

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

Case No:

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

VITAL LIVING PRODUCTS, INC. d/b/a
American Water Service; and

DONALD R. PODREBARAC,

Defendants.

**COMPLAINT FOR
PERMANENT INJUNCTION
AND OTHER EQUITABLE
RELIEF**

Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), by its undersigned attorneys, for its complaint alleges:

1. This is an action under Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), to secure injunctive relief and other equitable relief against defendants for their deceptive acts and practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this matter pursuant to 15 U.S.C. §§ 45(a) and 53(b), and 28 U.S.C. §§ 1331, 1337(a) and 1345.

3. Venue in the United States District Court for the Western District of North

Carolina is proper under 15 U.S.C. § 53(b) and 28 U.S.C. § 1391(b) and (c).

THE PARTIES

4. **Plaintiff FTC** is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41 - 58. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The FTC is authorized under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to initiate federal district court proceedings to enjoin violations of the FTC Act, and to secure such equitable relief as may be appropriate in each case.

5. **Defendant Vital Living Products, Inc. (“VLPI”)** is a Delaware corporation doing business as American Water Service with its registered office located at 2711 Centreville Road, Suite 400, Wilmington, Delaware 19808, and its principal place of business at 5001 Smith Farm Road, Matthews, North Carolina 28104-8137. It markets products that putatively test for the presence of the spore-forming bacterium *Bacillus anthracis* which causes the disease anthrax. It transacts business in the Western District of North Carolina.

6. **Defendant Donald R. Podrebarac (“Podrebarac”)** is President and Chief Executive Officer of VLPI. Podrebarac conducts business at 5001 Smith Farm Road, Matthews, North Carolina 28104-8137. Individually, or in concert with others, Podrebarac directs, controls, formulates, or participates in the acts and practices complained of below. He resides and transacts business in the Western District of North Carolina.

COMMERCE

7. Defendants' course of trade is in or affecting commerce, within the meaning of Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFENDANTS' BUSINESS PRACTICES

8. Since at least September 12, 2001, and continuing thereafter, defendants have advertised, promoted, and/or marketed "PurTest® Anthrax Test" ("anthrax test") to consumers throughout the United States. These anthrax tests purportedly detect the presence of *Bacillus anthracis* in or on air, water, and surfaces. *Bacillus anthracis* can cause the disease anthrax, an acute infectious disease most commonly found in hooved mammals. Anthrax is also found in humans. The tests will retail for approximately \$24.99 each.

9. In the course of advertising, promoting, and/or marketing their anthrax test, defendants made the following statements:

a. **PurTest Anthrax Test Kit**

**TEST AIR, WATER,
AND SURFACES FOR
THE PRESENCE OF
DEADLY ANTHRAX
GERMS AND SPORES AT
HOME OR IN THE
WORKPLACE**

* * *

**Our do-it-yourself test, allows you to screen air, water, and surfaces for
the presence of anthrax:**

a color change from red to yellow indicates anthrax detected

FAST EASY ACCURATE CONVENIENT

– Exhibit A

- b. Vital Living Products, Inc. . . . is pleased to announce that its PurTest[®] Anthrax Test has been certified by an independent FDA registered laboratory . . . and that the test results are in line with the Company’s previous statements. The certified report by Sani-Pure Food Laboratories states, “Currently, the PurTest[®] Anthrax screening kit is statistically consistent with specificity of 95% and the corresponding false positive rate of 5%.” “We promised consumers a screening test that would be easy and reliable for use in the workplace or home. This independent certification met our expectation for accuracy and validity.” said Donald Podrebarac, CEO of vital Living Products. “The testing was conducted in a laboratory and environmental settings using Anthrax, various bacillus and other bacterial contaminants.”

– Exhibit B

DEFENDANTS’ VIOLATIONS OF THE FTC ACT

COUNT I (False Claims)

10. Defendants have represented, expressly or by implication, that:
- a. Defendants’ anthrax test is an accurate and effective test for detecting the presence of anthrax bacteria and spores in air, water, and on surfaces; and
 - b. An independent FDA registered laboratory conducted tests, using anthrax, which showed that defendant’s anthrax test effectively detected anthrax.
11. In truth and in fact,
- a. Defendant’s anthrax test is not an accurate and effective test for detecting the presence of anthrax bacteria and spores in air, water and on surfaces; and

- b. An independent FDA registered laboratory did not conduct tests, using anthrax, which showed that defendants' anthrax test effectively detected anthrax.

12. Therefore, the representations set forth in paragraph 10 are false and misleading, and constitute deceptive acts or practices, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT II (Unsubstantiated Claims)

13. Defendants did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph 10, above, at the time the representations were made.

14. Therefore, the making of the representations set forth in paragraph 10, above, was and is a deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

CONSUMER INJURY

15. Defendants' violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), have injured and will continue to injure consumers, and defendants will be unjustly enriched as a result of their unlawful practices. Absent injunctive relief by the Court, defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

16. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and other ancillary equitable relief, including consumer redress, disgorgement, and restitution, to prevent and remedy any violations of any provision of law enforced by the FTC.

PRAYER FOR RELIEF

WHEREFORE, plaintiff FTC, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and this Court's own equitable powers, requests that this Court:

(1) Enjoin defendants temporarily and permanently from violating Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), including committing such violations in connection with the offer, sale, advertising, or other promotion or distribution of anthrax tests or other tests to detect the presence or absence of biohazards;

(2) Award all temporary and preliminary injunctive and ancillary relief that may be necessary to avert the likelihood of consumer injury during the pendency of this action, and to preserve the possibility of effective final relief;

(3) Award such relief as the Court finds necessary to redress injury to consumers resulting from defendants' violations of the FTC Act, including, but not limited to, refund of monies paid, rescission of contracts, and disgorgement of unlawfully obtained monies;

(4) Award plaintiff the cost of bringing this action as well as such additional equitable relief as the Court may determine to be just and proper.

Respectfully submitted,

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DATED: _____, 2002