IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GEMTRONICS INC., and WILLIAM H. ISELY, Petitioners, v. FEDERAL TRADE COMMISSION, Respondent.	)	No. 11-1301

RESPONDENT FEDERAL TRADE COMMISSION'S MOTION TO DISMISS

Respondent Federal Trade Commission ("Commission" or "FTC") hereby moves that this Court dismiss the above captioned matter. Petitioners seek review of an order of the Commission that denied their request for attorney's fees under the Equal Access to Justice Act ("EAJA"). Because the Petition for Review was not timely filed, the petition fails to comply with the requirements of EAJA and must be dismissed.

BACKGROUND

In September 2008, the Commission issued an administrative complaint alleging that petitioners had violated Sections 5(a) and 12 of the FTC Act, 15 U.S.C. § 5(a), 12, by making cancer-cure claims for an herbal product. http://www.ftc.gov/os/adjpro/d9330/080918admincomplaint.pdf. The cancer-cure claims appeared on an internet website, and sales made through the website were

fulfilled by petitioners. However, the Commission's complaint counsel was unable to prove that petitioners controlled the content of the website, and in October 2009, an Administrative Law Judge ("ALJ") dismissed the complaint.[1] Complaint counsel did not seek review of the ALJ's decision, and pursuant to Commission Rule 3.51, 16 C.F.R. § 3.51, the ALJ's decision became the decision of the Commission.

In December 2009, petitioners filed an application for an award of attorney's fees pursuant to EAJA. 5 U.S.C. § 504.[2] In April 2010, the ALJ denied petitioners' application.[3] Petitioners sought review before the Commission, and on February 11, 2011, the Commission issued its order affirming the ALJ's decision and denying petitioners' application.[4] In an opinion accompanying that order, the Commission explained that petitioners were not entitled to attorney's fees because the Commission's complaint counsel had satisfied its burden of showing that its position was "substantially justified."[5] 5 U.S.C. § 504(a)(1). In particular, the Commission held that reasonable minds might accept that there was adequate evidence to support the conclusion that petitioners participated in the dissemination of the cancer-cure

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[1] http://www.ftc.gov/os/adjpro/d9330/ 091002gemtronicsinitialdec.pdf.

[2] http://www.ftc.gov/os/adjpro/d9330/091202respapplicationforfees.pdf.

[3] http://www.ftc.gov/os/adjpro/d9330/100427initialdecision.pdf.

[4] http://www.ftc.gov/os/adjpro/d9330/110211gemtronicsorder.pdf.

[5] http://www.ftc.gov/os/adjpro/d9330/ 110211gemtronicsopinion.pdf.

claims because: petitioner Isely was listed as the domain registrant for the website; his name and telephone number were listed throughout the website; the website directed consumers located in the United States to contact Mr. Isely for product information and ordering; purchases of the herbal product made through the website were fulfilled by Mr. Isely; and promotional literature included in the packages mailed by Mr. Isely made claims touting the cancer-related benefits of the product. The Commission also rejected petitioners' claim that the Commission lacked jurisdiction merely because the entity ultimately responsible for the website was located in Brazil.

On March 30, 2011, petitioners filed their petition for review of the Commission's order in this Court. This Court designated this case for informal briefing, and petitioners filed their brief on April 13, 2011.[6]

DISCUSSION

Pursuant to EAJA, petitioners may seek review of the Commission's denial in this Court;[7] however, the petition must be dismissed because it was not timely filed.

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[6] Petitioners focus primarily on two of the arguments that they made before, and that were rejected by, the Commission: that the Commission's position was not substantially justified, and that the Commission did not have jurisdiction over the cancer-cure claims because the website's actual developer was in Brazil.

[7] Pursuant to 5 U.S.C. § 504(c)(2), a party that is dissatisfied with an agency's EAJA determination may seek review in the court that would have had "jurisdiction to review the merits of the underlying decision of the agency adversary adjudication." Pursuant to 15 U.S.C. § 45(c), this Court would have had jurisdiction to review a final (continued...)

In particular, 5 U.S.C. § 504(c)(2) provides that "[i]f a party other than the United States is dissatisfied with a determination of fees and other expenses [sought pursuant to EAJA], that party may, *within 30 days after the determination is made*, appeal the determination * * *." (Emphasis added.) In this case, the Commission made its determination denying petitioners' request for attorney's fees under EAJA on February 11, 2011. Indeed, the petition for review filed by petitioners recognizes that the Commission's Order was entered on February 11. However, petitioners did not file their petition for review until March 30, 2011, the 47th day after the Commission made its determination. Accordingly, the petition for review filed by petitioners is not

[7](...continued)
Commission cease and desist order directed to petitioners.

CONCLUSION

For the reasons set forth above, the Commission requests that the Commission dismiss the petition for review in this matter.

Respectfully submitted,

s/ Lawrence DeMille-Wagman
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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2011, I electronically filed Respondent Federal Trade Commission's Motion to Dismiss with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I further certify that, on the same day, I sent a copy of this motion by mail to petitioners at the following address: William H. Isely, 300 Finsbury St., #103, Durham, NC 27703. I also e-mailed the motion to petitioners at the following e-mail address: b.isely@ftpmailbox.com. I sent a copy of the motion to Mr. Oliva at the following address: S.M. Oliva, 128 Old Fifth Circle, Charlottesville, VA 22903. I e-mailed him a copy of the motion at the following e-mail address: director@antitrusthall.com.

s/ Lawrence DeMille-Wagman