

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

Case No: 3:02-cv-00074-mb

FILED  
CHARLOTTE, N.C.

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U.S. DISTRICT COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE, N.C.

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

VITAL LIVING PRODUCTS, INC., d/b/a  
American Water Service; and

DONALD R. PODREBARAC,

Defendants.

**STIPULATED FINAL ORDER  
FOR PERMANENT  
INJUNCTION**

On [INSERT DATE], plaintiff, the Federal Trade Commission ("FTC" or "Commission"), filed a complaint for permanent injunction and other relief, pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), against Vital Living Products, Inc. d/b/a American Water Service and Donald R. Podrebarac.

The Commission and Defendants have stipulated to the entry of this Final Order for Permanent Injunction ("Order") in settlement of the Commission's complaint against Defendants. The Court, being advised in the premises, finds as follows:

**FINDINGS**

1. In its complaint, the Commission alleged that Defendants violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). The Commission sought permanent injunctive relief for alleged deceptive acts or practices by Defendants in connection with the marketing and sale of tests that

purportedly detect the presence of *Bacillus anthracis* in or on air, water, and surfaces. *Bacillus anthracis* can cause the disease anthrax, an acute infectious disease most commonly found in hoofed mammals. Anthrax is also found in humans.

2. The Commission has the authority under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to seek the relief it has requested.

3. This Court has jurisdiction over the subject matter of this case, and jurisdiction over Defendants. Venue in the Western District of North Carolina is proper, and the complaint states a claim upon which relief may be granted against the Defendants.

4. The activities of Defendants as alleged in the Commission's complaint were or are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

5. The Commission and Defendants stipulate and agree to this Order, without trial or final adjudication of any issue of fact or law, to settle and resolve all matters in dispute arising from the complaint to the date of entry of this Order. By entering this stipulation, Defendants do not admit or deny any of the allegations set forth in the complaint, other than jurisdictional facts.

6. Defendants waive all rights to seek judicial review or otherwise challenge or contest the validity of this Order. Defendants also waive any claim that they may have held under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action to the date of this Order. Each party to this Order shall bear its own costs and attorneys' fees incurred in connection with this action.

7. Entry of this Order is in the public interest.

8. Pursuant to Federal Rule of Civil Procedure 65(d), the provisions of this Order are binding upon Defendants, and their officers, agents, servants, employees and attorneys, and all

other persons or entities in active concert or participation with them, who receive actual notice of this Order by personal service or otherwise.

## **ORDER**

### **I. DEFINITIONS**

IT IS THEREFORE STIPULATED AND ORDERED, that, for the purposes of this Order, the following definitions shall apply:

- A. “Defendants” shall mean Vital Living Products, Inc. (“VLPI”) d/b/a American Water Service and its divisions, subsidiaries, affiliates, and its successors or assigns; Donald R. Podrebarac, individually and as an officer and director of VLPI; and any combination of the foregoing.
- B. “Participating associates” shall refer to Defendants’ officers, agents, servants, employees, and all persons or entities in active concert or participation with Defendants who receive actual notice of this Order by personal service or otherwise.
- C. “Anthrax” shall refer to *Bacillus anthracis* which can cause an acute infectious disease in humans and other animals.
- D. “Biohazard” shall refer to any biological or chemical agent that can cause deadly harm to humans exposed to it, including but not limited to anthrax, small pox, sarin gas, mustard gas, or other such substance.
- E. “Biohazard test or device” shall refer to any product that is advertised, marketed, promoted, offered for sale, distributed, or sold with express or implied representations that the product will or may detect the presence of a biohazard in

or on air, water, surfaces and/or humans or other animals. It shall not refer to tests or devices to detect contaminants commonly found in water, such as iron, arsenic, lead, pesticides, hardness, or coliform bacteria, unless Defendants represent, expressly or by implication, that these contaminants cause or can cause deadly harm to humans.

F. “Competent and reliable scientific evidence” shall mean 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.

G. “Document(s)” or “record(s)” shall refer to:

1. The original or a true copy of any written, typed, printed, electronically stored, transcribed, taped, recorded, filmed, punched, or graphic matter or other data compilations of any kind, including, but not limited to, letters, e-mail or other correspondence, messages, memoranda, interoffice communications, notes, reports, summaries, manuals, magnetic tapes or discs, tabulations, books, records, checks, invoices, workpapers, journals, ledgers, statements, returns, reports, schedules, or files; and
2. Any information stored on any desktop personal computer (“PC”) and workstations, laptops, notebooks, or other portable computers, whether assigned to individuals or in pools of computers available for shared use; and home computers used for work-related purposes; backup disks and

tapes, archive disks and tapes, and other forms of offline storage, whether stored onsite with the computer used to generate them, stored offsite in another company facility or stored offsite by a third-party, such as in a disaster recovery center; and computers and related offline storage used by Defendants' participating associates, which may include persons who are not employees of the company or who do not work on company premises.

- H. The terms "and" and "or" in this Order shall be construed conjunctively or disjunctively as necessary, to make the applicable sentence or phrase inclusive rather than exclusive.
- I. The term "including" shall mean "without limitation."
- J. Any requirement that Defendants "notify" or "provide" any information or material to the Commission, shall mean that Defendants shall send the necessary information or material via first-class mail, costs prepaid, to:

Associate Director for Advertising Practices  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Washington, DC 20580  
Attn: FTC v. Vital Living Products, Inc.  
Matter No. 0223060

- K. Nothing contained herein shall be construed to waive any applicable privilege, including but not limited to the attorney-client privilege or the privilege against self-incrimination, held by Defendants.

## II. PROHIBITED BUSINESS ACTIVITIES

IT IS FURTHER STIPULATED AND ORDERED that in connection with the advertising, promotion, offering for sale, sale, or distribution of any biohazard test or device, the Defendants and their participating associates, are permanently enjoined from:

- A. Shipments or sales of PurTest Anthrax Test or any substantially similar test or device to consumers or distributors unless Defendants possess and rely upon evidence that demonstrates that, in truth and in fact, the test or device accurately and reliably detects the presence and absence of anthrax;
- B. Misrepresenting, expressly or by implication, that PurTest Anthrax Test or any substantially similar test or device is an accurate and effective test for detecting the presence of anthrax bacteria and spores in air, water, or on surfaces;
- C. Misrepresenting, expressly or by implication, that an independent FDA registered laboratory conducted tests, using anthrax, which showed that PurTest Anthrax Test or any substantially similar test or device effectively detected anthrax;
- D. Misrepresenting, or assisting others in misrepresenting, expressly or by implication, any material fact regarding any biohazard test or device, including misrepresenting, or assisting others in misrepresenting, expressly or by implication, the accuracy or efficacy of any biohazard test or device; and
- E. Representing, or assisting others in representing, in any manner, expressly or by implication, the accuracy or efficacy of any biohazard test or device, including representing, expressly or by implication, that any biohazard test or device is fit for its intended use, unless, at the time of making such representation, Defendants

possess and rely upon competent and reliable scientific evidence that substantiates the representation.

### **III. PROHIBITED REPRESENTATIONS**

IT IS FURTHER STIPULATED AND ORDERED that, in connection with the advertising, promotion, offering for sale, sale, or distribution of any product or service, the Defendants and their participating associates are permanently enjoined from misrepresenting, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

### **IV. NOTICE TO PAST PURCHASERS**

IT IS FURTHER STIPULATED AND ORDERED that, within ten (10) days of entry of this Order, Defendants shall send by first class U.S. Mail the notice set forth in Appendix A to this Order to any person or entity of which Defendants have record who ordered or purchased any of Defendants' anthrax tests between January 1, 2001 to the date of entry of this Order. A list of all persons or entities that received such notice shall be provided to the Commission sixty (60) days after the date of entry of this Order. To the extent that Defendants learn of any additional persons or entities who ordered or purchased any of Defendants' anthrax tests between January 1, 2001 and the date of entry of this Order, Defendants shall send the notice set forth in Appendix A within forty-five (45) days of the date on which Defendants learn of those orders or purchases.

### **V. ACKNOWLEDGMENT OF RECEIPT OF ORDER**

IT IS FURTHER STIPULATED AND ORDERED that, within five (5) business days after receipt by Defendants of this Order as entered by the Court, defendant Podrebarac,

individually and on behalf of defendant VLPI, shall execute and submit to the Commission a truthful sworn statement, in the form shown on Appendix B, that shall acknowledge receipt of this Order.

#### **VI. DISTRIBUTION OF ORDER**

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Order, Defendants shall:

- A. Provide a copy of this Order to, and obtain a signed and dated acknowledgment of receipt of same from, each officer or director, each individual serving in a management capacity, all personnel involved in responding to consumer complaints or inquiries, and all sales personnel, whether designated as employees, consultants, independent contractors or otherwise, immediately upon employing or retaining any such persons, of VLPI and any business where (1) Defendant Podrebarac is the majority owner of the business or directly or indirectly manages or controls the business, and (2) the business is engaged in the advertising, marketing, promotion, offering for sale, distribution or sale of any biohazard test or device; and
- B. Maintain for a period of three (3) years after creation, and upon reasonable notice, make available to representatives of the Commission, the original signed and dated acknowledgments of the receipt of copies of this Order, as required in Subsection (A) of this Paragraph.

## **VII. COMMISSION'S AUTHORITY TO MONITOR COMPLIANCE**

IT IS FURTHER ORDERED that the Commission is authorized to monitor Defendants' compliance with this Order by all lawful means, including but not limited to the following:

- A. The Commission is authorized, without further leave of court, to obtain discovery from any person in the manner provided by Chapter V of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 26 - 37, including the use of compulsory process pursuant to Fed. R. Civ. P. 45, for the purpose of monitoring and investigating Defendants' compliance with any provision of this Order;
- B. The Commission is authorized to use representatives posing as consumers and suppliers to Defendants, defendants' employees, or any other entity managed or controlled in whole or in part by Defendants, without the necessity of identification or prior notice;
- C. Nothing in this Order shall limit the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to investigate whether Defendants have violated any provision of this Order or Section 5 of the FTC Act, 15 U.S.C. § 45.

## **VIII. COMPLIANCE REPORTING**

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

- A. For a period of five (5) years from the date of entry of this Order, Defendant Podrebarac shall notify the Commission of the following:

1. Any changes in his residence, mailing addresses, and telephone numbers, within ten (10) days of the date of such change; and
  2. Any changes in his employment status (including self-employment) within ten (10) days of such change. Such notice shall include the name and address of each business that Defendant is affiliated with or employed by, a statement of the nature of the business, and a statement of Defendant's duties and responsibilities in connection with the business or employment; and
- B. For a period of five (5) years from the date of entry of this Order, Defendant VLPI shall notify the Commission of any proposed change in its structure, such as creation, incorporation, dissolution, assignment, sale, creation or dissolution of subsidiaries, or any other change that may affect compliance obligations arising out of this Order, thirty (30) days prior to the effective date of any proposed change; and
- C. One hundred eighty (180) days after the date of entry of this Order, Defendants shall provide a written report to the FTC, sworn to under penalty of perjury, setting forth in detail the manner and form in which they have complied and are complying with this Order. This report shall include but not be limited to:
1. Defendant Podrebarac's then current residence address and telephone number;
  2. Defendant Podrebarac's then current employment, business addresses, and telephone numbers, a description of the business activities of each such employer, and defendant's title and responsibilities for each employer;

3. Defendant VLPI's then current business addresses, telephone numbers, a description of its business activities, and identification of all products that it advertises or sells;

4. A copy of each acknowledgment of receipt of this Order obtained by Defendants pursuant to Paragraph V.

5. A statement describing the manner in which Defendants have complied and are complying with Paragraphs II and III; and

D. Upon written request by a representative of the Commission, Defendants shall submit additional written reports (under oath, if requested) and produce documents on fifteen (15) days' notice with respect to any conduct subject to this Order.

E. For the purposes of this Paragraph, "employment" includes the performance of services as an employee, consultant, or independent contractor; and "employers" include any individual or entity for whom Defendant Podrebarac performs services as an employee, consultant, or independent contractor.

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F. For purposes of the compliance reporting required by this Paragraph, to the extent that Defendants are represented by counsel (including but not limited to Kennedy Covington Lobdell & Hickman, L.L.P.), the Commission shall communicate only with counsel. The Commission is authorized to communicate directly with Defendants for the purpose of determining whether they are represented by counsel.

**IX. ACCESS TO BUSINESS PREMISES**

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Order, for the purpose of further determining compliance with this Order, Defendants shall permit representatives of the Commission, within three (3) business days of receipt of written notice from the Commission:

A. Access during normal business hours to any office, or facility storing documents, of VLPI or any business where (1) Defendant Podrebarac is the majority owner of the business or directly or indirectly manages or controls the business, and (2) the business is engaged in advertising, marketing, promotion, offering for sale, distribution or sale of any biohazard test or device. In providing such access, Defendants shall permit representatives of the Commission to inspect and copy all documents relevant to any matter contained in this Order; and shall permit Commission representatives to remove documents relevant to any matter contained in this Order for a period not to exceed five (5) business days so that the documents may be inspected, inventoried, and copied; and

- B. To interview the officers, directors, and employees, including all personnel involved in responding to consumer complaints or inquiries, and all sales personnel, whether designated as employees, consultants, independent contractors or otherwise, of any business to which Subsection (A) of this Paragraph applies, concerning matters relating to compliance with the terms of this Order. The person interviewed may have counsel present.

*Provided* that, upon application of the Commission and for good cause shown, the Court may enter an *ex parte* order granting immediate access to defendants' business premises for the purposes of inspecting and copying all documents relevant to any matter contained in this Order.

#### **X. RECORD KEEPING PROVISIONS**

IT IS FURTHER ORDERED that, for a period of eight (8) years from the date of entry of this Order, in connection with defendant VLPI and any business where (1) defendant Podrebarac is the majority owner or an officer or director of the business, or directly or indirectly manages or controls the business and where (2) the business engages, or assists others engaged in, the advertising, marketing, promotion, offering for sale, distribution or sale of any biohazard test or device, are permanently enjoined from failing to create, or have such business create, and from failing to retain, unless otherwise specified:

- A. All documents evidencing or referring to the accuracy or efficacy of any biohazard test or device advertised, marketed, promoted, offered for sale, distributed or sold by Defendants, including, but not limited to, all tests,

reports, studies, demonstrations, or other evidence that confirm, contradict, qualify, or call into question the accuracy or efficacy of such biohazard test or device;

- B. Books, records and accounts that, in reasonable detail, accurately and fairly reflect the cost of biohazard tests or devices sold and revenues generated;
- C. Records accurately reflecting the name, address, and telephone number of each manufacturer or laboratory engaged in the development or creation of any biohazard test or device obtained by Defendants for the purpose of advertising, marketing, promoting, offering for sale, distributing, or selling such biohazard test or device;
- D. Records accurately reflecting: the name, address, and telephone number of each person employed by Defendants, including as an independent contractor, who is engaged in the advertising, marketing, promotion, offer for sale, distribution, or sale of any biohazard test or device; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable;
- E. Records containing the names, addresses, telephone numbers, dollar amounts paid, quantity of items or services purchased, and description of items or services purchased, for all purchasers to whom Defendants has sold, invoiced or shipped any biohazard test or device;
- F. Records that reflect, for every customer complaint or refund request relating to any biohazard test or device, whether received directly or

indirectly or through any third party: (1) the customer's name, address, telephone number and the dollar amount paid by the customer; (2) the written complaint or refund request, if any, and the date of the complaint or refund request; (3) the basis of the complaint, including the name of any defendant or participating associate complained against, and the nature and result of any investigation conducted concerning any complaint; (4) each response and the date of the response; (5) any final resolution and the date of the resolution; and (6) in the event of a denial of a refund request, the reason for the denial; and

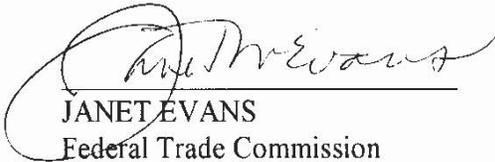
- G. Copies of all advertisements, promotional materials, sales scripts, training materials, or other marketing materials utilized relating to any biohazard test or device.

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**XI. RETENTION OF JURISDICTION**

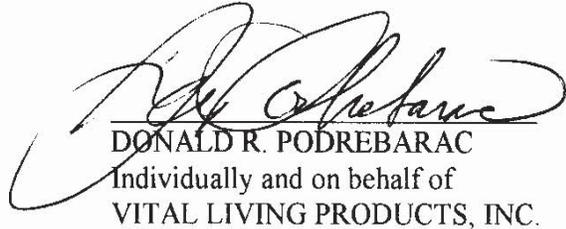
IT IS FURTHER STIPULATED AND ORDERED that this Court shall retain jurisdiction of this matter for purposes of construction, modification and enforcement of this Order.

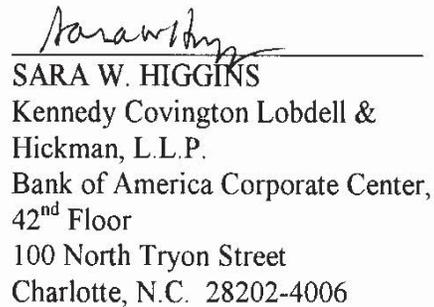
SO STIPULATED:

  
\_\_\_\_\_  
JANET EVANS

Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Washington, DC 20580  
(202) 326-2125 (voice)  
(202) 326-3259 (facsimile)

Attorney for Plaintiff  
FEDERAL TRADE COMMISSION

  
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DONALD R. PODREBARAC  
Individually and on behalf of  
VITAL LIVING PRODUCTS, INC.

  
\_\_\_\_\_  
SARA W. HIGGINS  
Kennedy Covington Lobdell &  
Hickman, L.L.P.  
Bank of America Corporate Center,  
42<sup>nd</sup> Floor  
100 North Tryon Street  
Charlotte, N.C. 28202-4006

Attorney for Defendants  
DONALD R. PODREBARAC and  
VITAL LIVING PRODUCTS, INC.

IT IS SO ORDERED, this 13<sup>th</sup> day of March, 2002.

  
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UNITED STATES DISTRICT COURT