

FILED - SOUTHERN DIVISION
CLERK, U.S. DISTRICT COURT
APR 26 2007
CENTRAL DISTRICT OF CALIFORNIA
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17 UNITED STATES DISTRICT COURT
18 CENTRAL DISTRICT OF CALIFORNIA
19 SOUTHERN DIVISION

20 FEDERAL TRADE COMMISSION,

21 Plaintiff,

22 v.

23 PACIFIC HERBAL SCIENCES, INC.,
et al.,

24 Defendants.

Case No. CV05-7247 CJC (RZx)

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

25
26 Plaintiff, Federal Trade Commission ("Commission" or "FTC"), filed a
27 Complaint for Injunctive and Other Equitable Relief on October 6, 2005, pursuant
28 to Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"),

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

LOGGED

1 15 U.S.C. §§ 53(b) and 57b, and Section 7(a) of the Controlling the Assault of
2 Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”),
3 15 U.S.C. § 7706(a), against Defendants Pacific Herbal Sciences, Inc. (“PHS”),
4 John A. Brackett, Jr. (“Brackett”), Natural Health Product, Inc., New Star
5 Marketing Group, Inc., and Lei Lu.

6 By and through their respective counsel, Plaintiff and Defendants PHS and
7 Brackett (collectively, hereafter, “Defendants”), without any admission of
8 wrongdoing or violation of law, have consented to the entry of this Stipulated
9 Final Judgment and Order for Permanent Injunction and Other Equitable Relief
10 (“Order”) without a trial or adjudication of any issue of law or fact herein:

11 **THEREFORE**, on the joint motion of Defendants and Plaintiff, **IT IS**
12 **HEREBY ORDERED, ADJUDGED, AND DECREED** as follows:

13
14 **FINDINGS**

15 1. This Court has jurisdiction over the subject matter of this case and
16 Defendants pursuant to 15 U.S.C. §§ 45(a), 53(b), 57b, and 7706(a), and 28 U.S.C.
17 §§ 1331, 1337(a), and 1345.

18 2. Venue in this District is proper under 15 U.S.C. § 53(b) and 28 U.S.C.
19 § 1391(b) - (c).

20 3. The activities of Defendants are in or affecting commerce, as “commerce”
21 is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

22 4. The Complaint states a claim upon which relief may be granted against
23 Defendants under Sections 5(a), 12, 13(b), and 19 of the FTC Act, 15 U.S.C.
24 §§ 45(a), 52, 53(b), and 57b, and Section 5(a) of the CAN-SPAM Act, 15 U.S.C.
25 § 7704(a).

26 5. Defendants have entered into this Order freely and without coercion. They
27 further acknowledge that they have read the provisions of this Order and are
28 prepared to abide by them.

1 6. Defendants do not admit any of the allegations set forth in the Complaint
2 other than jurisdictional facts. No provision of this Order shall be construed as an
3 admission or denial that Defendants have engaged in violations of the FTC Act or
4 the CAN-SPAM Act, or any other law or regulation.

5 7. The undersigned, individually and by and through their counsel, have
6 agreed that entry of this Order resolves all matters of dispute between them arising
7 from the Complaint in this action, up to the date of entry of this Order.

8 8. Defendants waive all rights to seek appellate review or otherwise to contest
9 the validity of this Order. They further waive and release any claim they may have
10 against the Commission, its employees, representatives, or agents.

11 9. Defendants agree that this Order does not entitle them to seek or to obtain
12 attorneys' fees as prevailing parties under the Equal Access to Justice Act, 28
13 U.S.C. § 2412, as amended by Pub. L. 104-21, 110 Stat. 847, 863-64 (1996), and
14 they further waive any right to attorneys' fees that may arise under that provision.

15 10. This Order is in addition to, and not in lieu of, any other civil or criminal
16 remedies that may be provided by law.

17 11. Entry of this Order is in the public interest.
18

19 DEFINITIONS

20 1. **"Affiliate program"** means any arrangement whereby any person through
21 hyperlinks on the World Wide Web, hyperlinks in commercial email messages, or
22 any other Internet-based mechanism, provides Defendants with, or refers to
23 Defendants, potential or actual customers.

24 2. **"Asset"** or **"Assets"** means any legal or equitable interest in, right to, or
25 claim to, any real and/or personal property including, but not limited to, chattels,
26 goods, instruments, equipment, fixtures, general intangibles, effects, leaseholds,
27 mail or other deliveries, inventory, checks, notes, accounts, credits, contracts,
28

1 receivables, shares of stock, funds, monies, and all cash, wherever located,
2 including both within and outside the territorial United States.

3 3. **“Assisting others”** includes, but is not limited to, the following:

4 (1) performing customer service functions including, but not limited to, receiving
5 or responding to consumer complaints, receiving and identifying financial
6 information from consumers, and communicating with consumers; (2) developing,
7 providing, or arranging for the development or provision of marketing materials,
8 including, but not limited to, Web site and commercial electronic message content;
9 (3) providing, or arranging for the provision of, names or addresses, including
10 email addresses, of potential customers; (4) performing marketing services of any
11 kind, including but not limited to (a) registering for email accounts or domain
12 names, and (b) providing liaison between a sender of electronic messages, as
13 defined in 15 U.S.C. § 7702(16)(A), and a transmitter of electronic messages;
14 (5) providing means to obscure the true origination of a commercial electronic
15 message; or (6) acting as an officer or director of a business entity.

16 4. **“Commercial electronic mail message”** (or **“commercial email**
17 **message”**) is defined in 15 U.S.C. § 7702(2)(A), and means any electronic mail
18 message the primary purpose of which is the commercial advertisement or
19 promotion of a commercial product or service (including the content on an Internet
20 Web site operated for a commercial purpose), with exceptions and relevant criteria
21 further defined in 15 U.S.C. §§ 7702(2)(B)-(D) and 7702(17), and 16 C.F.R.
22 § 316.3.

23 5. **“Competent and reliable scientific evidence”** means tests, analyses,
24 research, studies, or other evidence based on the expertise of professionals in the
25 relevant area, that have been conducted in an objective manner by persons
26 qualified to do so, using procedures generally accepted in the profession to yield
27 accurate and reliable results.

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1 6. **“Covered product or service”** means any dietary supplement, food, drug,
2 device, or service purporting to provide health-related benefits.

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

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

12 9. **“Domain name”** is defined in 15 U.S.C. § 7702(4), and means any
13 alphanumeric designation which is registered with or assigned by any domain
14 name registrar, domain name registry, or other domain name registration authority
15 as part of an electronic address on the Internet.

16 10. **“Electronic mail address”** (or **“email address”**) is defined in 15 U.S.C.
17 § 7702(5), and means a destination, commonly expressed as a string of characters,
18 consisting of a unique user name or mailbox (commonly referred to as the “local
19 part”) and a reference to an Internet domain (commonly referred to as the “domain
20 part”), whether or not displayed, to which an electronic mail message can be sent
21 or delivered.

22 11. **“Electronic mail message”** (or **“email”**) is defined in 15 U.S.C. § 7702(6),
23 and means a message sent to a unique electronic mail address.

24 12. **“Endorsement”** is defined as stated in 16 C.F.R § 255.0(b).

25 13. **“Food,” “drug,”** and **“device”** are defined as stated in 15 U.S.C. § 55.

26 14. **“Header information”** is defined in 15 U.S.C. § 7702(8), and means the
27 source, destination, and routing information attached to an electronic mail
28 message, including the originating domain name and originating electronic mail

1 address, and any other information that appears in the line identifying, or
2 purporting to identify, a person initiating the message.

3 15. **“HGH-related product”** means any product or products advertised,
4 marketed, promoted, offered for sale, distributed, or sold with express or implied
5 representations that the product contains any form of human growth hormone,
6 causes an increase in a consumer’s growth hormone levels, or produces effects
7 similar in nature to those produced by any form of human growth hormone, and
8 includes, but is not limited to, “HGH Revolution,” “HGH-R,” and “Natural
9 Rejuvenator,” or any substantially similar products.

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

17 17. **“Person”** means a natural person, an organization or other legal entity,
18 including a corporation, partnership, sole proprietorship, limited liability
19 company, association, cooperative, or any other group or combination acting as an
20 entity.

21 18. **“Sender”** is defined in 15 U.S.C. § 7702(16), and, when used with respect
22 to an electronic mail message, means a person who initiates such a message and
23 whose product, service, or Internet Web site is advertised or promoted by the
24 message.

25 19. **“Valid physical postal address”** means a sender’s current street address, a
26 Post Office box a sender has registered with the United States Postal Service, or a
27 private mailbox a sender has registered with a commercial mail receiving agency
28 that is established pursuant to United States Postal Service regulations.

1 or act as a solution to osteoporosis; (v) eliminate joint pains;
2 (vi) lower cholesterol; (vii) lower or normalize blood pressure;
3 (viii) improve cardiovascular and respiratory functions and
4 reduce the occurrence of cardiovascular diseases; (ix) improve
5 vision; (x) stabilize mood swings and act as an antidepressant;
6 (xi) help heal wounds; and (xii) eliminate sleep disorders;

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

9 D. Making any representation about the health benefits, performance,
10 efficacy, or safety of any such product or service unless the representation is true
11 and not misleading, and unless, at the time it is made, Defendants possess and rely
12 upon competent and reliable scientific evidence that substantiates the
13 representation; and

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

18 19 **II. PROHIBITIONS AGAINST VIOLATIONS OF THE CAN-SPAM ACT**

20 **IT IS FURTHER ORDERED** that Defendants and their officers, agents,
21 servants, employees, 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 hereby
25 restrained and enjoined from violating, or assisting others in violating, the CAN-
26 SPAM Act, 15 U.S.C. §§ 7701 *et seq.*, as currently promulgated or as it may
27 hereafter be amended, including, but not limited to, initiating the transmission of a
28 commercial email message that:

1 A. Contains, or is accompanied by, materially false or misleading header
2 information, including, but not limited to:

- 3 1. an originating email address, domain name, or Internet Protocol
4 address, the access to which for purposes of initiating the
5 message was obtained by means of false or fraudulent pretenses
6 or representations; or
7 2. a "from" line (the line identifying or purporting to identify the
8 person or email account initiating the message) that does not
9 accurately identify any person or email account that initiated
10 the message;

11 B. Contains a subject header likely to mislead recipients, acting
12 reasonably under the circumstances, about material facts regarding the contents or
13 subject matter of the message;

14 C. Does not include a clear and conspicuous notice of the recipient's
15 opportunity to decline to receive further commercial email messages from the
16 sender at the recipient's email address and does not describe the means by which
17 the recipient can decline to receive future commercial email messages from the
18 sender;

19 D. Does not include a functioning return email address or other Internet-
20 based mechanism, clearly and conspicuously displayed: (i) that a recipient may use
21 to submit, in a manner specified in the message, a reply email message or other
22 form of Internet-based communication requesting not to receive future commercial
23 email from that sender at the email address where the message was received; and
24 (ii) that remains capable of receiving such messages or communications for no less
25 than 30 days after the transmission of the original message;

26 E. Is sent to a recipient's email address more than 10 days after the
27 sender receives a request from that email recipient not to receive future
28 commercial email messages from the sender at the recipient's email address;

1 F. Does not provide clear and conspicuous identification that the
2 message is an advertisement or solicitation; or

3 G. Does not include a clear and conspicuous display of an accurate and
4 valid physical postal address of the sender.

5 **III. DISCLOSURE OF CUSTOMER LISTS**

6 **IT IS FURTHER ORDERED** that Defendants and their officers, agents,
7 servants, employees, and all other persons or entities in active concert or
8 participation with them who receive actual notice of this Order by personal
9 service, facsimile or otherwise, are hereby permanently restrained and enjoined
10 from selling, renting, leasing, transferring, or otherwise disclosing the name,
11 address, telephone number, credit card number, bank account number, email
12 address, or other identifying information of any person who paid any money to any
13 Defendant at any time prior to entry of this Order, in connection with the
14 manufacturing, labeling, marketing, advertising, promotion, offering for sale, sale,
15 or distribution of any HGH-related product or other covered product or service.
16 *Provided, however,* that Defendants may disclose such identifying information to
17 a law enforcement agency or as required by any law, regulation, or court order.

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19 **IV. MONITORING BY DEFENDANTS FOR COMPLIANCE**

20 **IT IS FURTHER ORDERED** that Defendants and their officers, agents,
21 servants, employees, 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 hereby
25 permanently restrained and enjoined from failing to immediately take the
26 following steps to ensure compliance with Sections I and II of this Order:

1 A. Prior to a person's participation in Defendants' affiliate program,
2 Defendants shall require each prospective participant to provide identifying
3 information to the Defendants, including, but not be limited to:

- 4 1. The name, physical address, and a working telephone number
5 for each prospective participant. In the event that the
6 prospective participant is not a natural person, but is a
7 corporation, partnership, proprietorship, limited liability
8 company, or other organization or legal entity, including an
9 association, cooperative, agency, or other group or combination
10 acting as an entity, Defendants shall also require from that
11 prospective participant the name(s), address(es), and working
12 telephone number(s) of the natural person(s) who owns,
13 manages, or controls that prospective participant; and
- 14 2. For each natural person whose name, address, and telephone
15 number is responsive to Paragraph A.1 of this Section, a
16 photocopy of that person's driver's license or other State-
17 issued identification card if a resident of the United States, or
18 of that person's government-issued identification, if he or she
19 resides outside of the United States;

20 B. Defendants shall require each person who participates in Defendants'
21 affiliate programs to provide identifying information to the Defendants concerning
22 that participant's sub-affiliates, employees, agents, or sub-contractors who initiate
23 commercial email messages on Defendants' behalf. Such identifying information
24 shall include the same types of information as required by Paragraph A of this
25 Section and shall be required prior to that person's participation in Defendants'
26 affiliate program or immediately after any change to that participant's sub-
27 affiliates, employees, agents, or sub-contractors;

28

1 C. Prior to a person's participation in Defendants' affiliate program,
2 Defendants shall provide each prospective participant with a copy of this Order;

3 D. Prior to a person's participation in Defendants' affiliate program,
4 Defendants shall obtain from each prospective participant an express written
5 agreement to comply with this Order and the CAN-SPAM Act, and an
6 acknowledgment of receipt of this Order;

7 E. Defendants shall require each person who initiates commercial email
8 messages on Defendants' behalf to submit to Defendants, at least seven (7) days
9 prior to the start of an email campaign on Defendants' behalf, the following
10 information:

- 11 1. A certification as to how that person obtained each email
12 address that the person intends to use in such email campaign;
- 13 2. The subject line, body, and source code for each email message
14 in the proposed email campaign;
- 15 3. The email address(es) from which each proposed campaign will
16 be sent; and
- 17 4. The proposed dates that the email messages in the campaign
18 will be sent;

19 F. At least three (3) days prior to the start of an email campaign that has
20 been submitted to Defendants under Paragraph E of this Section, Defendants shall
21 review that email campaign for compliance with the CAN-SPAM Act and this
22 Order. If, after reviewing such email campaign, Defendants determine that the
23 campaign is in compliance with the CAN-SPAM Act and this Order, Defendants
24 shall provide to the person who submitted that email campaign a written
25 acknowledgment of Defendants' approval of such email campaign. If, after
26 reviewing such email campaign, Defendants determine that the campaign is not in
27 compliance with the CAN-SPAM Act or this Order, Defendants shall take
28

1 immediate steps to ensure that such email campaign is not initiated on the
2 Defendants' behalf;

3 G. Defendants shall establish, implement, and maintain a functioning
4 email address or other Internet-based mechanism that recipients of commercial
5 email messages initiated on Defendants' behalf may use to submit directly to
6 Defendants a reply email message or other form of Internet-based communication
7 requesting not to receive future commercial email messages from the sender of
8 that message at the electronic mail address where the message was received;

9 H. Defendants shall require each person who initiates commercial email
10 messages on Defendants' behalf to include in each email message that is initiated
11 on Defendants' behalf a functioning hyperlink or other Internet-based mechanism,
12 clearly and conspicuously disclosed, that recipients can use to access the email
13 address or other Internet-based mechanism established by Defendants under
14 Paragraph G of this Section;

15 I. Within ten (10) business days of receiving a reply email message or
16 other form of Internet-based communication from a recipient pursuant to the
17 procedures established under Paragraph G of this Section, Defendants shall require
18 each person who initiates commercial email messages on Defendants' behalf to
19 stop initiating commercial email messages on Defendants' behalf to such
20 recipient;

21 J. Defendants shall establish, implement, maintain, and prominently
22 display on any Web site used for marketing Defendants' products or services, an
23 email address, other Internet-based mechanism, or toll-free telephone number for
24 receiving and responding to consumer complaints, whether received directly by
25 Defendants or through an intermediary, concerning violations of the CAN-SPAM
26 Act and this Order;

27 K. Defendants shall require each person who initiates commercial email
28 messages on Defendants' behalf to include in each email message that is initiated

1 on Defendants' behalf a functioning hyperlink or other Internet-based mechanism,
2 clearly and conspicuously disclosed, that recipients can use to access the email
3 address or other Internet-based mechanism established by Defendants pursuant to
4 Paragraph J of this Section;

5 L. Defendants shall establish, implement, and maintain a procedure to
6 ascertain the number and nature of consumer complaints received each month for
7 each affiliate;

8 M. Defendants shall promptly and fully investigate, in accordance with
9 the best practices of the industry, any complaint received by Defendants regarding
10 a commercial email message that was initiated by Defendants;

11 N. Defendants shall require each person who participates in Defendants'
12 affiliate programs to create, maintain, and retain the records and documents
13 necessary to demonstrate each person's full compliance with each provision of this
14 Order; and

15 O. Defendants shall immediately terminate from Defendants' affiliate
16 program and cease payment to any person who has initiated commercial email
17 messages on Defendants' behalf that violate the CAN-SPAM Act or any provision
18 of this Order.

19 *Provided, however,* that this Section does not authorize or require
20 Defendants to take any action that violates any federal, state, or local law.

21 22 **V. MONETARY RELIEF**

23 **IT IS FURTHER ORDERED** that judgment for consumer redress in the
24 amount of \$762,000 is entered against Defendants, jointly and severally, in favor
25 of the Commission, subject to the following conditions:

26 A. The judgment shall be suspended until further order of the Court
27 pursuant to Section VI of this Order (Right to Reopen), and subject to the
28 conditions set forth in Section VI.

1 B. If any funds are paid pursuant to this section and Section VI (Right to
2 Reopen), those funds shall be deposited into a fund administered by the
3 Commission or its designated agent to be used for equitable relief, including, but
4 not limited to, consumer restitution and any attendant expenses for the
5 administration of any monetary fund. In the event that direct restitution to
6 consumers is wholly or partially impracticable or funds remain after restitution is
7 completed, the Commission may apply any remaining funds for such other
8 equitable relief (including consumer information remedies) as it determines to be
9 reasonably related to the Defendants' practices alleged in the Complaint. Any
10 funds not used for such equitable relief shall be deposited to the Treasury as
11 disgorgement. Defendants shall be notified as to how the funds are disbursed but
12 shall have no right to challenge the Commission's choice of remedies under this
13 Section.

14 C. The Commission and Defendants acknowledge and agree as follows:

- 15 1. No portion of this judgment for equitable monetary relief shall
16 be deemed a fine, penalty, punitive assessment, or forfeiture;
- 17 2. The facts as alleged in the Complaint filed in this action shall
18 be taken as true for purposes of any subsequent proceedings to
19 enforce payments required by this Section, including, but not
20 limited to, a non-dischargeability complaint filed in a
21 bankruptcy proceeding; and
- 22 3. In accordance with 31 U.S.C. § 7701, Defendants shall, unless
23 they have done so already, furnish the Commission their tax
24 identification numbers, which shall be used for purposes of
25 collecting and reporting on any delinquent amounts arising out
26 of this Order.

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VI. RIGHT TO REOPEN

IT IS FURTHER ORDERED that suspension of the judgment against Defendants is conditioned on the following:

A. By agreeing to this Order, Defendants reaffirm and attest to the truthfulness, accuracy, and completeness of the financial statements and amended financial statements that Defendants prepared and transmitted to the Commission on October 14 and December 27, 2005 (hereafter, the "Financial Statements"). Plaintiff's agreement to this Order is expressly premised upon the truthfulness, accuracy, and completeness of the representations of Defendants' financial condition in the Financial Statements referenced above, which contain material information upon which Plaintiff relied in negotiating and agreeing to the terms of this Order.

B. If, upon motion by Plaintiff, this Court finds that either Defendant failed to disclose any material asset, or materially misrepresented the value of any asset, or made any other material misrepresentation in or omission from the Financial Statements, the entire amount of \$762,000 shall become immediately due and payable. *Provided, however*, that in all other respects, this Order shall remain in full force and effect unless otherwise ordered by this Court; and *provided further* that proceedings instituted under this Section are in addition to, and not in lieu of, any other civil or criminal remedies as may be provided by law, including any other proceedings Plaintiff may initiate to enforce this Order.

VII. DISSOLUTION OF PRIOR ORDERS, INCLUDING ASSET FREEZE

IT IS FURTHER ORDERED that, upon entry of this Order, the freeze against Defendants' assets pursuant to the Stipulated Preliminary Injunction entered by the Court on November 21, 2005, shall be dissolved. The Stipulated Preliminary Injunction is hereby vacated and superseded by this Order.

1 **VIII. ACKNOWLEDGMENT OF RECEIPT OF ORDER**
2 **BY DEFENDANTS**

3 **IT IS FURTHER ORDERED** that each Defendant, within ten (10)
4 business days of receipt of this Order as entered by the Court, must submit to the
5 Commission a truthful sworn statement acknowledging receipt of this Order.
6

7 **IX. DISTRIBUTION OF ORDER BY DEFENDANTS**

8 **IT IS FURTHER ORDERED** that, for a period of five (5) years from the
9 date of entry of this Order, Defendants shall deliver copies of the Order as directed
10 below:

11 A. Corporate Defendant PHS must deliver a copy of this Order to all of
12 its principals, officers, directors, and managers, and to all of its employees,
13 agents, and representatives who engage in conduct related to the subject matter of
14 the Order. For current personnel, delivery shall be within ten (10) days of service
15 of this Order upon the Defendants. For new personnel, delivery shall occur before
16 they assume their responsibilities.

17 B. Individual Defendant John A. Brackett, Jr., as control person: For
18 any business that Defendant Brackett controls, directly or indirectly, or in which
19 he has a majority ownership interest, he must deliver a copy of this Order to all
20 principals, officers, directors, and managers of that business, and to all employees,
21 agents, and representatives of that business who engage in conduct related to the
22 subject matter of the Order. For current personnel, delivery shall be within ten
23 (10) days of service of this Order upon Defendant Brackett. For new personnel,
24 delivery shall occur before they assume their responsibilities.

25 C. Individual Defendant John A. Brackett, Jr., as employee or non-
26 control person: For any business for which Defendant Brackett is not a controlling
27 person but for which, in the course of his employment, he initiates commercial
28 electronic email messages, or engages in advertising, marketing, or sale of any

1 covered product or service over the Internet, Defendant Brackett must deliver a
2 copy of this Order to all principals and managers of such business before engaging
3 in such conduct.

4 D. The Defendants must secure a signed and dated statement
5 acknowledging receipt of the Order, within thirty days of delivery, from all
6 persons receiving a copy of the Order pursuant to this Section.

7 X. RECORDKEEPING

8 **IT IS FURTHER ORDERED** that, for a period of eight (8) years from the
9 date of entry of this Order, Defendants and their officers, agents, servants,
10 employees, and all other persons or entities in active concert or participation with
11 them who receive actual notice of this Order by personal service, facsimile or
12 otherwise, are hereby restrained and enjoined from failing to create and retain the
13 following records, in connection with any business that any Defendant manages or
14 controls, directly or indirectly, or in which any Defendant holds a majority
15 ownership interest, if the business is engaged in, or assists others engaged in, the
16 manufacturing, labeling, marketing, advertising, promotion, offering for sale, sale,
17 or distribution of any HGH-related product or other covered product or service:

18 A. Accounting records that reflect the cost of goods or services sold,
19 revenues generated, and the disbursement of such revenues;

20 B. Personnel records accurately reflecting, for each person employed in
21 any capacity by such business, including as an independent contractor, the
22 person's name, address, telephone number, job title or position, date upon which
23 the person commenced work, and date and reason for the person's termination, if
24 applicable;

25 C. Customer files containing the names, addresses, telephone numbers,
26 dollar amounts paid, quantity of items or services purchased, and description of
27 items or services purchased, to the extent such information is obtained in the
28 ordinary course of business;

1 D. Complaints and refund requests (whether received directly, indirectly,
2 or through any third party) and any responses to those complaints or requests;

3 E. Copies of all information obtained, pursuant to Section IV of this
4 Order, from each person who participates in Defendants' affiliate programs; and

5 F. All other records and documents necessary to demonstrate full
6 compliance with each provision of this Order, including but not limited to, all
7 documents obtained, created, or generated, or which in any way relate to the
8 requirements, provisions or terms of this Order, copies of signed and dated
9 acknowledgments of receipt of this Order required by Section IX of this Order,
10 and all reports submitted to the FTC pursuant to this Order.

11 12 **XI. COMPLIANCE REPORTING BY DEFENDANTS**

13 **IT IS FURTHER ORDERED** that, in order that compliance with the
14 provisions of this Order may be monitored:

15 A. For a period of five (5) years from the date of entry of this Order,

16 1. Defendant Brackett shall notify the Commission of the
17 following:

18 a. Any changes in residence, mailing addresses, and
19 telephone numbers, within ten (10) days of the date of
20 such change;

21 b. Any changes in employment status (including self-
22 employment) and any change of his ownership in any
23 business entity, within ten (10) days of the date of such
24 change. For any such change, notice shall include, the
25 name and address of each business that the Defendant is
26 thus employed by, performs services for, is affiliated
27 with, or has created or formed; a statement of the nature
28 of the business; and a statement of the Defendant's

1 duties and responsibilities in connection with the
2 business or employment; and

3 c. Any changes in the Defendant's name or use of any
4 aliases or fictitious names;

5 2. Both Defendants shall notify the Commission of any changes in
6 the corporate structure of PHS or any business entity that
7 Defendant Brackett, directly or indirectly, controls or has an
8 ownership interest in, that may affect compliance obligations
9 arising under this Order, including but not limited to a
10 dissolution, assignment, sale, merger, or other action that
11 would result in the emergence of a successor entity; the
12 creation or dissolution of a subsidiary, parent, or affiliate that
13 engages in any acts or practices subject to this Order; the filing
14 of a bankruptcy petition; or a change in the corporate name or
15 address, at least thirty (30) days prior to such change. *Provided*
16 that, with respect to any proposed change in the business entity
17 about which a Defendant learns less than thirty (30) days prior
18 to the date such action is to take place, the Defendant shall
19 notify the Commission as soon as is practicable after obtaining
20 such knowledge; and *provided* further that this sub-paragraph
21 shall apply only to a business entity that engages in, or assists
22 others engaged in, the manufacturing, labeling, marketing,
23 advertising, promotion, offering for sale or distribution of any
24 product or service marketed or sold over the Internet, or of any
25 HGH-related product or other covered product or service
26 marketed or sold by any means;

27 B. One hundred eighty (180) days after the date of entry of this Order,
28 Defendants shall each provide a written report to the Commission, sworn to under

1 penalty of perjury, setting forth in detail the manner and form in which they have
2 complied and are complying with this Order. This report shall include, but not be
3 limited to:

4 1. For Defendant Brackett:

- 5 a. His then-current residence address, mailing addresses,
6 and telephone numbers;
- 7 b. His then-current employment and business addresses and
8 telephone numbers, a description of the business
9 activities of each such employer or business, and the title
10 and responsibilities of the Defendant for each such
11 employer or business; and
- 12 c. Any other changes required to be reported under
13 Paragraph A of this Section.

14 2. For both Defendants:

- 15 a. A copy of each acknowledgment of receipt of this Order,
16 obtained pursuant to Section IX;
- 17 b. Any other changes required to be reported under
18 Paragraph A of this Section;
- 19 c. A list that identifies every person who is marketing or
20 promoting, through commercial email messages, any
21 goods or services of Defendants since entry of this
22 Order;
- 23 d. A list of all names under which Defendants did or
24 currently do business since entry of this Order; and
- 25 e. A list of all domain names and Web site addresses
26 Defendants have registered or used since entry of the
27 Order.

1 C. For the purposes of this Order, Defendants shall, unless otherwise
2 directed by the Commission's authorized representatives, mail all written
3 notifications to the Commission to:

4 Associate Director
5 Division of Enforcement
6 Federal Trade Commission
7 601 New Jersey Avenue, Room 2119
8 Washington, D.C. 20580
9 Re: *FTC v. Pacific Herbal Sciences, et al.*, No.CV05-7247 RSWL (RZx)

10 D. For purposes of the compliance reporting and monitoring required by
11 this Order, the Commission is authorized to communicate directly with
12 Defendants.

13 XII. COMPLIANCE MONITORING

14 **IT IS FURTHER ORDERED** that, for the purpose of monitoring and
15 investigating compliance with any provision of this Order:

16 A. Within ten (10) days of receipt of written notice from a representative
17 of the Commission, Defendants PHS and Brackett shall submit additional written
18 reports, sworn to under penalty of perjury; produce documents for inspection and
19 copying; appear for deposition; and/or provide entry during normal business hours
20 to any business location in such Defendant's possession or direct or indirect
21 control to inspect the business operation;

22 B. The Commission is authorized to monitor compliance with this Order
23 by all other lawful means, including but not limited to the following:

- 24 1. Obtaining discovery from any person, without further leave of
25 court, using the procedures prescribed by Fed. R. Civ. P. 30,
26 31, 33, 34, 36, and 45;
- 27 2. Posing as consumers to Defendants, Defendants' employees, or
28 any other entity managed or controlled in whole or in part by

1 Defendants, without the necessity of identification or prior
2 notice; and

- 3
4 3. Interviewing, with respect to matters relating in any way to any
5 conduct subject to this Order, and without interference by
6 Defendants, any employer, consultant, independent contractor,
7 representative, agent, or employee of Defendants who agrees to
8 such an interview, *provided* that the person interviewed is
9 allowed to have counsel present;

10
11 C. Nothing in this Order shall limit the Commission's lawful use of
12 compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C.
13 §§ 49 and 57b-1, to obtain any documentary material, tangible things, testimony,
14 or information relevant to unfair or deceptive acts or practices in or affecting
15 commerce within the meaning of 15 U.S.C. § 45(a)(1).

16
17 **XIII. COOPERATION WITH FTC COUNSEL**

18 **IT IS FURTHER ORDERED** that Defendants shall, in connection with
19 this action or any subsequent investigations related to or associated with the
20 transactions or the occurrences that are the subject of the FTC's Complaint,
21 cooperate in good faith with the FTC and appear, or, in the case of PHS, cause its
22 officers, employees, representatives, or agents to appear, at such places and times
23 as the FTC shall reasonably request, after written notice, for interviews,
24 conferences, pretrial discovery, review of documents, and for such other matters as
25 may be reasonably requested by the FTC. If requested in writing by the FTC,
26 Defendants shall appear, or, in the case of PHS, cause its officers, employees,
27 representatives, or agents to appear, and provide truthful testimony in any trial,
28

1 deposition, or other proceeding related to or associated with the transactions or the
2 occurrences that are the subject of the Complaint, without service of a subpoena.

4 **XIV. RETENTION OF JURISDICTION**

5 **IT IS FURTHER ORDERED** that this Court shall retain jurisdiction of
6 this matter for purposes of construction, modification, and enforcement of this
7 Order.

8 **IT IS SO ORDERED.**

10 Dated _____, 2006

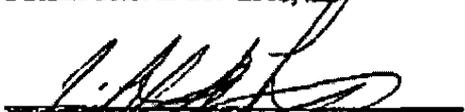
11 **THE HONORABLE CORMAC J. CARNEY**
12 **UNITED STATES DISTRICT JUDGE**

13 The Commission and Defendants, as represented by the undersigned
14 counsel, hereby stipulate and agree to entry of the foregoing Order, which shall
15 constitute a final judgment in this action.

16 Dated 11/15, 2006

17 
18 **JOHN A. BRACKETT, JR.**
19 individually and as sole officer of
20 Pacific Herbal Sciences, Inc.

19 Dated 11/19, 2006

20 
21 **JEFFREY A. LIPOW**
22 **LIPOW & HARRIS**
23 Attorney for Defendants
24 Pacific Herbal Sciences, Inc., and John A. Brackett, Jr.

24 Dated _____, 2006

25 **MAXINE R. STANSELL**
26 **MARY T. BENFIELD**
27 Attorneys for Plaintiff
28 Federal Trade Commission

1 deposition, or other proceeding related to or associated with the transactions or the
2 occurrences that are the subject of the Complaint, without service of a subpoena.

3
4 **I. RETENTION OF JURISDICTION**

5 **IT IS FURTHER ORDERED** that this Court shall retain jurisdiction of
6 this matter for purposes of construction, modification, and enforcement of this
7 Order.

8 **IT IS SO ORDERED.**

9
10 
11 THE HONORABLE CORMAC J. CARNEY
12 UNITED STATES DISTRICT JUDGE

Dated April 26, 2007

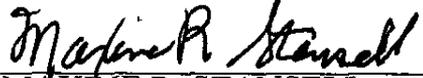
13 The Commission and Defendants, as represented by the undersigned
14 counsel, hereby stipulate and agree to entry of the foregoing Order, which shall
15 constitute a final judgment in this action.

16 JOHN A. BRACKETT, JR.
17 individually and as sole officer of
18 Pacific Herbal Sciences, Inc.

Dated _____, 2006

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

Dated _____, 2006

23 
24 MAXINE R. STANSELL
25 MARY T. BENFIELD
26 Attorneys for Plaintiff
27 Federal Trade Commission

Dated April 24, 2007

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I caused the foregoing document to be served on all
3 defendants on the date set forth below by providing a full, true, and correct copy
4 thereof by mail, in a sealed, first-class postage-prepaid envelope, deposited with
5 the United States Postal Service at Seattle, Washington, addressed as follows:

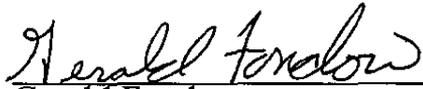
6 x counsel for defendants Pacific Herbal Sciences, Inc., and John A. Brackett,
7 Jr.:

8 Jeffrey A. Lipow, Lipow & Harris, 9952 Santa Monica Boulevard,
9 First Floor, Beverly Hills, California 90212; and

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

12 David M. Livingston, Livingston - Bakhtiar, Equitable Plaza, 3435
13 Wilshire Boulevard, Suite 770, Los Angeles, California 90010.

14
15 Dated April 24, 2007.

16
17 
18 Gerald Fondow