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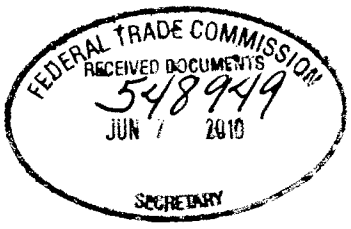

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June 2, 2010

Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Ave. NW, Room H-135
Washington, DC 20580

Re: In re Gemtronics, Inc., and William H. Isely (FTC No. 9330)

Dear Mr. Clark:

Please accept for filing the enclosed Motion of S.M. Oliva for Leave to File Amicus Curiae Brief Supporting Respondents' Appeal and Brief of S.M. Oliva as Amicus Curiae Supporting Respondents' Appeal. I previously filed electronic copies of both documents with your office.

Sincerely yours,

S.M. Oliva

Enclosures

cc: D. Michael Chappell, Administrative Law Judge
Barbara E. Bolton, Southeast Region director
William H. Isely

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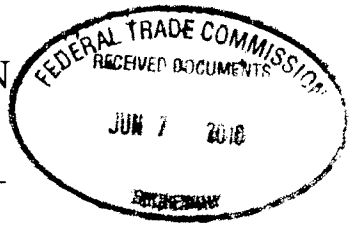
UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



DOCKET NO. 9330

In the Matter of

GEMTRONICS, INC.,
a corporation; and

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

Respondents.

Motion of S.M. Oliva for Leave to File *Amicus Curiae* Brief Supporting Respondents' Appeal

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[PUBLIC]

S.M. Oliva
128 Old Fifth Circle
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(434) 253-1179

Amicus Curiae, pro se

June 2, 2010

I, S.M. Oliva, respectfully ask the Commission for leave to file the accompanying brief as *amicus curiae*, as permitted by this Commission's Rule 3.52(k). The proposed brief supports Respondents William Isely and Gemtronics' appeal of an Initial Decision denying Isely's application for an award of attorney fees and related expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504.

1. Interest of the Applicant

I am a writer who focuses on antitrust policy and the work of the Federal Trade Commission. My reporting appears on the Mises Economics Blog[1], a publication of the Ludwig von Mises Institute, the world's premier research center for Austrian economics and libertarian theory. Additionally, I self-publish a website on FTC and antitrust policy, Under Penalty of Catapult.[2]

I have reported on the present case since 2009 when Administrative Law Judge D. Michael Chappell issued his Initial Decision — now the Commission's final decision — dismissing the complaint against Isely and Gemtronics. In December 2009, I discovered and reported on the Commission's violation of 5 U.S.C. § 552a in disclosing the private financial data of Isely and his spouse, who is not a party to this case. I am also a party to an unresolved dispute with the Commission over the application of the Freedom of Information Act (5 U.S.C. § 552) to information on the Commission's expenditure of taxpayer funds in this case.

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[1] blog.mises.com
[2] www.underpenaltyofcatapult.com

More generally, I have an interest in this case as an advocate for individual rights and Austrian economics. Isely's appeal raises novel and important questions regarding the Commission's liability for the wrongful prosecution of individuals and small businesses. As a frequent critic of the Commission, I am keenly interested in the outcome of Isely's efforts to receive restitution for the substantial financial injuries inflicted by the Commission's decision to prosecute him.

I do not, however, have a direct financial interest in the outcome of this appeal. Nor has Isely made a financial or material contribution to the proposed brief. This brief solely reflects my views, which may not be those of the Ludwig von Mises Institute or any other outlet that publishes my work.

2. Reasons the Proposed Brief Is Desirable

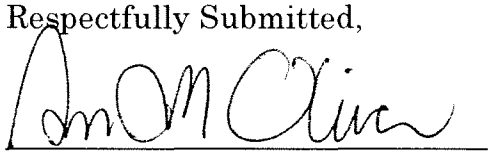
This appeal presents an unprecedented situation. William Isely is currently representing himself, having parted company with his former attorney in late 2009. Isely is 84 years old and has no experience with the Commission, its policies, or practices prior to the present case. Given these circumstances, *amicus* participation is desirable towards ensuring a proper examination of all issues relevant to the appeal.

The proposed brief addresses case law that was not brought to the ALJ's attention during his consideration of Isely's application. The brief also examines the underlying public policy goals of the EAJA, which Congress designed, in part, to remedy abuses by agencies like the Commission. As this may be the only time the Commission hears an EAJA appeal, it is more than desirable for the Commission to

hear from a third party who has taken the time and effort to study the broader policy implications of the Commission's decision.

Accordingly, I ask the Commission grant leave and accept the accompanying brief.

Respectfully Submitted,



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Applicant, pro se

June 2, 2010

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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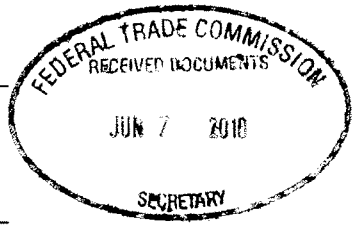

DOCKET NO. 9330

In the Matter of

GEMTRONICS, INC.,
a corporation; and

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

Respondents.

Brief of S.M. Oliva as *Amicus Curiae* Supporting Respondents' Appeal

[PUBLIC]

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Amicus Curiae, pro se

June 2, 2010

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Preliminary Statement

William Isely[1] defeated the Commission's attempt to hold him legally responsible for a website he did not own, operate, or control. Isely now seeks to recover some of the $130,000 in attorney fees and other expenses he incurred defending himself. The Administrative Law Judge held that Isely was eligible to recover an award under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, but still denied his application because the Commission's position was "substantially justified," as defined by § 504(a)(1).

This *amicus* brief addresses three questions:

1. Did the ALJ apply the law correctly?
2. Was the Commission's position "substantially justified" given the agency's own prior decision proves there was *not* a reasonable investigation before it issued the complaint?
3. Do public policy considerations require the Commission to reverse the ALJ and grant Isely's application?

Argument

The answers are "no" to the first two questions and "yes" to the third. The ALJ incorrectly determined the Commission's position in the prior litigation was "substantially justified" based on the ALJ's earlier denial of Complaint Counsel and Isely's motions for summary decision. Under the applicable case

[1] The Commission's complaint named Isely and his closely held corporation, Gemtronics, as co-respondents. Because the Decision of the Commission held that Gemtronics is an inactive shell corporation, this brief will simply refer to "Isely" rather than "Respondents."

law, the Commission's position cannot be "substantially justified" when there was an inadequate pre-complaint investigation, as was the case here. Additionally, the legislative history of the EAJA and the statute's clearly stated objectives require the Commission to compensate Isely for his role in correcting the policy errors that originally led to his prosecution.

1. The ALJ applied the law incorrectly.

The Commission's decision to issue a complaint against Isely was not "substantially justified" as defined by 5 U.S.C. § 504(a)(1). The ALJ erroneously equated "substantially justified" with the standard for a summary decision under this Commission's Rule 3.24, but the mere declaration that there were disputed facts does not satisfy the Commission's burden of proof under the EAJA. This is consistent with the Supreme Court's controlling opinion in *Pierce v. Underwood*[2], which the ALJ misconstrued in denying Isely's application for attorney fees.

The ALJ concluded that because "there is a genuine dispute regarding evidence, there is substantial justification for proceeding with the action."[3] The ALJ elaborated that "the evidence upon which [the Commission] relies to oppose the Application is essentially the same evidence upon which it relied in support of its motion for summary decision in the Prior Adjudicative Proceeding."[4] The ALJ denied sides' motions for summary decision because

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[2] 487 U.S. 552 (1988).
[3] Initial Decision at 12.
[4] Ibid. at 11.

"neither side's evidence established an absence of disputed material facts, and it could not be concluded that either side was entitled to judgment as a matter of law."[5] The ALJ then said the Supreme Court's decision in *Pierce* required a finding that the Commission's position was "substantially justified" because "there is a genuine dispute regarding evidence."[6]

This is not what *Pierce* requires. To the contrary, the *Pierce* court considered and rejected a similar argument. There, the fee applicant argued, "[T]he weakness of the Government's position is established by the objective fact that the merits were decided at the pleadings stage." The Court disagreed, noting, "[S]ummary disposition proves only that the district judge was efficient."[7]

Similarly, the Seventh Circuit's decision in *United States v. Hallmark Construction Co.*[8], explained that *Pierce* did not equate "substantially justified" with the standard for summary judgment. The Seventh Circuit remanded an EAJA application because the District Court gave the following explanation for denying the application:

> While this court found Hallmark's evidence...more persuasive, the government's case was far from baseless. There existed a genuine dispute over which reasonable minds could differ. For that reason, Hallmark's attempts to secure judgment prior to trial failed. ... Failure to prevail at trial does not necessarily mean

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[5] Ibid.
[6] Ibid. at 12.
[7] 487 U.S. at 569.
[8] 200 F.3d 1076 (2000).

> that the government's litigative position was unreasonable or unjustified.[9]

The Seventh Circuit said this was an "insufficient explanation of the court's conclusion" for an EAJA case, particularly given the district court's emphatic rejection of the government's litigating position on the merits.[10]

Hallmark is also noteworthy here because the district court produced not one but two detailed orders regarding summary judgment.[11] In Isely's case, the ALJ never produced a written opinion on summary decision of any kind; the record shows he simply denied both parties' motions orally in open court.[12] This further undermines the ALJ's adoption of summary decision as the primary test for determining whether the Commission's position was "substantially justified."

When the *Pierce* court said the "substantially justified" standard is satisfied by the existence of a "genuine dispute," it meant "justified to a degree that could satisfy a reasonable person."[13] The ALJ cited two additional cases — *Stein v. Sullivan*[14] and *Morgan v. Perry*[15] — to further refine this standard. Neither case is especially helpful. In *Stein*, the Seventh Circuit simply stated, "There was evidence to support the [government's] position. A genuine dispute

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[9] 200 F.3d at 1079 (citing District Court's Order Denying Attorney Fees, April 5, 1999).
[10] Ibid.
[11] Ibid. at 1078.
[12] Decision of the Commission at 2.
[13] 487 U.S. at 565.
[14] 966 F.2d 317 (7th Cir. 1992).
[15] 142 F.3d 670 (3rd Cir. 1998).

existed."[16] With *Morgan*, the ALJ cited the Third Circuit's view that "[T]he inquiry into reasonableness for EAJA purposes may not be collapsed into [the] antecedent evaluation of the merits, for EAJA sets forth a distinct legal standard."[17]

Actually, the very next sentence in *Morgan* is more useful to this case: "[W]e must scrutinize both the government's prelitigation position and its litigation position."[18] The Third Circuit explained that "[b]oth positions must be substantially justified and if either is not, attorney's fees should be awarded to the prevailing party."[19] This is important because the ALJ acknowledged substantial deficiencies in the government's prelitigation position — specifically the Commission investigator's testimony that the pre-complaint investigation of Isely "could have been better"[20] — in the *very same paragraph* he cited *Morgan* and concluded the government's overall position was "substantially justified."

The ALJ, perhaps following the Seventh Circuit's formula in *Stein*, simply declared the existence of a factual dispute and denied Isely's application. But *Morgan* suggests the ALJ forgot to ask an important question before reaching that conclusion: *Why* was there a factual dispute? The answer, as the Commission's final decision in the prior litigation established, was the Commission's own inadequate pre-complaint investigation.

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[16] 966 F.2d at 320.
[17] 142 F.3d at 685.
[18] Id.
[19] Id.
[20] Initial Decision at 12.

2. The Commission's position was not "substantially justified."

a. Binding precedent requires the Commission to conduct an adequate investigation before issuing a complaint.

The ALJ's analysis of the EAJA includes no case law from the D.C. or Fourth Circuits, the two courts that would have jurisdiction over any future appeal from the Commission's decision on Isely's application.[21] This is curious because the Fourth Circuit's decision in *Hess Mechanical Corp. v. NLRB*[22] requires an examination of a regulatory agency's pre-complaint investigation to determine whether a "reasonable person" — the barometer established in *Pierce* — would have proceeded with the complaint.

In *Hess*, a regional director for the National Labor Relations Board filed a complaint against an employer alleging wrongful termination of an employee. At a hearing before the ALJ, the director's only evidence was an uncorroborated affidavit from the fired employee, who claimed he'd been fired for engaging in legally protected union activities. In fact, there was "a litany of complaints about" the employee's work unrelated to union matters. The ALJ dismissed the complaint, and the NLRB accepted that decision as final.[23]

As in Isely's case, the ALJ in *Hess* denied the respondent's subsequent application for attorney fees under the EAJA. The *Hess* ALJ said that since "the case depended on credibility determinations that could be resolved only

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[21] Isely resides and conducts business in North Carolina, so under 5 U.S.C. § 45(c), he can seek review of an adverse Commission decision in either the Fourth or District of Columbia circuits.

[22] 112 F.3d 146 (1997).

[23] Ibid. at 148.

after a hearing," the NLRB's position was "substantially justified." The Fourth Circuit disagreed and reversed.

The Fourth Circuit rejected the NLRB's mere assertion that a factual dispute existed that "substantially justified" an administrative proceeding. The Court noted, "[T]he weaknesses of the [NLRB's] case was obvious before the complaint was filed."[24] The only evidence was an uncorroborated affidavit from the fired employee. Conversely, the NLRB "faced uncontroverted evidence which supported" the respondent's defense, and no effort was made to obtain additional evidence to corroborate the NLRB's position:

> The Board's assertion that the pre-complaint evidence was not "conclusive" misses the mark. The point is that the relevant evidence before the General Counsel was substantial, and all of it indicated that [the respondent] had a valid defense. *Under such circumstances, no reasonable party would have proceeded with the complaint without further investigation to ensure that the defense could be challenged.* The record is devoid of any indication, for example, that the General Counsel ever questioned [the fired employee] regarding his poor performance or verified [his] claim that he gave union cards to several workers. Additional inquiry in this case, of course, would have uncovered only mounting evidence favoring [respondent]. The EAJA does not tell an agency how to handle a case, *but the General Counsel cannot decline to conduct further inquiry and then plead his own failure to investigate as reason to conclude that his position was substantially justified.*[25] (italics added)

There's little ambiguity here. *Hess* is controlling precedent that requires the Commission, not Isely, to prove it conducted an adequate pre-complaint investigation to corroborate the allegations in the complaint. If the Commission chooses *not* to conduct an adequate inquiry, it cannot then,

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[24] Ibid. at 150.
[25] Ibid.

consistent with *Hess*, plead such failure as grounds for avoiding an award under the EAJA. Yet this is exactly what the ALJ concluded in his Initial Decision on Isely's fee application.

b. The prior Decision of the Commission proves the pre-complaint investigation did not satisfy the requirements of Hess.

By contrast, the ALJ's decision on the merits of the Commission's complaint — which is now the final Decision of the Commission — overwhelmingly proves the Commission's pre-complaint investigation of Isely did not satisfy the requirements of *Hess*. The ALJ tried to un-ring the bell of his first decision by claiming in his second decision that Isely gave "undue weight to evidence indicating that someone other than [Isely]," owned the website in question. It's strange to argue Isely gave "undue weight" to the *truth*, but in any case, the ALJ improperly shifted the burden of proof to Isely. The issue under *Hess* is whether the *Commission* failed to give proper weight to evidence demonstrating someone other than Isely was responsible for the content of the challenged website — or more precisely, whether the Commission failed to conduct a reasonable investigation that would have inevitably produced such evidence.

The Commission produced three pieces of "evidence" to establish Isely controlled the content of the challenged website: The appearance of Isely's contact information on various pages of the challenged website, a WHOIS search report, and two "undercover purchases" made by a Commission

investigator. As the Decision of the Commission found, all of these items contained substantial clues that would have led a "reasonable" person to discover Isely was not the person responsible for the website and its advertising claims. The Commission's failure to make those discoveries — and to proceed with litigation in ignorance — requires a conclusion that its decision to issue a complaint against Isely was not "substantially justified."

1. The Commission never called Isely or investigated any other person identified on the challenged website.

First, there's the presence of Isely's name and telephone number on the challenged website. The Decision of the Commission stated that a webpage containing claims that the supplement RAAX11 can be used to treat cancer provided Isely's name and telephone number with the statement, "If you are living in the US, just call Mr. Isely and he will explain how it works."[26] Although product manufacturers' websites commonly provide contact information for their distributors — without implying the distributor *controls* the website — the Commission argued the presence of Isely's contact information established him as the person responsible for the website's *content*, including advertising claims about RAAX11.

The question a "reasonable person" would ask at this point is simple: Did the Commission *call* Isely to see if he'd explain how RAAX11 could treat cancer, as the manufacturer's website directed? In fact, nobody from the

[26] Decision of the Commission at 19.

Commission ever called Isely to see if he'd repeat or verify the claims on the website. To the contrary, the Decision of the Commission stated that,

> On two occasions Isely received telephone calls from women who said they had heard about a cancer study in the United States. The callers did not tell Isely where they had learned of the study. Isely told them he was not aware of any study and that he could not help them.[27]

If the Commission called Isely and received a similar response, the investigation would have shifted towards other individuals identified on the website. For example, the website identified "Dr. Steven Hall" as the author of a protocol on the use of RAAX11 to treat cancer. According to the Decision of the Commission, "[T]he evidence presented at trial does not indicate there was any investigation of Dr. Hall" or the statements *attributed to him* on the website. Nor did the Commission investigate another U.S. distributor of RAAX11 identified on the website.[28]

2. The Commission never corroborated the information obtained from the WHOIS search.

The centerpiece of the Commission's complaint was a WHOIS search conducted by the Commission's investigator on the challenged website's domain. A "reasonable person" with ordinary experience in website management understands that WHOIS data is not, by itself, conclusive evidence of the owner, operator, or author of a website. Indeed, the WHOIS search engine used by the Commission investigator contained a disclaimer

[27] Ibid. at 21.
[28] Ibid. at 32.

stating it could not guarantee the "accuracy or completeness" of the registration information provided.[29]

The Commission's WHOIS search listed Isely as the registrant and Isely and George Otto as contacts. Actually, it listed "William *Isley*," a clear misspelling of Isely's name.[30] Additionally, the search's contact information included Isely's home address, a telephone number that did not belong to Isely, and an email address that belonged to George Otto.[31] The Commission made no effort to investigate or explain these inconsistencies.

More importantly, the Commission never investigated the *ownership* of the website, only the domain registration. The Decision of the Commission explained, "The identity of the legal owner of a website is obtainable from the 'registrar' of the website."[32] The Commission's investigator, Michael Liggins, made no attempt to obtain this critical information:

> When he investigated this matter, Liggins was aware of the difference between an "owner" of a website and the listed "registrant," and was aware that an owner could list someone else as the registrant. Liggins did not know whether Isely had the user name and password to control the content of the [ ] website. Liggins does not recall that he contacted the registrar of the domain.[33]

Much as a telephone call to Isely would establish he never disseminated information about the use of RAAX11 in cancer treatment protocols, a telephone call to the website's registrar would establish that George Otto, not

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[29] Ibid. at 29.
[30] Ibid. at 28.
[31] Ibid.
[32] Ibid.
[33] Ibid. at 32.

Isely, was the sole owner and responsible party for the content of the challenged website. The failure to make these calls cannot be excused as anything other then nonfeasance by the Commission.

3. The Commission's "undercover purchases" had nothing to do with establishing Isely's control or responsibility for the challenged website.

In lieu of directly contacting Isely or the domain registrar to determine ownership of the challenged website, the Commission instead conducted a bizarre "undercover" operation designed to establish — well, it's not clear what the Commission was trying to establish. It certainly was not who was responsible for the advertising claims on the challenged website.

As explained in laborious detail in the Decision of the Commission, investigator Michael Liggins made two purchases of RAAX11 from the challenged website using falsified names and credit card numbers. The website processed the orders on behalf of its owner, Takesun do Brasil, a company controlled by George Otto. Takesun/Otto received the payments from Liggins via PayPal.[34] Isely then fulfilled the orders as a courtesy to Otto, since Isely already had a supply of RAAX11 in the United States. Otto never reimbursed Isely for the shipments to Liggins's aliases; these were the only "drop shipments" Isely made for Otto in the preceding two years.[35]

The Commission considered Isely's fulfillment of the "undercover" purchases as conclusive evidence he was responsible for the *advertising* claims

[34] Ibid. at 23.
[35] Ibid. at 25.

on the challenged website. No reasonable person would make that leap given the following inconsistencies documented in the Decision of the Commission:

- An email receipt for one purchase identified George Otto, not Isely, as the seller.[36]
- In the other purchase, the website listed "Takesun do Brasil," not Isely, as the seller, and a subsequent confirmation page listed "Takesun Portugal Lda. Verkauf Duetschland."[37]
- The credit card record for the undercover purchase listed "TAKESUNPORT" as the payee. The record also listed a telephone number with a Nebraska area code and the initials "CA." At trial, Liggins admitted he "did not know" what any of these things meant, and he made no effort to learn.[38]

A "reasonable" person would conclude that Liggins purchased RAAX11 — a perfectly legal product — from a website owned, operated, and controlled by George Otto through Takesun do Brasil. The mere fact that Isely fulfilled the order as a courtesy to his foreign supplier does not establish any connection between Isely and the *content* of the challenged website.

The only purpose of the "undercover" purchases was to fabricate an act of interstate commerce to trigger the Commission's jurisdiction over Isely. This was necessary because no *actual* customers of Isely complained to the Commission. Nor had any witness corroborated Isely's alleged connection to the challenged website or its advertising claims. The only "connection" was in the minds of the Commission's investigator and Complaint Counsel — the

[36] Ibid. at 23.
[37] Ibid. at 24.
[38] Ibid.

same individuals who declined to pursue *any* evidence that established the truth about the website's ownership.

In Isely's case, as in *Hess*, "no reasonable party would have proceeded with the complaint without further investigation to ensure that the defense could be challenged." By declining to conduct a proper investigation before proceeding to issue a complaint against Isely, the Commission cannot now plead its own "failure to investigate as reason to conclude that [its] position was substantially justified." On these grounds alone, the Commission should grant Isely's application for attorney fees.

3. Public policy — including the legislative history of the EAJA — supports granting Isely's application for attorney fees.

Beyond the case law discussed above, there are compelling public policy reasons to grant Isely's application. The Commission is not acting as an Article III court that is bound only to consider the strict text of a statute (as the Supreme Court was in *Pierce*[39]). It is a "legislative agency" expected to "carry into effect legislative policies" by "filling in and administering the details embodied" by statutes.[40] Since the Commission acted as legislative agency when it pursued Isely as part of a broader campaign to expand federal regulation of Internet marketing of dietary supplements, the Commission must now contemplate Congress's legislative goals in considering Isely's application for attorney fees.

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[39] *See*, e.g., 487 U.S. at 567.
[40] *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935).

a. Congress enacted the EAJA to address the disproportionate burden of government regulation on small businesses and individuals.

It is appropriate to this case that the original 1979 Senate committee report on the original EAJA included a lengthy quotation — from a previous congressional hearing — from this Commission's former chief economist, Dr. Frederic M. Scherer, who testified about the impact of Commission enforcement policies on small businesses:

> I had not fully realized until I came to Washington how unfairly the burden of federal regulation and antitrust enforcement falls upon small as compared to large companies. The corporate giants can and do maintain stables of highly skilled attorneys who advise them how to stay clear of the law and defend them if they nevertheless run afoul. Smaller firms are less able to afford such counsel, and the law firms they retain typically lack the specialized knowledge needed to cope with a body of statutory, case, and regulatory law as complex as [antitrust law]. As a result, such small firms are likely to get into trouble and to settle by consent if a complaint is brought.[41]

More than 30 years later, Dr. Scherer's testimony remains an accurate description of the disproportionate burden that small businessmen like William Isely face when dealing with the Commission. Congress enacted the EAJA to try and level the playing field:

> The [EAJA] rests on the premise that certain individuals ... may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights. These economic deterrents ... are magnified in these cases by the disparity between the resources and expertise of these individuals and the government.[42]

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[41] *Equal Access to Justice Act*, 96th Cong., 1st sess., 1979, S. Rep. 253, at 5, n1.
[42] Ibid. at 1.

Congress was particularly concerned that agencies like the Commission would use its "greater resources and expertise" to "force compliance with its position." In turn, this would establish future precedent "on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views." Congress cited Dr. Scherer's testimony about his experiences at the Commission as "evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue," and the EAJA was necessary to prevent "truncated justice" from compromising the regulatory decision-making process.[43]

In contrast to the ALJ's position in denying Isely's application, Congress did not anticipate EAJA fee awards only in cases where there was an absence of disputed facts or law. Congress understood that "adjudicated or civil action provides a concrete adversarial test of government regulation and thereby insures the legitimacy and fairness of the law," because only a contested hearing could prove "that the policy or factual foundation underlying an agency rule is erroneous or inaccurate."[44] Since adjudication, in this context, is necessary for "refining and formulating public policy," Congress thought it unfair that a small businessman, like Isely, might be forced "to finance through their tax dollars unreasonable government action and also bear the costs of vindicating their rights."[45]

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[43] Ibid. at 5.
[44] Ibid at 5–6.
[45] Ibid.

b. The Commission's recent history suggests a lack of institutional control that emphasizes the necessity of meaningful EAJA relief.

The second part of Dr. Scherer's testimony cited in the legislative report on the EAJA further underscores a basic problem that Congress wanted to address — the economic incentives for Commission staff attorneys to target small businesses as a means of furthering their own careers:

> What I have learned since joining the Commission staff is that many attorneys measure their own success in terms of the number of complaints brought and settlements won. In the absence of broader policy guidance, therefore, the typical attorney shies away from a complex, long, uncertain legal contest with well represented giant corporations and tries to build a portfolio emphasizing small, easy-to-win cases. The net results of these three broad propensities is that it is the little guys, not the giants who dominate our manufacturing and trade industries, who typically get sued.[46]

The Commission's prosecution of Isely is a case in point. This was not a case where the Commission responded to a customer complaint or reacted as an impartial enforcer of the law. Rather, the Commission pursued Isely and dozens of other small businesses as part of a policy initiative known as "Operation False Cures":

> Initiated with an online surf for fraudulent cancer cure products in June 2007, the FTC sent warning letters via e-mail to 112 Web sites marketing everything from essiac tea and other herbal blends (some containing highly toxic herbs), to laetrile, shark cartilage, coral calcium, mushroom extract, and black salve (a corrosive product that can cause burns and scarring) – all promoted to prevent, cure, or treat cancer. Of the 112 sites contacted by the FTC, nearly 30 percent either shut down their sites or removed the cancer claims. The remainder were reviewed to determine whether law enforcement was appropriate, with some referred to FDA or Canadian authorities. The FTC followed this effort with 11 enforcement actions charging companies and individuals with

[46] Ibid. at 5, n1.

> making false or unsubstantiated cancer claims, and in some cases even misrepresenting that there was scientific proof that their products worked.[47]

Operation False Cures certainly qualifies as building "a portfolio emphasizing small, easy-to-win cases." Many, if not most, of the websites targeted by the Commission were operated by individuals like Isely whose income from the sale of herbal and dietary supplements could never cover the fees for attorneys with the type of "specialized knowledge" — to cite Dr. Scherer — required to challenge the Commission's superior resources in an adjudicated proceeding.[48]

This type of enforcement "sweep" creates a high risk of false positives, as was the case with Isely. In the absence of market forces, there is no incentive for Commission staff to get the facts right. The Commission has the resources — and the monopoly power — to stonewall overmatched respondents for years, insisting its position must be correct even in the face of overwhelming evidence to the contrary. There is no self-correction mechanism to minimize the risk of Commission error at the expense of innocent parties.

In short, the Commission lacks institutional control. This is corroborated by a number of recent incidents:

- In 2005 the Eleventh Circuit's decision in *Schering-Plough Corp. v. FTC* reversed a Commission order that the court said "relied on somewhat forced evidence" and, ignoring "the overwhelming

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[47] Senate Special Committee on Aging, *Prepared Statement of the Federal Trade Commission on Deceptive Marketing of Dietary Supplements – FTC Enforcement Activities*, 111th Cong., 2nd sess., 2010, at 11.

[48] *See*, e.g., S.M. Oliva, "Consumer Protection or Legal Extortion?" Mises Daily, July 10, 2008, http://mises.org/daily/3035.

evidence that contradicts the Commission's conclusion," "instead relied on information that was not even in the record."[49] The court further chided the Commission for ignoring public policy concerns and arguing a liability theory that would exacerbate the "the costs of lawsuits" and "the public problems associated with overcrowded court dockets."[50]

- In 2008 the District of Columbia Circuit ended the Commission's seven years of litigation against Rambus Inc., condemning an "aggressive interpretation of weak evidence"[51] and declaring, "The Commission's findings are murky,"[52] in an attempt to support a theory of liability previously rejected by another federal appellate court.

- In a 2009 interview, former chief administrative law judge Stephen J. McGuire discussed the Commission's reversal of his initial decision in the ongoing *Realcomp* litigation[53], noting, "I am struck by the similarity of the rationale regarding [my] conclusions being 'inconsistent with governing law and antitrust policy,' as they mimic precisely what the Commission said in their reversal of the Rambus decision; a case where the Commission's findings, if not their

[49] 402 F.3d 1056, 1070.
[50] Ibid. at 1076.
[51] *Rambus, Inc. v. FTC*, 522 F.3d 456, 469 (D.C. Cir. 2008).
[52] Ibid. at 467.
[53] *Realcomp II Ltd. v. FTC*, No. 9320 (F.T.C. 2009).

underlying motivations, have been thoroughly repudiated by the federal courts."[54]

- This past February, Commissioner Rosch issued an extraordinary dissent from a proposed consent order against an employee of a physician group that was the subject of a previous Commission order. Rosch said he was "gravely concerned" that the Commission's decision to prosecute the employee "can be viewed as retaliation for [her] decision to exercise her First Amendment rights when she publicly criticized the Commission's initial decision" against her employer; Rosch further said the Commission "reneged" on a previous agreement, undermining the Commission's ability to negotiate future settlements.[55]

- In the present case, Commission Secretary Donald S. Clark's office illegally published Isely's original, unredacted application for an award of attorney fees — containing the personal financial information of Isely and his wife — on the Commission's public website.[56] Separately, the Commission's general counsel refused a

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[54] S.M. Oliva, "Realcomp Challenges FTC 'Right' to Dictate Website Content," Mises Economics Blog, Dec. 1, 2009, http://blog.mises.org/11130.
[55] *In the Matter of M. Catherine Higgins*, FTC File No. 051-0252, Dissenting Statement of Commissioner J. Thomas Rosch, Feb. 5, 2010, at 2.
[56] S.M. Oliva, "FTC Illegally Published Elderly Couple's Financial Information," Mises Economics Blog, Dec. 10, 2009, http://blog.mises.org/11216.

Freedom of Information Act request for information about the Commission's spending in this case.[57]

In cases like *Rambus* and *Schering-Plough*, the innocent parties were not eligible for an award under the EAJA because of their net worth.[58] This only accentuates the policy importance of granting awards to parties who *are* eligible. The EAJA may be the only mechanism left for compelling the Commission to publicly admit error and accept the consequences of its actions.

Conclusion

Denying Isely's application for an award of attorney fees would, to cite a famous American philosopher, be a declaration by the Commission that, "This is everybody's fault but mine." The Commission, not Isely nor anyone else, is liable for brining a complaint that lacked any justification, substantial or otherwise. The EAJA requires a minimal amount of accountability.

Starting with the Supreme Court's decision in *Pierce* and continuing with the Fourth Circuit's controlling precedent in *Hess*, the law clearly requires the Commission assess its pre-complaint investigation — or lack thereof — and not simply fall back on the ALJ's contention that merely disputing Isely's valid defense created a "genuine dispute" that exempts the Commission from EAJA

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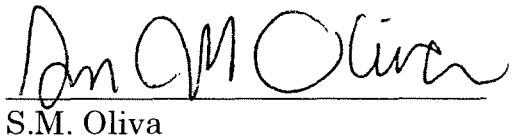
[57] S.M. Oliva, "FTC Thinks Concealing Information Helps the Public," Mises Economics Blog, April 1, 2010, http://blog.mises.org/12350.

[58] The EAJA limits awards to individuals with a net worth of less than $2 million and businesses with a net worth of less than $7 million. *See* 5 U.S.C. § 504(b)(1)(B).

liability. Such arguments defy the plain meaning of the EAJA and Congress's public policy objectives in enacting the law.

The amount of Isely's EAJA award is beyond the scope of this brief. Suffice to say, however, that Isely is entitled to the maximum award allowed within accepted EAJA standards. He has suffered demonstrable injuries at the Commission's hand, and there is no just reason to deny him some measure of compensation. Accordingly, the Commission should vacate the ALJ's Initial Decision and grant Isely's application for an award of attorney fees and other expenses.

Respectfully Submitted,



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Amicus Curiae, pro se

June 2, 2010

CERTIFICATE OF SERVICE

I certify that on June 2, 2010, as required by FTC Rules of Practice 4.2(c) and 4.4(b), I caused the foregoing Motion of S.M. Oliva for Leave to File *Amicus Curiae* Brief Supporting Respondents' Appeal and Brief of S.M. Oliva as *Amicus Curiae* Supporting Respondents' Appeal to be served and filed, as follows:

The original and 12 paper copies via first-class mail and one electronic copy via email to:

Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue NW, Room H-135
Washington, DC 20580
secretary@ftc.gov

One paper copy via first-class mail and one electronic copy via email to:

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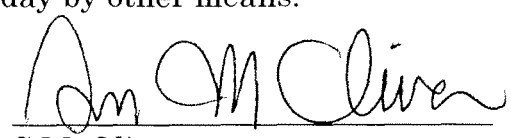
I further certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original, and that a paper copy with an original signature is being filed on the same day by other means.



S.M. Oliva