

1 WILLIAM BLUMENTHAL
General Counsel

2 MAXINE R. STANSELL
3 MARY T. BENFIELD
4 Federal Trade Commission
915 Second Ave., Suite 2896
5 Seattle, WA 98174
(206) 220-4474 (Stansell)
6 (206) 220-4472 (Benfield)
(206) 220-6366 (fax)
mstansell@ftc.gov, mbenfield@ftc.gov

7 JOHN D. JACOBS
8 CA Bar No. 134154
9 Federal Trade Commission
10877 Wilshire Boulevard, Suite 700
10 Los Angeles, CA 90024
(310) 824-4360 (voice)
11 (310) 824-4380 (fax)
jjacobs@ftc.gov

12 ATTORNEYS FOR PLAINTIFF

13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA
15 WESTERN DIVISION

15 FEDERAL TRADE COMMISSION,
16 Plaintiff,
17 v.
18 PACIFIC HERBAL SCIENCES, INC.,
19 *et al.*,
20 Defendants.

Case No. CV05-7247 RSWL (RZx)

**STIPULATED PRELIMINARY
INJUNCTION AND ORDER FOR
OTHER EQUITABLE RELIEF
AS TO PACIFIC HERBAL
SCIENCES, INC., AND JOHN A.
BRACKETT, JR.**

21 Plaintiff, Federal Trade Commission ("Commission" or "FTC"), pursuant to
22 Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"),
23 15 U.S.C. §§ 53(b) and 57b, and the Controlling the Assault of Non-Solicited
24 Pornography and Marketing Act of 2003 ("CAN-SPAM Act"), 15 U.S.C.
25 § 7706(a), has filed a Complaint for injunctive and other relief, including
26 consumer redress, and applied *ex parte* for a Temporary Restraining Order with
27 Asset Freeze and Other Equitable Relief and for an Order to Show Cause Why a

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CENTRAL DISTRICT OF CALIFORNIA
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FEDERAL TRADE COMMISSION
915 Second Ave., Su. 2896
Seattle, Washington 98174
(206) 220-6350

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1 Preliminary Injunction Should Not Issue pursuant to Federal Rule of Civil
2 Procedure 65. On October 6, 2005, this Court granted Plaintiff's application and
3 entered a Temporary Restraining Order with an order to show cause why a
4 preliminary injunction should not issue against all defendants named in this action.

5 By and through their respective counsel, Plaintiff and Defendants Pacific
6 Herbal Sciences, Inc., and John A. Brackett, Jr., without any admission of any
7 wrongdoing or violation of law, voluntarily have agreed to the entry of the
8 following stipulated order for preliminary injunction ("Order"):

9 The Court, being advised in the premises, finds as follows:

10 FINDINGS OF FACT

11 1. This Court has jurisdiction over the subject matter of this case and
12 and there is good cause to believe that the Court will have jurisdiction over all
13 parties.

14 2. Venue lies properly with this Court.

15 3. Plaintiff's Complaint states a claim upon which relief may be granted
16 against all Defendants under 15 U.S.C. §§ 45(a), 52, and 7704(a).

17 4. The acts and practices of Defendants are in or affecting commerce, as
18 defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

19 5. This Order is in the public interest.

20 DEFINITIONS

21 1. "Asset" or "Assets" means any legal or equitable interest in, right to,
22 or claim to, any real and/or personal property including, but not limited to,
23 chattels, goods, instruments, equipment, fixtures, general intangibles, effects,
24 leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits,
25 contracts, receivables, shares of stock, funds, monies, and all cash, wherever
26 located, including both within and outside the territorial United States, and shall
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1 include both existing assets and assets acquired after the date of entry of this
2 Order.

3 2. **“Assisting others”** means: (1) performing customer service functions
4 including, but not limited to, receiving or responding to consumer complaints,
5 receiving identifying and financial information from consumers, and
6 communicating with consumers; (2) developing, providing, or arranging for the
7 development or provision of marketing materials, including, but not limited to,
8 Web site and commercial electronic message content; (3) providing names of, or
9 arranging for the provision of names of, potential customers; (4) performing
10 marketing services of any kind; or (5) acting as an officer or director of a business
11 entity.

12 3. **“Customer”** means any person who has paid, or may be required to
13 pay, for goods or services offered for sale or sold by Defendants.

14 4. **“Defendant” or “Defendants”** means Pacific Herbal Sciences, Inc.,
15 Inc., and John A. Brackett, Jr., individually and as an officer or director of Pacific
16 Herbal Sciences, Inc.

17 5. **“Document”** is synonymous in meaning and equal in scope to the
18 usage of the term as defined in Federal Rule of Civil Procedure 34(a), and includes
19 writings, drawings, graphs, charts, photographs, audio and video recordings,
20 computer records, and other data compilations from which information can be
21 obtained and translated, if necessary, through detection devices into reasonably
22 usable form. A draft or non-identical copy is a separate document within the
23 meaning of the term.

24 6. **“Financial institution”** means any bank, savings and loan institution,
25 credit union, or any financial depository of any kind, including, but not limited to,
26 any brokerage house, trustee, broker-dealer, escrow agent, title company, payment
27 processing company, commodity trading company, or precious metal dealer.
28

1 7. **“Header Information”** is defined in 15 U.S.C. § 7702(8) and means
2 the source, destination, and routing information attached to an electronic mail
3 message, including the originating domain name and originating electronic mail
4 address, and any other information that appears in the line identifying, or
5 purporting to identify, a person initiating the message.

6 8. **“Initiating” or “Initiate”** is defined in 15 U.S.C. § 7702(9) and
7 means to originate or transmit a commercial electronic mail message or to procure
8 the origination or transmission of such message, but does not include actions that
9 constitute routine conveyance of such message. For purposes of this definition,
10 **“procure,”** as defined in 15 U.S.C. § 7702(12), means intentionally to pay or
11 provide other consideration to, or induce, another person to initiate such a
12 commercial electronic mail message on one’s behalf.

13 9. **“Person”** means a natural person, an organization or other legal
14 entity, including a corporation, partnership, sole proprietorship, limited liability
15 company, association, cooperative, or any other group or combination acting as an
16 entity.

17 10. **“Plaintiff”** means the Federal Trade Commission (“Commission” or
18 “FTC”).

19 11. **“Protected computer”** is defined in 15 U.S.C. § 7702(13) and 18
20 U.S.C. § 1030(e)(2)(B) and means a computer which is used in interstate or
21 foreign commerce or communication, including a computer located outside the
22 United States that is used in a manner that affects interstate or foreign commerce
23 or communication of the United States.

24 12. **“HGH-related product”** means any product or products that are
25 advertised, marketed, promoted, offered for sale, distributed, or sold with express
26 or implied representations that the product contains any form of human growth
27 hormone, causes an increase in a consumer’s growth hormone levels, or may
28 produce effects similar in nature to those produced by any form of human growth

1 hormone, and includes, but is not limited to, "HGH Revolution," "HGH-R," and
2 "Natural Rejuvenator," or any substantially similar products.

3
4 **ORDER**

5 **I. PROHIBITED BUSINESS ACTIVITIES PURSUANT TO THE FTC ACT**

6 **IT IS THEREFORE ORDERED** that Defendants, and their officers,
7 agents, servants, employees, attorneys, and all other persons or entities in active
8 concert or participation with them who receive actual notice of this Order by
9 personal service, facsimile, or otherwise, whether acting directly or through any
10 trust, corporation, subsidiary, division, or other device, or any of them, are hereby
11 temporarily restrained and enjoined from making, or assisting others in making,
12 expressly or by implication, including through the use of a trade name or
13 endorsement, any false or misleading statement or representation in connection
14 with the marketing, advertising, promotion, offering for sale, sale, or provision of
15 any HGH-related product, drug, or dietary supplement, including but not limited
16 to:

17 A. Misrepresenting that the product contains human growth hormone
18 and/or causes an increase in a consumer's growth hormone levels;

19 B. Misrepresenting that the product:

20 1. Will enable the consumer to lose weight, or replace fat with
21 muscle, without diet or exercise;

22 2. Will turn back or reverse the aging process, including, but not
23 limited to, that the product will (i) increase energy levels,
24 stamina, and muscle strength; (ii) restore the size of bodily
25 organs that shrink with age (*e.g.*, liver, pancreas and heart); and
26 (iii) improve memory; or

27 3. Will prevent, treat, or cure any disease or other medical
28 condition, including, but not limited to, representing that the

1 product will (i) strengthen or elevate the immune system;
 2 (ii) reduce the risk of Alzheimer's disease; (iii) increase bone
 3 density; (iv) prevent or act as a solution to osteoporosis;
 4 (v) eliminate joint pains; (vi) lower cholesterol; (vii) lower or
 5 normalize blood pressure; (viii) improve cardiovascular and
 6 respiratory functions and reduce the occurrence of
 7 cardiovascular diseases; (ix) improve vision; (x) stabilize mood
 8 swings and act as an antidepressant; (xi) help heal wounds; and
 9 (xii) eliminate sleep disorders;

10 C. Misrepresenting the existence, contents, validity, results, conclusions,
 11 or interpretations of any test, study, or research;

12 D. Making any representation about the health benefits, performance,
 13 efficacy, or safety of any such product unless, at the time of making such
 14 representation, Defendants possess and rely upon competent and reliable scientific
 15 evidence that substantiates the representation; and

16 E. Misrepresenting that the order pages on Web sites marketing any such
 17 product are secured using SSL encryption technology and/or that credit card
 18 numbers and other personal information entered by consumers on the order pages
 19 cannot be seen by others when transmitted.

20
 21 **II. PROHIBITED BUSINESS ACTIVITIES UNDER THE**
 22 **CONTROLLING THE ASSAULT OF NON-SOLICITED PORNOGRAPHY**
 23 **AND MARKETING ACT OF 2003**

24 **IT IS FURTHER ORDERED** that Defendants, and their officers, agents,
 25 servants, employees, attorneys, and all other persons or entities in active concert or
 26 participation with them who receive actual notice of this Order by personal
 27 service, facsimile, or otherwise, whether acting directly or through any trust,
 28 corporation, subsidiary, division, or other device, or any of them, are hereby

1 preliminarily restrained and enjoined from violating, or assisting others in
2 violating, the provisions contained in Sections 5 and 6 of the CAN-SPAM Act,
3 15 U.S.C. §§ 7704 and 7705, as currently promulgated or as it may hereafter be
4 amended, or any rule, regulation, or requirement adopted pursuant thereto,
5 including, but not limited to, by initiating the transmission, to protected
6 computers, of a commercial email message that:

7 A. Contains, or is accompanied by, header information that is materially
8 false or misleading in violation of Section 5(a)(1) of the CAN-SPAM Act,
9 15 U.S.C. § 7704(a)(1), including but not limited to a message with header
10 information that is misleading because the person initiating the message
11 knowingly uses another protected computer to relay or retransmit the message for
12 purposes of disguising its origin;

13 B. Contains subject headings that are likely to mislead a recipient, acting
14 reasonably under the circumstances, about a material fact regarding the contents or
15 subject matter of the message, in violation of Section 5(a)(2) of the CAN-SPAM
16 Act, 15 U.S.C. § 7704(a)(2);

17 C. Fails to include a clear and conspicuous notice of the recipient's
18 opportunity to decline to receive further electronic mail messages from the sender,
19 in violation of Section 5(a)(5)(A)(ii) of the CAN-SPAM Act, 15 U.S.C.
20 § 7704(a)(5)(A)(ii);

21 D. Fails to include a functioning return electronic mail address or other
22 Internet-based mechanism, clearly and conspicuously displayed, that a recipient
23 may use to submit a reply electronic mail message or other form of Internet-based
24 communication requesting not to receive future commercial electronic mail
25 messages, from that sender, at the electronic mail address where the message was
26 received, and that remains capable of receiving such replies for no less than thirty
27 (30) days after the transmission of the original message, in violation of Section
28 5(a)(3)(A) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(3)(A);

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1 E. Advertises or promotes products or services but fails to include clear
2 and conspicuous identification that the message is an advertisement or solicitation,
3 in violation of Section 5(a)(5)(A)(i) of the CAN-SPAM Act, 15 U.S.C.
4 § 7704(a)(5)(A)(i); and

5 F. Advertises or promotes products or services but fails to include a
6 valid physical postal address of the sender in violation of Section 5(a)(5)(A)(iii) of
7 the CAN-SPAM Act, 15 U.S.C. § 7704(a)(5)(A)(iii).

8
9 **III. ASSET FREEZE**

10 **IT IS FURTHER ORDERED** that Defendants, and their officers, agents,
11 servants, employees, attorneys, and all other persons or entities in active concert or
12 participation with them who receive actual notice of this Order by personal
13 service, facsimile, or otherwise, whether acting directly or through any trust,
14 corporation, subsidiary, division, or other device, or any of them, except as agreed
15 to in writing by the parties or as directed by further order of the Court, are
16 temporarily restrained and enjoined from, except as provided in paragraph III.D:

17 A. Selling, liquidating, assigning, transferring, converting, loaning,
18 encumbering, pledging, concealing, dissipating, spending, disbursing,
19 withdrawing, or otherwise disposing of any assets wherever located, including any
20 assets outside the territorial United States, that are:

- 21 1. In the actual or constructive possession of any Defendant;
- 22 2. Owned or controlled by, or held for the benefit of, or subject to
23 access by, or belonging to, any Defendant; or
- 24 3. In the actual or constructive possession of, owned or controlled
25 by, subject to access by, or belonging to, any corporation,
26 partnership, trust, or any other entity directly or indirectly
27 owned, managed, or controlled by, or under common control
28 with, any Defendant including, but not limited to, any assets

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1 held by or for any Defendant at any bank or savings and loan
2 institution, credit union, independent service organization,
3 independent credit card processing company, or with any
4 broker-dealer, escrow agent, title company, commodity trading
5 company, precious metal dealer, common carrier, credit card
6 processing agent, customs broker, commercial mail receiving
7 and/or forwarding agency, commercial freight holding and/or
8 forwarding agency, or financial institution or depository of any
9 kind.

10 B. Opening or causing to be opened any safe deposit boxes or storage
11 facilities titled in the name of any Defendant, or subject to access by any
12 Defendant or under any Defendant's control, without providing Plaintiff with prior
13 notice and a reasonable opportunity to first inspect the contents in order to
14 determine whether they contain any assets covered by this Part; and

15 C. Failing to hold and account for all assets, including, without
16 limitation, payments, loans, and gifts, received after service of this Order.

17 D. Defendants may, without violating this section, use funds in Wells
18 Fargo Bank accounts 092-2981519 and 101-11857883, titled in the name of
19 Pacific Herbal Sciences, Inc., to pay business debts owed by Pacific Herbal
20 Sciences, Inc., to Wells Fargo Bank in the amount of \$3,348.64, and to American
21 Express in the amount of \$5,667.40. The asset freeze provisions may be further
22 modified by agreement of the parties or by order of the Court.

23
24 **IV. DUTIES OF THIRD PARTIES HOLDING DEFENDANTS' ASSETS**

25 **IT IS FURTHER ORDERED** that, effective immediately upon notification
26 of this Order, any financial institution, or any person or other entity served with a
27 copy of this Order, or who otherwise has actual knowledge of this Order, that has
28 possession, custody, or control of any account, asset, or document held on behalf

1 of, or relating or belonging to, any Defendant, shall, except as provided in
2 paragraph III.D:

3 A. Hold and retain within such entity's or person's control, and prohibit
4 the withdrawal, removal, assignment, transfer, pledge, hypothecation,
5 encumbrance, disbursement, dissipation, conversion, sale, liquidation, or other
6 disposal of any funds, documents, property, or other assets held by or under such
7 entity's or person's control:

- 8 1. On behalf of, or for the benefit of, any Defendant;
- 9 2. In any account maintained in the name of, or subject to
10 withdrawal by, any Defendant; or
- 11 3. Subject to access or use by, or under the signatory power of,
12 any Defendant;

13 B. Deny access to any safe deposit boxes that are either:

- 14 1. Titled in the name, individually or jointly, or held on behalf or
15 for the benefit, of any Defendant; or
- 16 2. Subject to access by any Defendant;

17 C. Provide to counsel for the Commission, within five (5) business days,
18 if not previously provided pursuant to the Temporary Restraining Order entered on
19 October 6, 2005, by facsimile or by overnight delivery, a sworn statement setting
20 forth:

- 21 1. The identification of each account or asset titled in the name,
22 individually or jointly, or held on behalf or for the benefit, of
23 any Defendant;
- 24 2. The balance of each such account, or a description of the nature
25 and value of such asset;
- 26 3. The identification of any safe deposit box that is either titled in
27 the name of, individually or jointly, or otherwise subject to
28 access or control by, any Defendant; and

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1 4. If the account, safe deposit box, or other asset has been closed
2 or removed, the date closed or removed and the balance on said
3 date.

4 D. The accounts and assets subject to this Part include existing accounts
5 and assets, and accounts created and assets deposited after the effective date of
6 this Order. This Part shall not prohibit transfers in accordance with agreement of
7 the parties, any provision of this Order, or any further order of the Court.

8 E. The FTC is granted leave, pursuant to Fed. R. Civ. P. 45, to subpoena
9 documents immediately from any such financial institution, account custodian, or
10 other entity concerning the nature, location, status, and extent of Defendants'
11 assets, as well as compliance with this Order, and such financial institution,
12 account custodian, or other entity shall respond to such subpoena within five (5)
13 business days after service.

14 **V. FINANCIAL STATEMENTS AND ACCOUNTING**

15 **IT IS FURTHER ORDERED** that, if Defendants have not previously
16 complied with Section V of the Temporary Restraining Order entered on
17 October 6, 2005, they shall do so immediately.

18
19 **VI. RECORD KEEPING/MAINTAINING BUSINESS RECORDS**

20 **IT IS FURTHER ORDERED** that Defendants, and their officers, agents,
21 servants, employees, attorneys, and all other persons or entities in active concert or
22 participation with them who receive actual notice of this Order by personal
23 service, facsimile, or otherwise, whether acting directly or through any trust,
24 corporation, subsidiary, division, or other device, or any of them, are restrained
25 and enjoined from:

26 A. Failing to make and keep books, records, accounts, bank statements,
27 current accountants' reports, general ledgers, general journals, cash receipts
28 ledgers, cash disbursements ledgers, documents indicating title to real or personal

1 property, and any other data which, in reasonable detail, accurately and fairly
2 reflect the transactions and dispositions of the assets of Defendants; and

3 B. Destroying, erasing, mutilating, concealing, altering, transferring or
4 otherwise disposing of, in any manner, directly or indirectly, contracts,
5 agreements, customer files, customer lists, customer addresses and telephone
6 numbers, correspondence, advertisements, brochures, sales material, training
7 material, sales presentations, documents evidencing or referring to Defendants'
8 products or services, data, computer tapes, disks, or other computerized records,
9 books, written or printed records, handwritten notes, telephone logs, "verification"
10 or "compliance" tapes or other audio or video tape recordings, receipt books,
11 invoices, postal receipts, ledgers, personal and business canceled checks (fronts
12 and backs) and check registers, bank statements, appointment books, copies of
13 federal, state or local business or personal income or property tax returns, and
14 other documents or records of any kind, including electronically stored materials,
15 that relate to the business practices or business or personal finances of any
16 Defendant or other entities directly or indirectly under the control of any
17 Defendant. This provision applies documents and records wherever located,
18 including outside the territorial United States.

20 VII. REQUIRED DISTRIBUTION OF ORDER BY DEFENDANTS

21 IT IS FURTHER ORDERED that Defendants shall, within three (3)
22 calendar days after service of this Order, provide a copy of this Order to each
23 affiliate, partner, division, sales entity, successor, assign, officer, director,
24 employee, independent contractor, agent, attorney, ad broker, fulfillment house,
25 and/or representative of any Defendant. Within five (5) calendar days following
26 service of this Order by Plaintiff, Defendants shall serve on Plaintiff an affidavit
27 identifying the name, title, address, telephone number, date of service, and manner
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1 of service of each person or entity Defendants served with a copy of this Order in
2 compliance with this provision.

3
4 **VIII. SERVICE OF ORDER**

5 **IT IS FURTHER ORDERED** that copies of this Order may be served by
6 facsimile transmission, personal or overnight delivery, or by first class U.S. mail,
7 by agents and employees of the Commission or any state, federal or foreign law
8 enforcement agency, or by private process server, on: (1) any financial institution,
9 entity, or person that holds, controls, or maintains custody of any documents or
10 assets of any Defendant, or that held, controlled, or maintained custody of any
11 documents or assets of any Defendant; or (2) any other person or entity that may
12 be subject to any provision of this Order. Service upon any branch or office of any
13 financial institution or entity shall effect service upon the entire financial
14 institution or entity.

15 **IX. CREDIT REPORTS**

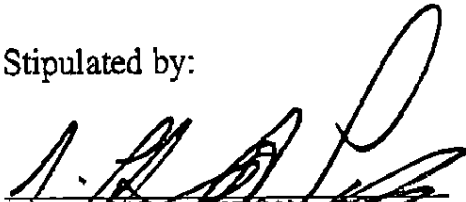
16 **IT IS FURTHER ORDERED** that pursuant to Section 604(a)(1) of the
17 Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(1), any consumer reporting
18 agency may furnish a consumer report concerning any Defendant to the
19 Commission.

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RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes.

Stipulated by:


JEFFREY A. LIPOW
LIPOW & HARRIS
Attorney for Defendants
Pacific Herbal Sciences, Inc., and John A. Brackett, Jr.

Dated: 11-16-05


MAXINE R. STANSELL
MARY T. BENFIELD
Attorneys for Plaintiff
Federal Trade Commission

Dated: 11-16-05

IT IS SO ORDERED.

RONALD S.W. LEW

Dated November, 18th 2005.

THE HONORABLE RONALD S.W. LEW
UNITED STATES DISTRICT JUDGE

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CERTIFICATE OF SERVICE

SCANNED

I hereby certify that I caused the foregoing Stipulated Preliminary Injunction and Order for Other Equitable Relief as to Pacific Herbal Sciences, Inc., and John A. Brackett, Jr., to be served on all defendants on the date set forth below by providing a full, true, and correct copy thereof by mail, in a sealed, first-class postage-prepaid envelope, deposited with the United States Postal Service at Seattle, Washington, addressed as follows, with a courtesy copy by fax to the indicated fax telephone numbers, to which complete transmission was confirmed:

✓ to counsel for defendants Pacific Herbal Sciences, Inc., and John A. Brackett, Jr.:

Jeffrey A. Lipow, Lipow & Harris, 9952 Santa Monica Boulevard, First Floor, Beverly Hills, California 90212, (310) 282-0507 (voice), (310) 286-1171 (fax); and

✓ to counsel for defendants Lei Lu, Natural Health Product, Inc., and New Star Marketing Group, Inc.:

David Brockway, Root Brockway & Rothblatt, 801 S. Garfield Ave., # 202, Alhambra, California 91801, (626) 588-2003 (voice), (626) 588-2113 (fax).

Dated 16 Nov., 2005.

Gerald Fondow
Gerald Fondow