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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14 WESTERN DISTRICT

15 FEDERAL TRADE COMMISSION,

16 Plaintiff,

17 v.

18 PACIFIC HERBAL SCIENCES, INC.,
a California corporation;

19 NATURAL HEALTH PRODUCT,
20 INC., a California corporation;

21 NEW STAR MARKETING GROUP,
INC., a California corporation;

22 JOHN A. BRACKETT, JR.,
23 individually and as an officer or director
of PACIFIC HERBAL SCIENCES,
24 INC.; and

25 LEI LU, also known as LEI LI,
26 individually and as an officer or director
of NATURAL HEALTH PRODUCT,
27 INC., and NEW STAR MARKETING
GROUP, INC., and doing business as
"IE MARKETING, INC.,"

28 Defendants.

Case No. CV05-7247 RSW

COMPLAINT FOR INJUNCTIVE
AND OTHER EQUITABLE
RELIEF (RZX)

1
2
3 Plaintiff, the Federal Trade Commission (“FTC” or “the Commission”), for
4 its complaint alleges as follows:

5 1. The FTC brings this action under Sections 13(b) and 19 of the
6 Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 53(b) and 57b, and the
7 Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003
8 (“CAN-SPAM”), 15 U.S.C. § 7706(a), to obtain preliminary and permanent
9 injunctive relief, rescission of contracts, restitution, redress, disgorgement and
10 other equitable relief for Defendants’ deceptive and unfair acts or practices and the
11 making of false advertisements in violation of Sections 5 and 12 of the FTC Act,
12 15 U.S.C. §§ 45 and 52, and for violations of CAN-SPAM, 15 U.S.C. § 7701 *et*
13 *seq.*

14 **JURISDICTION AND VENUE**

15 2. This Court has jurisdiction over this matter pursuant to 15 U.S.C.
16 §§ 45(a), 52, 53(b), 57b, and 7706(a), and 28 U.S.C. §§ 1331, 1337(a), and 1345.

17 3. Venue in the United States District Court for the Central District of
18 California is proper under 15 U.S.C. § 53(b) and 28 U.S.C. § 1391(b) and (c).

19 **PLAINTIFF**

20 4. Plaintiff FTC is an independent agency of the United States
21 government created by statute. 15 U.S.C. §§ 41-58. The Commission enforces
22 Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, which prohibit,
23 respectively, unfair or deceptive acts or practices, and false advertisements for
24 food, drugs, devices or cosmetics, in or affecting commerce. The FTC is also
25 charged with enforcing CAN-SPAM as if statutory violations of CAN-SPAM
26 “were an unfair or deceptive act or practice proscribed under Section 18(a)(1)(B)
27 of the [FTC Act] (15 U.S.C. 57a(a)(1)(B)).” *See* 15 U.S.C. § 7706(a).
28

1 IE Marketing set forth in this Complaint. Lei Lu resides in the Central District of
2 California.

3
4 **COMMERCE**

5 11. At all times material to this Complaint, Defendants have maintained a
6 substantial course of trade in or affecting commerce, as “commerce” is defined in
7 Section 4 of the FTC Act, 15 U.S.C. § 44.

8 **DEFINITIONS**

9 CAN-SPAM defines the following terms as follows:

10 12. **“Electronic mail message”** (or “email”) means a message sent to a
11 unique electronic mail address. 15 U.S.C. § 7702(6).

12 13. **“Header information”** means the source, destination, and routing
13 information attached to an electronic mail message, including the originating
14 domain name and originating electronic mail address, and any other information
15 that appears in the line identifying, or purporting to identify, a person initiating the
16 message. 15 U.S.C. § 7702(8).

17 14. **“Initiate,”** when used with respect to a commercial email message,
18 means to originate or transmit such message or to procure the origination or
19 transmission of such message. 15 U.S.C. § 7702(9).

20 15. **“Procure,”** when used with respect to a commercial email message,
21 means intentionally to pay or provide other consideration to, or induce, another
22 person to initiate such a message on one’s behalf. 15 U.S.C. § 7702(12).

23 16. **“Protected computer”** means a computer used in interstate or foreign
24 commerce or communication, including a computer located outside the United
25 States that is used in a manner that affects interstate or foreign commerce or
26 communication of the United States. 15 U.S.C. § 7702(13) and 18 U.S.C.
27 § 1030(e)(2)(B).

1 of ingredients identical to those listed for HGH Revolution. These sites identify
2 the sellers or producers of the oral spray marketed and sold at these sites as IE
3 Marketing, Inc., and Pacific Herbal Sciences, Inc. Pacific Herbal responds by
4 email to orders placed at these sites, and the product received from these sites is
5 bottled and packaged identically to the product received in response to orders
6 placed at www.pacificherbal.com. The same Web sites also contain solicitations
7 to visitors to become distributors of the oral sprays, identifying NHP as the entity
8 soliciting distributors.

9 c. In the third set, the Web sites market and sell oral spray
10 products under the names HGH Revolution, Natural Rejuvenator, and others, and
11 make the same or virtually identical claims for the product as those made on the
12 sites referenced in paragraph 20.b, and listing most of the same product
13 ingredients. These sites have identified the sellers or producers of the oral spray
14 marketed and sold at those sites variously as IE Marketing, NHP, or New Star, or
15 have provided the address of NHP or New Star as that of the entity marketing or
16 selling the oral spray. As with the second set of sites, NHP is identified as the
17 entity soliciting distributors. The domain name registrations for many of these
18 sites have identified NHP or New Star as registrant or have provided an email
19 address for the registrant identical to one used to register a domain on behalf of
20 NHP or New Star. Products ordered from these sites are sent to consumers in
21 packages identifying NHP as the sender. The product label also refers to NHP.

22 21. To induce consumers to purchase HGH Revolution, Pacific Herbal's
23 official Web site at www.hghrevolution.com makes the following statements.

24 a. The site's "home" page states: "With HGH Revolution you can
25 boost your energy, burn off stubborn body fat, Increase [*sic*] lean muscle mass
26 faster, . . . , sleep deeper - feel more rested, and enjoy the freedom of Feeling and
27 Looking Great every day!"

1 b. Under the heading, “What Can HGH Revolution Do For
2 You?,” the site states:

3 Prescription HGH treatments have helped millions of men and
4 women reverse some of the key effects of aging, but such
5 treatments are very costly and invasive. Now, an all-natural
6 product like HGH Revolution can produce outstanding results
7 by enabling your own body to naturally produce more HGH.
8 This is done by a complex chain of Amino-Acids that trigger
9 IGF-1 (Insulin Growth Factor –1) production. IGF-1 causes
10 your body to produce more HGH and replenish cell structures
11 that otherwise would be left to age.

12 c. Under the headings, “How Does Buying HGH Change The
13 Lives Of Millions Of Men and Women” and “What Results Can I Expect?,” the
14 site lists additional purported benefits of HGH Revolution including, among
15 others, “Increased Energy Level,” “Improved exercise capacity,” “Builds Muscle
16 tone,” “Better Mood and Emotions,” “Improves Immunity System,” and “Improves
17 Memory and Mental Focus.”

18 d. These claims are reinforced by references to studies
19 purportedly proving the claimed benefits. For example, on a page headed,
20 “Human Growth Hormone and Clinical Study Information,” and under the
21 heading, “How HGH Effects Anti-Aging,” the site lists several “Physical
22 Attribute[s]” with a claimed “Improvement” for each, including 88% improvement
23 in “Muscle Strength”; 71% improvement in “Healing Capacity”; 84%
24 improvement in “Energy”; 62% improvement in “Memory”; 86.8% improvement
25 in “Fatigue Reduction”; and 73.5% improvement in “Anxiety Alleviated.”
26 According to the site, “These results are from studies at the Medical College of
27 Wisconsin by Dr. Leon Cass Terry.” Also, under the heading, “Are The Results
28 Proven?,” the site states:

1 Yes, millions of Americans are using homeopathic Growth Hormone
2 to slow, and in some cases, reverse the effects of aging. Numerous
3 studies have been conducted on the incredible properties of these
4 products.

5 22. To induce consumers to purchase oral spray products purporting to
6 contain, or cause the body to produce, HGH, Web sites operated by or on behalf of
7 Pacific Herbal, Lei Lu doing business as IE Marketing, Inc., NHP, and New Star,
8 make the following statements on the Internet Web sites listed in paragraphs 20.b-
9 20.c and on other sites not listed:

10 a. The sites' home pages typically state:

11 **LOSE WEIGHT WHILE YOU SLEEP without DIETING**
12 **or EXERCISE. 100% SATISFACTION GUARANTEED.**

13 Experience up to an 82% IMPROVEMENT in body fat loss
14 while erasing 10 YEARS in 10 WEEKS!

15 b. The sites typically explain how the oral spray works as follows,
16 stating that "Until recently, growth hormone therapy has only been available in the
17 form of injections that are prohibitively expensive and difficult to use." The sites
18 state that users can obtain the benefits of HGH from Defendants' oral spray
19 product without injections, claiming that:

20 an oral delivery system has been developed. It takes advantage of the short
21 distance between the brain and the mouth so that HGH can pass through the
22 mucous membrane under the tongue into the blood vessels within seconds,
23 then it goes directly into the brain. It is quickly absorbed and works to
24 stimulate and reactivate the functions of the pituitary gland to secrete HGH
25 and other rejuvenating hormones.

26 The sites also represent that the oral sprays contain:

27 natural substances (secretagogues) which have been documented to increase
28 growth hormone naturally and may exceed the effectiveness of injection

1 therapy. These natural secretagogues provide nutritional support for the
2 release of growth hormone from its sequestered state in the pituitary gland.

3 c. Under the heading, “Why We Need HGH,” the sites typically
4 list various conditions and claim that HGH will prevent, treat, or cure them. For
5 example, under “Osteoporosis,” the sites discuss the risks of lower bone density
6 and fractures associated with osteoporosis, then state, “The solution is to increase
7 the intake of HGH.” Under “Cardiovascular Disease,” the sites observe that the
8 occurrence of cardiovascular diseases greatly increases after menopause because
9 “bad (low density) cholesterol will grow while the good (high density) cholesterol
10 will diminish.” The sites claim that if one takes HGH, “the situation will be
11 reversed.” Similarly, the sites claim that, “As revealed by the medical report,
12 taking HGH will greatly reduce the potentiality of having Alzheimer disease.”

13 d. Under the heading, “How does it work,” the sites list other
14 purported benefits of the oral spray sold there.

15 i. Under the heading, “Elevate the Immune System,” the
16 sites state that “Hgh will help you improve the manufacture of new antibodies,
17 increases production of T-cells and interlukin 2, induces the proliferation of
18 disease fighting white blood cells, stimulates bacteria fighting macrophages and
19 improves production of red blood cells.”

20 ii. Under the heading, “Stabilize Mood-Swings,” the sites
21 state, “Hgh acts in your brain as an antidepressant, raising B-endorphin levels, the
22 brains [*sic*] own opiate, and lowering dopamine, which causes agitation.” They
23 also state that “Hgh can help you reduce stress [and] improve concentration.”

24 iii. Under the heading, “Burn Fat and Reduce Cellulite,” the
25 sites call HGH the “most effective anti-obesity ‘agent’ ever discovered,” claiming
26 that it “revs up the metabolism to former highs, selectively reducing the abdomen,
27 waist, thighs and hips, while at the same time increasing muscle mass.”

28

1 iv. Under the heading, “Fitness and Bodybuilding,” the sites
2 state that “Hgh has been found to significantly increase the effects of exercise and
3 muscle building, including energy, muscle strength and endurance.”

4 v. Under the heading, “Memory Improvement,” the sites
5 state that HGH “can help to stimulate the rejuvenation and repair of your brain
6 cells” and that it “affects the proteins produced in the brain for storing your
7 memories.”

8 vi. Under the heading, “No more Sleeping Disorders,” the
9 sites state that HGH “can be a great help in balancing your sleeping pattern,”
10 helping users to “feel more rested in the morning,” and that “many report for the
11 first time in years they are able to sleep through the entire night.”

12 vii. Under the heading, “Furthermore,” the sites state that
13 “Hgh can also help to strengthen your bones, . . . improve your vision, lower the
14 cholesterol and blood pressure, improve your digestion, and quicken healing of
15 wounds and so much more.”

16 e. The sites typically include a chart headed, “Improvement Facts
17 in HGH.” The “facts” listed include “Body Fat loss 82%,” “Muscle strength
18 88%,” “Emotional stability 67%,” and “Memory 62%.”

19 f. These claims are reinforced by references to studies
20 purportedly proving the claimed benefits. Under the headings, “Doctors and
21 Research,” and “Reverse 10 to 20 years of aging,” the sites typically state:

22 The New England Journal of Medicine published the clinical findings
23 of Daniel Rudman, MD, regarding his . . . research on the anti-aging
24 effects of hgh. . . . After six months, Dr. Rudman observed a reversal
25 of the aging process from 10 to 20 years in the patients who received
26 hgh injections.

27 The Web sites typically also state:
28

1 A recent outcome based high human growth hormone research study
2 of the oral spray we recommend, revealed that 75% of subjects
3 experienced a 41% average increase in IGF-1 levels (an indicator of
4 growth hormone levels). In addition, there was lowered cholesterol in
5 an average of 11% in 90% of the cases, and 80% of the subjects
6 experienced an average 29% reduction in tryglicerides (fat), reflecting
7 better overall health.

8 Additional purported findings of the study were that users experienced “loss of
9 body fat . . . without dieting or exercise,” “increase in lean muscle mass . . .
10 without exercise,” “Superior Immune Function,” “Stronger Bones,” “More Rapid
11 Healing,” and “Increased Memory Retention.” One doctor whose “study” is
12 referenced reportedly “guarantees a loss of 10 to 12 percent of body fat every six
13 months if they are overweight, and a gain of 8 to 10 percent in muscle mass every
14 six months, continuing every six months until body composition has reverted to
15 that of a twenty year old.”

16 23. To induce recipients to visit the Web sites and purchase Defendants’
17 oral spray products, unsolicited electronic mail messages promoting Web sites
18 operated by Defendants or their agents make various claims, including claims that
19 the products:

- 20 a. Stimulate the production of HGH;
- 21 b. Enable the user to burn fat without dieting or exercise;
- 22 c. Slow and reverse the aging process;
- 23 d. Increase muscle strength and size;
- 24 e. Increase energy and cardiac output;
- 25 f. Strengthen the heart muscle;
- 26 g. Improve vision;
- 27 h. Help eliminate depression;

1 i. Strengthen the immune system, increase resistance to common
2 illness, and prevent disease;
3 j. Increase bone density;
4 k. Lower blood pressure;
5 l. Control cholesterol;
6 m. Quicken healing of wounds;
7 n. Have been proven by “studies,” “clinical evidence,” or
8 “[c]linical results based on trials” to produce such effects as an 84% increase in
9 energy level, an 88% improvement in muscle strength, an 81% increase in muscle
10 mass, expanded exercise tolerance/endurance of 81-83%, a 72% decrease in body
11 fat without diet or exercise, improved immune function of 73%, a 67%
12 improvement in mental stability, and a 62% improvement in memory.

13 24. Defendants or their agents take orders for their oral sprays over the
14 Internet. To order, consumers enter personal information called for by
15 Defendants’ order form, including their names, addresses, and credit card
16 numbers. The order form has appeared under this statement: “NOTE: To ensure
17 your personal privacy, all of the information that you submit to us after this point
18 will be secured using SSL encryption technology.” In numerous instances, these
19 Web sites’ home pages have also promised that “Online ordering is Secure.”

20 25. Defendants are “initiators” with respect to an email message when
21 they have either originated or transmitted a message themselves or have procured
22 the origination or transmission of a message through payments or other
23 consideration, or inducements.

24 26. Defendants are “senders” with respect to an email message when they
25 have initiated a message and it is Defendants’ products, services, or Web sites that
26 are being advertised or promoted by such message.

27 27. In numerous instances, Defendants have initiated commercial email
28 messages that contain materially false or misleading header information. In many

1 instances, the email contains an originating email address that was not assigned by
2 the email service provider or was used without the authorization of the subscriber
3 who obtained the email address from the email service operator. In other
4 instances, the email message fails to identify accurately the protected computer
5 used to initiate the message because the email message was relayed or
6 retransmitted through another protected computer for purposes of disguising its
7 origin.

8 28. In numerous instances, in order to induce consumers to open and read
9 their commercial emails, Defendants have initiated commercial email messages
10 that contain subject headings that misrepresent the content or subject matter of the
11 message.

12 29. In numerous instances, Defendants have initiated commercial email
13 messages that fail to include a clear and conspicuous identification that the
14 message is an advertisement or solicitation.

15 30. In numerous instances, Defendants' commercial email messages fail
16 to include any notification to recipients of their ability to decline receiving future
17 email messages from Defendants. These email messages further fail to include a
18 reply email address or other Internet-based mechanism that recipients can use to
19 decline receiving future email messages from Defendants. In other instances,
20 Defendants' commercial email messages include only vague indications of
21 recipients' rights to decline receiving future email messages from Defendants.

22 31. In numerous instances, Defendants have initiated commercial email
23 messages that fail to include a valid physical postal address of the sender.

24 **VIOLATIONS OF SECTIONS 5 AND 12 OF THE FTC ACT**

25 32. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits unfair or
26 deceptive acts or practices in or affecting commerce. Section 12(a) of the FTC
27 Act, 15 U.S.C. § 52(a), prohibits the dissemination of any false advertisement in or
28 affecting commerce for the purpose of inducing, or which is likely to induce, the

1 purchase of food, drugs, devices, or cosmetics. For purposes of Section 12 of the
2 FTC Act, the oral sprays sold by Defendants are either “food,” “drugs” or
3 “devices” as defined in Sections 15(b), (c) and (d) of the FTC Act, 15 U.S.C.
4 §§ 55(b), (c) and (d). As set forth below, Defendants have engaged in and are
5 continuing to engage in such unlawful practices in connection with the marketing
6 and sale of HGH Revolution, Natural Rejuvenator, and oral sprays marketed under
7 other names. Defendants represent that these products contain HGH, cause an
8 increase in the body’s growth hormone level, or cause effects purportedly similar
9 to those caused in nature by HGH.

10 COUNT I

11 33. Through the means described in Paragraphs 18-23, Defendants have
12 represented, expressly or by implication, directly or through their agents, that their
13 oral spray products:

14 a. Contain human growth hormone and/or cause a statistically
15 significant and clinically meaningful increase in a consumer’s growth hormone
16 levels;

17 b. Enable the consumer to lose weight, or replace fat with muscle,
18 without diet or exercise;

19 c. Will turn back or reverse the aging process, including, but not
20 limited to, representing that the products will (i) increase energy levels, stamina,
21 and muscle strength; (ii) restore the size of bodily organs that shrink with age
22 (*e.g.*, liver, pancreas and heart); and (iii) improve memory; and

23 d. Prevent, treat, or cure various diseases and medical conditions,
24 including, but not limited to, representing that the products will (i) strengthen or
25 elevate the immune system; (ii) reduce the risk of having Alzheimer’s disease;
26 (iii) increase bone density; (iv) prevent or act as a solution to osteoporosis;
27 (v) eliminate joint pains; (vi) lower cholesterol; (vii) lower or normalize blood
28 pressure; (viii) improve cardiovascular and respiratory functions and reduce the

1 occurrence of cardiovascular diseases; (ix) improve vision; (x) stabilize mood
2 swings and act as an antidepressant; (xi) help heal wounds; and (xii) eliminate
3 sleep disorders.

4 34. In truth and in fact, Defendants' oral spray products:

5 a. Do not contain human growth hormone or cause a statistically
6 significant or clinically meaningful increase in a consumer's growth hormone
7 levels;

8 b. Do not enable the consumer to lose weight, or replace fat with
9 muscle, without diet or exercise;

10 c. Do not turn back or reverse the aging process, and do not
11 (i) increase energy levels, stamina, and muscle strength; (ii) restore the size of
12 bodily organs that shrink with age (*e.g.*, liver, pancreas and heart); or (iii) improve
13 memory; and

14 d. Do not prevent, treat or cure diseases or medical conditions,
15 and do not (i) strengthen or elevate the immune system; (ii) reduce the risk of
16 having Alzheimer's disease; (iii) increase bone density; (iv) prevent or act as a
17 solution to osteoporosis; (v) eliminate joint pains; (vi) lower cholesterol;
18 (vii) lower or normalize blood pressure; (viii) improve cardiovascular and
19 respiratory functions and reduce the occurrence of cardiovascular diseases;
20 (ix) improve vision; (x) stabilize mood swings and act as an antidepressant;
21 (xi) help heal wounds; and (xii) eliminate sleep disorders.

22 35. Therefore, Defendants' representations as set forth in Paragraph 33
23 above are false or misleading and constitute a deceptive practice, and the making
24 of false advertisements, in or affecting commerce, in violation of Sections 5(a) and
25 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

1 **COUNT II**

2 36. Through the means described in Paragraphs 18-23, Defendants have
3 represented, expressly or by implication, directly or through their agents, that their
4 oral spray products:

5 a. Contain human growth hormone or cause a statistically
6 significant or clinically meaningful increase in a consumer's growth hormone
7 levels;

8 b. Enable the consumer to lose weight, or replace fat with muscle,
9 without diet or exercise;

10 c. Will turn back or reverse the aging process, including, but not
11 limited to, representing that the products will (i) increase energy levels, stamina,
12 and muscle strength; (ii) restore the size of bodily organs that shrink with age
13 (e.g., liver, pancreas and heart); and (iii) improve memory; and

14 d. Prevent, treat, or cure various diseases and medical conditions,
15 including, but not limited to, representing that the products will (i) strengthen or
16 elevate the immune system; (ii) reduce the risk of having Alzheimer's disease;
17 (iii) increase bone density; (iv) prevent or act as a solution to osteoporosis;
18 (v) eliminate joint pains; (vi) lower cholesterol; (vii) lower or normalize blood
19 pressure; (viii) improve cardiovascular and respiratory functions and reduce the
20 occurrence of cardiovascular diseases; (ix) improve vision; (x) stabilize mood
21 swings and act as an antidepressant; (xi) help heal wounds; and (xii) eliminate
22 sleep disorders.

23 37. Defendants did not possess and rely upon a reasonable basis that
24 substantiated the representations set forth in Paragraph 36 above at the time the
25 representations were made.

26 38. Therefore, the making of the representations set forth in Paragraph 36
27 above constitutes a deceptive practice, and the making of false advertisements, in
28

1 or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act,
2 15 U.S.C. §§ 45(a) and 52.

3 **COUNT III**

4 39. Through the means described in Paragraphs 21.d, 22.f, and 23.n,
5 Defendants have represented that scientific research, including research published
6 in the New England Journal of Medicine, proves that Defendants' oral spray
7 products will produce the following effects, among others:

- 8 a. an increase in consumers' growth hormone levels;
- 9 b. a decrease in body fat, without diet or exercise;
- 10 c. an increase in muscle mass, without exercise;
- 11 d. improved immune function;
- 12 e. more rapid healing;
- 13 f. stronger bones;
- 14 g. lower cholesterol;
- 15 h. normalized blood pressure;
- 16 i. improved vision; and
- 17 j. improved memory.

18 40. In truth and in fact, scientific research, including research published
19 in the New England Journal of Medicine, has not proven that Defendants' oral
20 spray products will produce the effects claimed by Defendants.

21 41. Therefore, the representations set forth in Paragraph 39 above are
22 false or misleading and constitute a deceptive practice, and the making of false
23 advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of
24 the FTC Act, 15 U.S.C. §§ 45(a) and 52.

25 **COUNT IV**

26 42. Through the means described in Paragraph 24, Defendants in
27 numerous instances, expressly or by implication, directly or through their agents,
28 represent that the order pages of Web sites marketing Defendants' products are

1 secured using SSL encryption technology and that credit card numbers and other
2 personal information entered by consumers on the order pages and submitted to
3 Defendants cannot be seen by others when transmitted.

4 43. In truth and in fact, in numerous instances the order pages on the Web
5 sites marketing Defendants' products do not support encryption, and information
6 transmitted via these order forms is not secure and is at risk of being seen by
7 others during transmission.

8 44. Therefore, the making of the representations set forth in Paragraph 42
9 above constitutes a deceptive practice in or affecting commerce in violation of
10 Section 5(a) of the FTC Act, 15 U.S.C. §§ 45(a).

11 **VIOLATIONS OF THE CONTROLLING THE ASSAULT OF**
12 **NON-SOLICITED PORNOGRAPHY AND MARKETING ACT OF 2003**

13 45. The Controlling the Assault of Non-solicited Pornography and
14 Marketing Act of 2003 ("CAN-SPAM"), 15 U.S.C. § 7701, *et seq.*, became
15 effective on January 1, 2004, and has since remained in full force and effect.

16 46. Section 5(a)(1) of CAN-SPAM, 15 U.S.C. § 7704(a)(1), states:
17 It is unlawful for any person to initiate the transmission, to a
18 protected computer, of a commercial electronic mail message . . . that
19 contains, or is accompanied by, header information that is materially
20 false or materially misleading.

21 47. Section 5(a)(6) of CAN-SPAM, 15 U.S.C. § 7704(a)(6), states:
22 For purposes of paragraph (1) [15 U.S.C. § 7704(a)(1)], the term
23 "materially," when used with respect to false or misleading header
24 information, includes the alteration or concealment of header
25 information in a manner that would impair the ability of an Internet
26 access service processing the message on behalf of a recipient, a
27 person alleging a violation of this section, or a law enforcement
28 agency to identify, locate, or respond to a person who initiated the

1 electronic mail message or to investigate the alleged violation, or the
2 ability of a recipient of the message to respond to a person who
3 initiated the electronic message.

4 48. Section 5(a)(2) of CAN-SPAM, 15 U.S.C. § 7704(a)(2), states:

5 It is unlawful for any person to initiate the transmission to a protected
6 computer of a commercial electronic mail message if such person has
7 actual knowledge, or knowledge fairly implied on the basis of
8 objective circumstances, that a subject heading of the message would
9 be likely to mislead a recipient, acting reasonably under the
10 circumstances, about a material fact regarding the contents or subject
11 matter of the message (consistent with the criteria used in
12 enforcement of section 5 of the Federal Trade Commission Act (15
13 U.S.C. § 45)).

14 49. Section 7(e) of CAN-SPAM, 15 U.S.C. § 7706(e), states that in any
15 action to enforce compliance, through an injunction, with Sections 5(a)(1)(c),
16 5(a)(2), and other specified sections of CAN-SPAM, the FTC need not allege or
17 prove the state of mind required by such sections.

18 50. Section 5(a)(3)(A) of CAN-SPAM, 15 U.S.C. § 7704(a)(3)(A), states:

19 It is unlawful for any person to initiate the transmission to a protected
20 computer of a commercial electronic mail message that does not
21 contain a functioning return electronic mail address or other Internet-
22 based mechanism, clearly and conspicuously displayed, that--

23 (i) a recipient may use to submit, in a manner specified in
24 the message, a reply electronic mail message or other form of
25 Internet-based communication requesting not to receive future
26 commercial electronic mail messages from that sender at the
27 electronic mail address where the message was received; and

28 (ii) remains capable of receiving such messages or

1 **COUNT VI**

2 55. Through the means described in Paragraphs 25-26 and 28, Defendants
3 in numerous instances have initiated the transmission, to protected computers, of
4 commercial email messages that contained subject headings that would be likely to
5 mislead a recipient, acting reasonably under the circumstances, about a material
6 fact regarding the contents or subject matter of the message.

7 56. Defendants' acts or practices, as described in paragraph 55 above,
8 violate 15 U.S.C. § 7704(a)(2).

9 **COUNT VII**

10 57. Through the means described in Paragraphs 25-26 and 30, Defendants
11 in numerous instances have initiated the transmission, to protected computers, of
12 commercial email messages that advertise or promote Defendants' Internet Web
13 sites, products or services, and do not include:

14 a. a clear and conspicuous notice of the recipient's opportunity to
15 decline to receive further commercial electronic mail messages from Defendants at
16 the recipient's electronic mail address; and/or

17 b. a functioning return electronic mail address or other Internet-
18 based mechanism, clearly and conspicuously displayed, that a recipient could use
19 to submit a reply electronic mail message or other form of Internet-based
20 communication requesting not to receive future commercial electronic mail
21 messages from Defendants at the electronic mail address where the message was
22 received, and that remains capable of receiving such messages or communications
23 for no less than 30 days after the transmission of the original message.

24 58. Defendants' acts or practices, as described in paragraph 57 above,
25 violate 15 U.S.C. § 7704(a)(5)(A)(ii) and/or § 7704(a)(3).

1 **COUNT VIII**

2 59. Through the means described in Paragraphs 25-26, 29, and 31,
3 Defendants in numerous instances have initiated the transmission, to protected
4 computers, of commercial email messages that advertise or promote Defendants’
5 Internet Web sites, products or services and fail to include clear and conspicuous
6 identification that the message is an advertisement or solicitation and/or the
7 sender’s valid physical postal address.

8 60. Defendants’ acts or practices, as described in paragraph 59 above,
9 violate 15 U.S.C. § 7704(a)(5)(i) and (iii).

10 **CONSUMER INJURY**

11 61. Individuals and businesses throughout the United States and beyond
12 have suffered, and continue to suffer, substantial monetary loss and other injury as
13 a result of Defendants’ unlawful acts and practices. In addition, Defendants have
14 been unjustly enriched as a result of their unlawful acts and practices. Absent
15 injunctive relief by this Court, Defendants are likely to continue to injure
16 consumers and businesses, reap unjust enrichment, and harm the public interest.

17 **THIS COURT’S POWER TO GRANT RELIEF**

18 62. Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b,
19 empower this Court to grant injunctive and other ancillary equitable relief to
20 prevent and remedy Defendants’ violations of the FTC Act, and in the exercise of
21 its equitable jurisdiction, to award redress to remedy the injury to individuals and
22 businesses, to order the disgorgement of monies resulting from Defendants’
23 unlawful acts or practices, and to order other ancillary equitable relief. A violation
24 of CAN-SPAM may be remedied in the same manner as a violation of the FTC
25 Act. 15 U.S.C. § 7706.

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff FTC, pursuant to Sections 13(b) and 19 of the FTC
3 Act, 15 U.S.C. §§ 53(b) and 57b, Sections 7(a), 7(d), and 7(e) of the CAN-SPAM
4 Act, 15 U.S.C. § 7706(a), (d), and (e), and the Court's own equitable powers,
5 requests that this Court:

6 1. Enter an order enjoining Defendants preliminarily and permanently
7 from violating Sections 5 and 12 of the FTC Act, the CAN-SPAM Act, and
8 freezing Defendants' assets;

9 2. Award such relief as the Court finds necessary to address injury
10 resulting from Defendants' violations of the FTC Act and the CAN-SPAM Act,
11 including, but not limited to, rescission of contracts, restitution, redress,
12 disgorgement of ill-gotten gains, and the refund of monies paid; and

13 3. Award Plaintiff the costs of bringing this action, as well as such other
14 and additional relief as the Court may determine to be just and proper.

15
16 Respectfully submitted,

17
18 WILLIAM BLUMENTHAL
General Counsel

19
20 CHARLES A. HARWOOD
Regional Director

21 Dated: October 6, 2005

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