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AL9545

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

FEDERAL TRADE COMMISSION,	)	Hon. Garrett E. Brown, Jr.
	)	
Plaintiff,	)	Civil Action No. 05-3460 (GEB)
	)	
v.	)	
	)	
ROBERT CHINERY, JR., TRACY	)	
A. CHINERY, and RTC RESEARCH	)	
& DEVELOPMENT, LLC,	)	
Defendants.	)	
	)	

**STIPULATED FINAL ORDER FOR PERMANENT INJUNCTION  
AND SETTLEMENT OF CLAIMS FOR MONETARY RELIEF  
AS TO ALL DEFENDANTS**

Plaintiff, the Federal Trade Commission ("FTC" or "Commission") filed a Complaint for Permanent Injunction and Other Equitable Relief ("Complaint") against Defendants Robert Chinery, Jr.; Tracy A. Chinery; and RTC Research & Development, LLC (collectively, "Defendants") pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), to secure permanent injunctive relief, restitution, disgorgement, and other equitable relief against Defendants for their alleged deceptive acts or practices and false advertisements in connection with the advertising, promotion, and sale of an alleged weight-loss product, Xenadrine EFX, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

Other than the allegations pertaining to jurisdictional facts and except as otherwise stated herein, Defendants deny the allegations in the Complaint. Defendants agree to the terms of the Order to avoid the uncertainties and costs of litigation.

The Commission and Defendants have stipulated to the entry of the following Order in settlement of the Commission's Complaint against Defendants. The Court, being advised in the premises, finds:

#### **FINDINGS**

1. This Court has jurisdiction over the subject matter of this case and jurisdiction over all parties pursuant to 15 U.S.C. §§ 45(a), 52, and 53(b) and 28 U.S.C. §§ 1331, 1337(a) and 1345.
2. Venue in the District of New Jersey is proper under 15 U.S.C. § 53(b) and 28 U.S.C. § 1391(b) and (c).

3. The acts and practices of Defendants were and are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

4. The Complaint states a claim upon which relief can be granted under Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, and the Commission has the authority to seek the relief it has requested.

5. The Commission and Defendants stipulate and agree to this Order, without trial or final adjudication of any issue of fact or law, to settle and resolve all matters in dispute arising from the Complaint through the date of entry of this Order. Other than the allegations pertaining to jurisdictional facts and except as otherwise stated herein, Defendants deny the allegations in the Complaint. By entering this stipulation, Defendants do not admit that they, or any one of them, has engaged in conduct prohibited by Sections 5 or 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. Nothing in this stipulation shall be considered or construed to be an admission of liability by Defendants.

6. 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.

7. Pursuant to Federal Rule of Civil Procedure 65(d), the provisions of this Order are binding upon Defendants, and their officers, agents, servants, employees, and all other persons or entities in active concert or participation with them, who receive actual notice of this Order by personal service or otherwise.

8. Nothing in this Order obviates Defendants' obligation to comply with Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52.

9. This Order was drafted jointly by the Commission and Defendants and reflects the negotiated agreement of the parties. Each party reserves all rights not expressly addressed in this Order.

10. The paragraphs of this Order shall be read as the necessary requirements for compliance and not as alternatives for compliance and no paragraph serves to modify another paragraph unless expressly so stated.

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

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

13. This Order resolves (a) all of the Commission's claims against Defendants and Nutraquest, Inc., a company owned by Defendants and which previously was authorized to sell Xenadrine EFX and which is now a debtor-in-possession pursuant to Chapter 11 of the United States Bankruptcy Code; and (b) all of the Commission's claims against any other person or entity based upon advertisements for Xenadrine EFX that were created or disseminated by or on behalf of Defendants on or before the date of entry of this Order, with the exception of any claims arising under the Agreement Containing Consent Order entered by the Commission in the administrative proceeding captioned *In the Matter of Cytodyne, LLC, Evergood Products Corp., and Melvin L. Rich*, FTC Docket No. C-4146. This Order 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 future actions taken in concert or participation with Defendants, and by virtue of such

future actions, and any other persons or entities in any type of indemnification or contractual relationship with Defendants.

## **ORDER**

### **DEFINITIONS**

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

1. Unless otherwise specified, "Defendants" shall mean:
  - a. Robert Chinery, Jr. ("Robert Chinery"), individually and in his capacity as an officer and director of Nutraquest, Inc. and as an officer of RTC Research & Development, LLC;
  - b. Tracy A. Chinery ("Tracy Chinery"), individually and in her capacity as an officer of Nutraquest, Inc. and as managing member of RTC Research & Development, LLC; and
  - c. RTC Research & Development, LLC ("RTC"), a limited liability company, its managers, members, divisions and subsidiaries, its successors and assigns.
  
2. "Advertising" and "promotion" shall mean any written or verbal statement, illustration or depiction designed to effect a sale or create interest in the purchasing of goods, whether it appears in a brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, packaging, package insert, label, film, slide, radio, television or cable

television, audio program transmitted over a telephone system, program-length commercial (“infomercial”), the Internet, email, press release, video news release, or in any other medium.

3. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. “Competent and reliable scientific evidence” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

5. “Xenadrine EFX” shall refer to all past, present, and future formulations of any dietary supplement marketed under the name Xenadrine EFX.

6. “Substantially similar product” shall mean any product containing active ingredients identical to those of Xenadrine EFX and any product containing a majority of active ingredients common to the active ingredients in Xenadrine EFX.

7. “Weight-loss product” shall mean any product, program, or service designed, used, or purported to produce weight loss, reduction or elimination of fat, slimming, or caloric deficit in a user of the product, program, or service and shall include but not be limited to Xenadrine EFX and any substantially similar product.

8. “Covered product” shall mean any weight-loss product, dietary supplement, food, drug, or device.

9. “Endorsement” shall mean as defined in 16 C.F.R. § 255.0(b).

10. “Food,” “drug,” and “device” shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.

11. "Commission" shall mean the Federal Trade Commission.

12. "Eligible Purchasers" shall mean all consumers who purchased Xenadrine EFX between February 1, 2002 and May 22, 2006 and shall include:

- a. Consumers who purchased Xenadrine EFX directly from Nutraquest, Inc. and who can be specifically identified from information in one or more of Defendants' possession ("Direct Eligible Purchasers");
- b. Consumers who are members of the *Markowitz* plaintiff class of consumers of Xenadrine EFX, who have not opted out of the *Markowitz* settlement, who can be specifically identified by name and current address in the possession of *Markowitz* counsel, and who are identified in a searchable electronic file to be provided by *Markowitz* counsel to counsel for the Commission no later than twenty (20) days after entry of this Order ("*Markowitz* Eligible Purchasers"); and
- c. All other consumers who purchased Xenadrine EFX, who are not either Direct Eligible Purchasers or *Markowitz* Eligible Purchasers, and who have not opted out of the *Markowitz* settlement ("Other Eligible Purchasers").

13. "Participating Purchasers" shall mean all Eligible Purchasers who fully comply with the redress program procedures in Part VII of this Order. Participating Purchasers will receive redress in an amount that will be calculated based on the purchase of one bottle of Xenadrine EFX at a retail price of \$30.00 per bottle. Depending upon the number of allowable

claims, the redress amount distributed to Participating Purchasers may be a pro rata share of the Redress Account (less costs of notice and of administration of the Redress Account) rather than full reimbursement for purchases of Xenadrine EFX.

14. A requirement that any defendant “notify,” “furnish,” “provide,” or “submit” to the Commission shall mean that the defendant shall send the necessary information via overnight courier, costs prepaid, to:

Associate Director for Enforcement  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, DC 20580  
Attn: *FTC v. Robert Chinery, Jr., et al.* (D.N.J.)  
Civil Action No. 05-3460 (GEB)

15. The terms “and” and “or” in this Order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

16. The term “including” in this Order shall mean “without limitation.”

17. With regard to advertising disclosures, “clear(ly) and prominent(ly)” shall mean as follows:

- a. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement. *Provided, however,* that in any advertisement presented solely through visual or audio means, the disclosure may be made through the same means in



which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure shall be of a size and shade, with a degree of contrast to the background against which it appears, and shall appear on the screen for a duration and in a location, sufficiently noticeable for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

- b. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

**IT IS STIPULATED, AGREED, AND ORDERED THAT:**

**I.  
PROHIBITED REPRESENTATIONS FOR  
XENADRINE EFX AND CERTAIN OTHER PRODUCTS**

A. Defendants, directly or through any corporation, partnership, subsidiary, division, trade name, device, or other entity, and their officers, agents, servants, employees, and all persons and entities in active concert or participation with them who receive actual notice of this Order, by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Xenadrine EFX or any substantially similar

product are hereby permanently restrained and enjoined from making, or assisting others in making, directly or by implication, including through the use of endorsements or product names, any representation that:

1. Such product causes permanent or long-term weight loss; or
2. Such product enables users to lose substantial weight or fat without the need to increase exercise or reduce caloric intake.

B. Defendants, directly or through any corporation, partnership, subsidiary, division, trade name, device, or other entity, and their officers, agents, servants, employees, and all persons and entities in active concert or participation with them who receive actual notice of this Order, by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Xenadrine EFX or any other weight-loss product are hereby permanently restrained and enjoined from making, or assisting others in making, directly or by implication, including through the use of endorsements or product names, any representation that:

1. Such product causes weight loss or fat loss; or
2. Such product enables users to lose weight or fat, or any specific amount of weight or fat;

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

**II.  
PROHIBITED REPRESENTATIONS FOR COVERED PRODUCTS**

Defendants, directly or through any corporation, partnership, subsidiary, division, trade name, device, or other entity, and their officers, agents, servants, employees, and all persons and entities in active concert or participation with them who receive actual notice of this Order, by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, are hereby permanently restrained and enjoined from making, or assisting others in making, directly or by implication, including through the use of endorsements or product names, any representation regarding the health benefits, performance, efficacy, safety, or side effects of such product unless the representation is true, non-misleading, and, at the time it is made, Defendants possess and rely upon competent and reliable scientific evidence that substantiates the representation.

**III.  
PROHIBITED REPRESENTATIONS REGARDING TESTS OR STUDIES**

Defendants, directly or through any partnership, corporation, subsidiary, division, trade name, device, or other entity, and their officers, agents, servants, employees, and all persons and entities in active concert or participation with them who receive actual notice of this Order, by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, in or affecting commerce, are hereby permanently restrained and enjoined from making, or assisting others in making, directly or by implication, including through the use of endorsements or product names,

any misrepresentation about the existence, independence, contents, validity, results, conclusions, or interpretations of any test or study.

**IV.**

**PROHIBITED REPRESENTATIONS IN ENDORSEMENTS AND TESTIMONIALS**

Defendants, directly or through any corporation, partnership, subsidiary, division, trade name, device, or other entity, and their officers, agents, servants, employees, and all persons and entities in active concert or participation with them who receive actual notice of this Order, by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, are hereby permanently restrained and enjoined from making, or assisting others in making, directly or by implication:

A. Any misrepresentation that a user testimonial or endorsement of such product represents the user's or endorser's actual experience that resulted from using the product under the circumstances depicted in the endorsement; and

B. Any representation about any user or endorser of such product unless they disclose, clearly and prominently, any material connection between such user or endorser and any defendant and any material connection between such user or endorser and any other individual or entity manufacturing, advertising, promoting, offering for sale, selling, or distributing such product. For purposes of this Part, a "material connection" shall mean any relationship that materially affects the weight or credibility of the user testimonial or endorsement and that would not reasonably be expected by consumers, including, but not limited to, monetary payments and

the provision of goods, services, or other benefits to anyone providing a user testimonial or endorsement.

**V.  
FDA-APPROVED CLAIMS**

Nothing in Part II of this Order shall prohibit Defendants from making any representation:

A. 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 for any new drug application approved by the Food and Drug Administration; and

B. 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.

**VI.  
MONETARY JUDGMENT AND CONSUMER REDRESS**

A. Judgment in the amount necessary to fund the redress program described in Part VII, below, is hereby entered jointly and severally against Defendants. *Provided, however,* that, judgment shall not be recorded as a lien unless and until Defendants fail to make any payment required under Part VII within five (5) calendar days of the due date of such payment. *Provided, further,* that subject to the provisions of Part VIII, this judgment shall be deemed to be fully satisfied if Defendants, jointly and severally, fully comply with the terms of Parts VI and VII of this Order.

B. In accordance with 31 U.S.C. § 7701, Defendants are hereby required, unless they have done so already, to furnish to the Commission their taxpayer identifying numbers and/or social security numbers, which may be used for purposes of collecting and reporting on any delinquent amount arising out of Defendants' relationship with the government.

C. Proceedings instituted under this Part 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.

## **VII. REDRESS PROGRAM**

Defendants shall provide redress to Eligible Purchasers of Xenadrine EFX in accordance with the provisions of this Part.

A. Within twenty (20) days after entry of this Order, Defendants shall provide on a confidential basis to the Commission a searchable electronic file containing the name and contact information for all Direct Eligible Purchasers, together with the total number of units ordered by each such consumer ("Consumer Database"). The information shall be updated through the National Change of Address database and shall be accompanied by a sworn affidavit attesting to its accuracy.

B. The redress program shall be administered by a Redress Administrator selected by the Commission. Notice and administrative costs for the redress program will be reasonably consistent with the Commission's past experience regarding notice and administrative costs for other redress programs. Defendants shall have no right to contest the Commission's selection of

the Redress Administrator. The Commission will provide the Consumer Database to the Redress Administrator.

- C. The parameters of the redress program are as follows:
1. Redress Eligibility Notices in the form set forth in Attachment A, containing the Claim Form set forth in Attachment B, shall be issued to all Direct Eligible Purchasers as identified in the Consumer Database and to all *Markowitz* Eligible Purchasers.
  2. Similarly worded public notices shall also be published in newspapers and in magazines in which Xenadrine EFX was advertised to reach Other Eligible Purchasers. The Commission shall consult with class counsel in the *Markowitz* class action with regard to the content, scope, location, and frequency of publication of the public notices, but all final decisions regarding the public notice and redress administration shall be made by the Commission.
  3. Eligible Purchasers who verify their eligibility for a refund by returning a signed Claim Form within the time specified in the Redress Eligibility Notices or the public notices will be Participating Purchasers. The signature and the act of submitting a claim for redress as a Participating Purchaser shall be deemed to be an unsworn declaration made under penalty of perjury in accordance with 28 U.S.C. § 1746, and all claim forms shall so indicate.

D. Defendants shall fund the redress program as follows:

1. Defendants shall provide to the Commission the amount of eight million dollars (\$8,000,000) within ten (10) business days after the date of entry of this Order by electronic funds transfer in accordance with directions to be provided by the Commission. The Commission, or its Redress Administrator, shall pay this fund into a Redress Account to be used to pay redress to Participating Purchasers and to pay the costs of notice and administration of the redress program. The one hundred thousand dollars (\$100,000) previously collected by the Commission in its settlement with Cytodyne LLC, Evergood Products Corp., and Melvin L. Rich shall likewise be placed into the Redress Account.
2. If, after completion of the claims process in subparagraph C of this Part, the amount of complete redress payments to Participating Purchasers plus the costs of notice and administration of the redress program is less than the funds in the Redress Account, then any remaining funds shall be deposited as equitable disgorgement into the U.S. Treasury.
3. In the event that funds in the Redress Account provided pursuant to subparagraph D(1) of this Part are insufficient to provide complete redress payments to Participating Purchasers pursuant to subparagraph C of this Part plus the costs of notice and administration of the redress program, Defendants, jointly and severally, within ten (10) business days of receiving written notice from the Commission of the Redress Account



deficiency, shall pay to the Commission by electronic funds transfer, the additional amount necessary to cover the actual remaining costs of redress and administration, up to a maximum additional amount of four million eight hundred thousand dollars (\$4,800,000). By separate document, which is incorporated by reference into this Order and is designated as confidential except to the extent necessary for enforcement purposes, Defendants have provided the Commission with adequate assurances that funds in the amount of four million eight hundred thousand dollars (\$4,800,000) are currently available, have been appropriately segregated, and will remain available until the Commission either notifies Defendants that the redress program has been completed without any need for the segregated funds or seeks some or all of the segregated funds in accordance with this subparagraph D(3). *Provided, however,* that the funds need not remain available and need no longer be segregated upon the expiration of nine (9) months from the transfer of the initial redress amount under subparagraph D(1) of this Part, subject to the right of the Commission to seek an extension of time from the Court for good cause shown.

4. Defendants relinquish all dominion, control, and title to the payments made pursuant to this Part. Defendants shall make no claim to or demand for the return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of one or more of the

Defendants, Defendants acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

5. The payments made pursuant to this Part represent redress and are intended to be compensatory in nature, and no portion of such payment shall be deemed a payment of any fine, penalty, or punitive assessment.

#### **VIII. RIGHT TO REOPEN**

The Commission's agreement to the monetary judgment and consumer redress program set forth in Parts VI and VII is expressly premised on the truthfulness, accuracy, and completeness of the financial information and other representations submitted to the Commission by Defendants in connection with the court-ordered mediation in this matter. The financial information and other representations consists of information contained in two memoranda, with attached schedules and explanations, from WithumSmith+Brown dated November 1, 2005, and November 23, 2005, which the Defendants provided separately to the Commission, which are incorporated into this Order by reference, and which are designated as confidential except to the extent necessary for enforcement purposes (collectively, "Financial Information"); and certain additional representations made directly by the Defendants and listed in *i-vii*, below ("Additional Representations"):

- (i) The total sales of all products by Nutraquest, Inc. during the period February 1, 2002 to May 23, 2003, as set forth in Exhibit C (Revised) in the Financial Information.

- (ii) The total expenses of Nutraquest, Inc. (including expenses and costs of goods sold, selling and distribution expenses and general administrative expenses) for the period February 1, 2002 to May 23, 2003, as set forth in Exhibit C (Revised) in the Financial Information.
- (iii) The total royalties received from the sale of Xenadrine EFX by RTC from Nutraquest, Everrich, LLC and/or Cytodyne, LLC from inception to November 23, 2005, as set forth in Exhibit E in the Financial Information.
- (iv) The total "distributions" to Robert Chinery and Tracy Chinery from Nutraquest in 2002 and 2003, as set forth in Exhibit D contained in the Financial Information.
- (v) The total estimated Federal and State taxes paid by Robert Chinery and Tracy Chinery for 2002 and 2003, as set forth in Exhibit F contained in the Financial Information.
- (vi) The total amounts paid and/or to be paid by the Defendants (not including payments made on the Defendants' behalf by insurance companies) in connection with the settlement of claims during the pendency of the Chapter XI reorganization of Nutraquest, and/or as part of an approved plan of Chapter XI reorganization of Nutraquest, Inc. and its related Funding Agreement, will be not less than twenty-two million seven hundred fifty thousand dollars (\$22,750,000), inclusive of counsel fees and disbursements and other professional fees and expenses paid directly by

the Defendants and exclusive of payments to the Commission pursuant to this Order.

- (vii) Defendants have formally waived and released all past unpaid royalties owed to RTC by Cytodyne, LLC for sales of Xenadrine EFX through November 23, 2005 ("Past Due Royalties"). No Defendant, directly or through any business entity controlled by them, has received any benefit from Cytodyne, LLC, in the form of cash, credit, or offset against costs associated with future business activities in exchange for waiving and releasing those Past Due Royalties.

The parties stipulate that the Financial Information and the Additional Representations were material to the Commission's negotiation of and agreement to the terms of this Order and to the Commission's agreement to suspend the remaining amount of the monetary judgment.

A. If, upon motion by the Commission ("Motion to Reopen") and such further proceedings as the Court determines to be appropriate, the Court finds that the Financial Information and the Additional Representations listed in representations *i-vii* of this Part, above, contained any material misrepresentation or omission, the Court shall impose the following stipulated judgment against each Defendant named in that Motion to Reopen:

- I. **For any knowing material misrepresentation or omission in Additional Representations *i-vii*, above:** Judgment shall be entered jointly and severally against each such Defendant in the amount of fifteen million dollars (\$15,000,000), less any amounts paid by the Defendants in accordance with Parts VI.A and VII.D.

2. **For any other material misrepresentation or omission:** Judgment shall be entered jointly and severally against each such Defendant in an amount equal to the amount by which the misrepresentation or omission caused the amount of profits received by the Defendants from sales of Xenadrine EFX to be understated.

*Provided, however,* that it shall not be deemed to be a violation of this Part if one or more of the Defendants voluntarily discloses to the Commission the existence of a misrepresentation or omission in the financial and other information provided by the Defendants in the Financial Information or in Additional Representations *i-vii* of this Part, above, and if one or more of the Defendants tenders, and the Commission at its sole discretion accepts, payment in an amount equal to the amount by which the misrepresentation or omission caused the amount of profits received by the Defendants from sales of Xenadrine EFX to be understated.

B. *Provided, however,* that in all other respects this Order shall remain in full force and effect unless otherwise ordered by the Court. *Provided further,* that proceedings instituted under this Part would be in addition to, and not in lieu of, any other civil or criminal remedies as may be provided by law, including but not limited to contempt proceedings, or any other proceedings that the Commission or the United States may initiate to enforce this Order. For purposes of this Part, and any subsequent proceedings to enforce payment, including but not limited to a non-dischargeability complaint filed in a bankruptcy proceeding, Defendants agree not to contest any of the allegations in the Commission's Complaint.

C. Defendants shall establish, to the Commission's satisfaction, that the total amounts paid and/or to be paid by the Defendants (not including payments made on the

Defendants' behalf by insurance companies) in connection with the settlement of claims during the pendency of the Chapter XI reorganization of Nutraquest, and/or as part of an approved plan of Chapter XI reorganization of Nutraquest, Inc. and its related Funding Agreement will be not less than twenty-two million seven hundred fifty thousand dollars (\$22,750,000), inclusive of counsel fees and disbursements and other professional fees and expenses paid directly by the Defendants and exclusive of payments to the Commission pursuant to this Order. *Provided, however,* that Defendants' failure to directly and irreversibly pay such minimum amount shall not be deemed to be a violation of this Part if Defendants pay to the Commission as additional disgorgement the difference between such minimum amount shown and the lesser amount actually disbursed to resolve all non-FTC claims against Defendants.

D. In agreeing to this Order and to the amount of the funding that Defendants are to provide to the redress program described in Part VII, the Commission has specifically relied on representations by Defendants regarding state and federal taxes paid relating to income derived from sales of Xenadrine EFX. Defendants agree that they will not, whether acting directly or through any corporation, partnership, subsidiary, division, trade name, device, or other entity, submit to any federal or state tax authority any return, amended return, or other official document that takes a deduction for and/or seeks a tax refund or other favorable tax treatment for any payments by one or more of the Defendants pursuant to Parts VI and VII of this Order. Likewise, Defendants agree that they will not, whether acting directly or through any corporation, partnership, subsidiary, division, trade name, device, or other entity, submit to any federal or state tax authority any return, amended return, or other official document that takes a deduction for a write-off of more than fifteen percent (15%) of the unpaid portion of a note provided by

Cytodyne, LLC to Nutraquest in connection with the May 2003 transaction. Defendants shall provide certifications from Defendants' regular accountants, Withum, Smith & Brown, to demonstrate their continued compliance with this Part.

**IX.  
ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANTS**

Each Defendant, within ten (10) business days of receipt of this Order as entered by the Court, shall submit to the Commission a truthful sworn statement acknowledging receipt of this Order, using the forms shown at Attachment C.

**X.  
DISTRIBUTION OF ORDER BY DEFENDANTS**

For a period of three (3) years from the date of entry of this Order, Defendants shall deliver copies of the Order as directed below:

A. **Defendant RTC:** RTC shall deliver a copy of this Order to all principals, officers, directors, and managers and also to all of its employees, agents, consultants, independent contractors, or other persons who engage in conduct related to the subject matter of this Order. For current personnel, delivery shall be within ten (10) business days of service of this Order upon RTC. For new personnel, delivery shall occur prior to their assuming their responsibilities.

B. **Individual Defendants Robert Chinery and Tracy Chinery as Control Persons:** For any business controlled, directly or indirectly, by one or both of Robert Chinery and Tracy Chinery, or in which one or both has a majority ownership interest, each or both shall

deliver a copy of this Order to all principals, officers, directors, and managers of that business and also to all agents, servants, and employees of that business who engage in conduct related to the subject matter of this Order. For current personnel, delivery shall be within ten (10) business days of service of this Order upon one or both of Robert Chinery and Tracy Chinery. For new personnel, delivery shall occur prior to their assuming their responsibilities.

**C. Individual Defendants Robert Chinery and Tracy Chinery as Employee or Non-Control Person:** For any business that is not controlled by one or both of Robert Chinery and Tracy Chinery, but in which one or both otherwise engages in conduct related to the subject matter of this Order, each or both shall deliver a copy of this Order to all principals and managers of such business before engaging in such conduct.

**D.** Each Defendant shall create, maintain, and update as necessary a declaration identifying the dates, names, titles, addresses, and telephone numbers of the persons and entities that the Defendant has provided with a copy of this Order as required by this Part.

**E.** Each Defendant shall maintain, for a period of three (3) years, and upon reasonable notice make available to the Commission, a signed declaration regarding distribution of copies of this Order as required by this Part.

## **XI.**

### **MONITORING OF RESELLERS, DISTRIBUTORS, AND LICENSEES**

Robert Chinery and Tracy Chinery, in their capacities as directors, officers, or other control-persons of a business, and RTC shall:



A. Institute a reasonable program of surveillance adequate to reveal whether any of Defendants' resellers, distributors, or licensees are disseminating any advertisement or promotional material that contains any representation prohibited by this Order.

B. Notify, immediately, each such reseller, distributor, or licensee that Defendants will stop doing business with that reseller, distributor, or licensee if it continues to use any advertisement or promotional material that contains any representation prohibited by this Order.

C. Terminate all sales to any reseller, distributor, or licensee within twenty (20) days if that reseller, distributor, or licensee has continued to use any advertisement or promotional material that contains any representation prohibited by this Order after receipt of the notice required by subparagraph B of this Part.

## **XII. COMPLIANCE MONITORING BY THE COMMISSION**

For the purpose of monitoring and investigating compliance with any provision of this Order:

A. Within thirty (30) days of receipt of written notice from a representative of the Commission, Defendants Robert Chinery, Tracy Chinery, and RTC 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. Copies of any such notice shall also be provided by the Commission to the undersigned counsel representing Defendants or to any other counsel whose identity has been

furnished to the Commission;

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;  
and
2. posing as consumers, marketers, suppliers or other product-related entities to Robert Chinery, Tracy Chinery, and RTC, their employees, or any other entity managed or controlled in whole or in part by Robert Chinery, Tracy Chinery, and RTC, without the necessity of identification or prior notice;  
and

C. Defendants Robert Chinery, Tracy Chinery, and RTC 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)).

**XIII.  
COMPLIANCE REPORTING BY DEFENDANTS**

In order that compliance with the provisions of this Order may be monitored:

- A. For a period of five (5) years from the date of entry of this Order,
1. Robert Chinery and Tracy Chinery each shall notify the Commission of the following:
- a. Any change in residence, mailing addresses, and telephone numbers, within ten (10) business days of the date of such change;
- b. Any change in employment status (including consulting arrangements, self-employment, and any other income-generating activities), within ten (10) business days of the date of such change. Such notice shall include the name and address of each business, consultancy, or other income-generating activity that the submitting defendant is affiliated with, employed by, creates or forms, or performs services for; a statement of the nature of the business; and a statement of the submitting defendant's duties and responsibilities in connection with the business or employment;
- c. Any change of ownership or controlling interest in any business entity, including acquisition or divestment, within ten (10) business days of such change to the extent that such change may affect compliance obligations arising under this Order. Such notice shall include the name and address of each business, consultancy, or

other income-generating activity that the submitting defendant is affiliated with, employed by, creates or forms, or performs services for; a statement of the nature of the business; and a statement of the submitting defendant's duties and responsibilities in connection with the business or employment; and

- d. Any changes in the submitting defendant's name or use of any aliases or fictitious names; and
2. Defendants shall notify the Commission of any changes in RTC's corporate structure or in any business entity that is directly or indirectly controlled by one or both of Robert Chinery or Tracy Chinery, or in which one or both has an ownership interest, 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 entity; 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 Defendants learn less than thirty (30) days prior to the date such action is to take place, Defendants shall notify the Commission as soon as is practicable after obtaining such knowledge.

B. Sixty (60) days after the date of entry of this Order, each of the Defendants shall provide a written report to the Commission, sworn to under penalty of perjury, setting forth in detail the manner and form in which they have complied and are complying with this Order.

This report shall include, but not be limited to:

1. For each of Robert Chinery and Tracy Chinery:
  - a. The then-current residence addresses, mailing addresses, and telephone numbers;
  - b. The then-current employment and business addresses and telephone numbers, a description of the business activities of each such employer or business, and the title and responsibilities for each such employer or business; and
  - c. Any other changes required to be reported under subparagraph A of this Part.
2. For all Defendants:
  - a. A copy of the signed declaration regarding distribution of this Order, as described in Part X.D;
  - b. A statement describing the manner in which the submitting Defendant has complied and is complying with Parts I through V; and
  - c. Any other changes required to be reported under subparagraph A of this Part.

C. For purposes of the compliance reporting and monitoring required by this Order, the Commission is authorized to communicate directly with Defendants.

**XIV.  
RECORD-KEEPING PROVISIONS**

For a period of five (5) years from the date of entry of this Order, in connection with any business involved in the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, operated by any Defendant, or where any Defendant is a majority owner of the business or directly or indirectly manages or controls such a business, Defendants 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, phone 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) relating to a covered product and any responses to those complaints or requests;

E. Copies of all advertisements, promotional materials, sales scripts, training materials, Websites, or other marketing materials utilized in the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product;

F. All materials that were relied upon in making any representations contained in the materials identified in subparagraph E of this Part, including all documents evidencing or referring to the accuracy of any claim therein or to the efficacy of any covered product, including, but not limited to, all tests, reports, studies, demonstrations, or other evidence that confirm, contradict, qualify, or call into question the accuracy of any claim or the efficacy of each such product;

G. 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 manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product;

H. Copies of all contracts concerning the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product; and

I. All records and documents necessary to demonstrate full compliance with each provision of this Order, including but not limited to, copies of acknowledgments of receipt of this Order and all reports submitted to the FTC pursuant to this Order.

**[remainder of page intentionally left blank]**

**ATTACHMENT A**

**IMPORTANT REFUND INFORMATION**

Claims Administrator Center

[address]

[date]

[Customer Name  
Control Number]

Dear Customer:

To settle a dispute over advertising claims with the Federal Trade Commission, the marketers of Xenadrine EFX are offering you a refund if you are NOT SATISFIED with the Xenadrine EFX you purchased. If you are SATISFIED with the Xenadrine EFX you purchased, you should disregard this refund offer. Information about this refund program is set forth below.

In July 2005, the Federal Trade Commission ("FTC") filed a complaint in federal court in the District of New Jersey against marketers of Xenadrine EFX, including Robert Chinery, Jr. and RTC Research & Development, LLC. The FTC's complaint alleges that Xenadrine EFX's marketers made deceptive representations about the product's ability to cause weight loss. Xenadrine EFX's marketers have denied all charges but have agreed to a settlement order. Under that settlement order, the marketers promised to make refunds for certain eligible purchases.

**To receive a refund payment, you must fill out the information required on the enclosed claim form and return it to the address above no later than [insert date that is 30 days after mailing.]** If you request a refund, the claims contractor will mail you a refund check. The amount of the refund check will depend on the number of consumers who decide to participate in this refund offer.

If you have questions about this letter or about the refund program, please call the following toll-free number: 1-800-[insert number.]

Again, to receive a redress payment if you are dissatisfied, simply fill out the Claim form, sign it, put it in the envelope, place a stamp on the envelope, and mail it no later than [date that is 30 days after mailing].

Sincerely,  
Claims Administration Center

**We are the only Claims Administration Center authorized by the FTC to mail notice and claims forms and process and refund claims in this settlement. You are not required to pay**



**anything to receive a refund. If any other company or individual contacts you and requests that you send them money or information in return for a refund from [company name], please call the Claims Administration Center immediately at the phone number above.**

**PRIVACY ACT NOTICE**

**This information is being collected in order to make a distribution of funds in connection with a stipulated judgement entered by the U.S. District Court for the District of New Jersey pursuant to 15 U.S.C. 53(b). In addition, this information may be disclosed for other purposes authorized by the Privacy Act, 15 U.S.C. 552a and 47 Fed. Reg. 32, 622, including disclosure to other government agencies. Failure to provide the requested information could delay processing or, in some cases, make it impossible for us to process your claim.**

**ATTACHMENT B**

**CLAIM FORM**

[Control number  
Name of Consumer  
Mailing Address]

**RETURN NO LATER THAN**  
**[date that is 30 days after initial mailing]**

I was a purchaser of Xenadrine EFX and I am dissatisfied with the product. Please send me a redress payment in connection with the Federal Trade Commission's settlement with that product's marketers.

Signed: \_\_\_\_\_  
Print name: \_\_\_\_\_  
Date: \_\_\_\_\_  
Daytime phone: \_\_\_\_\_

If the address above is incorrect, please add your correct address below:

Apartment number: \_\_\_\_\_  
Street Address: \_\_\_\_\_  
City, State, Zip: \_\_\_\_\_

**PRIVACY ACT NOTICE: The FTC seeks the above information to provide refunds to eligible consumers. Providing this information is voluntary. If you decide not to provide this information it could delay processing or, in some cases, make it impossible to process your claim. This information may be disclosed as authorized by the Privacy Act, such as to another government agency. 15 U.S.C. 552a, 47 Fed. Reg. 32,662.**

**ATTACHMENT C-1**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

FEDERAL TRADE COMMISSION,	)	Hon. Garrett E. Brown, Jr.
	)	
Plaintiff,	)	Civil Action No. 05-3460 (GEB)
	)	
v.	)	
	)	
ROBERT CHINERY, JR., TRACY	)	
A. CHINERY, and, RTC RESEARCH	)	
& DEVELOPMENT, LLC,	)	
Defendants.	)	
	)	

**DECLARATION OF DEFENDANT  
ROBERT CHINERY, JR. UNDER 28 U.S.C. § 1746**

ROBERT CHINERY, JR. declares as follows:

1. My name is Robert Chinery, Jr. My current residence is \_\_\_\_\_. I am a citizen of the United States and am over the age of eighteen. I have personal knowledge of the facts set forth in this Declaration.
2. I am a defendant in the above-captioned case, *FTC v. Robert Chinery, Jr., et al.*
3. On [DATE], I received a copy of the Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief, which was entered by the Court on [DATE] ("Order"). A true and correct copy of the Order is attached to this Declaration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on [DATE].

\_\_\_\_\_  
ROBERT CHINERY, JR.



I declare under penalty of perjury that the foregoing is true and correct.

Executed on [DATE].

\_\_\_\_\_  
TRACY A. CHINERY

**ATTACHMENT C-3**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

FEDERAL TRADE COMMISSION;	)	Hon. Garrett E. Brown, Jr.
	)	
Plaintiff,	)	Civil Action No. 05-3460 (GEB)
	)	
v.	)	
	)	
ROBERT CHINERY, JR., TRACY	)	
A. CHINERY, and, RTC RESEARCH	)	
& DEVELOPMENT, LLC,	)	
Defendants.	)	
	)	

**DECLARATION OF DEFENDANT  
TRACY A. CHINERY UNDER 28 U.S.C. § 1746**

TRACY A. CHINERY declares as follows:

1. My name is Tracy A. Chinery. My current residence is \_\_\_\_\_. I am a citizen of the United States and am over the age of eighteen. I have personal knowledge of the facts set forth in this Declaration.
2. I am a defendant in the above-captioned case, *FTC v. Robert Chinery, Jr., et al.*
3. On [DATE], I received a copy of the Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief, which was entered by the Court on [DATE] ("Order"). A true and correct copy of the Order is attached to this Declaration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on [DATE].

\_\_\_\_\_  
TRACY A. CHINERY



**XV.  
RETENTION OF JURISDICTION**

This Court shall retain jurisdiction over Defendants for purposes of construction, modification, and enforcement of this Order.

IT IS SO ORDERED, this \_\_\_\_ day of \_\_\_\_\_, 2006.

\_\_\_\_\_  
HONORABLE GARRETT E. BROWN, JR.  
CHIEF JUDGE, UNITED STATES DISTRICT COURT

**SO STIPULATED:**

\_\_\_\_\_  
PETER B. MILLER  
MICHAEL OSTHEIMER  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

ANTHONY J. LABRUNA  
Assistant United States Attorney  
970 Broad Street, Suite 700  
Newark, NJ 07102  
*Attorneys for Plaintiff*

  
\_\_\_\_\_  
ROBERT CHINERY, JR., Defendant

\_\_\_\_\_  
TRACY A. CHINERY, Defendant

\_\_\_\_\_  
RTC RESEARCH & DEVELOPMENT,  
LLC, Defendant

By: TRACY A. CHINERY,  
its Managing Member

\_\_\_\_\_  
LAURENCE B. ORLOFF  
Orloff, Lowenbach, Stifelman & Siegel  
101 Eisenhower Parkway  
Roseland, NJ 07068  
*Attorney for Defendants Tracy A. Chinery  
and RTC Research & Development, LLC*

\_\_\_\_\_  
BRIAN J. MOLLOY  
Wilentz, Goldman & Spitzer, P.A.  
90 Woodbridge Center Drive  
Suite 900  
Woodbridge, NJ 07095-0958  
*Attorney for Defendant Robert Chinery*

**XV.  
RETENTION OF JURISDICTION**

This Court shall retain jurisdiction over Defendants for purposes of construction, modification, and enforcement of this Order.

IT IS SO ORDERED, this \_\_\_\_ day of \_\_\_\_\_, 2006.

\_\_\_\_\_  
**HONORABLE GARRETT E. BROWN, JR.**  
**CHIEF JUDGE, UNITED STATES DISTRICT COURT**

**SO STIPULATED:**


\_\_\_\_\_  
**PETER B. MILLER**  
**MICHAEL OSTHEIMER**  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

**ANTHONY J. LABRUNA**  
Assistant United States Attorney  
970 Broad Street, Suite 700  
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*Attorney for Plaintiff*

\_\_\_\_\_  
**ROBERT CHINERY, JR., Defendant**

\_\_\_\_\_  
**BRIAN J. MOLLOY**  
Wilentz, Goldman & Spitzer, P.A.  
90 Woodbridge Center Drive  
Suite 900  
Woodbridge, NJ 07095-0958  
*Attorney for Defendant Robert Chinery*

\_\_\_\_\_  
**TRACY A. CHINERY, Defendant**

  
\_\_\_\_\_  
**RTC RESEARCH & DEVELOPMENT,  
LLC, Defendant**  
By: **TRACY A. CHINERY,**  
*its Managing Member*

\_\_\_\_\_  
**LAURENCE B. ORLOFF**  
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*Attorney for Defendants Tracy A. Chinery  
and RTC Research & Development, LLC*

**XV.  
RETENTION OF JURISDICTION**

This Court shall retain jurisdiction over Defendants for purposes of construction, modification, and enforcement of this Order.

IT IS SO ORDERED, this \_\_\_\_ day of \_\_\_\_\_, 2006.

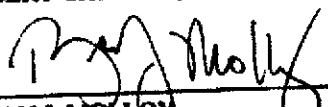
\_\_\_\_\_  
HONORABLE GARRETT E. BROWN, JR.  
CHIEF JUDGE, UNITED STATES DISTRICT COURT

**SO STIPULATED:**

\_\_\_\_\_  
PETER B. MILLER  
MICHAEL OSTHEIMER  
Federal Trade Commission  
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Washington, DC 20580

ANTHONY J. LABRUNA  
Assistant United States Attorney  
970 Broad Street, Suite 700  
Newark, NJ 07102  
*Attorneys for Plaintiff*

\_\_\_\_\_  
ROBERT CHINERY, JR., Defendant

  
\_\_\_\_\_  
BRIAN J. MOLLOY  
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Suite 900  
Woodbridge, NJ 07095-0958  
*Attorney for Defendant Robert Chinery*

\_\_\_\_\_  
TRACY A. CHINERY, Defendant

\_\_\_\_\_  
RTC RESEARCH & DEVELOPMENT,  
LLC, Defendant

By: TRACY A. CHINERY,  
its Managing Member

\_\_\_\_\_  
LAURENCE B. ORLOFF  
Orloff, Lowenbach, Stifelman & Siegel  
101 Eisenhower Parkway  
Roseland, NJ 07068  
*Attorney for Defendants Tracy A. Chinery  
and RTC Research & Development, LLC*

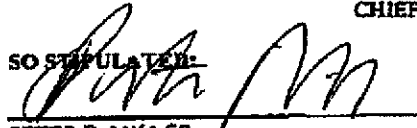
**XV.  
RETENTION OF JURISDICTION**

This Court shall retain jurisdiction over Defendants for purposes of construction, modification, and enforcement of this Order.

IT IS SO ORDERED, this \_\_\_\_ day of \_\_\_\_\_, 2006.

HONORABLE GARRETT E. BROWN, JR.  
CHIEF JUDGE, UNITED STATES DISTRICT COURT

SO STIPULATED:



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Woodbridge, NJ 07095-0958  
*Attorney for Defendant Robert Chinery*



TRACY A. CHINERY, Defendant

RTC RESEARCH & DEVELOPMENT,  
LLC, Defendant

By: TRACY A. CHINERY,  
its Managing Member




LAURENCE B. ORLOFF  
Orloff, Lowenbach, Stiefelman & Siegel  
101 Eisenhower Parkway  
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*Attorney for Defendants Tracy A. Chinery  
and RTC Research & Development, LLC*

**XV.  
RETENTION OF JURISDICTION**

This Court shall retain jurisdiction over Defendants for purposes of construction, modification, and enforcement of this Order.

IT IS SO ORDERED, this 31<sup>th</sup> day of MARCH, 2009.

  
HONORABLE GARRETT E. BROWN, JR.  
CHIEF JUDGE, UNITED STATES DISTRICT COURT

**SO STIPULATED:**

\_\_\_\_\_  
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ROBERT CHINERY, JR., Defendant

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\_\_\_\_\_  
TRACY A. CHINERY, Defendant

\_\_\_\_\_  
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