

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE**

FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	CIVIL ACTION NO.
v.)	
)	
PINNACLE MARKETING, L.L.C.,)	
also d/b/a Health Remedies,)	STIPULATED FINAL
Acadia Skin Care,)	JUDGMENT & ORDER
Atlantic Skin Care,)	FOR PERMANENT INJUNCTION
Atlantic Skin Care Products, and)	AND MONETARY SETTLEMENT
Pinnacle Marketing Group, L.L.C.,)	
TODD FLAHERTY,)	
MATTHEW TASKER,)	
and)	
KEVIN CURTY,)	
)	
Defendants.)	

WHEREAS Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), has commenced this action by filing the Complaint herein; Defendants Pinnacle Marketing, L.L.C., Todd Flaherty, Matthew Tasker, and Kevin Curty have waived service of the Summons and Complaint; the parties have been represented by the attorneys whose names appear hereafter; and the parties have agreed to settlement of this action upon the following terms and conditions, without adjudication of any issue of fact or law and without Defendants admitting liability for any of the matters alleged in the Complaint;

THEREFORE, on the joint motion of Plaintiff and Defendants, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. This Court has jurisdiction over the subject matter of this case and jurisdiction

over all parties. Venue in the District of Maine is proper.

2. The Complaint states a claim upon which relief can be granted, and the Commission has the authority to seek the relief it has requested.

3. The activities of Defendants are in or affecting commerce, as defined in 15 U.S.C. § 44.

4. Defendants waive all rights to seek judicial review or otherwise challenge or contest the validity of this Order. Defendants also waive any claims 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.

5. The Commission and the Defendants stipulate and agree to this Final 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 Final Order. By stipulating to this Final Order, the Defendants do not admit any of the allegations set forth in the Complaint, other than jurisdictional facts.

6. This Order does not constitute, and shall not be interpreted to constitute, an admission by Defendants or a finding by the Court that Defendants have engaged in any violations of law.

7. This action and the relief awarded herein are in addition to, and not in lieu of, other remedies as may be provided by law.

8. Each party shall bear its own costs and attorneys' fees.

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

DEFINITIONS

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

1. “Commerce” means as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
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. “Covered product or service” means any product, service, or program, including, but not limited to, any dietary supplement, food, drug, cosmetic, or device, which purportedly provides health benefits, including weight loss, inch loss, fat loss, or exercise or fitness benefits.
4. “Defendants” mean Pinnacle Marketing, L.L.C. and its successors and assigns (“Pinnacle”), Todd Flaherty (“Flaherty”), Matthew Tasker (“Tasker”), and Kevin Curty (“Curty”).
5. “Endorsement” means as defined in 16 C.F.R. § 255.0(b).
6. “Food,” “drug,” “device,” and “cosmetic” mean as defined in Section 15 of the FTC Act, 15 U.S.C. § 55.
7. The term “including” means “including, without limitation.”

CONDUCT PROHIBITIONS

I. PROHIBITED FALSE REPRESENTATIONS

IT IS ORDERED that Defendants, their successors and assigns, and their officers, agents, servants, employees, and attorneys, and all persons and entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any corporation, subsidiary, division, trade name, or other entity, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Ultra Carb 3000, or any other dietary supplement, food, or non-prescription drug or device, are hereby permanently enjoined from making any representation, expressly or by implication, in any manner, including through the use of endorsements, that such product:

- A. causes substantial weight loss by blocking the absorption of fat; and
- B. causes quick and substantial weight loss without the need to exercise or reduce caloric intake.

II. PROHIBITED UNSUBSTANTIATED REPRESENTATIONS

IT IS FURTHER ORDERED that Defendants, their successors and assigns, and their officers, agents, servants, employees, and attorneys, and all persons and entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any corporation, subsidiary, division, trade name, or other entity, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Ultra Carb 3000 or any other covered product or service, in or affecting commerce, are hereby permanently enjoined from making any representation, in any manner, expressly or by implication, including through the use of endorsements:

- A. that such product or service causes rapid or substantial weight loss or fat loss;
- B. that such product or service causes substantial weight loss by blocking the absorption of carbohydrates; or
- C. about the benefits, performance, efficacy, safety, or side effects, of such product or service;

unless the representation is true and at the time of making such representation, defendants possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III. PROHIBITED REPRESENTATIONS ABOUT TESTS, STUDIES, AND RESEARCH

IT IS FURTHER ORDERED that Defendants, their successors and assigns, officers, agents, servants, employees, and attorneys, and all persons and entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any corporation, subsidiary, division, trade name, or other entity, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service, in or affecting commerce, are hereby permanently enjoined from misrepresenting, in any manner, expressly or by implication, including through the use of endorsements, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

IV. FOOD AND DRUG REGULATIONS

IT IS FURTHER ORDERED that:

- A. Nothing in this Order shall prohibit Defendants from making any representation

for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration; and

- B. Nothing in this Order shall prohibit Defendants from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

V. MONETARY RELIEF

IT IS FURTHER ORDERED that judgment is hereby entered against Defendants, jointly and severally in the amount of TWO HUNDRED AND NINETEEN THOUSAND (\$219,000), under the following terms and conditions:

- A. Within ten (10) days of the date of entry of this Order, Defendants, jointly and severally, shall pay the sum of TWO HUNDRED THOUSAND (\$200,000) to the Commission by wire transfer or certified cashier's check made payable to the Federal Trade Commission. Within sixty (60) days of the date of entry of this Order, Defendants, jointly and severally, shall pay the sum of NINETEEN THOUSAND (\$19,000) to the Commission by wire transfer or certified cashier's check made payable to the Federal Trade Commission.
- B. All funds paid pursuant to this Order shall be deposited into a fund administered by the Commission or its agent to be used for equitable relief, including but not limited to consumer redress and any attendant expenses for the administration of such equitable relief. In the event that direct redress to consumers is wholly or

partially impracticable or funds remain after redress is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to the Defendants' practices alleged in the complaint. Any funds not used for such equitable relief shall be deposited to the United States Treasury as disgorgement. Defendants shall have no right to challenge the Commission's choice of remedies under this Paragraph. Defendants shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment pursuant to this Paragraph shall be deemed a payment of any fine, penalty or punitive assessment.

- C. In accordance with 31 U.S.C. § 7701, Defendants are hereby required, unless they have done so already, to furnish to the FTC their taxpayer identifying numbers and/or social security numbers, which shall be used for purposes of collecting and reporting on any delinquent amount arising out of Defendants' relationship with the government.
- D. Proceedings instituted under this Paragraph are in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law, including any other proceedings the Commission may initiate to enforce this Order.
- E. In the event of any default by any Defendant of its obligations set forth in Paragraph V(A), including any failure to timely and completely fulfill any of the payment obligations, the amount of TWENTY TWO MILLION FIVE HUNDRED AND SEVENTY TWO THOUSAND AND FIVE HUNDRED AND SIXTY ONE DOLLARS (\$22,572,561), which Defendants stipulate is the net

amount consumers paid to purchase the Ultra Carb 3000 products, less the sum of any amounts Defendants paid in this action after the date of this Final Order, shall become immediately due and payable, and interest computed at the rate prescribed under 28 U.S.C. § 1961, as amended, shall immediately begin to accrue on the unpaid balance.

F. Defendants agree that, if they fail to timely fulfill any of their payment obligations required under this Order, the facts as alleged in the Complaint filed in this matter shall be taken as true in any subsequent litigation filed by the Commission to enforce its rights pursuant to this Order, including but not limited to a nondischargeability complaint in any bankruptcy case.

G. Defendants shall provide their complete list of Ultra Carb 3000 purchasers, including most recently updated contact information, to the Commission within thirty (30) days of the date of entry of this Order. The customer list shall be in a searchable electronic format and shall, to the extent such information is maintained in the ordinary course of business, include the name and address of all purchasers of Ultra Carb 3000, the amount of each product purchased, the date of purchase, and the number of times each consumer made a repeat purchase.

VI. RIGHT TO REOPEN

A. IT IS FURTHER ORDERED that the Commission's agreement to this Order is expressly premised upon Defendants' financial condition as represented by the information Defendants provided to the Commission regarding each Defendant's financial condition:

1) the sworn January 2004 financial statements of

Pinnacle Marketing and Messrs. Flaherty, Tasker,
and Curty; and

2) counsel's correspondence and enclosures
regarding Defendants' financial condition dated
January 30, 2004, February 25, 2004, March 11,
2004 (Pinnacle Marketing and related company
balance sheets), April 1, 2004 (Flaherty loan
application), April 9, 2004, April 19, 2004, April
28, 2004, and May 4, 2004 (letters).

These financial statements and supporting documents contain material
information upon which the Commission relied in negotiating and agreeing to the
terms of this Order.

B If, upon motion by the Commission, a Court should determine that any of the
Defendants made a material misrepresentation or omitted material information
concerning its financial condition, then the Court shall enter judgment against the
Defendant(s) who made or is responsible for the misrepresentation to the
Commission, in favor of the Commission, in the amount of TWENTY TWO
MILLION FIVE HUNDRED AND SEVENTY TWO THOUSAND AND FIVE
HUNDRED AND SIXTY ONE DOLLARS (\$22,572,561), which Defendants
stipulate is the net amount consumers paid to purchase the Ultra Carb 3000
products, less the sum of any amounts Defendants paid in this action after the date
of this Final Order, which amount would be rendered immediately due and
payable and interest computed at the rate prescribed under 28 U.S.C. § 1961, as

amended, shall immediately begin to accrue on the unpaid balance.

Provided, however, that in all other respects this Order shall remain in full force and effect unless otherwise ordered by the Court; and *provided further*, that any proceedings instituted under this Paragraph shall be in addition to and not in lieu of any other civil or criminal remedies as may be provided by law, including proceedings the Commission may initiate to enforce this Order. For the purposes of reopening or enforcing this Paragraph VI, including but not limited to a non-dischargeability complaint filed in a bankruptcy case, the Defendants agree not to contest any of the allegations set forth in the Complaint filed in this matter.

VII. COMPLIANCE MONITORING

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

- A. Within twenty (20) days of receipt of written notice from a representative of the Commission, Defendants Pinnacle, Flaherty, Tasker, and Curty each shall submit additional written reports, sworn to 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. In addition, 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; or
 - 2. 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;

Provided 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)).

- 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.

VIII. 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. Defendants Flaherty, Tasker, and Curty each shall notify the Commission of the following:
 - a. Any changes in his residence, mailing addresses, and telephone numbers, within ten (10) days of the date of such change;
 - b. Any changes in his employment status (including self-employment) within ten (10) days of the date of such change.Such notice shall include the name and address of each business

that the Defendant is affiliated with, employed by, or performs services for; a statement of the nature of the business; and a statement of his duties and responsibilities in connection with the business;

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

2. Defendants Pinnacle and Flaherty, in his capacity as President of Pinnacle, shall notify the Commission of any changes in corporate structure that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the 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 Defendant learns less than thirty (30) days prior to the date such action is to take place, Defendant shall notify the Commission as soon as is practicable after obtaining such knowledge.

B. One hundred eighty (180) days after the date of entry of this Order, Defendants Pinnacle, Flaherty, Tasker, and Curty shall provide a written report to the FTC, sworn to under penalty of perjury, setting forth in detail the manner and form in which each Defendant has complied and is complying with this Order. This

report shall include, but not be limited to:

1. Any changes required to be reported pursuant to subparagraph (A) above;
and
 2. A copy of each acknowledgment of receipt of this Order obtained by Defendant pursuant to Paragraph X.
- C. For the purposes of this Order, each Defendant shall, unless otherwise directed by the Commission's authorized representatives, mail all written notifications to the Commission to: Associate Director for Enforcement, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580. Attn: FTC v. Pinnacle Marketing, L.L.C., et al. (D. Me.).
- D. For purposes of the compliance reporting required by this Paragraph, the Commission shall communicate with Defendants through their designated attorney unless any Defendants or their attorney subsequently notifies the Commission in writing to the address stated in Subparagraph (C) above that the Defendant is no longer represented, in which case the Commission is authorized to communicate directly with such Defendants.

IX. RECORD KEEPING PROVISIONS

IT IS FURTHER ORDERED that, for a period of six (6) years from the date of entry of this Order, Defendant Pinnacle and any business where (1) Defendant Flaherty, Tasker or Curty is the majority owner, an officer, or director of the business, or directly or indirectly manages or controls the business and where (2) the business engages, or substantially assists others engaged in the advertising, marketing, promotion, offering for sale, distribution or sale of any covered

product or service, and their agents, employees, officers, corporations, successors, and assigns, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby restrained and enjoined from failing to create and retain the following records:

- A. Accounting records that reflect the cost of goods or services sold, revenues generated, and the disbursement of such revenues;
- B. Personnel records accurately reflecting: the name, address, and telephone number of each person employed in any capacity by such business, including as an independent contractor; 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;
- C. Customer files containing the names, addresses, telephone numbers, dollar amounts paid, quantity of items or services purchased, and description of items or services purchased, to the extent such information is obtained in the ordinary course of business;
- D. Complaints and refund requests (whether received directly, indirectly, or through any third party) and any responses to those complaints or requests; and
- E. Copies of all advertisements, promotional materials, sales scripts, training materials, or other marketing materials utilized in the advertising, marketing, promotion, offering for sale, distribution or sale of any covered product or service;
- F. All materials that were relied upon in making any representations contained in the materials identified in Subparagraph (E);

- G. All other documents evidencing or referring to the accuracy of any claim therein or to the efficacy of any covered product or service, including, but not limited to, all tests, reports, studies, demonstrations, or other evidence that confirm, contradict, qualify, or call into question the safety or efficacy of such covered product or service; and
- H. Records accurately reflecting the name, address, and telephone number of each manufacturer or laboratory engaged in the development or creation of any testing obtained for the purpose of advertising, marketing, promoting, offering for sale, distributing, or selling any covered product or service.

X. DISTRIBUTION OF ORDER BY DEFENDANTS

IT IS FURTHER ORDERED that, for a period of three (3) years from the date of entry of this Order:

- A. Defendant Pinnacle shall deliver a copy of this Order to all principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this Order, and shall secure from each such person a signed and dated statement acknowledging receipt of the Order. Defendant Pinnacle shall deliver this Order to current personnel within thirty (30) days after the date of service of this Order, and to new personnel within thirty (30) days after the person assumes such position or responsibilities.
- B. Defendants Flaherty, Tasker, and Curty shall deliver a copy of this Order to the principals, officers, directors, managers and employees under Flaherty's, Tasker's, and Curty's control for any business that (a) employs or contracts for

personal services from Defendants Flaherty, Tasker, and Curty and (b) has responsibilities with respect to the subject matter of this Order. Defendants Flaherty, Tasker, and Curty shall secure from each such person a signed and dated statement acknowledging receipt of the Order within thirty (30) days after the date of service of the Order or the commencement of the employment relationship.

XI. ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANTS

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

XII. RETENTION OF JURISDICTION

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

XIII. SCOPE OF ORDER

IT IS FURTHER ORDERED that this Order resolves only claims against the named Defendants and does not preclude the Commission from initiating further action or seeking any remedy against any other persons or entities, including without limitation persons or entities who may be subject to portions of this Order by virtue of actions taken in concert or participation with Defendants, and persons or entities in any type of indemnification or contractual relationship with Defendants.

JUDGMENT IS THEREFORE ENTERED in favor of Plaintiff and against Defendants,

pursuant to all the terms and conditions recited above.

SO STIPULATED:

Laureen Kapin

LAUREEN KAPIN
CAROL JENNINGS
AMY M. LLOYD
Federal Trade Commission
600 Pennsylvania Ave.
Washington, D.C. 20580
(202) 326-3237
(202) 326-2559 (facsimile)

Todd Flaherty
PINNACLE MARKETING, LLC

TODD FLAHERTY, individually and as
President of PINNACLE MARKETING, LLC

Matt Tasker

MATT TASKER, individually and as Vice
President of PINNACLE MARKETING, LLC

Kevin Curty

KEVIN CURTY, individually and as Manager
of PINNACLE MARKETING, LLC

Gary Hailey

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SO ORDERED

DATED: _____

UNITED STATES DISTRICT JUDGE