

CAUSE NO. 05-05795

STATE OF TEXAS, § IN THE DISTRICT COURT OF
Plaintiff, §
§
§
vs. § DALLAS COUNTY, T E X A S
§
BERKELEY PREMIUM NUTRA- §
CEUTICALS, INC., LIFEKEY, INC.; §
WARNER HEALTH CARE, INC.; §
BOLAND NATURALS, INC.; and §
WAGNER NUTRACEUTICALS, INC., §
and STEVE WARSHAK, Individually §
Defendants. § 101st JUDICIAL DISTRICT

FINAL JUDGMENT AND AGREED PERMANENT INJUNCTION

Plaintiff, the STATE OF TEXAS, acting by and through Attorney General Greg Abbott (“State”), and Defendants BERKELEY PREMIUM NUTRACEUTICALS, INC., LIKEKEY, INC., WARNER HEALTH CARE, INC., BOLAND NATURALS, INC., WAGNER NUTRACEUTICALS, INC., and STEVE WARSHAK, individually, (“Defendants”), having consented to the entry of this Final Judgment and Agreed Permanent Injunction, and before any testimony is taken in this case and without Defendants admitting to any violations of the Texas Food, Drug and Cosmetic Act, TEX. HEALTH & SAFETY CODE ANN. §431.001 *et seq.* (“TFDCA”); the Texas Deceptive Trade Practices - Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §17.21 *et seq.* (“DTPA”); or any other law, have jointly moved that the Court enter this Judgment.

Defendants stipulate to the amount of civil penalties, attorneys fees, and investigative costs listed in paragraphs 34 and 38 below, if Defendants fail to comply with Paragraph 36 or 39 below.

Defendants stipulate that Defendants' indebtedness to the State of Texas for civil penalties, identified in paragraph 34 below, for violations of the TDPTA and TFDCA, having been found by this court to constitute a civil fine or penalty to and for a governmental unit and not compensation for actual pecuniary loss, would be a debt that would be nondischargeable in a subsequently filed bankruptcy proceeding under either Chapter 7 or Chapter 11 and that, in the event a voluntary or involuntary chapter 7 or chapter 11 bankruptcy proceeding is commenced against debtor, the debtor stipulates that he shall not contest either directly or indirectly future attempts, if any, by the State of Texas to have such debt declared nondischargeable in accordance with 11 U.S.C. § 523(a)(7).

The Court finds that the parties have resolved the matters in controversy between them and have consented to the terms of this judgment. The Court, with the consent of said parties, makes the following:

I. FINDINGS OF FACT

1. The State of Texas is the Plaintiff in this case.
2. BERKELEY PREMIUM NUTRACEUTICALS, INC., LIKEKEY, INC., WARNER HEALTH CARE, INC., BOLAND NATURALS, INC., WAGNER NUTRACEUTICALS, INC., and STEVE WARSHAK are the Defendants in this case. The principal place of business of BERKELEY PREMIUM NUTRACEUTICALS, INC., LIKEKEY, INC., WARNER HEALTH CARE, INC., BOLAND NATURALS, INC., WAGNER NUTRACEUTICALS, INC., and STEVE WARSHAK is Cincinnati, Ohio.
3. Defendant STEVE WARSHAK is a resident of Ohio. He is the sole owner of BERKELEY PREMIUM NUTRACEUTICALS, INC., LIKEKEY, INC., WARNER HEALTH CARE, INC., BOLAND NATURALS, INC., WAGNER NUTRACEUTICALS, INC., and is the past president and chief executive officer the same.

4. The State investigated the Defendants' business practices of advertising, promoting, labeling, selling, and billing for their foods, including the following dietary supplements: Altovis, Avlimil, Avlimil Complete, Dromias, Enzyte, Mioplex, Ogoplex, Numovil, Pinadol, Prulato, Rogisen, Rovacid, Suvaril, Nuproxi, and Rudofil. Defendants have engaged in the business of offering for sale and selling foods, including the above listed dietary supplements, in Texas via telemarketing, Internet web sites, distributors, and retail stores. The State alleges that Defendants' representations in the labeling and advertising for their products make claims to prevent, treat, mitigate, or cure disease or any signs or symptoms of a disease in man which make these products unapproved drugs. The State also alleges that Defendants' labels fail to conform to state and federal laws.

5. The Plaintiff investigated the Defendants' practice of advertising and offering to consumers a "free" trial supply of dietary supplements with enrollment in Defendants' continuity program whereby consumers would receive an automatic shipment of a product monthly or bi-monthly and Defendants would charge consumers' debit or credit accounts.

6. The State filed this action seeking a permanent injunction, pursuant to §431.047 of the TFDCa that authorizes the Attorney General to seek injunctive relief and recover any costs and attorney fees incurred in obtaining that relief, and civil penalties, pursuant to §431.0585 of the TFDCa that authorizes the Attorney General to seek civil penalties, per day for each violation of §431.021 of the TFDCa by Defendants. The State also filed this action seeking a permanent injunction against Defendants, pursuant to §17.47 of the DTPA, upon the grounds that Defendants have engaged in false, misleading or deceptive acts or practices in the course of trade and commerce and declared unlawful by §§17.46(a) and (b) of the DTPA.

7. In consenting to the entry of this Final Judgment and Agreed Permanent Injunction, the Defendants do not admit that they have engaged in any illegal or deceptive

practices and specifically deny the allegations set forth herein. Instead, the Defendants state that they are consenting to this Final Judgment and Agreed Permanent Injunction, including the monetary payment set forth herein, in the spirit of compromise solely to voluntarily resolve their differences with the State without the necessity of further costly and unnecessary litigation and to indicate their intent to ensure that their business practices will be in compliance with the law.

BASED ON THE FOREGOING FINDINGS OF FACT, THE RECORD HEREIN, AND THE AGREEMENTS OF THE PARTIES MANIFESTED HEREIN, the Court concludes as follows:

II. CONCLUSIONS OF LAW

9. The Court has jurisdiction over the parties and the subject matter of this action.

10. Plaintiff's Original Petition states a claim for relief against Defendants and good cause exists for the court to enter judgment as to Defendants Berkeley Premium Nutraceuticals, Inc., Lifekey, Inc., Warner Health Care, Inc., Boland Naturals, Inc., Wagner Nutraceuticals, Inc., and Steve Warshak.

11. Venue of this matter is proper in Dallas County by virtue of the fact that Defendants are or were engaged in the business of advertising, offering for sale and selling foods, including dietary supplements, in Dallas County, Texas.

12. Defendants have, by signature of their counsel hereto, waived any right to appeal, petition for certiorari, or move to reargue or rehear this judgment and order. Entry of this Final Judgment and Agreed Permanent Injunction is in the public interest.

13. Entry of this Final Judgment and Agreed Permanent Injunction is not a finding of liability on the part of the Defendants.

14. The parties have agreed to resolve their differences and the agreement of the parties is just and reasonable with respect to all parties. The court approves the terms of the

parties' agreement and adopts them as its own determination of the parties' respective rights and obligations.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

III. DEFINITIONS

15. The following definitions shall be used in construing this Judgment:

A. **“Defendants”** means, unless otherwise specified, Berkeley Premium Nutraceuticals, Inc., Lifekey, Inc., Lifekey Healthcare, Inc., Warner Health Care, Inc., Boland Naturals, Inc., Wagner Nutraceuticals, Inc., their subsidiaries and affiliates, general partners, officers, directors, and representatives of any of them, and the successors and assigns of each thereof, and Steve Warshak. In addition, Defendants shall include all persons, corporations, partnerships, and other entities acting in concert or participating with the entities and person(s) above, who receive actual notice of this Final Judgment and Agreed Permanent Injunction.

B. **“Advertising”** means any oral, written, graphic or pictorial statement or representation, including but not limited to testimonials, endorsements, or other Third Party representations, regardless of the medium of communication employed, for the purpose of inducing, or that are likely to induce, directly or indirectly, the purchase of food, dietary supplements or drugs; and includes but is not limited to Product packages, labels, Labeling, Product inserts, Product literature and internet sites.

C. **“Billing Information”** means any information that enables an entity to charge a consumer's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.

D. **“Charge”** means any amount charged or debited to a consumer's credit card, checking, savings, share or similar account, utility bill, telephone bill, mortgage loan

account, debit card, or any similar form of collecting money from a consumer.

E. **“Clear and Conspicuous” statement, or a statement presented “Clearly and Conspicuously”** means a statement or communication, written or oral, presented in such font, size, color, location, audibility and contrast against the background in which it appears, compared to the other matter with which it is presented, so it is easily noticed and readily understood. If such statement or communication modifies, explains, or clarifies other information with which it is presented, it must be presented in close proximity to such other information and in the same manner (audible or visual) so it is easily noticed and readily understood. In addition, the term means that:

- i. With respect to any Promotional materials communicated through any non-print medium (including such formats as telephone, television, radio, CD-ROM, DVD, other electronic, magnetic, or interactive media, and including the Internet and online services), audio disclosures shall be delivered in a volume and cadence sufficient to be easily heard and readily understood, and video disclosures shall be of a size and shade, in contrast with the background with which it appears, and shall appear on the screen for a period of time sufficient to make them easily read and readily understood.
- ii. In addition to the foregoing, in media such as the Internet, online services, or other interactive software, the disclosures shall also be unavoidable and shall require the consumer to affirmatively assent or click “OK” to the disclosures prior to the consumer being requested to agree to incur any obligation, financial or otherwise.

F. **“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.

G. **“Drug”** means articles defined in §431.002 (14) of the Texas Food, Drug, and Cosmetic Act.

H. **“FDCA”** means the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq.

I. **“FDA”** means the United States Food and Drug Administration.

J. **“Free-to-Pay Conversion”** means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives an initial Product or service for free, or for free for a period of time, but then will incur an obligation to pay for the Product or service, or additional Product(s) or service(s), if the customer does not take affirmative action to cancel before the end of that period.

K. **“Including”** means “including, without limitation.”

L. **“Labeling”** means all labels and other written, printed, or graphic matter upon any containers or wrappers or any other written Promotional materials, such as sales brochures, leaflets, or other written, printed, or graphic matter, which accompanies a Product.

M. **“Membership”** means any arrangement whereby persons who purportedly agree to the arrangement (often called “members”) receive specified benefits over a period of time, including but not limited to, free shipping and handling, discounts on goods and services, guaranteed prices, and expedited processing of orders.

N. **“Negative Option Feature”** means, in an offer or agreement to sell or provide any goods or services, a provision under which the consumer’s silence or failure to reject

goods or services or to cancel the agreement within any certain time period is treated by the seller or provider as if the consumer has given the seller or provider the right to send or provide, and charge the consumer for, future goods or services. Agreements with a Negative Option Feature include, but are not limited to: (i) Free-to-Pay Conversion plans; (ii) continuity plans (such as Defendants' "Managed Care Direct," "Established Customer Care," "Value Added Program" and "Home Delivery Plan") in which, subsequent to the consumer's agreement to the plan, the seller or provider automatically ships goods to a consumer unless the consumer notifies the seller or provider within a certain time not to ship the goods; and (iii) automatic Renewal plans in which the seller automatically renews the agreement and charges the consumer unless the consumer cancels before the seller renews the agreement.

O. **"Partner(s)"** of Defendants means any Third Party that contracts with any of the Defendants to provide Telemarketing or other marketing services in connection with any transaction wherein any of the Defendants provide, offer to provide or arrange for others to provide goods or services to consumers in exchange for consideration.

P. **"Product" or "Products" or "Berkeley Products"** means Altovis, Avlimil, Avlimil Complete, Dromias, Enzyte, Mioplex, Numōvil, Ogoplex, Pinadol, Prulato, Rogisen, Rovacid, Suvaril, Nūproxī, Rudofil and any other dietary supplement or other item marketed and sold by Defendants.

Q. **"Promotion"** means all representations and activities (including, but not limited to, direct contact with consumers) which advertise or result in a sale of any Berkeley Product.

R. **"Renewal"** means an extension beyond the original term of a Membership or an agreement to receive goods or services that are offered on a periodic basis.

- S. “**TFDCA**” means the Texas Food, Drug, and Cosmetic Act.
- T. “**Telemarketing**” means any business activity (which includes, but is not limited to, initiating or receiving telephone calls, managing or contracting with others who initiate or receive telephone calls, operating an enterprise that initiates or receives telephone calls, owning an enterprise that initiates or receives telephone calls, or otherwise participating as an officer, director, employee or independent contractor in an enterprise that initiates or receives telephone calls) that involves attempts to induce consumers to purchase or agree to receive any item, good, or service, or to enter a contest for a prize, by means of telephone sales presentations, either exclusively or in conjunction with the use of other forms of marketing; *provided* that the term “Telemarketing” does not include transactions that are not completed until after a face-to-face contact between the seller or solicitor and the consumers solicited.
- U. “**Third Party**” means (a) any entity that is not owned or controlled by Defendants, and (b) any person who is not acting in his or her capacity as an officer or employee of Defendants or any entity owned or controlled by Defendants.

IV. JUDGMENT

16. NOW THEREFORE, on the basis of the above findings and conclusions of law, incorporated herein, and for the purpose of effecting this Final Judgment and Agreed Permanent Injunction.

A. Health Claims and Representations

17. **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Defendants, their employees, agents and servants are hereby permanently restrained and enjoined from:

- A. Advertising or representing, directly or indirectly, that any Product can diagnose, mitigate, treat, cure, or prevent any disease or any signs or symptoms of a disease or

abnormal condition associated with a natural state or process, if the abnormal condition is uncommon or can cause significant or permanent harm, within the meaning of 21 CFR §101.93(g), unless Defendants' application with respect to such Product has been approved as a drug under Section 505 of the FDCA (21 U.S.C. §355).

B. Making any representation, directly or indirectly, about the efficacy, benefits, performance, safety, and side effects of any Products, including using the phrases "no side effects" and "no drug interaction," unless Defendants possess Competent and Reliable Scientific Evidence that substantiates such representations and such representations are not in violation of injunctive term Paragraph 17. A. above.

C. Misrepresenting, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, analysis, research, or other evidence used to label, advertise, promote, offer for sale, sell or distribute any Product.

D. Failing to clearly and conspicuously disclose any side effects or adverse drug reactions with the use of any Product if such disclosure would be material to consumers.

E. Failing to clearly and conspicuously place, in any Advertising that contains claims that a Product supports the structure or function of the body, including but not limited to Product packages, labels, Labeling, Product inserts, brochures and internet sites for Defendants' Products, as may also be required by FDA regulations, the following disclosure, set apart from other text in the Advertising and within a bordered box: "This statement has not been evaluated by the Food and Drug Administration. This Product is not intended to diagnose, treat, cure, or prevent any disease." In any visual Advertising, including but not limited to television Advertising, this disclosure shall be presented in such font, size, color and contrast against the background in which it appears

compared to the other matter with which it is presented, so it is easily noticed and readily understood. In addition, in product packaging, print Advertising, or other print material, this disclosure, if it does not appear adjacent to the claims it modifies, must also appear in boldface type. Notwithstanding the requirement in the definition of “Clear and Conspicuous” in Paragraph 15. E. of this Final Judgment and Agreed Permanent Injunction that a disclosure be made “in the same manner (audible or visual)” as the information to which it relates, the disclosure required under this Paragraph 17. E., when required in television Advertising, may be a video disclosure, and the Defendants shall not be required to also make an audio disclosure. In radio Advertising, the disclosure required under this Paragraph 17. E. shall be made orally, in such tone, audibility and cadence so that it is easily heard and readily understood.

F. Advertising or representing, directly or indirectly, that any Product is superior to or comparable to any drug approved by the FDA, unless such Product has been approved by the FDA as required in injunctive term Paragraph 17. A. above.

G. Making any Advertising representation, whether by means of an endorsement, testimonial, or otherwise, that the experience of an individual or group of consumers with any Product is the “typical,” “ordinary,” or “actual” experience of consumers using the Product, unless such representation is true.

H. Making any claim that a Product can diagnose, mitigate, treat, cure, or prevent any disease or any signs or symptoms of a disease or abnormal condition associated with a natural state or process, if the abnormal condition is uncommon or can cause significant or permanent harm, within the meaning of 21 CFR § 101.93(g), unless Defendants’ application with respect to such Product has been approved as a drug under Section 505 of the FDCA (21 U.S.C. § 355) in an endorsement, testimonial, or vignette that would

violate injunctive term Paragraph 17. A. above.

I. Making any Advertising representation without clearly and conspicuously disclosing any material connection between a person providing an endorsement or testimonial for any Product or program, and any of the Defendants or any individual or entity which labels, advertises, promotes or offers for sale, or sells or distributes such Product or program. For purposes of this paragraph, “material connection” means any relationship, monetary or otherwise, that might materially affect the weight or credibility of the endorsement or testimonial.

J. Introduce into commerce any food, including a dietary supplement, whose label or labeling is false or misleading and fails to display prominently and accurately information and statements required by regulations promulgated under the authority of the TFDCA.

B. Prohibited Advertising Practices and the Use of the Term “Free”

18. **IT IS FURTHER ORDERED** that Defendants, their employees, agents and servants are hereby permanently restrained and enjoined in its Advertising and Promotions from:

A. Using the word(s) “free,” “free sample,” “free trial,” “no obligation,” or other words of similar import in television or radio Advertising for Defendants’ products, without clearly and conspicuously disclosing in close proximity to the word(s), the following:

- i. that, if true, the consumer must pay any shipping and handling charges (such charges not being excessive in amount); and
- ii. that, if true, the consumer may be required to enroll in a program with a Negative Option Feature and that such Negative Option feature may result in additional charges to the consumer.

- B. Using the word(s) “free,” “free sample,” “free trial,” “no obligation,” or other words of similar import in Advertising other than television or radio, without clearly and conspicuously disclosing in close conjunction with the word(s) all terms and conditions associated with the use of the word(s).
- C. Using the word(s) “free,” “free sample,” “free trial,” “no obligation,” or other words of similar import in violation of the Federal Trade Commission’s Guide Concerning the Use of the Word “Free,” 16 CFR Part 251 or any applicable law of the State of Texas.
- D. Using the words “limited time,” “while supplies last,” “this week only,” or other words of similar import, unless such limitations are actually applied.
- E. Representing directly or by implication that any sale, Negative Option Feature, or payment for goods or services requires only a “co-payment” or similar shared payment, is similar to an insurance benefit, is covered by any insurance program, or is subsidized by any of the Defendants.
- F. Making any representations that are false, deceptive or misleading, or failing to clearly and conspicuously disclose any material fact.

C. Mandatory Disclosures

19. **IT IS FURTHER ORDERED** that Defendants, their employees, agents and servants are hereby permanently restrained and enjoined from failing to disclose, truthfully, and clearly and conspicuously, before obtaining a consumer’s express authorization to bill or charge the consumer for any goods or services, all material terms and conditions for the purchase of any such goods or services, including, but not limited to:

- A. The quantity of any goods or services that are the subject of the sales offer.

- B. All material restrictions, limitations, or conditions to purchase, receive or use the goods or services that are the subject of the sales offer.
- C. All policies regarding refunds, guarantees, cancellations, exchanges and repurchases, including any policy that refunds will not be made, or that cancellations or exchanges will not be accepted.
- D. The number of payments that must be made (if more than one), the dates or time periods when the payments will be required or charged, the amount of each payment, and the total cost.
- E. If true, that Billing Information the seller already possesses, either because the customer previously provided it to the seller, or the seller obtained it from another source, will be used to bill or charge the consumer.
- F. If the offer includes a Negative Option Feature or Membership, all material terms and conditions of the Negative Option Feature or Membership, including but not limited to, the fact that the consumer's account will be automatically charged unless the consumer takes an affirmative action to avoid the charges, when the charges will be submitted for payment, the specific steps the consumer must take to avoid the charges, when a consumer cancellation request must be received by the Defendants, and a telephone number or address where the consumer's cancellation request should be directed; provided that with respect to the first such automatic shipment or automatic renewal, the telephone disclosures must identify the specific date by which the consumer must take an affirmative action to avoid the charge.
- G. If any of the Defendants obtain a consumer's Billing Information to purchase any goods or services and then solicits the purchase of other goods or services, an affirmative disclosure must be made of all material terms and conditions for the purchase of each

additional good or service, including, but not limited to, those set forth in this Paragraph 19, before obtaining the consumer's express authorization to bill or charge for such additional good or service.

H. In addition to compliance with A. through G. of this Paragraph 19, Defendants shall comply with all applicable state laws, regulations and/or rules.

D. Mandatory Disclosures with Product Shipments

20. **IT IS FURTHER ORDERED** that Defendants, their employees, agents and servants are hereby permanently restrained and enjoined from:

A. Failing to provide, prior to charging the consumer for any goods or services supplied pursuant to a Negative Option Feature, a written document clearly and conspicuously disclosing all material terms and conditions of the sale including, but not limited to the fact that the consumer is currently enrolled in Defendants' Negative Option Feature, that the consumer's account will be charged for the first and all successive product shipments under the Negative Option Feature unless the consumer cancels his or her enrollment in the Negative Option Feature, the specific steps the consumer must take to cancel enrollment in the Negative Option Feature, including a telephone number or address where a notice to cancel enrollment may be directed and the amount of time the consumer has to submit such notice to the Defendants. The disclosure document required under this Paragraph 20. must be a separate, stand-alone document and not contain any sales or promotional material and shall be conspicuously placed within the shipment so as to be unavoidable. The document shall also provide clear and conspicuous notice that the consumer has the right to a refund, along with instructions on how to exercise such right; provided that Defendants may set terms and conditions for refund policies (such as a reasonable time limit within which consumers may request a refund, or that shipping

and handling charges will not be refunded), only if Defendants have clearly and conspicuously disclosed such terms with the offer.

B. Failing to provide consumers at least fourteen (14) days after receipt of the introductory or free shipment which enrolls the consumer in a Negative Option Feature, and at least fourteen (14) days after receipt of any succeeding shipment under a Negative Option Feature, within which to cancel the continuity program and to avoid any future charges.

E. Telemarketing

21. **IT IS FURTHER ORDERED** that Defendants, their employees, agents and servants are hereby permanently restrained and enjoined from:

A. Violating any provision of the federal Telemarketing Sales Rule, 16 C.F.R. Part 310, as in effect now or as it may be amended; and

B. Conducting any Telemarketing calls, whether inbound or outbound, which result in the shipment of goods or services, and any related customer service calls, without such calls being recorded in their entirety and such recordings being kept on file with Defendants for a period of one (1) year from the date of such call.

F. Guarantee and Refund Promises

22. **IT IS FURTHER ORDERED** that Defendants, their employees, agents and servants are hereby permanently restrained and enjoined from:

A. With respect to any good or service offered with a money-back guarantee by Defendants, failing to submit a request to the appropriate credit card processor or mail a check if appropriate, within seven (7) business days of Defendants' receipt of a refund request, a full refund of the purchase price of the good or service, including any shipping costs, insurance, handling, or any other fee or charge paid by the consumer; provided,

however, that Defendants may set terms and conditions for such money-back guarantee (such as a reasonable time limit within which consumers may request a refund, or that shipping and handling charges will not be refunded), only if Defendants have clearly and conspicuously disclosed such terms and conditions in close proximity to the money-back guarantee offer.

B. Failing to honor any representations made by Defendants regarding refunds.

C. Failing to clearly and conspicuously disclose, at the time a consumer makes a new order, modifies his/her order, or requests a refund, all the terms and conditions that may impact any refund policy or money-back guarantee that the Defendants are providing. Such disclosure shall be made by the Defendants prior to accepting any modified or new order by the consumer.

D. Failing to honor a request that Defendants receive to cancel enrollment in a Continuity Program, when such a request is consistent with clearly and conspicuously disclosed terms and conditions of the Continuity Program. **Provided, however,** that if Defendants receive or discover credible evidence that any of their agents, servants, representatives, employees, and all persons or entities in active concert or participation with any of them who receive actual notice of this Order by personal service or otherwise, have made any representation to a consumer during a transaction that is inconsistent with or contradicts any of the disclosures required by this Order, Defendants must offer to the consumer an appropriate refund and cancellation of his or her enrollment in the Continuity Program. If a consumer asserts, directly or through a third party, without any evidence, that a representation inconsistent with or contradicting any of the disclosures required by this Order was made, the Defendants, unless they can

produce evidence to the contrary, must offer to the consumer an appropriate refund and cancellation of his or her enrollment in the Continuity Program.

G. Maintaining Accessibility to Telephone Personnel

23. **IT IS FURTHER ORDERED** that Defendants, their employees, agents and servants are hereby permanently restrained and enjoined from failing to ensure consumer accessibility to personnel manning any telephone number that Defendants provide for canceling any order for Products, goods or services, for requesting refunds, or for effectuating any money-back guarantee. For purposes of this Paragraph 23, “consumer accessibility” shall mean that, under normal operating conditions, at least ninety percent (90%) of all calls placed during each consecutive three (3) month period to such telephone numbers shall be connected to Defendants’ personnel no later than four (4) minutes after the call is answered. In addition, for purposes of this Paragraph 23, “calls placed” shall exclude any call placed by a consumer if a consumer voluntarily disconnects within twenty (20) seconds. Further, Defendants shall ensure that all telephone calls placed to such numbers are answered within four (4) rings and that if live personnel are not immediately available to conduct business with the consumer when the phone is answered, Defendants must deliver over the telephone a Clear and Conspicuous recording that live personnel should be available to assist the consumer within four (4) minutes. Defendants shall provide documents evidencing compliance with this Paragraph 23 within five (5) business days after receipt of any written request from Plaintiff for such verification. This Paragraph 23 shall become effective on the first day of the third full month following the date that this Final Judgment and Agreed Permanent Injunction has been filed with the court.

H. Responding to Consumer Complaints

24. **IT IS FURTHER ORDERED** that Defendants, their employees, agents and servants are hereby permanently restrained and enjoined from failing to investigate and promptly

resolve any consumer complaint or request for refund, in accordance with Paragraph 22 of this Final Judgment and Agreed Permanent Injunction, received by Defendants and to notify the consumer of the resolution of the complaint or request and the reason therefore.

I. Wholesalers, Distributors, and Resellers

25. **IT IS FURTHER ORDERED** that Defendants, their employees, agents and servants are hereby permanently restrained and enjoined from:

A. Including in any contract with any wholesaler, distributor, or known reseller of Defendants' Products terms and conditions that conflict with the requirements of this Final Judgment and Agreed Permanent Injunction.

B. Failing to provide all wholesalers, distributors, and known resellers of Defendants' Products with a comprehensive summary of this Final Judgment and Agreed Permanent Injunction, as set forth in Exhibit "A," within ten (10) business days of the entry of this Final Judgment and Agreed Permanent Injunction. For any wholesalers, distributors, and known resellers that initiates distribution of Defendants' Products ten (10) or more business days after the entry of this Final Judgment and Agreed Permanent Injunction, and that has not previously received a copy of the Exhibit "A," Defendants shall immediately transmit a copy to the wholesaler or known reseller.

C. Providing to, or approving the use of, marketing materials or information, Labeling, Product packaging or package inserts, or Products, to wholesalers, distributors, and known resellers of Defendants' Products that do not comply with the requirements of this Final Judgment and Agreed Permanent Injunction.

J. Distribution of Final Judgment and Agreed Permanent Injunction by Defendants

26. **IT IS FURTHER ORDERED** that, for a period of five (5) years from the date of entry of this Final Judgment and Agreed Permanent Injunction, Defendants must each:

A. Provide a copy of this Final Judgment and Agreed Permanent Injunction to and obtain a signed and dated acknowledgment of receipt from each of its officers and directors;

B. Provide a summary of this Final Judgment and Agreed Permanent Injunction, as set forth in Exhibit "A," to, and obtain a signed and dated acknowledgment of receipt from:

i. All sales and marketing personnel and all personnel involved in responding to consumer complaints or inquiries, whether such persons are designated as employees, consultants, independent contractors or otherwise, of any of the Defendants or of any business entity owned or controlled, directly or indirectly, or managed, by any of the Defendants; and

ii. Each Partner of any of the Defendants; provided that each of the Defendants must deliver the copy of the Final Judgment and Agreed Permanent Injunction or summary of the Final Judgment and Agreed Permanent Injunction, as appropriate, to current personnel and Partners within thirty days after the date of entry of the Final Judgment and Agreed Permanent Injunction, and to future personnel and Partners within thirty days after the person assumes such position or responsibilities.

C. Maintain for a period of five (5) years after creation, and, within fifteen (15) days of receipt of a written request, make available to representatives of Plaintiff, the original signed and dated acknowledgments of the receipt of the Final Judgment and Agreed

Permanent Injunction or summary of the Final Judgment and Agreed Permanent Injunction, as required in Paragraph 26. A. and B. above. Provided, however, that such acknowledgments received by Defendants may be stored in an electronic format.

K. Plaintiff's Authority to Monitor Compliance

27. **IT IS FURTHER ORDERED** that Plaintiff is authorized to monitor compliance with this Final Judgment and Agreed Permanent Injunction by all lawful means, including but not limited to the following means:

A. Plaintiff is authorized, without further leave of court, to obtain discovery from any person in the manner provided in the rules and statutes of the State of Texas, for the purpose of monitoring and investigating compliance with any provision of this Final Judgment and Agreed Permanent Injunction by Defendants;

B. Plaintiff is authorized to use representatives posing as consumers and suppliers to (1) Defendants, (2) Defendants' employees, or (3) any entity managed or controlled in whole or in part, directly or indirectly, by any of the Defendants, without the necessity of identification or prior notice; and

C. Nothing in this Final Judgment and Agreed Permanent Injunction limits Plaintiff's lawful use of compulsory process to investigate whether any of the Defendants has violated any provision of the law enforced by Plaintiff.

L. Compliance Reports

28. **IT IS FURTHER ORDERED** that, in order that compliance with the provisions of this Final Judgment and Agreed Permanent Injunction may be monitored:

A. For a period of three (3) years from the date of entry of this Final Judgment and Agreed Permanent Injunction, Defendant Steve Warshak must notify the Plaintiff of the following:

- i. Any changes in his residence addresses, mailing addresses, and telephone numbers within ten (10) days of the date of such change;
- ii. Any changes in his name or use of any aliases or fictitious names within ten (10) days of the date of such change; and

B. Berkeley Premium Nutraceuticals, Inc., Lifekey, Inc., Warner Health Care, Inc., Boland Naturals, Inc., Wagner Nutraceuticals, Inc., and Steve Warshak must notify the Plaintiff in writing of any changes in Berkeley Premium Nutraceuticals, Inc., Lifekey, Inc., Warner Health Care, Inc., Boland Naturals, Inc., Wagner Nutraceuticals, Inc or any business entity that Steve Warshak directly or indirectly control(s), or has any ownership interest in, that may affect compliance obligations arising under this Final Judgment and Agreed Permanent Injunction, 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 Final Judgment and Agreed Permanent Injunction; the filing of a bankruptcy petition; or a change in the corporate name or address, at least thirty (30) days prior to such change, **provided** that, with respect to any proposed change in the corporation about which Defendants learn less than thirty (30) days prior to the date such action is to take place, Defendants notify the Plaintiff as soon as is practicable after obtaining such knowledge.

C. Ninety (90) days after the date of entry of this Final Judgment and Agreed Permanent Injunction, Berkeley Premium Nutraceuticals, Inc., Lifekey, Inc., Warner Health Care, Inc., Wagner Nutraceuticals, Inc., and Steve Warshak each must provide a written report to the Plaintiff, sworn to under penalty of perjury, setting forth in detail the manner and form in which they have complied and are complying with this Final

Judgment and Agreed Permanent Injunction. This report must include, but not be limited to:

- i. For Individual Defendant Steve Warshak:
 - a. The then-current residence address, mailing addresses, and telephone numbers of the Individual Defendant;
 - b. The then-current employment and business addresses and telephone numbers of the Individual Defendant a description of the business activities of each such employer or business, and the title and responsibilities of the Individual Defendant, for each such employer or business; and
 - c. Any other changes required to be reported under Subpart A of this Paragraph 28.
- ii. For all Defendants:
 - a. A copy of each acknowledgment of receipt of this Order, obtained pursuant to Paragraph 26;
 - b. Any other changes required to be reported under Subpart A of this Paragraph.

D. For the purposes of this Final Judgment and Agreed Permanent Injunction, Defendants must, unless otherwise directed by the Plaintiff's authorized representatives, mail all written notifications to the Plaintiff to: Joyce Wein Iliya, Assistant Attorney General, Office of the Attorney General, Consumer Protection and Public Health Division, 1412 Main Street, Suite 810, Dallas, Texas 75202.

E. For the purposes of the compliance reporting and monitoring required by this Final Judgment and Agreed Permanent Injunction, Plaintiff must, unless directed by the Defendants' authorized representatives, mail all written notifications to the Defendants'

counsel: Jonathan P. Saxton, Rendigs, Fry, Kiely & Dennis, LLP, One West Fourth Street, Suite 900, Cincinnati, Ohio 45202, 513-381-9288, jsaxton@rendigs.com

M. Consumer Redress/Restitution

“Unresolved Consumer Complaints.”

29. **IT IS FURTHER ORDERED** that within thirty (30) calendar days from the date of the filing of this fully executed Final Judgment and Agreed Permanent Injunction with this Court, Plaintiff will transmit to Defendants, and request that the Better Business Bureau transmit to Defendants, any outstanding or unresolved consumer complaint in its possession on the date of the filing of this fully executed Final Judgment and Agreed Permanent Injunction with this Court for full and complete resolution as set forth herein. Within sixty (60) calendar days of the filing of this fully executed Final Judgment and Agreed Permanent Injunction with this Court, Defendants shall satisfy all consumer complaints received by the Plaintiff, Defendants and the Better Business Bureau, prior to the date of the filing of this Final Judgment and Agreed Permanent Injunction, with full and complete refunds as requested in those complaint(s) within thirty (30) calendar days of Defendants receipt of such outstanding or unresolved complaints.

30. **IT IS FURTHER ORDERED** that within thirty (30) calendar days of the completion of the consumer redress provision set forth in Paragraph 29 above, Defendants shall provide a detailed written report to Plaintiff setting forth the resolution of consumer complaints as required therein. The report will state, for each consumer, the name and address of the consumer, the date the complaint was received, the date the complaint was satisfied/paid and the amount of the consumer restitution paid.

“Ninety (90) Day Consumer Complaints.”

31. For a ninety (90) calendar day period running from the date that this fully executed Final Judgment and Agreed Permanent Injunction was filed with this Court, Defendants shall

satisfy all consumer complaints received by the Plaintiff, Defendants and the Better Business Bureau with full and complete refunds as requested in those complaint(s). Plaintiff will transmit to a designated representative of Defendants, and request that the Better Business Bureau transmit to the designated representative of the Defendants, immediately upon receipt, any consumer complaint regarding Defendants for full and complete refunds as requested in those complaint(s) as set forth herein. Within thirty (30) calendar days of receipt of any “Ninety (90) Day Consumer Complaints,” Defendants shall resolve the consumer complaints with full and complete refunds as requested in the complaints.

32. Within thirty (30) calendar days of the completion of the “Ninety(90)-Day Consumer Complaint” redress provision period set forth in Paragraph 31 above, Defendants shall provide a detailed written report to Plaintiff setting forth the resolution of consumer complaints as required therein. The report will state, for each consumer, the name and address of the consumer, the date the complaint was received, the date the complaint was satisfied/paid and the amount of the consumer restitution paid.

33. The Plaintiff, upon notification to Defendants, shall have the ability to examine any and all documents or materials related to the restitution/redress process.

N. Civil Penalties

34. **IT IS FURTHER ORDERED THAT** Defendants shall pay Four Hundred Fifty Thousand Dollars (\$450,000.00) to the Office of the Attorney General as civil penalties pursuant to §431.0585 of the TFDCa and to DTPA §17.47(c)(1)-(2), subject to paragraph 35 below. It is ordered that Defendants’ indebtedness to the State of Texas for civil penalties, identified in this paragraph, for violations of the DPTA and TFDCa, constitute a civil fine or penalty to and for a governmental unit and not compensation for actual pecuniary loss.

35. **IT IS FURTHER ORDERED** that ninety-one (91) days following receipt by the

State of Texas from Defendants of the total sum of Three Hundred Fifty Thousand Dollars (\$350,000.00) to the Office of the Attorney General, as outlined in paragraphs 34, 38, and 39, with One Hundred Thousand Dollars (\$100,000.00) payable as civil penalties pursuant to §431.0585 of the TFDCA and to DTPA §17.47(c)(1)-(2); with Two Hundred Forty Thousand Dollars (\$240,000.00) designated as attorneys fees and investigative costs for the Office of the Attorney General under §431.047 of the TFDCA and the TEX. GOVT. CODE §402.006 (c); and Ten Thousand Dollars (\$10,000.00) to the Texas Department of State Health Services to cover the investigative costs pursuant to §431.047 of the TFDCA, the State of Texas shall consider the monetary portion of the Final Judgment and Agreed Permanent Injunction , as ordered in paragraphs 34 and 38, satisfied in full unless the State has evidence that this Final Judgment and Agreed Permanent Injunction should be reopened as outlined in Paragraphs 36 and 37, below. The State of Texas then may reopen this Final Judgment and Agreed Permanent Injunction for the sole purpose of allowing the State of Texas to modify the monetary liability of Defendants.

36. **IT IS FURTHER ORDERED** that Defendants' agreement to and the Court's approval of this Final Judgment and Agreed Permanent Injunction are expressly premised upon:

- A. The truthfulness, accuracy and completeness of the financial statements and information provided to the Plaintiff by the corporate Defendants and Defendant Steve Warshak, individually, during the pendency of this matter and resubmitted collectively by letter of February 3, 2006, from Defendants' attorney, Jonathan P. Saxton, which contain material information relied upon by Plaintiff in negotiating and agreeing to the terms of this Final Judgment and Agreed Permanent Injunction, and
- B. Defendants having made all required payments, as set forth in Paragraph 39, below, in a timely manner.

37. **IT IS FURTHER ORDERED** that if, upon motion by the Plaintiff, this Court

finds that the corporate Defendants or Defendant Steve Warshak, individually, have misrepresented or failed to disclose any material asset, the value of which exceeds \$1,000.00, in the financial statements and supporting documents provided to the Plaintiff during the pendency of this matter and resubmitted collectively by letter of February 3, 2006, from Defendants' attorney, Jonathan P. Saxton, the Court shall enter a judgment against the Defendants, jointly and severally, in favor of the Plaintiff for the total amounts listed in Paragraph 34 (\$450,000.00) and Paragraph 38 (\$250,000.00), which total amount shall be rendered immediately due and payable, less any payments already made. All other terms of this Final Judgment and Agreed Permanent Injunction shall remain in full force and effect unless otherwise ordered by the Court. For the purposes of reopening or enforcing this Final Judgment and Agreed Permanent Injunction, Defendants waive any right to contest any of the allegations set forth in Plaintiff's Original Petition filed in this matter.

O. Payment to the Plaintiff

38. **IT IS FURTHER ORDERED** that Defendants Berkeley Premium Nutraceuticals, Inc., Lifekey, Inc., Lifekey Healthcare, Inc., Warner Health Care, Inc., Boland Naturals, Inc., Wagner Nutraceuticals, Inc. and Steve Warshak shall make payments to the Plaintiff in an amount totaling Three Hundred and Fifty Thousand (\$350,000.00) with One Hundred Thousand Dollars (\$100,000.00) payable as civil penalties pursuant to §431.0585 of the TFDCA and to DTPA §17.47(c)(1)-(2); Two Hundred Forty Thousand Dollars (\$240,000.00) to the Office of the Attorney General as attorneys fees and investigative costs under §431.047 of the TFDCA and the TEX. GOVT. CODE §402.006 (c) and Ten Thousand Dollars (\$10,000.00) to cover the investigative costs pursuant to §431.047 of the TFDCA for the Texas Department of State Health Services, subject to paragraph 37 above. All payments required herein shall be in the form of a certified bank check made payable to the "Office of the Attorney General," except for Payment

One requires an additional certified bank check made payable to the Texas Department of State Health Services, and sent to Joyce Wein Iliya, Assistant Attorney General, Office of the Attorney General, Consumer Protection and Public Health Division, 1412 Main Street, Suite 810, Dallas, Texas 75202. Time is of the essence for the payments to the Plaintiff, as stated in Paragraph 39.

39. **IT IS FURTHER ORDERED** that the payment to the Plaintiff shall be made in accordance with the following schedule:

Payment 1: Within fifteen calendar days of the filing of this fully executed Final Judgment and Agreed Permanent Injunction with this Court, Defendants shall deliver to Plaintiff, as directed herein, a payment by two certified bank checks, one in the amount of Ten Thousand Dollars (\$10,000.00) made out to Texas Department of State Health Services and one for Sixty Thousand Dollars (\$60,000.00) made out to the Office of the Attorney General;

Payment 2: Within one hundred eighty (180) calendar days of the filing of this fully executed Final Judgment and Agreed Permanent Injunction with this Court, Defendants shall deliver to Plaintiff, as directed herein, a payment by certified bank check in the amount of Fifty-six Thousand Dollars (\$56,000.00);

Payment 3: Within three hundred sixty (360) calendar days of the filing of this fully executed Final Judgment and Agreed Permanent Injunction with this Court, Defendants shall deliver to Plaintiff, as directed herein, a payment by certified bank check in the amount of Fifty-six Thousand Dollars (\$56,000.00);

Payment 4: Within five hundred forty (540) calendar days of the filing of this fully executed Final Judgment and Agreed Permanent Injunction with this Court, Defendants shall deliver to Plaintiff, as directed herein, a payment by certified bank check in the amount of Fifty-six Thousand Dollars (\$56,000.00);

Payment 5: Within seven hundred twenty (720) calendar days of the filing of this fully executed Final Judgment and Agreed Permanent Injunction with this Court, Defendants shall deliver to Plaintiff, as directed herein, a payment by certified bank check in the amount of Fifty-six Thousand Dollars (\$56,000.00);

Payment 6: Within nine hundred (900) calendar days of the filing of this fully executed Final Judgment and Agreed Permanent Injunction with this Court, Defendants shall deliver to Plaintiff, as directed herein, a payment by certified bank check in the amount of Fifty-six Thousand Dollars (\$56,000.00).

40. **IT IS FURTHER ORDERED** that in the event that Defendants do not fulfill, or only partially fulfill, the payment obligations set forth in Paragraph 39 above, Defendants shall

jointly and severally be liable immediately for payment of the entire amount of this Final Judgment and Agreed Permanent Injunction, as detailed in paragraphs 34 and 38 above totaling Seven Hundred Thousand Dollars (\$700,000.00), less any payments already made.

Notwithstanding any other provision of this Final Judgment and Agreed Permanent Injunction, Defendants agree that, if they fail to meet the payment obligations set forth in Paragraph 39, the facts as alleged in Plaintiff's Original Petition filed in this matter shall be taken as true in any subsequent litigation filed by the State of Texas to enforce its rights pursuant to this Final Judgment, including, but not limited to, a non-dischargeability complaint in any subsequent bankruptcy proceeding.

P. Additional Provisions

41. **IT IS FURTHER ORDERED** that this Final Judgment and Agreed Permanent Injunction shall not exempt Defendants from complying with all federal, state, or local laws, regulations, ordinances, or codes, including but not limited to, Chapter 431 of the Texas Health and Safety Code, the Texas Food, Drug and Cosmetic Act, and Chapter 17 of Texas Business and Commerce Code, the Deceptive Trade Practices Act.

42. **IT IS FURTHER ORDERED** that this Final Judgment and Agreed Permanent Injunction does not constitute an approval by the Plaintiff of any of Defendants' advertising, products, promotions and/or practices, and Defendants shall make no representations to the contrary.

43. **IT IS FURTHER ORDERED** that this Final Judgment and Agreed Permanent Injunction does not limit the remedies available to the Office of the Attorney General in connection with any future violation of Texas laws or regulations by Defendants.

44. **IT IS FURTHER ORDERED** that this Final Judgment and Agreed Permanent Injunction shall not affect the rights of any private party to pursue any remedy or remedies

pursuant to the laws of the State of Texas or any federal law. The resolution of this matter does not release or affect in any way the claims of any individual consumer or group of consumers. No claims of any person not a signatory to this Final Judgment and Agreed Permanent Injunction are compromised or released.

45. **IT IS FURTHER ORDERED** that Defendants shall pay all costs of the Court.

46. The clerk of the Court is authorized to issue such writs of execution or other process necessary to collect and enforce this Judgment.

47. The Court retains jurisdiction to enforce this Final Judgment and Agreed Permanent Injunction .

48. All relief not granted herein is hereby denied.

AGREED TO BY:

Plaintiff State of Texas

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

ED D. BURBACH
Deputy Attorney General for Litigation

PAUL D. CARMONA
Assistant Attorney General
Chief, Consumer Protection and Public Health Division

JOYCE WEIN ILIYA
Assistant Attorney General
Consumer Protection and Public Health Division
State Bar No. 00784319
1600 Pacific Avenue, Suite 1700
Dallas, Texas 75201-3513
(214) 969-7639, ext. 111
Facsimile: (214) 969-7615

Date: _____

STIPULATED AND AGREED TO BY:

DEFENDANTS:

Berkeley Premium Nutraceuticals, Inc.
Lifekey, Inc.
Warner Health Care, Inc.
Boland Naturals, Inc.
Wagner Nutraceuticals, Inc.

By: _____
STEVE WARSHAK, President

Date: _____

Steve Warshak, Individually

STEVE WARSHAK

Date: _____

Counsel for Defendants

By: _____
Jonathan P. Saxton
Rendigs, Fry, Kiely & Dennis, LLP,
State Bar No:
One West Fourth Street, Suite 900
Cincinnati, Ohio 45202
(513) 381-9288
Facsimile: (513) 381-9206

Date: _____

SO ORDERED, this ____ day of _____ 2006.

District Judge