

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Jon Leibowitz, Chairman**
 Pamela Jones Harbour
 William E. Kovacic
 J. Thomas Rosch

In the Matter of

**NATIVE ESSENCE HERB COMPANY,
a corporation,**

**MARK J. HERSHISER, individually, d/b/a Native
Essence Herb Company, and as an officer of the
corporation, and**

**MARIANNE HERSHISER, individually, d/b/a Native
Essence Herb Company, and as an officer of the
corporation.**

DOCKET NO. 9328

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1.a. Respondent Native Essence Herb Company (“Native Essence”) is or has been a New Mexico corporation, with its principal office or place of business at 4 Tune Drive, Unit B, El Prado, New Mexico 87529.

1.b. Respondent Mark J. Hershiser is an officer of Native Essence. Individually or in concert with others, he has formulated, directed, controlled, or participated in the policies, acts, or practices of Native Essence, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Native Essence.

1.c. Respondent Marianne Hershiser is an officer of Native Essence. Individually or in concert with others, she has formulated, directed, controlled, or participated in the policies, acts, or practices of Native Essence, including the acts and practices alleged in this complaint. Her principal office or place of business is the same as that of Native Essence.

2. Respondents have been served with a copy of the complaint issued by the Federal Trade Commission charging them with violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

3. Respondents admit all the jurisdictional facts set forth in the Commission’s complaint in this proceeding.

4. Respondents waive:

- a. Any further procedural steps;
- b. The requirement that the Commission’s decision contain a statement of findings of fact and conclusions of the law;
- c. All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and
- d. Any claim under the Equal Access to Justice Act.

5. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it will be placed on the public record for a period of thirty (30) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the respondents, in which event it will take such action as it may consider appropriate, or issue and serve its decision, in disposition of the proceeding.

6. This agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the Commission’s complaint, or that the facts as alleged in the Commission’s complaint, other than the jurisdictional facts, are true.

7. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 3.25(f) of the Commission's Rules, the Commission may without further notice to respondents, (1) issue its decision containing the following order to cease and desist in disposition of the proceeding, and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery of the decision containing the agreed-to order to respondents' address as stated in this agreement by any means specified in Section 4.4(a) of the Commission's Rules shall constitute service. Respondents waive any right they might have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or in the agreement may be used to vary or to contradict the terms of the order.

8. Respondents have read the complaint and the order contemplated hereby. They understand that once the order has been issued, they will be required to file one or more compliance reports showing that they have fully complied with the order. Respondents further understand that they may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, "respondents" means Native Essence Herb Company, a corporation, its successors and assigns and its officers; Mark J. Hershiser, individually, d/b/a Native Essence Herb Company, and as an officer of the corporation; and Marianne Hershiser, individually, d/b/a Native Essence Herb Company, and as an officer of the corporation; and each of the above's agents, representatives and employees.
2. "Commerce" means as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. "Competent and reliable scientific evidence" means tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
4. "Food" and "drug" mean "food" and "drug" as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.

5. “Covered product or service” means any food, dietary supplement, or drug, including, but not limited to, Native Essense (Rene Caisse) Formula tea or extract, Native Essense Plus tea or extract, Native Essense with Cat’s Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus Formula extract, or any other health-related product, service, or program.

6. “Endorsement” means as defined in 16 C.F.R. § 255.0(b).

I.

IT IS ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of Native Essense (Rene Caisse) Formula tea or extract, Native Essense Plus tea or extract, Native Essense with Cat’s Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus Formula extract, or any substantially similar product or any other covered product or service, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that:

- A. Such product is effective in the treatment or cure of cancer;
- B. Such product prevents or lowers the risk of cancer;
- C. Such product is effective in reducing the size of, or eliminating, cancerous tumors; or
- D. Such product is safe or non-toxic or has no side effects;

unless the representation is true, non-misleading, and, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of any covered product or service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the efficacy, performance, or health-related benefits of any covered product or service, unless the representation is true, non-misleading, and, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

IV.

IT IS FURTHER ORDERED that:

- A. Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration; and
- B. Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

V.

IT IS FURTHER ORDERED that:

- A. Respondents shall, within seven (7) days after the date of service of this order, deliver to the Commission a list, in the form of a sworn affidavit, of all consumers who purchased Native Essense (Rene Caisse) Formula tea or extract, Native Essense Plus tea or extract, Native Essense with Cat's Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus Formula, on or after January 1, 2005 through the date of service of this order. Such list shall include each consumer's name and address, the product(s) purchased, and, if available, the consumer's telephone number and email address;
- B. Within forty-five (45) days after the date of service of this order, respondents shall send by first class mail, postage prepaid, an exact copy of the notice attached as Attachment A to all persons identified in Part V.A. The face of the envelope containing the notice shall be an exact copy of Attachment B. The mailing shall not include any other documents; and
- C. Except as provided in this order, respondents, and their officers, agents, servants, employees, attorneys, and representatives shall not sell, rent, lease, transfer, or otherwise disclose the name, address, telephone number, credit card number, bank

account number, e-mail address, or other identifying information of any person who paid any money to any respondent, at any time prior to issuance of this order, in connection with the purchase of Native Essense (Rene Caisse) Formula tea or extract, Native Essense Plus tea or extract, Native Essense with Cats Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus extract. *Provided, however*, that respondents may disclose such identifying information to the FTC pursuant to Part V.A, above, or any law enforcement agency, or as required by any law, regulation, or court order.

VI.

IT IS FURTHER ORDERED that respondents shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. A specimen copy of all advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VII.

IT IS FURTHER ORDERED that respondent Native Essence Herb Company, and its successors and assigns, and respondents Mark J. Hershiser and Marianne Hershiser shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying a copy of each signed statement acknowledging receipt of the order.

VIII.

IT IS FURTHER ORDERED that respondent Native Essence Herb Company, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but

not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

IX.

IT IS FURTHER ORDERED that respondents Mark J. Hershiser and Marianne Hershiser, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of their current business or employment, or of their affiliation with any new business or employment. The notice shall include respondents' new business address and telephone number and a description of the nature of the business or employment and their duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

X.

IT IS FURTHER ORDERED that respondents shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XI.

This order will terminate on May 7, 2029, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondents did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: May 7, 2009

ATTACHMENT A
LETTER TO BE SENT BY FIRST CLASS MAIL
[To be printed on letterhead of Native Essence Herb Company]

[Name and address of recipient] [Date]

Dear [Recipient]:

Our records show that you bought Native Essense (Rene Caisse) Formula tea or extract, Native Essense Plus tea or extract, Native Essense with Cat's Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus Formula extract. All of these products were sold on the Native Essence Herb Company website.

We are writing to tell you that the Federal Trade Commission ("FTC") has alleged that our advertising claims for these products were false or unsubstantiated. To resolve these charges, we have entered into a settlement with the FTC that prohibits us from making misleading or unsubstantiated claims about these products or any other health-related product. The settlement with the FTC does not constitute an admission that we have violated the law. As part of the settlement, however, we are required to send you the following information prepared by the FTC about the scientific evidence on these products.

Very little scientific research has been done concerning Native Essense, Native Essense Plus, Native Essense with Cat's Claw, chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus as a treatment or cure for cancer in humans. The scientific studies that have been done do not demonstrate that Native Essense, Native Essense Plus, Native Essense with Cat's Claw, chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus, or the ingredients in these products, are effective in the treatment of cancer.

It is very important that you talk to your doctor or health care provider before using *any* alternative or herbal product, including Native Essense, Native Essense Plus, Native Essense with Cat's Claw, chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus. Speaking with your doctor is important to make sure that all aspects of your medical treatment work together. Things that seem safe, such as certain foods, herbs, or pills, may interfere or affect your cancer or other medical treatment, or other medicines you might be taking. Some herbs or other complementary or alternative treatments may keep your medicines from doing what they are supposed to do, or could be harmful when taken with other medicines or in high doses. It also is very important that you talk to your doctor or health care provider before you decide to take any alternative or herbal product, including Native Essense, Native Essense Plus, Native Essense with Cat's Claw, chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus, instead of taking conventional cancer treatments that have been scientifically proven to be safe and effective in humans.

If you would like further information about complementary and alternative treatments for cancer, the following Internet web sites may be helpful:

1. The National Cancer Institute: www.cancer.gov/cancertopics/pdq; or
2. The National Center for Complementary and Alternative Medicines: www.nccam.nih.gov

You also can contact the National Cancer Institute's Cancer Information Service at 1-800-4-CANCER or 1-800-422-6237.

Sincerely,

ATTACHMENT B

Native Essence Herb Company
P.O. Box 189
Carson, New Mexico 87517

[name and address of purchaser]

GOVERNMENT ORDERED NOTICE