



of Default Judgment Against Defendants is hereby granted, and **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** as follows:

**FINDINGS**

1. This Court has jurisdiction over the subject matter of this case and the parties hereto.
2. Venue and service of process are proper.
3. Defendants have engaged in activities in or affecting commerce, as “commerce” is defined in 15 U.S.C. § 44.
4. This action was instituted by the FTC under Sections 5, 12, 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 45, 52, 53(b), 57b and CAN-SPAM, 15 U.S.C. § 7706(a). The Commission seeks permanent injunctive relief and monetary and other equitable relief for deceptive acts or practices by Defendants in connection with the sale of hoodia gordonii and human growth hormone (“HGH”) products and the initiation of commercial e-mail messages in violation of CAN-SPAM. Pursuant to Sections 13(b) and 19, 15 U.S.C. §§ 53(b) and 57b, the FTC has the authority to seek the relief it has requested.
5. The FTC’s Complaint states a claim upon which relief may be granted against Defendants under Sections 5, 12, 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 45, 52, 53(b) and 57b.
6. Defendants were served with the Complaint and Summons as required by Rule 4(e) and 4(h) of the Federal Rules of Civil Procedure. Defendants appeared in this matter through counsel.
7. On August 27, 2004, the Court signed a Stipulated Preliminary Injunction Order With Asset Freeze and Other Equitable Relief. In the Preliminary Injunction, Defendants

stipulated that they “received service of the Complaint, Summons and TRO[.]” Defendants further stipulated that this Court has subject matter jurisdiction and personal jurisdiction over Defendants.

8. On November 6, 2007, the Court adopted the parties’ proposed discovery dates and issued a scheduling order. The Court’s scheduling order required that initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1) be tendered on or before November 6, 2007. On December 10, 2007, Magistrate Judge Denlow granted the FTC’s motion to compel Defendants to tender their initial disclosures, and ordered Defendants to serve their initial disclosures on or before December 19, 2007 or be barred from calling any witnesses or producing any documents in defense of this case. Defendants still have not tendered their initial disclosures.

9. On January 8, 2008, the Court granted the FTC’s motion for entry of default. The FTC is therefore entitled to a default judgment pursuant to Rule 55(b) of the Federal Rules of Civil Procedure.

10. The Court now finds that, in connection with the advertising, marketing and sale of their hoodia products, Defendants violated Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, by falsely representing, expressly or by implication, that:

- (A) the hoodia products cause rapid and substantial weight loss, including as much as forty pounds in a month;
- (B) the hoodia products cause users to lose safely three or more pounds per week for multiple weeks;
- (C) the hoodia products cause permanent weight loss; and/or
- (D) scientific research establishes that the hoodia products cause substantial weight loss.

11. The Court further finds that, in connection with the advertising, marketing, and sale of HGH products, Defendants violated Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, by falsely representing, expressly or by implication, that the HGH products:

- (A) contain human growth hormone and/or cause a clinically meaningful increase in a consumer's growth hormone levels; and/or
- (B) will turn back or reverse the aging process, including, but not limited to, causing such effects as: (i) lowering blood pressure, (ii) reducing cellulite, (iii) improving vision, (iv) causing new hair growth, (v) improving sleep, (vi) improving emotional stability, (vii) speeding injury recovery, (viii) relieving chronic pain, (ix) increasing muscle mass, and (x) causing fat and weight loss.

12. The Court further finds that Defendants have initiated the transmission, to protected computers, of commercial e-mail messages that contained, or were accompanied by, header information that is materially false or materially misleading in violation of Section 5(a)(1) of CAN-SPAM, 15 U.S.C. § 7704(a)(1).

13. The Court further finds that Defendants have initiated the transmission, to protected computers, of commercial e-mail messages that contained subject headings that would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message in violation of Section 5(a)(2) of CAN-SPAM, 15 U.S.C. § 7704(a)(2).

14. The Court further finds that Defendants have initiated the transmission of commercial e-mail messages to protected computers that fail to provide:

- (A) clear and conspicuous notice of the opportunity to decline to receive further commercial electronic mail messages from the sender; and/or
- (B) a functioning return e-mail address or other internet-based mechanism, clearly and conspicuously displayed, that a recipient could use to submit a reply requesting not to receive future commercial e-mail from Defendants, and that remains capable of receiving such messages for no less than 30 days after the transmission of the original message.

in violation of Sections 5(a)(5)(A)(ii) and/or 5(a)(3) of CAN-SPAM, 15 U.S.C. § 7704(a)(5)(A) and/or § 7704(a)(3).

15. The Court further finds that Defendants have initiated the transmission of commercial e-mail messages to protected computers that fail to provide the senders' valid physical postal address in violation of Section 5(a)(5)(A)(iii) of CAN-SPAM, 15 U.S.C. § 7704(a)(5)(A)(iii).

16. The Court further finds that Defendant McDaid is the sole officer of Sili Neutraceuticals and has formulated, directed, controlled or participated in the acts or practices set forth above. Defendant McDaid is thus individually liable for the violations attributed to Defendant Sili Neutraceuticals described above. *See FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573-74 (7th Cir. 1989).

17. It is proper in this case to issue a permanent injunction prohibiting Defendants from making, or assisting in making, false or misleading statements or representations with the advertising, marketing, offering for sale, or sale of any good or service, or from further violations of CAN-SPAM. *See FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *Amy Travel*, 875 F.2d at 572.

18. It is proper in this case to enter equitable monetary relief against Defendants for consumer injury caused by Defendants' violation of the FTC Act for the deceptive sale of Hoodia and HGH Products through illegal spam email messages. *See Febre*, 128 F.3d at 534, 537 (court may "order repayment of money for consumer redress as restitution" and may order disgorgement of ill-gotten gains to "prevent[] the defendant from being unjustly enriched by the fraud"). The Court finds that the total amount of consumer injury and ill-gotten gains caused by Defendants' violations of the FTC Act and CAN-SPAM Act is \$2,569,851.77.

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

#### **DEFINITIONS**

1. **"Commercial electronic mail message"** (or **"commercial email"**) "means any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website for a commercial purpose)." 15 U.S.C. § 7702(2)(A).

2. **"Competent and reliable scientific evidence"** means tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have 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.

3. **"Defendants"** means Sili Neutraceuticals, LLC and Brian McDaid, individually and doing business as Kaycon Ltd.

4. **"Document"** is synonymous in meaning and equal in scope to the term, as defined in Federal Rule of Civil Procedure 34(a), and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from which information can be obtained and translated, if necessary, through detection devices into

reasonably usable form. A draft or non-identical copy is a separate document within the meaning of this term.

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

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

7. **“HGH Products”** shall refer to any products that are advertised, marketed, promoted, offered for sale, distributed, or sold with express or implied representations that the product contains any form of Human Growth Hormone and/or may cause a statistically significant and clinically meaningful increase in a consumer’s growth hormone levels, and include, but are not limited to, “Perfect HGH,” “Dr. HGH,” or any other substantially similar products.

8. **“Hoodia Products”** shall refer to any products that are advertised, marketed, promoted, offered for sale, distributed, or sold with express or implied representations that the product contains any form of Hoodia gordonii, and include, but are not limited to, “HoodiaHerbal,” or any other substantially similar products.

9. **“Initiate,”** “when used with respect to a commercial email message, means to originate or transmit such message or procure the origination or transmission of such message,

but shall not include actions that constitute routine conveyance of such message.... [M]ore than one person may be considered to have initiated a message.” 15 U.S.C. § 7702(9).

10. **“Material”** means likely to affect a person’s choice of, or conduct regarding, goods or services.

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

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

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

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

**I.**

**PROHIBITIONS AGAINST PRODUCT MISREPRESENTATIONS**

**IT IS THEREFORE ORDERED** that Defendants, and their officers, agents, servants, employees and attorneys, and those persons or entities in active concert or participation with them who receive actual notice of this Order by personal service, facsimile, or otherwise,

whether acting directly or through any trust, corporation, subsidiary, division, or other device, or any of them, are hereby restrained and enjoined from making, or assisting others in making, expressly or by implication, including through the use of a trade name or endorsement, any false or misleading oral or written statement or representation in connection with the marketing, advertising, promotion, offering for sale, sale or provision of any Hoodia- or HGH-related Products, or any other products or services, including, but not limited to:

- A. Misrepresenting that the Hoodia Products cause rapid and substantial weight loss, including as much as forty pounds in a month;
- B. Misrepresenting that the Hoodia Products cause users to lose safely three or more pounds per week for multiple weeks;
- C. Misrepresenting that the Hoodia Products cause permanent weight loss;
- D. Misrepresenting that scientific research establishes that the Hoodia Products cause substantial weight loss;
- E. Representing that the HGH Products contain human growth hormone and/or cause a statistically significant and clinically meaningful increase in a consumer's growth hormone levels;
- F. Misrepresenting that the HGH Products will turn back or reverse the aging process, including, but not limited to, causing effects such as, (i) lowering blood pressure, (ii) reducing cellulite, (iii) improving vision, (iv) causing new hair growth, (v) improving sleep, (vi) improving emotional stability, (vii) speeding injury recovery, (viii) relieving chronic pain, (ix) increasing muscle mass, and (x) causing fat and weight loss;
- G. Misrepresenting that any product, or any ingredient contained in it, is effective in the diagnosis, cure, mitigation, treatment, or prevention of any disease;

H. Making any representation about the health benefits, performance, efficacy, or safety of any product unless, at the time of making such representation, Defendants possess and rely upon competent and reliable scientific evidence that substantiates the representation;

I. Misrepresenting any other fact material to a consumer's decision to purchase any product; and

J. Assisting others who violate any provision of Paragraphs A through I of this Section.

## II.

### **PROHIBITIONS AGAINST VIOLATIONS OF CAN-SPAM**

**IT IS FURTHER ORDERED** that Defendants and their officers, agents, servants, employees, and attorneys, and those persons or entities in active concert or participation with them who receive actual notice of this Order by personal service, facsimile, or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other device, or any of them, are hereby restrained and enjoined from violating, or assisting others in violating, the provisions contained in Sections 5 and 6 of CAN-SPAM, as currently promulgated or as it may hereafter be amended, or any rule, regulation, or requirement adopted pursuant thereto, including, but not limited to, initiating the transmission of a commercial email message that:

A. Contains, or is accompanied by, materially false or materially misleading header information;

B. Contains subject headers that misrepresent the content or subject matter of the message;

- C. Fails to include a clear and conspicuous notice of the opportunity to decline to receive further electronic mail messages from the sender; or
- D. Fails to include a valid physical postal address of the sender.

### III.

#### EQUITABLE MONETARY RELIEF

**IT IS FURTHER ORDERED** that

A. Judgment is hereby entered against Defendants, jointly and severally, in the amount of two million, five hundred and sixty nine thousand, eight hundred and fifty one dollars and seventy seven cents (\$2,569,851.77) as equitable monetary relief for violations of the FTC Act and the CAN-SPAM Act. This monetary judgment shall become immediately due and payable by Defendants upon entry of this Order, and interest computed at the rate prescribed under 28 U.S.C. § 1961(a), as amended, shall immediately begin to accrue on the unpaid balance.

B. ~~All payments under this Section shall be made by certified check or other guaranteed funds payable to and delivered to the Commission, or by wire transfer in accord with directions provided by the Commission.~~

C. All funds paid pursuant to this Section shall be deposited into a fund administered by the FTC or its agent to be used for equitable relief, including, but not limited to, consumer redress and any attendant expenses for the administration of any redress fund. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after redress is completed, the FTC may apply any remaining funds for other equitable relief (including consumer information remedies) as it determines to be reasonably related to the Defendants' practices alleged in the Complaint. Defendants

shall have no right to challenge the FTC's choice of remedies under this Subsection. The Commission, in its sole discretion, may use a designated agent to administer consumer redress. This judgment for equitable monetary relief is solely remedial in nature and is not a fine, penalty, punitive assessment, or forfeiture.

**IV.**

**ASSETS HELD BY THIRD PARTIES**

**IT IS FURTHER ORDERED** that Defendants shall have no right, title and interest to approximately \$300,000 in assets frozen pursuant to Section V of the Stipulated Preliminary Injunction entered by the Court on August 27, 2007, including assets held by Bank of America, Central Bancard, Citadel Federal Credit Union, PayPal, and Scottrade. In order to partially satisfy the monetary judgment set forth in Section III above, any financial or brokerage institution, escrow agent, title company, commodity trading company, automated clearing house, network transaction processor, business entity, or person that holds, controls, or maintains custody of any account or asset of, on behalf of, or for the benefit of, the Defendants, including Bank of America, Central Bancard, Citadel Federal Credit Union, PayPal, and Scottrade, shall turn over such account or asset to the Commission within ten (10) business days of receiving notice of this Order by any means, including, but not limited to, via facsimile.

**V.**

**COMPLIANCE MONITORING**

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

- A. Within ten (10) days of receipt of written notice from a representative of the Commission, Defendants each shall submit additional written reports, sworn to or

affirmed under penalty of perjury; produce documents for inspection and copying; appear for deposition; and/or provide entry during normal business hours to any business location in such Defendant's possession or direct or indirect control to inspect the business operation;

B. The Commission is authorized to monitor compliance with this Order

by all other lawful means, including but not limited to the following:

1. obtaining discovery from any person, without further leave of Court, using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36 and 45; and
  2. posing as consumers and suppliers to Defendants, any of Defendants' employees, or any other entity managed or controlled in whole or in part by any Defendant, without the necessity of identification or prior notice;
- and

C. Defendants shall permit representatives of the Commission to interview any employer, consultant, independent contractor, representative, agent, or employee who has agreed to such an interview, relating in any way to any conduct subject to this Order. The person interviewed may have counsel present.

*Provided, however,* that 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 obtain any documentary material, tangible things, testimony, or information relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C. § 45(a)(1)).

**VI.**

**COMPLIANCE REPORTING BY DEFENDANTS**

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

- A. For a period of three (3) years from the date of entry of this Order,
  1. Defendant Brian McDaid shall notify the FTC of the following:
    - (a) Any changes in residence, mailing addresses and telephone numbers, within ten (10) days of the date of such change;
    - (b) Any changes in employment status (including self-employment) and any change in the ownership in any business entity within ten (10) days of such change. Such notice shall include the name and address of each business Defendant is affiliated with or employed by, creates or forms, or performs services for; 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
    - (c) Any changes in the Defendant's name or use of any aliases or fictitious names; and
  2. Defendant McDaid shall notify the Commission of any changes in corporate structure of any business that he directly or indirectly controls, or has an ownership interest in, 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

