Counsel's Motion to Compel Discovery, Respondents made Mr. Isely available for deposition and produced a small number of business documents.

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[1] Submitted with the letters were a handful of Internet articles and studies that Respondents claimed they were prepared to introduce through at trial through an expert. The FTC's expert, Dr. Omer Kucuk, examined Respondents' data and concluded that it did not support the challenged cancer claims.

An administrative trial was held in June 2009. At the trial, Complaint Counsel learned that Respondents' had withheld numerous business documents that were responsive to the FTC's discovery requests. By withholding such key documents, Respondents willfully deprived Complaint Counsel of relevant information that had the potential to impact the duration and outcome of this litigation.

The Initial Decision of this Court was issued on October 2, 2009, which dismissed the Commission's Complaint. The Initial Decision became the Decision of the Federal Trade Commission on November 9, 2009.

On December 2, 2009, Respondents filed the instant Applicant for an award under EAJA.[2] Complaint Counsel opposes Respondents' application because, as set forth in detail below, the Commissions' position in the proceeding was substantially justified. In addition, Respondents' application should be denied because special circumstances make such an award under EAJA unjust. Further, the award sought by Respondents is not allowable under the law.

III. THE COMMISSION'S POSITION IN THE PROCEEDING WAS SUBSTANTIALLY JUSTIFIED

The Commission's position in bringing the complaint and pursuing the litigation was substantially justified in this case, and therefore, Respondents' application for an award of fees and expenses under EAJA should be denied. Under Commission Rule 3.81, an eligible party

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[2] This Answer in Opposition will deal with Respondents' instant Application. On December 23, 2009, Complaint Counsel received a copy of Respondents' submission to Chief Administrative Law Judge ("ALJ") Chappell which included "Supplement to Attorney's fees and Expenses, Attachment C of Request for Award Submitted Dec. 2, 2009" and "Petition to the Commission for Rulemaking on Maximum Rates for Attorney Fees as Provided Under Rule 3.81(g)." It is unclear whether these materials were filed with the Secretary's Office. The supplement to Attachment C contains duplicate expenses, uncorroborated new expenses, and conflicting fee petitions to those filed with the instant application. Complaint Counsel will file a supplemental opposition to this additional petition.

will receive an award when:

> It prevails in the adjudicative proceeding, unless the Commission's position in the proceeding was substantially justified . . . . Whether or not the position of the agency was substantially justified will be determined on the basis of the administrative record as a whole that is made in the adversary proceeding for which fees and other expenses are sought.[3]
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> * * * *
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> The burden of proof that an award should not be made to an eligible prevailing applicant is on complaint counsel, which may avoid an award by showing that its position had a reasonable basis in law and fact.[4]

Thus, an eligible party that prevails[5] in a Commission proceeding may receive attorney's fees and other expenses unless the Commission's position was "substantially justified."

A. Legal Standard for "Substantially Justified"

In the seminal case on this issue, *Pierce v. Underwood,* the Supreme Court defined "substantially justified," stating that the term does not mean "'justified to a high degree,' but rather 'justified in substance or in the main' – that is, justified to a degree that could satisfy a reasonable person."[6] Courts have found the "substantially justified" provision of EAJA to be

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[3] Rule 3.81(a)(1)(I).

[4] Commission Rule § 3.81(e)(I). Contrary to their argument, Respondents' Application curiously states that "[t]here was reasonable basis in law or fact" for the Commissions' complaint. (Application ¶10 (hereinafter cited "App. ___")).

[5] This Court has previously considered parties to be "prevailing" for the purposes EAJA applications where the Commission's complaint against them has been dismissed. *See In the Matter of Robert G. Koski, D.O.,*113 F.T.C. 130 (1990) (Initial Decision denying EAJA application for award of fees and expenses); *In the Matter of Motor Transport Association of Connecticut, Inc.*, 112 F.T.C. 574 (1989) (Interlocutory Order denying request for an award under EAJA).

[6] 487 U.S. 552, 565-66 (1988); *see also Hadden v. Bowen*, 851 F.2d 1266, 1267 n.2 (10th Cir. 1988) (Under *Pierce*, "the Supreme Court has laid to rest the argument that the term 'substantial justification' requires a showing of more than reasonableness.")

satisfied if a reasonable person could believe the position was correct; that there is a genuine dispute; or if reasonable people could differ as to the appropriateness of the contested action.[7]

The fact that the Commission's complaint was ultimately dismissed cannot raise the presumption that its position was not substantially justified. Courts have recognized that an award of fees under EAJA is not automatic in every case where a private party prevails over the government, and the fact that the government lost in the underlying litigation does not create a presumption that its position was not substantially justified.[8] In its 2009 decision, *Williams v. Astrue*, the Third Circuit stated, "EAJA is not a 'loser pays' statute; rather, courts should limit their inquiries to whether the government's position was reasonable under the facts and the law."[9] Further, courts have made clear that under the legal standard of EAJA, the inquiry into reasonableness should not be collapsed into an antecedent evaluation of the merits.[10] Rather, in determining whether the government's position is substantially justified, a court must arrive at

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[7] *Pierce*, 487 U.S. at 566 n.2; *Murphy v. Astrue,* 2009 U.S. App. LEXIS 24499 * 6 (7th Cir. 2009); *Golembiewski v. Barnhart,* 382 F.3d 721, 724 (7th Cir. 2004); *Stein v. Sullivan,* 966 F.2d 317, 320 (7th Cir. 1992).

[8] *Williams v. Astrue*, 2009 U.S. App. LEXIS 26362 * 6 (3d Cir. 2009); *Morgan v. Perry,* 142 F.3d 670, 685 (3d Cir. 1998); *In the Matter of Motor Transport*, 112 F.T.C. at 574-75; *Kali v. Bowen*, 854 F.2d 329, 334 (9th Cir. 1988); *S.E.C. v. Fox*, 855 F.2d 247, 252 (5th Cir. 1988).

[9] *Williams v. Astrue*, 2009 U.S. App. LEXIS 26362 * 6 (citing *Morgan v. Perry,* 142 F.3d at 685); *Hanover Potato Prods., Inc. v. Shalala,* 989 F.2d 123, 128 (3d Cir. 1993).

[10] *Id. See also Halverson v. Slater*, 206 F.3d 1206, 1212 (D.C . Cir. 2000); *Louisiana, ex rel. Guste v. Lee*, 853 F.2d 1219, 1222 (5th Cir. 1988) (footnote omitted), quoting *Griffon v. HHS*, 832 F.2d 51, 52 (5th Cir. 1987) ("a finding of unreasonable governmental action is not 'conclusive on the substantial justification issue, else in this class of case the substantial justification issue would always simply merge with the decision on the merits.'")

one conclusion that simultaneously encompasses and accommodates the entire civil action.[11]

B. The Commission had a Reasonable Basis in bringing the Complaint and Pursuing the Litigation

Based on the evidence obtained from the time of its initial investigation to the time of the trial, Complaint Counsel's position had a reasonable basis in law and fact. There was compelling evidence that 1) the cancer-related advertising claims for RAAX11 on www.agaricus.net were false and unsubstantiated; and 2) that Respondents had the ability to control the website. Further, throughout its interactions with Respondents, Complaint Counsel continued to act reasonably in evaluating the liability of the Respondents and proposing sensible relief for both pre-complaint and post-complaint settlement.

In 2007, an FTC search of Internet cancer cures uncovered patently false and unsubstantiated representations made on the website www.agaricus.net claiming that RAAX11, a product sold on the website, could prevent, treat and cure a variety of cancers.[12] Some of the cancer claims included:

> Has a cancer killer been discovered? RAAX11 Extract.

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[11] *See Williams v. Astrue*, 2009 U.S. App. LEXIS 26362 * 6 (court review of the government's position must examine both its prelitigation agency position and its litigation position.); *Stewart v. Astrue,* 561 F.3d 679, 683 (7th Cir. 2009) ("a party's success on a single claim will rarely be dispositive of whether the government's overall position was substantially justified."); *Jackson v. Chater,* 94 F.3d 274, 278 (7th Cir. 1996) (affirming the denial of fees and finding the government's position on the whole was substantially justified); *see also Roanoke River Basin Assoc. v. Hudson,* 991 F.2d 132, 139 (4th Cir. 1993) ("[W]e conclude that when determining whether the government's position in a case is substantially justified, we look beyond the issue on which the petitioner prevailed to determine, from the totality of the circumstances, whether the government acted reasonably in causing the litigation or in taking a stance during the litigation.").

[12] The FTC's expert, Dr. Kucuk, found no competent and reliable substantiation for any efficacy or establishment claims for RAAX11found on the website. *See* JX 1.

> Scientists report that during laboratory tests the substance destroyed cancer cells that had been resistant to treatment up to now.[13]
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> Even very resistant Leukemia cells die off.[14]
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> Breast Cancer Patients in remission (2006) 621 out of 749 People in remission taking the RAAX11 protocol.
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> B-Cell Chronic Lymphocytic Leukemia Patient, m, 54, in remission taking the RAAX11 protocol.[15]

These statements, among others on website, not only made express cancer-related claims for RAAX11, but also directed consumers to "call Mr. Isely" or call his telephone numbers, which were listed throughout the website. For instance, webpages advertising RAAX11 included these statements:

> If you are living in the US, just call Mr. Isely and he will explain how it works.[16]
>
> If you would like to find out how you too can participate in our ongoing study in the USA, call 828-369-7590.[17]

Mr. Isely was the only source listed on the website for product information and ordering for U.S. consumers. In addition, the WHOIS registration for website's domain listed Mr. Isely at his residential address as the registrar and the administrative, technical, and zone contact.[18]

On January 3, 2008, and again on January 23, 2008, the FTC made undercover purchases

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13 Complaint Exs. A and B.

14 Complaint Exs. A and B.

15 Complaint Ex. D.

16 Exhibit A to the Commission's Complaint. (Hereinafter "Complaint Ex. __").

17 Complaint Ex. C. This telephone number is Mr. Isely's. *See* JX 15.

18 JX 16, JX 17.

of RAAX11 through the website. Both package envelopes listed Mr. Isely, at his residential address, on the return address. The package invoices with the name "Gemtronics" listed Mr. Isely's name, telephone number and email address, along with instructions to place future orders with him directly by phone or email.[19] Promotional literature included in the packages, which also bore the name "Gemtronics," not only repeated the cancer claims for RAAX11 found on the website, but likewise referred customers back to www.agaricus.net for more product information.[20]

With this evidence, Complaint Counsel reasonably believed that Respondents were advertising, offering for sale, and selling RAAX11 through the website, and that Respondents were violating the FTC Act by making false and unsubstantiated cancer-related claims for RAAX11 on the website. In March 2008, Complaint Counsel contacted Respondents regarding the website's alleged false and unsubstantiated advertising claims and provided Respondents with a proposed federal district court complaint and proposed stipulated order.[21]

In response to the FTC's contact, Respondents sent two letters dated May 6, 2008, and May 15, 2008, notifying Complaint Counsel that Mr. Isely did not have authority to control the website, but that he nonetheless had taken measures to have his name and contact information removed from the website and domain registration. Respondents further asserted that, through

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[19] JX 48, JX 56. In addition to the North Carolina records showing that Mr. Isely had incorporated Gemtronics, Inc. in September 2006, archival webpages from the website dating back to 2004 listed "Gemtronics" and Mr. Isely's phone number as a source for RAAX11 information and ordering. *See* JX. 35 - 42.

[20] *See* JX 47, JX 57 - JX 59.

[21] On April 17, 2008, the Food and Drug Administration ("FDA") sent a warning letter to Gemtronics, Inc. and Mr. Isely regarding alleged FDA law violations concerning the website claims for RAAX11. JX 65 is a copy of the FDA's letter.

Mr. Isely's efforts, "the contents of the website have changed dramatically and now no United States citizen can purchase any items from the . . . website."[22] Respondents also represented to Complaint Counsel that "assuming arguendo that Mr. Isely did have control over the contents of the website, [the product claims] are arguably supported by reliable studies and other scientific evidence"[23] and "[i]f prosecuted, Mr. Isely is prepared to introduce the referenced studies and information . . . through an expert witness."[24]

Despite these claims, Respondents did not provide Complaint Counsel with any valid evidence to confirm that they did not control the contents of the website nor did they provide any valid evidence substantiating the cancer cure claims for RAAX11. Further, Respondents did not deny that sold RAAX11 on the website. Complaint Counsel's repeated requests to Respondents for additional information were ignored. In fact, soon after these letters were mailed in May 2008, Respondents ceased all further communication with Complaint Counsel.[25]

Based on the available evidence, Complaint Counsel had a reasonable basis to believe that Respondents were making false and unsubstantiated cancer-related claims for RAAX11 on the website in violation of the FTC Act. In light of Respondents' refusal to pursue any settlement or continued dialog, Complaint Counsel had no reasonable alternative, but to request

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22 JX 66, JX 67.

23 JX 67.

24 JX 67. *See also* Note 1.

25 *See* Exhibit C to Respondents' Application, the itemized attorney billing statements, showing no contact with Complaint Counsel after May 31, 2008, until after the issuance of the Commission's Complaint. Complaint Counsel's records show no contact from Respondents after May 20, 2008, despite her repeated attempts to speak with Respondents after that date.

that the Commission issue a complaint against Respondents Isely and Gemtronics, Inc.

After the administrative complaint issued in September 2008, Complaint Counsel – with the assistance of the Administrative Law Judge – continued to seek a reasonable settlement of this matter with Respondents. The proposed Agreement Containing Consent Order ("Consent") attached to the Commission's complaint, contained no admission of liability and no monetary relief was sought. Nonetheless, Respondents not only refused to settle this matter, but also further prolonged and obstructed this case by thwarting Complaint Counsel's discovery efforts.

During the litigation, Respondents' actively hindered Complaint Counsel's pursuit of information by failing to make Mr. Isely available for deposition. The deposition of Mr. Isely was taken pursuant to the Court's Order granting Complaint Counsel's Motion to Compel Discovery.[26] Complaint Counsel also needed the Court's intervention to obtain Respondents' answers to interrogatories and document production. However, in response to the Order Compelling Discovery, Respondents produced only a small number of pages of requested documents and represented that further responsive documents would be forthcoming. Thereafter, when Complaint Counsel sought the additional responsive documents, Respondents assured Counsel all the requested materials had been produced.[27]

It was not until trial, when Mr. Isely testified that he had files of documents at his home

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[26] Complaint Counsel's Motion to Compel Answers to Interrogatories, Production of Documents, and Deposition of Respondent Isely was filed on January 22, 2009. The Court Order granting the Motion was issued on January 28, 2009.

[27] Respondents' failure to produce documents is further evidenced by the fact that, according to the billing statements of Respondents' Counsel, no further production of documents was made to Complaint Counsel after February 3, 2009, the date the Court Ordered for Respondents to respond to discovery.

evidencing years of Respondents' business transactions and communications,[28] that Complaint Counsel learned that Respondents had not complied with the Court's Order and hid virtually all of their documents from Complaint Counsel. Respondents' continued failure to produce the requested documents deprived Complaint Counsel of relevant, probative evidence that was potentially dispositive relating to the violations alleged in the Commission's complaint. Indeed, this evidence may have aided the parties in earlier disposition of this matter through settlement, voluntary dismissal, or pre-trial summary disposition and may have altered the Court's ultimate decision to dismiss the FTC's complaint.

Given the evidence that Complaint Counsel had showing Respondents' control over the website, and considering Respondents failure to produce any evidence to refute the claims in the Commission's complaint, Complaint Counsel had a reasonable basis in law and fact for bringing this case and pursuing the litigation. The Commission's position in the proceeding was substantially justified and thus, Respondents are not entitled to an EAJA award of fees and expenses.

IV. RESPONDENTS' ACTIONS DURING THE PROCEEDINGS MAKE AN AWARD UNJUST

Under EAJA, the adjudicative officer may deny or reduce an award of fees or expenses to the extent that the party unreasonably protracted the proceedings or if "special circumstances make an award unjust."[29] This provision operates as a safety valve to give the courts discretion

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[28] TR. 225 - 28.

[29] 5 U.S.C. § 504(a)(1).

to deny awards where equitable considerations dictate that an award should not be made.[30]

Respondents' actions throughout this matter caused an unreasonable protraction of these proceedings and their obstruction of the legal process by withholding documents constitutes special circumstances that make an award under EAJA unjust. Respondents initially protracted this proceeding by failing to produce discovery or make Mr. Isely available for deposition. As noted in detail, *supra*, Complaint Counsel was required to file a Motion to Compel discovery with this Court.[31] However, even after the Court issued its Order compelling discovery, Respondents willfully ignored the Order and failed to produce numerous documents within their custody and control. In spite of Respondents' assurances that all documents had been produced, at trial, Mr. Isely testified that he had files of documents at his home which had never been produced to Complaint Counsel.[32]

Complaint Counsel and this Court were denied access to potentially crucial documents that could have been influential to a resolution of this case through settlement, voluntary dismissal, or summary disposition. Likewise, the outcome of this trial could potentially have been different had all of the requested documents been produced. For example, Respondents' failure to produce documents evidencing years of communications with individuals whom Respondents claimed to be in control of the website, not only deprived Complaint Counsel of

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[30] *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 571 F. Supp. 1581, 1582 (D.D.C. 1983) (government's actions affording the relief sought were special circumstances making an EAJA award unjust); *See, e.g., Oguachuba v. I.N.S.*, 706 F.2d 93 (2nd Cir. 1983) (alien's persistent flouting of immigration law constituted "special circumstances" making an EAJA award unjust); *Wimpy v. Barnhart,* 350 F. Supp.2d 1031 (N.D. Ga. 2004) (special circumstances of late submission of evidence would make an EAJA award unjust).

[31] *See supra* note 26.

[32] TR. 225 - 28.

relevant and probative evidence, but also deprived this Court of information that conceivably might have altered the final decision dismissing the FTC's complaint.

Similarly, Respondents' assertion in their Application that there was no reasonable basis for naming the corporation, Gemtronics, Inc., as a party in this case could have easily been obviated if had Respondents produced the requested business documentation.[33] In neither written nor oral pre-complaint communications with Complaint Counsel did Respondents represent that "Gemtronics, Inc. was forever an inactive shell corporate entity."[34] Further, since Respondents produced no business records, the only information in Complaint Counsel's possession was the 2006 North Carolina corporate records for Gemtronics, Inc. showing Mr. Isely as the incorporator of an active corporation.[35] Based on this information, plus use of the name "Gemtronics" on the package invoices and promotional literature for RAAX11, and references to Gemtronics on the website,[36] Complaint Counsel had no reason to know that Mr. Isely was not operating Gemtronics as a corporate entity.[37] Thus, there was a reasonable basis at the time the Commission's complaint issued to name the corporation as a party. Any evidence to the contrary was never produced during this proceeding. In fact, in his Responses to Interrogatories, Mr. Isely states that he registered his warehouse with the FDA under the name

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[33] App.II.C., ¶¶ 24 - 28.

[34] App.II.C.

[35] JX 13. Both the FDA and FTC addressed their warning letters to Mr. Isely and Gemtronics, Inc. JX 64, JX 65. Mr. Isely took no steps to dissolve the corporation pending this litigation. TR. 22.

[36] *See supra* note 19.

[37] Mr. Isely had not registered "Gemtronics" as a fictitious name or dba in North Carolina. TR 22.

Gemtronics, Inc., thus further contradicting the Respondents' argument.[38]

Equitable considerations dictate that an award under EAJA should not be made to Respondents due to their protracting and obstructing the legal process in this case by frustrating discovery and this Courts' Order. Respondents should not be rewarded for their dereliction in producing discovery and, accordingly, Respondents' request for an award should be denied.

V. RESPONDENTS SEEK AN AWARD OF FEES AND EXPENSES NOT ALLOWABLE UNDER EAJA

Respondents' Application seeks an EAJA award of attorney's fees and expenses of $89,330.19, plus Mr. Isely's personal expenses in the amount of $42,902.17.[39] Respondents' Application should be denied or significantly reduced because they seek 1) an award for fees and expenses incurred prior to the issuance of the complaint; 2) enhanced attorney's fees; 3) unreasonable and non-compensable fees and expenses; and 4) fees and expenses incurred as a result of Respondents' undue delay in protracting final resolution of this matter.

A. Fees and Expenses Incurred Prior to Issuance of the Complaint Are Not Allowable Under EAJA

Respondents' Application includes a claim for fees and expenses incurred prior to the issuance of the Commission's complaint,[40] which are not allowable under EAJA.[41] The Act specifically provides only for the award of expenses "incurred" in connection with an "adversary

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38 JX 9, p.12.

39 App. page 10.

40 App., Ex. C.

41 Further, Respondents' request also includes fees for legal representation for Respondents' interactions with the FDA, which is irrelevant to this instant proceeding.

adjudication."[42] Commission Rule 3.81(a) similarly states that EAJA provides for the award of fees and expenses to "parties to adjudicative proceedings under Part 3 of this title." Under EAJA and the Commission's Rules, pre-complaint investigation is not an adjudicative proceeding. Specifically, EAJA states that an adversary adjudication is "an adjudication under section 554,"[43] and Section 554 states that it applies to adjudications "determined on the record after opportunity for an agency hearing." Commission investigations clearly fall outside the scope of this phrase.[44]

Commission Rule 3.2 defines the nature of Commission adjudicative proceedings, and specifically excludes from the definition pre-complaint activities: "It does not include other proceedings such as negotiations for the entry of consent orders; investigational hearings as distinguished from proceedings *after the issuance of the complaint* . . . ." (Emphasis added.) Further, Commission Rule 3.11(a) states that an adjudicative proceeding is commenced when an affirmative vote is taken by the Commission to issue a complaint.

The complaint in this matter was issued on September 18, 2008. Accordingly, any claimed fees and expenses incurred before that date should be denied. Since Respondents' Application contains pre-complaint hours billed for attorney and paralegal time, and attorney expenses for a total of $5,632.61, this amount should be deducted from their claim.

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[42] 5 U.S.C. §504(a)(1).

[43] 5 U.S.C. §504(b)(1)(C)(I).

[44] The term "adjudication" is defined in 5 U.S.C. §551(7) as an "agency process for the formulation of an order." Investigative efforts are not part of this process; rather, they lead to the decision whether to initiate an adjudication. The "Federal Trade Commission and the other regulatory agencies have two separate functions to perform, investigative and adjudicative." *FTC v. Atlantic Richfield Co.*, 567 F.2d 96, 102 (D.C. Cir. 1977).

B. Respondents Are Not Entitled To Enhanced Attorney's Fees

Respondents' Application seeks an EAJA award for legal services rendered by The Law Office of Matthew I. Van Horn, PLLC. Based on Exhibit C to the Application, Respondents' Counsel billed 271.1 hours at the rate of $225 per hour for his services from September 2008 through November 23, 2009, for a total of $60,997.[45]

Commission Rule 3.81(f)(2) states: "No award for the fee of an attorney or agent under these rules may exceed the hourly rate specified in 5 U.S.C. §504(b)(1)(A)."[46] The Act places a ceiling of $125 per hour for attorney's fees "unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."[47]

Respondents' seek an award at the rate of $225 per hour, which is in excess of EAJA's $125 per hour cap.[48] The Application provides the justification for such enhanced legal fees by

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[45] This amount reflects the post-complaint attorney hours billed. *See* section V.A., *supra*. App., Ex. C. Counsel also charged $110 per hour for the services of his paralegal, which fees are not reflected in this figure.

[46] In determining the reasonableness of the fee sought for an attorney, Commission Rule 3.81(f)(3) states that the ALJ shall consider the following:

(i) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;
(ii) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;
(iii) The time actually spent in the representation of the applicant;
(iv) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and
(v) Such other factors as may bear on the value of the services provided.

[47] 5 U.S.C. 504(b)(1)(A)(ii).

[48] App. Ex. C.

noting that the hourly rate charged for Counsel's fees is at or below "the rate charged by attorneys and professionals in the Raleigh, North Carolina community based on the similar level of experience and background representing clients in matters which are the same or similar to the Proceeding."[49]

In *Pierce v. Underwood*, the Supreme Court specifically explained that Congress could not have intended the "special factor" formulation in the statute to mean "that if the rates for all lawyers in the relevant city - or even in the entire country - come to exceed $75 per hour (adjusted for inflation), then that market minimum rate will govern instead of the statutory cap."[50] Rather, the Court found, "the 'special factor' formulation suggests Congress thought that $75 an hour was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be."[51]

Respondents have made no claim of, nor shown any support for, any special factor for their attorney that would merit the enhanced attorney's fees they seek. Further, Respondents have made no argument that would affirmatively respond to the *Underwood* criteria. Given that Respondents have made no showing of any special factors that would qualify their attorney for an enhanced hourly rate above that prescribed under EAJA, any award of fees should come within the hourly cap of $125. Based on the hours billed for attorney time after the issuance of the complaint, the compensation for attorney's fees at the rate of $125 per hour would be $33,887. Thus, according to the billing statements of Respondents' Counsel, $27,110 should be

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49 App. ¶ 7.

50 *Pierce*, 487 U.S. at 572. Congress raised the EAJA cap to $125 an hour in 1996.

51 *Pierce,* 487 U.S. at 572.

deducted from their claim for attorney's fees.

C. Respondents' Seek Unreasonable and Non-compensable Fees and Expenses

In addition to the pre-complaint attorney's fees and expenses, and the enhanced attorney's fees, Respondents' Application contains a number of other unreasonable requests for fees and expenses. To determine what constitutes a reasonable fee, Respondents bear the burden of establishing the reasonableness of both their entitlement to the hours expended and the hourly rates.[52] Respondents have submitted billing statements containing voluminous entries for work performed by the law firm of Matthew Van Horn that are unsupported by adequate documentation, beyond the scope of the proceedings, related to unsuccessful settlement efforts, and for purely clerical and secretarial tasks. Accordingly, Respondents' Application should be rejected in its entirety, or pending their further verification of the questionable fees, any excessive, unnecessary, redundant, or improperly documented fees should be deducted from any potential fee award.[53]

1. Fees Unsupported By Adequate Documentation

Many of Respondents' billing records lack adequate detail to permit Complaint Counsel or this Court to either "access accurately the work that should be compensated and that which is duplicative or excessive of attorney's time records," or to "determine with a high degree of

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[52] *Hensley v. Eckerhart,* 461 U.S. 424, 436 (1983).

[53] Complaint Counsel respectfully reserves the right to supplement its opposition and further contest Respondents' fees with greater specificity in the event that Respondents do or do not provide documentation or other substantiation to support their claim for a fee award. Further, it bears noting, that, in examining Respondents' time entries, Complaint Counsel has uncovered a least one arithmetic error. Exhibit C of Respondents' Application states the total amount of attorney expenses is $4,200.69, when the amount, as reflected in the bills, minus the pre-complaint expenses, comes to $4,372.09.

certainty" that the hours billed were reasonable.[54] Indeed, the billing records are often silent concerning the subject matter of particular entries. For example, Respondents' time records are riddled with unexplained entries that "provide little or no reference to the substance of the work claimed"[55] or make "no mention . . . of the subject matter of a meeting, telephone conference or the work performed during hours billed."[56] Some examples of these entries include:

09/19/2008	Telephone conference with Bill Isely. Reviewed e-mail from Client. (MVH)	0.80 hr.	$ 180.00
11/03/2008	Telephone conference with Larry Isely. (MVH)	1.0 hr.	$ 225.00
11/10/2008	Reviewed e-mail from Client. (MVH)	0.30 hr.	$ 67.50
12/04/2008	Reviewed and responded to e-mail. (MVH)	0.30 hr.	$ 67.50
02/23/2009	Reviewed e-mail from Client and responded to the same. (MVH)	0.10 hr.	$ 22.50

These and other entries on the fee petition make it impossible to determine whether specific portions of time were spent on legal work or client conferences.[57] Respondents' attorney has the burden of keeping records that are detailed enough so that a court may determine whether specific portions of time are compensable.[58]

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[54] *Cobell v. Norton,* 407 F. Supp.2d 140, 158 (D.D.C. 2005) (quoting *Sierra Club v. Mullen,* 619 F. Supp. 1244, 1251 (D.D.C. 1985) and *In re Donovan,* 278 U.S. App. D.C. 194, 877 F.2d 982, 995 (D.C. Cir. 1989)). *See also, United Slate Tile & Composition v. G & M Roofing,* 732 F.2d 495, 502 n. 2 (6th Cir. 1984).

[55] *Sierra Club,* 619 F. Supp. at 1251.

[56] *In re Meese,* 907 F.2d 1192, 1204 (D.C. Cir. 1990).

[57] *See Glick v. United States Civil Service Comm'n,* 567 F. Supp. 1483, 1487-88 (N.D. Ill. 1983) *aff'd,* 799 F.3d 753 (Attorneys are entitled to be compensated for time reviewing the record and briefing the case, but are not entitled to be compensated under the EAJA for extensive, unnecessary conferences with their client).

[58] *See Hensley v. Eckerhart,* 461 U.S. 424 & n.12.

Other unexplained entries appear to be duplicative, such as the following:

01/28/2009	Review two email Orders received from Administrative Law Judge - print. E-mail to Matthew Van Horn. Telephone conference with Matthew Van Horn. Enter deadlines into calendar. (LR)	0.30 hr.	$ 33.00
01/29/2009	Review email Order received from Administrative Law Judge - print. E-mail to Matthew Van Horn. Enter deadline into calendar. (LR)	0.40 hr.	$ 44.00

Additional inadequately documented records include Respondents' use of "block billing" – activities lumped together in a single entry with no indication how much time was spent on each task.[59] Some examples of the block billing contained in Respondents' Application are:

10/20/2008	Prepared Initial Disclosures filing. Reviewed Order of FTC setting hearing date. Reviewed file and related documents. Reviewed proposed FTC Order setting case deadlines. (MVH)	4.2 hrs.	$ 945.00
12/16/2008	Prepare draft of discovery requests for service on Barbara Bolton. Several telephone conferences with Federal Trade Commission and one conference with Office of Administrative Law Judge. Conferences with Matthew Van Horn. Legal research. (LR)	3.5 hrs.	$ 385.00
12/16/2008	Prepare draft of discovery requests for service on Barbara Bolton. Conferences with Matthew Van Horn. Legal research. (LR)	4.0 hrs.	$ 440.00

Complaint Counsel is unable to determine the sufficiency or the reasonableness of these and numerous other time entries.[60] As noted above, that burden rests on Respondents. In the

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[59] *See e.g., Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.,* 82 F.3d 1533, 1554 n. 15 (10th Cir. 1996) (the block billing method of "time-keeping" enters the total time spent working on a case, rather than itemizing the time expended on specific tasks).

[60] Faced with petitions containing block time entries, courts have responded in a variety of ways. *See, e.g. Traditional Cat Ass'n v. Gilbreath,* 340 F.3d 829, 834 (9th Cir. 2003) (court attempted to adjust fee award to reflect an apportionment); *Cobell v. Norton,* 407 F. Supp.2d.140 (court exercised discretion to reduce time requested); *Reyes v. Nations Title Agency of Ill., Inc.*, 2001 U.S. Dist. LEXIS 8446, 2001 WL 687451, at *1 (N.D. Ill. June 19, 2001) (court

absence of any attempt by Respondents to specifically delineate these and other such entries in order to clearly establish any entitlement to an award, Respondents' request should be denied or reduced.

2. Fees for Activities Beyond the Scope of the Proceedings

Respondents seek compensation for time spent in activities that are beyond the scope of this proceeding. For example, Respondents seek an award for time spent in conversation with the FDA and with the press,[61] which bears no relationship to this matter:

10/01/2008	Telephone conference with Client and Phil Campbell of FDA. Prepared e-mail to Client. (MVH)	0.60 hr.	$ 135.00
09/30/2008	Telephone conference with reporter for Macon City Franklin. Reviewed e-mail from Client. (MVH)	0.80 hr.	$ 180.00

Reimbursement for these such activities should not be assessed to the Commission, and should therefore be denied..

3. Fees for Clerical and Secretarial Tasks

While the Supreme Court has ruled that fees for paralegals are permissible under EAJA,[62] the Court also explained that to recover these fees, the services rendered by the paralegal must be legal in nature, *i.e.*, "factual investigation, locating and interviewing witnesses, assistance with depositions, interrogatories and document production, compilation of statistical and financial

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voided the entire time entries billed as block time).

[61] *Role Models of America, Inc. v. Brownlee,* 353 F.3d 962, 973 (2004) ("government cannot be charged for time spent in discussions with the press"); *See also In re Meese,* 907 F.2d at1203 n.19.

[62] *Richlin Security Serv. Co. v. Chertoff,* 553 U.S. ___, 128 S. Ct. 2007; 170 L. Ed. 2d 960 (2008).

data, checking legal citations and drafting correspondence."[63] Below, are examples of the numerous billing entries for what appear to be purely clerical tasks:

10/07/2008	Created files and organized research for use in proceedings before the Federal Trade Commission. Conference with Matthew Van Horn. (LR)	1.0 hr.	$ 110.00
10/21/2008	Transmit copy of draft Scheduling Order and Complaint Counsel's Initial Disclosures via facsimile. (LR)	0.10 hr.	$ 11.00
10/30/2008	Update legal calendar per Scheduling Order (with notes regarding Rules). Legal file maintenance. (LR)	1.2 hrs.	$ 132.00

Clerical tasks, such as those noted above, are usually performed by secretarial personnel and other office support staff. These expenses are typically considered within the overhead component of a lawyer's fee and are thus non-compensable.[64]

4. Business Losses and Personal Expenses

Respondents' EAJA Application seeks reimbursement of $42,902.17 for personal expenses incurred by Mr. Isely, including: 1) $36,902.11 in loss of business income and profits; 2) $3,590 in credit card interest; 3) 1,246.23 for his office supplies, postage, money transfers, round trip mileage to the post office, home broadband Internet, and telephone charges; and 4) $1,163.83 for his personal travel.[65] These expenses are not eligible for reimbursement under EAJA.

EAJA provides for an allowance of "expenses incurred" and defines the term to include

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[63] *Cobell v. Norton*, 407 F. Supp.2d at 156 (quoting *Missouri v. Jenkins,* 491 U.S. 274, 288 n. 10 (1989)).

[64] *Olson, In re Olson,* 884 F.2d 1415, 1426-27 (D.C. Cir. 1989) (per curiam).

[65] App. Ex. D.

"the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project . . . and reasonable attorney or agent fees."[66] Courts have been divided on what constitutes expenses under EAJA, with several holding that expenses such as telephone, postage, and travel should not be reimbursed,[67] while others have held that these types of expenses are reimbursable if incurred in preparation for the adjudication and if customarily charged by the attorney to the client.[68]

Here, however, the $42,902.17 in "expenses" that Respondents seek to recover are not those customarily billed to a client by an attorney. In fact, Respondents already seek reimbursement for post-complaint attorney-billed expenses of $4,372.09, for copies, printing, faxes, postage, and travel expenses of Respondents' Counsel, as part of their Application.[69] Rather, Respondents seek an EAJA award for undocumented and unsubstantiated personal

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[66] 5 U.S.C.A. §504(a)(1), (b)(1)(A).

[67] *See, e.g., Weakley v. Bowen,* 803 F.2d 575, 580 (10th Cir. 1986) (travel expenses and postage fees are not authorized under EAJA); *Massachusetts Fair Share v. Law Enforcement*, 776 F.2d 1066, 1069-70 (D.C. Cir. 1985) (taxi fares, messenger services, travel expenses, telephone bills, and postage are not reimbursable); *Action on Smoking and Health v. C.A.B.,* 724 F.2d 211, 223-24 (D.C. Cir. 1984) (taxi fares, filing, wrapping, and postage are not compensable); *Cobell v. Norton,* 407 F. Supp.2d at 165 (taxi fares, postage, telephone bills, and travel expenses are not recoverable).

[68] *See, e.g., Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988) (telephone, reasonable travel, postage, and computerized research are compensable); *Kelly v. Bowen*, 862 F.2d 1333, 1335 (8th Cir. 1988) (allowing recovery of telephone calls, postage, air courier costs, and travel expenses); *Aston v. Secretary of Health and Human Services*, 808 F.2d 9, 12 (2nd Cir. 1986) (telephone, postage, copies, and travel are reimbursable); *International Woodworkers of America, AFL-CIO, Local 3-98 v. Donovan*, 769 F.2d 1388, 1392 (9th Cir. 1985) (award of costs for telephone calls, postage, air courier and attorney travel expenses was proper).

[69] App. Ex. C.

expenses purportedly incurred by Mr. Isely.[70]

There is no provision in EAJA that allows for reimbursement of Respondents' claims for purported lost business income and profits, credit card interest, home office expenses, and Mr. Isely's personal travel costs. Thus, Respondents' claims for $42,902.17 for other expenses should be denied.

D. Fees and Expenses Incurred as a Result of Respondents' Undue Delay and Withholding of Documents in Protracting Final Resolution of this Matter Should Be Denied

EAJA provides that fees and expenses incurred as a result of undue delay by the applicant should be denied:

> The adjudicative officer . . . may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.[71]
>
> * * * *
>
> [F]ees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.[72]

As stated in detail above, Respondents initially unreasonably protracted this proceeding by failing to respond to discovery and failing to make Mr. Isely available for deposition. Respondents' actions necessitated that Complaint Counsel to file a Motion to Compel Discovery

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[70] Respondents' Application includes no documentation to support either the dates incurred, the amounts claimed, or payments for these purported expense claims as required under the EAJA. Respondents have failed to itemize and provide dates for these expenses, as well as submit receipts or other confirmation of these expenses.

[71] 5 U.S.C. § 504(a)(3). Commission Rule 3.81(e) also provides that awards "will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding."

[72] 5 U.S.C. § 504(b)(1)(E).

seeking a Court order and, and later, as a result of Respondents' delay, a Motion to Modify the Scheduling Order. More important, however, Respondents continued to flaunt the Court's Order and compound the delay by unlawfully withholding years of business records and other requested documents within their custody and control, all the while, assuring Complaint Counsel that all documents had been produced. By denying Complaint Counsel, and the Court, documents essential to this adjudication, Respondents' conduct unduly and unreasonably protracted the final resolution of the matter.

Respondents' application for an EAJA award should, therefore, be denied in its entirety, or in the alternative, reduced by at least $9,610.50 in fees and $ 353.09 in expenses. This fee amount represents the 25.4 attorney hours (at the billed rate of $225) and 44 paralegal hours (at $110 per hour) billed for discovery from December 16, 2008 through February 23, 2009. The expenses represent those charged to attend the compelled deposition of Mr. Isely.[73] On December 16, 2008, Respondents first began their practice of delay by seeking an extension from the FTC to propound discovery requests on the FTC. Thereafter, as the Court's records show, Respondents sought repeated extensions of time to comply with discovery and yet failed to comply with every aspect discovery until ordered by the Court.[74] The end date of February 23, 2009, represents the last date that Respondents' counsel billed for providing discovery to Complaint Counsel. This proposed amount does take into consideration the overall effect of the

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[73] Complaint Counsel is unable to discern from the generic expenses in the billing statements any other expenses attendant to this process, *i.e.*, FedEx expenses for filing their response to the Motion to Compel.

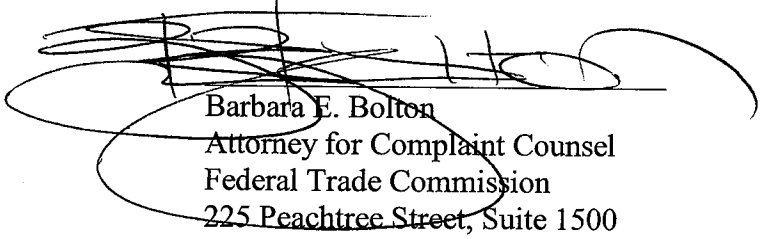
[74] Respondents' repeated last-minute cancelling of the deposition of Mr. Isely caused the Commission to incur hundreds of dollars in costs for cancelling the court reporters and venues for the deposition.

delay in discovery or the ultimate effect of Respondents' conduct unduly and unreasonably protracting the final resolution of the matter.

VI. CONCLUSION

Complaint Counsel's position throughout this case was reasonable. The Commission had substantial justification for bringing this case and pursuing the litigation. Respondents' actions in unduly protracting the proceeding and thwarting the Order of this Court by failing to produce discovery make an award under EAJA unjust. Further, Respondents seek an award for fees and expenses not recognized under EAJA Therefore, Complaint Counsel respectfully requests that Respondent's Application for attorney's fees and other expenses under EAJA be denied.

Respectfully submitted,



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Dated: January 6, 2010

CERTIFICATE OF SERVICE

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

1) COMPLAINT COUNSEL'S ANSWER IN OPPOSITION TO RESPONDENTS' APPLICATION FOR AN AWARD OF ATTORNEY'S FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT

The original and one (1) paper copy via overnight delivery and one (1) electronic copy via email to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room H-159
Washington, D.C. 20580
email: secretary@ftc.gov

One (1) email copy and four (4) paper copies served by overnight mail delivery to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., N.W. Room H-112
Washington, D.C. 20580
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Dated: January 6, 2010

Barbara E. Bolton
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