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FILED
CLERK, U.S. DISTRICT COURT
OCT - 6 2005
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

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13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA

LOGGED

2005 OCT - 6
FILED
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES

15 FEDERAL TRADE COMMISSION,
16 Plaintiff,
17 v.
18 PACIFIC HERBAL SCIENCES, INC.;
19 NATURAL HEALTH PRODUCT,
20 INC.; NEW STAR MARKETING
21 GROUP, INC.; JOHN A. BRACKETT,
22 JR.; and LEI LU,
23 Defendants.

Case No.

CV05-7247-RSWL

FILED UNDER SEAL

(PROPOSED)
TEMPORARY RESTRAINING
ORDER WITH ASSET FREEZE
AND OTHER EQUITABLE
RELIEF AND ORDER TO
SHOW CAUSE WHY
PRELIMINARY INJUNCTION
SHOULD NOT ISSUE

23 Plaintiff Federal Trade Commission, pursuant to Sections 13(b) and 19 of
24 the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b, has
25 filed a Complaint for Injunction and Other Equitable Relief, including consumer
26 redress, and applied *ex parte* for a Temporary Restraining Order with Asset Freeze
27 and Other Equitable Relief and for an Order to Show Cause Why a Preliminary
28 Injunction Should Not Issue pursuant to Federal Rule of Civil Procedure 65.

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

FINDINGS OF FACT

1
2 This Court has considered Plaintiff's Complaint, Application for *Ex Parte*
3 Temporary Restraining Order, Memorandum of Points and Authorities,
4 Declarations and Exhibits, and all other papers filed herein. It appears to the
5 satisfaction of the Court that:

6 1. This Court has jurisdiction over the subject matter of this case, and
7 there is good cause to believe that the Court will have jurisdiction over the parties;

8 2. Venue lies properly with this Court;

9 3. There is good cause to believe that the above-named Defendants have
10 engaged in, and are likely to engage in, acts and practices that violate Sections
11 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, and the Controlling the
12 Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM
13 Act"), 15 U.S.C. § 7701, *et seq.*, and that the Commission is likely to prevail on
14 the merits of this action;

15 4. There is good cause to believe that Defendants are likely to continue
16 to engage in violations of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a)
17 and 52, and of the CAN-SPAM Act, 15 U.S.C. § 7701, *et seq.*, absent the entry of
18 this Temporary Restraining Order ("Order"). Therefore, there is good cause for
19 entry of the injunctive relief contained in this Order;

20 5. There is good cause to believe that immediate and irreparable damage
21 to the Court's ability to grant effective final relief for consumers in the form of
22 monetary restitution will occur from the sale, transfer, assignment, or other
23 disposition or concealment by Defendants of their assets or records unless
24 Defendants are immediately restrained and enjoined by order of this Court.
25 Therefore, there is good cause for the entry of the ancillary relief contained in this
26 Order, including freezing Defendants' assets and prohibiting Defendants from
27 destroying records;

28

1 4. **“Defendant” or “Defendants”** means Pacific Herbal Sciences, Inc.
2 (“Pacific Herbal”); Natural Health Product, Inc. (“NHP”); New Star Marketing
3 Group, Inc. (“New Star”); John A. Brackett, Jr. (“Brackett”), individually and as
4 an officer or director of Pacific Herbal; and Lei Lu, also known as Lei Li and Lu
5 Lei, individually and as an officer or director of NHP and New Star, and also
6 doing business as “IE Marketing, Inc.”

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

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

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

23 8. **“Initiating” or “Initiate”** is defined in 15 U.S.C. § 7702(9) and
24 means to originate or transmit a commercial electronic mail message or to procure
25 the origination or transmission of such message, but does not include actions that
26 constitute routine conveyance of such message. For purposes of this definition,
27 **“procure,”** as defined in 15 U.S.C. § 7702(12), means intentionally to pay or
28

1 provide other consideration to, or induce, another person to initiate such a
2 commercial electronic mail message on one's behalf.

3 9. **"Person"** means a natural person, an organization or other legal
4 entity, including a corporation, partnership, sole proprietorship, limited liability
5 company, association, cooperative, or any other group or combination acting as an
6 entity.

7 10. **"Plaintiff"** means the Federal Trade Commission ("Commission" or
8 "FTC").

9 11. **"Protected computer"** is defined in 15 U.S.C. § 7702(13) and 18
10 U.S.C. § 1030(e)(2)(B) and means a computer which is used in interstate or
11 foreign commerce or communication, including a computer located outside the
12 United States that is used in a manner that affects interstate or foreign commerce
13 or communication of the United States.

14 12. **"HGH-related product"** means any product or products that are
15 advertised, marketed, promoted, offered for sale, distributed, or sold with express
16 or implied representations that the product contains any form of human growth
17 hormone, causes an increase in a consumer's growth hormone levels, or may
18 produce effects similar in nature to those produced by any form of human growth
19 hormone, and includes, but is not limited to, "HGH Revolution," "HGH-R," and
20 "Natural Rejuvenator," or any substantially similar products.

21 22 ORDER

23 I. PROHIBITED BUSINESS ACTIVITIES PURSUANT TO THE FTC ACT

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

1 temporarily restrained and enjoined from making, or assisting others in making,
2 expressly or by implication, including through the use of a trade name or
3 endorsement, any false or misleading statement or representation in connection
4 with the marketing, advertising, promotion, offering for sale, sale, or provision of
5 any HGH-related product, including but not limited to:

6 A. Representing that the product contains human growth hormone and/or
7 causes an increase in a consumer's growth hormone levels;

8 B. Representing that the product:

- 9 1. Will enable the consumer to lose weight, or replace fat with
10 muscle, without diet or exercise;
- 11 2. Will turn back or reverse the aging process, including, but not
12 limited to, that the product will (i) increase energy levels,
13 stamina, and muscle strength; (ii) restore the size of bodily
14 organs that shrink with age (*e.g.*, liver, pancreas and heart); and
15 (iii) improve memory; or
- 16 3. Will prevent, treat, or cure any disease or other medical
17 condition, including, but not limited to, representing that the
18 product will (i) strengthen or elevate the immune system;
19 (ii) reduce the risk of Alzheimer's disease; (iii) increase bone
20 density; (iv) prevent or act as a solution to osteoporosis; (v)
21 eliminate joint pains; (vi) lower cholesterol; (vii) lower or
22 normalize blood pressure; (viii) improve cardiovascular and
23 respiratory functions and reduce the occurrence of
24 cardiovascular diseases; (ix) improve vision; (x) stabilize mood
25 swings and act as an antidepressant; (xi) help heal wounds; and
26 (xii) eliminate sleep disorders;

27 C. Misrepresenting that the order pages on Web sites marketing any such
28 product are secured using SSL encryption technology and/or that credit card

1 numbers and other personal information entered by consumers on the order pages
2 cannot be seen by others when transmitted; and

3 D. Misrepresenting the existence, contents, validity, results, conclusions,
4 or interpretations of any test, study, or research.

5
6 **II. PROHIBITED BUSINESS ACTIVITIES UNDER THE**
7 **CONTROLLING THE ASSAULT OF NON-SOLICITED PORNOGRAPHY**
8 **AND MARKETING ACT OF 2003**

9 **IT IS FURTHER ORDERED** that Defendants, and their officers, agents,
10 servants, employees, attorneys, and all other persons or entities in active concert or
11 participation with them who receive actual notice of this Order by personal
12 service, facsimile, or otherwise, whether acting directly or through any trust,
13 corporation, subsidiary, division, or other device, or any of them, are hereby
14 temporarily restrained and enjoined from violating, or assisting others in violating,
15 the provisions contained in Sections 5 and 6 of the CAN-SPAM Act, 15 U.S.C.
16 §§ 7704 and 7705, as currently promulgated or as it may hereafter be amended, or
17 any rule, regulation, or requirement adopted pursuant thereto, including, but not
18 limited to, by initiating the transmission, to protected computers, of a commercial
19 email message that:

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

26 B. Contains subject headings that are likely to mislead a recipient, acting
27 reasonably under the circumstances, about a material fact regarding the contents or
28

1 subject matter of the message, in violation of Section 5(a)(2) of the CAN-SPAM
2 Act, 15 U.S.C. § 7704(a)(2);

3 C. Fails to include a clear and conspicuous notice of the recipient's
4 opportunity to decline to receive further electronic mail messages from the sender,
5 in violation of Section 5(a)(5)(A)(ii) of the CAN-SPAM Act, 15 U.S.C.
6 § 7704(a)(5)(A)(ii);

7 D. Fails to include a functioning return electronic mail address or other
8 Internet-based mechanism, clearly and conspicuously displayed, that a recipient
9 may use to submit a reply electronic mail message or other form of Internet-based
10 communication requesting not to receive future commercial electronic mail
11 messages, from that sender, at the electronic mail address where the message was
12 received, and that remains capable of receiving such replies for no less than thirty
13 (30) days after the transmission of the original message, in violation of Section
14 5(a)(3)(A) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(3)(A);

15 E. Advertises or promotes products or services but fails to include clear
16 and conspicuous identification that the message is an advertisement or solicitation,
17 in violation of Section 5(a)(5)(A)(i) of the CAN-SPAM Act, 15 U.S.C.
18 § 7704(a)(5)(A)(i); and

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

22 23 **III. ASSET FREEZE**

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, except as agreed

1 to in writing by the parties or as directed by further order of the Court, are
2 temporarily restrained and enjoined from:

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

- 7 1. In the actual or constructive possession of any Defendant;
- 8 2. Owned or controlled by, or held for the benefit of, or subject to
9 access by, or belonging to, any Defendant; or
- 10 3. In the actual or constructive possession of, owned or controlled
11 by, subject to access by, or belonging to, any corporation,
12 partnership, trust, or any other entity directly or indirectly
13 owned, managed, or controlled by, or under common control
14 with, any Defendant including, but not limited to, any assets
15 held by or for any Defendant at any bank or savings and loan
16 institution, credit union, independent service organization,
17 independent credit card processing company, or with any
18 broker-dealer, escrow agent, title company, commodity trading
19 company, precious metal dealer, common carrier, credit card
20 processing agent, customs broker, commercial mail receiving
21 and/or forwarding agency, commercial freight holding and/or
22 forwarding agency, or financial institution or depository of any
23 kind including, but not limited to, assets at the following
24 financial institutions or any branches thereof:
 - 25 a. Wells Fargo Bank;
 - 26 b. Westamerica Bank;
 - 27 c. Key Bank; and
 - 28 d. Card Ready International.

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

6 C. Failing to hold and account for all assets, including, without
7 limitation, payments, loans, and gifts, received after service of this Order.
8

9 **IV. DUTIES OF THIRD PARTIES HOLDING DEFENDANTS' ASSETS**

10 **IT IS FURTHER ORDERED** that, effective immediately upon notification
11 of this Order, and pending determination of the FTC's request for a preliminary
12 injunction, any financial institution, or any person or other entity served with a
13 copy of this Order, or who otherwise has actual knowledge of this Order, that has
14 possession, custody, or control of any account, asset, or document held on behalf
15 of, or relating or belonging to, any Defendant, shall:

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

- 21 1. On behalf of, or for the benefit of, any Defendant;
- 22 2. In any account maintained in the name of, or subject to
23 withdrawal by, any Defendant; or
- 24 3. Subject to access or use by, or under the signatory power of,
25 any Defendant;

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

- 27 1. Titled in the name, individually or jointly, or held on behalf or
28 for the benefit, of any Defendant; or

1 2. Subject to access by any Defendant;

2 C. Provide to counsel for the Commission, within five (5) business days,
3 by facsimile or by overnight delivery, a sworn statement setting forth:

4 1. The identification of each account or asset titled in the name,
5 individually or jointly, or held on behalf or for the benefit, of any
6 Defendant;

7 2. The balance of each such account, or a description of the nature
8 and value of such asset;

9 3. The identification of any safe deposit box that is either titled in
10 the name of, individually or jointly, or otherwise subject to access or
11 control by, any Defendant; and

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

14 D. The accounts and assets subject to this Part include existing accounts
15 and assets, and accounts created and assets deposited after the effective date of
16 this Order. This Part shall not prohibit transfers in accordance with any provision
17 of this Order or any further order of the Court.

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

24
25 **V. FINANCIAL STATEMENTS AND ACCOUNTING**

26 **IT IS FURTHER ORDERED** that, within five (5) calendar days after
27 service of this Order on Defendants Brackett and Lei Lu, Defendants shall provide
28 the following to counsel for the Commission:

1 A. Defendants Brackett and Lei Lu shall each prepare and provide a
2 completed financial statement, accurate as of the date of service of this Order, in
3 the form provided as Attachment A to this Order, captioned "Financial Statement
4 of Individual Defendant";

5 B. Defendant Brackett, on behalf of Defendant Pacific Herbal, shall
6 prepare and provide a completed financial statement, accurate as of the date of
7 service of this Order, in the form provided as Attachment B to this Order,
8 captioned "Financial Statement of Corporate Defendant";

9 C. Defendant Lei Lu, on behalf of Defendants NHP, New Star, and any
10 other entity doing business as IE Marketing, Inc., shall prepare and provide a
11 completed financial statement for each entity, accurate as of the date of service of
12 this Order, in the form provided as Attachment B to this Order, captioned
13 "Financial Statement of Corporate Defendant"; and

14 D. Each Defendant shall provide access to records and documents
15 pertaining to the Defendants that are held by financial institutions outside the
16 territory of the United States, by signing Attachment C to this Order, captioned
17 "Consent to Release of Financial Records."

18 VI. RECORD KEEPING/MAINTAINING BUSINESS RECORDS

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

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.

19 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
28

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 16 **IX. CREDIT REPORTS**

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

21 22 **X. DURATION OF TEMPORARY RESTRAINING ORDER**

23 **IT IS FURTHER ORDERED** that this Order shall expire on
24 October 18, 2005, unless within such time, the Order, for good
25 cause shown, is extended for an additional period not to exceed ten (10) days, or is
26 otherwise extended with the consent of the parties.

XI. ORDER TO SHOW CAUSE

1
2 **IT IS FURTHER ORDERED** pursuant to Federal Rule of Civil Procedure
3 65(b), that Defendants shall appear before this Court, Courtroom 21, United
4 States District Court for the Central District of California, _____,
5 Los Angeles, California, on the 17th day of October, 2005, at
6 9 o'clock a.m. (PDT), to show cause, if there is any, why this Court
7 should not enter a preliminary injunction, pending final ruling on the Complaint
8 against Defendants, enjoining them from further violations of Sections 5(a) and 12
9 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, and the CAN-SPAM Act, 15 U.S.C.
10 § 7701, *et seq.*, and imposing such additional relief as may be appropriate.
11

XII. EXAMINATION OF WITNESSES

12
13 **IT IS FURTHER ORDERED** that there will be no direct examination of
14 witnesses at the preliminary injunction hearing in this matter, unless specifically
15 ordered by this Court. In the event this Court permits direct examination of
16 witnesses at the preliminary injunction hearing, the parties shall exchange and file
17 with the Court the names of those witnesses to testify at the hearing, and a
18 summary of the substance of the testimony to be proffered at the hearing, no later
19 than four (4) business days prior to the scheduled hearing.
20

XIII. SERVICE OF DOCUMENTS AND EVIDENCE

21
22 **IT IS FURTHER ORDERED** that Defendants, in responding to this
23 Court's Order to Show Cause, shall serve all memoranda, affidavits, and other
24 evidence on which they intend to rely no later than 4:00 p.m. (PDT) of the fourth
25 day prior to the preliminary injunction hearing set in this matter. Service on the
26 Commission shall be performed by personal delivery or confirmed facsimile
27 delivery to Maxine R. Stansell at the following address: Federal Trade
28 Commission, 915 Second Ave., Suite 2896, Seattle, WA 98174, 206-220-6366

1 (fax). The Commission may serve and file a supplemental memorandum of points
 2 and authorities based on evidence discovered subsequent to the filing of its
 3 Complaint no later than 4:00 p.m. (PDT) of the fourth day prior to the preliminary
 4 injunction hearing, and may serve and file a reply to Defendants' opposition by no
 5 later than 4:00 p.m. (PDT) on the day prior to the preliminary injunction hearing.
 6 Defendants may serve and file a reply to any supplemental memorandum of points
 7 and authorities filed by the Commission by no later than 4:00 p.m. (PDT) on the
 8 day prior to the preliminary injunction hearing.

9
 10 **XIV. RETENTION OF JURISDICTION**

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

13
 14
 15 Dated this 6th day of October, 2005.

16
 17
 18 **RONALD S.W. LEW**

19 **UNITED STATES DISTRICT JUDGE**

20 Presented by:

21
 22 *Maxine R. Stansell*
 23 MAXINE R. STANSELL
 24 MARY T. BENFIELD
 Attorneys for Plaintiff
 Federal Trade Commission