

FORM PTO-1595

(Rev. 10/02)

OMB No 0851-0027 (exp 6/30/2005)

RECORDATION FORM COVER SHEET PATENTS ONLY

U.S. DEPARTMENT OF COMMERCE

U.S. Patent and Trademark Office

Docket No. HER85.CIP

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To the Honorable Commissioner of Patents and Trademarks: Please record the attached original documents or copy thereof.

1. Name of conveying party(ies).

William Birdsall

Additional name(s) of conveying party(ies) attached? ☐ Yes ☒ No

2. Name and address of receiving party(ies)

Name: HerbalScience, LLCInternal Address: Suite 200Street Address 1004 N. Collier Center WayCity: Naples State: FL Zip: 34110Additional name(s) & addresses(es) attached? ☐ Yes ☒ No

3. Nature of conveyance:

- ☐ Assignment ☐ Merger
☐ Security Agreement ☐ Change of Name
☒ Other Services and Non-Competition Agreement for William M. Birdsall

Execution Date: September 26, 2002 and July 7, 2003

4. Application number(s) or patent number(s):

If this document is being filed together with a new application, the execution date of the application is: _____

A. Patent Application No (s) 10/818,439

B. Patent No.(s) _____

Additional numbers attached? ☐ Yes ☒ No

5. Name and address of party to whom correspondence concerning document should be mailed:

Name: Mary Anthony Merchant, Ph.D.

Internal Address: _____

Bank of America PlazaSuite 5200Street Address: 600 Peachtree Street, N.E.City: Atlanta State: GA Zip: 30308-22166. Total number of applications and patents involved: 17. Total fee (37 CFR 3.41): \$40.00☐ Enclosed☒ Authorized to be charged to deposit account

8. Deposit account number:

20-1507

DO NOT USE THIS SPACE

9. Signature

Mary Anthony Merchant, Reg. No. 39,771

Name of Person Signing



Signature

August 31, 2004

Date

Total number of pages including cover sheet, attachments, and documents: 6

Mail documents to be recorded with required cover sheet information to:
 Commissioner of Patents & Trademarks, P.O. Box 1450, Mail Stop Assignment Recordation Services
 Alexandria, VA 22313-1450

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**SERVICES AND NON-COMPETITION AGREEMENT FOR
WILLIAM M. BIRDSALL**

SERVICES AND NON-COMPETITION AGREEMENT dated as of July 7, 2003 (the "Agreement") between HERBALSCIENCE, LLC, a Delaware limited liability company (the "Company") and WILLIAM M. BIRDSALL (the "Executive").

1. EFFECTIVENESS OF AGREEMENT.

This Agreement shall become effective as of July 7, 2003 (the "Effective Date").

2. SERVICES AND DUTIES.

2.1 General. The Company hereby wishes to employ the Executive as the Managing Director of Business Development. The Executive shall faithfully perform for the Company the duties of said office and shall perform such other duties of an executive, managerial or administrative nature as shall be specified and designated by the Managing Member. The Executive agrees to serve the Company faithfully and to the best of his ability under the Agreement.

2.2 Services. The Executive shall devote the amount of time necessary to fulfill his duties and responsibilities to the Company and to conduct the services required of him by the Managing Member. The Executive shall use his best efforts, judgment and energy to improve and advance the business and interests of the Company in a manner consistent with the duties of his position.

2.3 Term of Services. The Executive's services under this Agreement shall commence as of the Effective Date and shall terminate on the earlier of his resignation or his termination by the Managing Member.

2.4 Reimbursement of Expenses. The Company shall reimburse the Executive for reasonable travel and other business expenses incurred by him consistent with normal business practices and procedures adopted by the Company from time to time consistent with customary industry practices in the fulfillment of his duties upon the submission of the appropriate receipts and other supporting data that the Company may request.

MAY-17-2004 11:18

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3. COMPENSATION.

3.1 Services Fee.

3.2 Profit Participation Interest. As additional consideration for the

MAY-17-2004 11:19

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4. TERMINATION OF SERVICES. The Managing Member of HerbalScience shall have the right to terminate this Agreement for any or no reason in his sole and absolute discretion. Executive shall have no further right to receive any Services Fee or Profit Participation Interest after such termination or after resignation by Executive. The date of termination shall be the date specified in a written notice of termination to Executive, but in no event less than ten (10) business days after receipt of such notice by Executive. Executive may resign by providing HerbalScience with notice of resignation and the date of resignation shall be the date specified in the written notice to HerbalScience, or if no date is specified therein, ten (10) business days after receipt by HerbalScience of the written resignation from Executive.

5. NON-COMPETITION; NON-SOLICITATION; CONFIDENTIALITY.

- 5.1 Non-Competition and Non-Solicitation. The Executive covenants that, during the Restricted Period (as defined below), the Executive shall not, directly or indirectly in any Restricted Area (as defined below):

- (a) manage, operate, join, control, participate in, be connected with (as an officer, employee, partner, consultant or otherwise), enter into any agreement reflecting a business transaction with or without any interest (directly or indirectly) in any partnership, firm, corporation or any other business organization, person or entity that competes with HerbalScience, its subsidiaries or affiliates (collectively, the "Businesses"), in the acquisition, growing and harvesting, research and development, extraction or other processing, or marketing of any botanicals, nutraceuticals, or herbal medicines and in any similar, related or ancillary business in which the Businesses are engaged;
- (b) solicit business from, entice away from, accept orders involving or otherwise interfere with the relationship of any of the Businesses with any client, prospective client, vendor, or prospective vendor (including any person or entity herein during the most recent 36-month period with a client or vendor of any of the Businesses);
- (c) solicit the services of, or hire, any individual who is employed by any of the Businesses (or who was employed by any of the Businesses in the then most recent 36-month period), or who is retained by any of the Businesses as an independent contractor or consultant (or who was retained by any of the Businesses in such capacity in the most recent 36-month period), or take any action that results, or might result, in any individual performing services for any of the Businesses to cease performing such services.

MAY-17-2004 11:19

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For purposes of the Section 5, "Restricted Period" shall mean the period during which Executive provides services to the Businesses hereunder and during the thirty-six (36) month period immediately following Executive's termination of services with the Businesses for any reason. The activities described in this Section 5 shall be prohibited regardless of whether undertaken by Executive, or any of his agents, employees, or members of his immediate family and regardless of whether performed for Executive's own account or for the account of any other individual, partnership, firm, corporation or other business organization (other than the Businesses).

For the purposes of this Section 5, "Restricted Area" shall mean the United States, Mexico, Canada, Europe, Central America, South America, Australia, and Asia, including India.

- 5.2 Non-Disclosure and Use of Proprietary Information. The Executive covenants that he shall comply with the provisions of the Non-Disclosure Agreement between the Company and the Executive dated as of September 26, 2002. The termination of this Agreement shall in no event act to diminish, limit, extinguish, terminate or otherwise effect the validity of, or any term or provision of, the Non-Disclosure Agreement.
- 5.3 Ownership and Return of Materials. All materials (including, without limitation, computers, documents, drawings, models, apparatus, sketches, designs, lists, and all other tangible media of expression) furnished to Executive by HerbalScience, its subsidiaries or affiliates (collectively, the "Businesses") shall remain the property of HerbalScience. Any and all rights, benefits, and interests, including all intellectual property rights, that Executive (including without limitation Executive's employees and agents) may obtain in relation to the growth, development, processing, production, patenting and/or marketing of Kava or other botanicals, nutraceuticals, or herbal medicines, shall remain the property of HerbalScience. Upon termination of Executive's services with HerbalScience and at the request of HerbalScience, or at any time upon the request of HerbalScience before termination of services, Executive covenants to promptly (but no later than three (3) business days after the earlier of the termination of Executive's services or HerbalScience's request) destroy or deliver to HerbalScience, at HerbalScience's option, (a) all documents and data pertaining to the Businesses, whether prepared by Executive or otherwise in Executive's possession, (b) all tangible media of expression which are in Executive's possession and which incorporate any proprietary information or otherwise relate to the Businesses, and (c) written certification of Executive's compliance with its obligations under this sentence.
- 5.4 Computers, Computer Files and Systems. Executive acknowledges that HerbalScience has a critical business interest in maintaining complete control and access to its various computer systems. In view of this interest, Executive understands that he will have no right to privacy as to any personal information which

MAY-17-2004 11:20

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he inputs or otherwise causes to become a part of such systems. Further, HerbalScience shall be entitled (in the exercise of its sole discretion) to delete, erase and/or destroy any and all such information which Executive may so input or cause to become a part of HerbalScience's various computer systems. Executive further acknowledges that any computers provided to him by the Company remain the sole property of the Company and must be returned upon the request of the Managing Member.

5.5 Replacement of Invalid Terms. It is the desire and intent of the parties that the provisions of this Agreement shall be enforced to the fullest extent permissible under the laws and public policies applied in each jurisdiction in which enforcement is sought. Accordingly, if any particular term or provision of this Agreement shall be adjudicated to be invalid or unenforceable, the invalid or unenforceable term or provision shall be deemed replaced by a term or provision that is valid and enforceable and that comes closest to expressing the intention of the invalid or unenforceable term or provision. Any such replacement shall apply only with respect to the operation of this Agreement in the particular jurisdiction in which such adjudication is made. The remaining terms and provisions hereof shall remain unimpaired.

5.6 Relief. The Executive agrees and acknowledges that (unless otherwise expressly set forth in a written agreement between the Company and the Executive) he performs services at will and serves at the pleasure of the Managing Member. The Executive acknowledges that he has been asked to sign this Agreement because of his special talents and that violations of this Agreement would seriously hamper the Businesses. In addition to all remedies permitted by law or in equity and without limiting any action at law or in equity to which the Company and/or Businesses may be entitled in respect of any obligation of the Executive, the Company and/or Businesses shall be entitled to injunctive relief to enforce the terms and conditions stated herein. In the event that any provision of this Agreement is held to be unenforceable, the parties agree that the remaining provisions of this Agreement shall remain fully enforceable in accordance with their stated terms, and that the stricken provision shall be automatically amended to be given the broadest enforceable meaning that is closest to the initial intent of the parties as originally stated in such stricken provision.

6. MISCELLANEOUS.

6.1 Notices. All notices or communications hereunder shall be in writing addressed as follows:

MAY-17-2004 11:20

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To the Company:

HerbalScience, LLC
P. O. Box 7219
Naples, FL 34101

With a copy to:

Kevin G. Coleman, Esquire
Goodlette, Coleman & Johnson
4001 Tamiami Trail North, Suite 300
Naples, FL 34103

To the Executive:

William M. Birdsall
740 West Street
Naples, FL 34105

All such notices shall be conclusively deemed to be received and shall be effective (i) if sent by hand delivery, upon receipt, (ii) if sent by telecopy or facsimile transmission, upon confirmation of receipt by the sender of such transmission, or (iii) if sent by registered or certified mail, on the fifth day after the day on which such notice is mailed.

- 6.2 Severability. Each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement is held to be prohibited by or invalid under applicable law, such provision will be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.
- 6.3 Assignment. The Company's rights and obligations under this Agreement shall not be assignable by the Company except as incident to a reorganization, merger or consolidation, or transfer of all or substantially all of the Company's business and properties (or portion thereof in which the Executive provides services). Neither this Agreement nor any right hereunder shall be assignable or otherwise subject to hypothecation by the Executive.
- 6.4 Entire Agreement. This Agreement, including the Non-Disclosure Agreement of September 26, 2002 referenced herein and made a part hereof, represents the entire Agreement of the parties and shall supersede any and all previous contracts, arrangements, or understandings between Company and the Executive. This Agreement may be amended at any time by mutual written agreement of the parties thereto. Nothing herein shall be deemed to eliminate, modify, void or otherwise alter the terms of the Non-Disclosure Agreement between the parties of September 26, 2002.
- 6.5 Withholding. _____

MAY-17-2004 11:20

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6.6 Governing Law. This Agreement shall be construed, interpreted, and governed in accordance with the laws of the State of Florida without reference to rules relating to conflict of law.

IN WITNESS WHEREOF, the Company has caused this Agreement to be duly executed and the Executive has hereunto set his hand as of the day and year first above written.

Executive



William M. Birdsell

HerbalScience, LLC,
a Delaware limited liability company

By: 

Name: Robert T. Gow
Title: Managing Member

MAY-17-2004 11:21

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NON-DISCLOSURE AGREEMENT

NON-DISCLOSURE AGREEMENT, dated the 26th day of September, 2002 ("Agreement") between HerbalScience, LLC, a Delaware limited liability company ("Company") and William M. Birdsall ("Executive").

WHEREAS, Executive and Company mutually desire to engage in discussions concerning a possible business relationship where either party (the "Disclosing Party") may elect to disclose to the other party (the "Recipient") in the course of such discussions (and thereafter to the extent an arrangement is reached between the parties) certain confidential and proprietary information (hereinafter collectively, "Information") which both parties wish to protect from further disclosure. This exchange includes information pertaining to this Agreement provided in written form (including graphic materials), in machine or through verbal communication, by Disclosing Party and/or observed by Recipient.

NOW, THEREFORE, in consideration of Ten Dollars (\$10.00), the foregoing premises, and the mutual covenants herein contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. **CONFIDENTIAL AND PROPRIETARY INFORMATION.** For purposes of this Agreement, Information shall include, but shall not be limited to, the following: all know-how, data, data formats, computer programs, technical and non-technical materials, designs, concepts, processes, product samples and specifications, strategic and development plans, and other expertise, whether or not patentable, financial condition, business plans, co-developer identities, data, business records, customer lists, supplier lists, project records, market reports, employee lists and business manuals, policies and procedures, information relating to processes, technologies or theory and all other information which may be disclosed by Disclosing Party or others, or to which Recipient may be provided access by Disclosing Party or others, in accordance with this Agreement, or which is generated as a result of or in connection with the discussions and subsequent arrangement mentioned above, which is not generally available to the public.

2. **OBLIGATIONS.** Executive and Company agree as follows:

(a) That the disclosure of Information by Disclosing Party is in confidence and thus Recipient agrees to:

(1) (i) not disclose the Information to any other person except as specifically authorized in writing by Disclosing Party;

(ii) maintain the confidential nature of the Information with the same degree of care that Recipient would use in maintaining its own confidential information, but in no event less than reasonable care;

(2) restrict disclosure of the Information to Recipient's employees having a need to know such Information;

MAY-17-2004 11:21

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941 949 0078 P.10/14

(3) require Recipient's employees or subcontractors who will have access to the Information to have signed a confidentiality statement that is consistent with Recipient's obligations under this Agreement, before he or she receives access to the Information;

(4) return to Disclosing Party all documentation, copies, notes, diagrams, computer memory media and other materials containing any portion of the Information, or confirm to Disclosing Party, in writing, the destruction of such materials within fifteen (15) days following request of Disclosing Party.

3. **LIMITATION OF OBLIGATIONS.** This Agreement does not impose any obligation on Recipient with respect to any portion of the Information received from Disclosing Party which:

(a) was known to Recipient prior to disclosure by Disclosing Party, except that such Information is subject to the following requirements. In order to avail itself of the exception relating to knowledge prior to disclosure by the Disclosing Party, Recipient must, within 30 days from receipt of the disclosure pursuant to this Agreement, provide to the Disclosing Party a certified statement to the effect that the subject matter was known by the Recipient prior to disclosure. Accompanying such certificate shall be such documentary evidence from the Recipients' ordinary business records as shall substantiate the claim of prior knowledge;

(b) is lawfully obtained by Recipient from a third party who does not have an obligation of confidentiality;

(c) is or becomes generally known or publicly available other than by unauthorized disclosure. Matter shall be generally known in the pertinent trade only if the Recipient can establish that the full particulars of the Information are, in the combination disclosed to the Recipient, well known or generally used within the Recipient's trade or industry;

(d) is disclosed to Recipient by a third party without a duty of confidentiality;

(e) is required due to a valid order of a court or other governmental body of the United States of America, or of any state, city, town, municipality, county or any political subdivision thereof; provided, however, that the disclosing party shall first have given notice to the other party and made reasonable effort to obtain a protective order requiring that the Information and/or documents so disclosed be used only for the purposes for which the order was issued;

(f) is otherwise required by law or regulation to be disclosed; or

(g) is necessary to establish rights under this Agreement.

4. **OWNERSHIP OF WORK PRODUCT.**

(a) Company shall own all Work Product, (as defined in Section 4(e)). All Work

MAY-17-2004 11:21

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Product shall be considered work made for hire by Executive and owned by Company.

(b) If any of the Work Product may not, by operation of law, be considered work made for hire by Executive for Company, or if ownership of all right, title, and interest of the intellectual property rights therein shall not otherwise vest exclusively in Company, Executive agrees to assign, and upon creation thereof automatically assign, without further consideration, the ownership of all Trade Secrets, U.S. and international copyrights, patentable inventions, and other intellectual property rights therein to Company, its successors, and assigns.

For purposes of this Agreement, a "Trade Secret" is any information, including, but not limited to, technical or non-technical data, formulas, patterns, compilations, programs, devices, methods, techniques, drawings, processes, financial data, financial plans, product plans, or lists of actual or potential customers or suppliers that: derive economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from their disclosure or use; and are subject of efforts that are reasonable under the circumstances to maintain their secrecy.

(c) Company, its successors, and assigns, shall have the right to obtain and hold in its or their own name copyrights, registrations, patents and any other protection available in the foregoing.

(d) Executive agrees to perform, if applicable, upon the reasonable request of Company, during or after the period that Executive provides services to Company, such further acts as may be necessary or desirable to transfer, perfect, and defend Company's ownership of the Work Product. When requested, Executive will:

(1) Execute, acknowledge, and deliver any requested affidavits and documents of assignment and conveyance;

(2) Obtain and aid in the enforcement of copyrights and, if applicable, patents with respect to the Work Product in any countries;

(3) Provide testimony in connection with any proceeding affecting the right, title, or interest of Company in any Work Product; and

(4) Perform any other acts deemed necessary or desirable to carry out the purposes of this Agreement.

Company shall reimburse all reasonable out-of-pocket expenses incurred by Executive at Company's request in connection with the foregoing, including (unless Executive is otherwise being compensated at the time) a reasonable per diem or hourly fee for services rendered at Company's written request, if applicable, following termination of Executive's service relationship with Company.

MAY-17-2004 11:22

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(c) For purposes hereof, "Work Product" shall mean all intellectual property rights, including all Trade Secrets, U.S. and international copyrights, patentable inventions, discoveries and improvements, and other intellectual property rights, in any programming, documentation, technology, or other Work Product that relates to the business and interests of Company and that Executive conceives, develops, or delivers to Company at any time during the term of Executive's services to Company, if applicable. Work Product shall also include all intellectual property rights in any programming, documentation, technology, or other work product that is now contained in any of the products or systems, including development and support systems of Company to the extent Executive conceived, developed or delivered such Work Product to Company prior to the date of this Agreement or while Executive was engaged as a service provider to Company. Executive hereby irrevocably relinquishes for the benefit of Company and its assigns any moral rights in the Work Product recognized by applicable law.

5. MISCELLANEOUS.

(a) The Information being disclosed to the Recipient pursuant to this Agreement is with the express understanding that each party recognizes that this Agreement does not constitute a contract of engagement and that neither Party will be obligated to enter into any further agreement relating to the Information, and nothing in this Agreement shall be construed as granting any right, title, grant, option, ownership, interest in or license from one Party to the other relating thereto.

(b) The obligations of confidentiality shall survive in perpetuity following the date of execution hereof, unless the parties enter into a definitive contract expressly modifying or superseding this Agreement as to the subject matter hereof, in which case the rights and obligations of the parties shall be governed by that contract. A Services Agreement between Executive and Company shall not be deemed a contract which terminates Executive's obligations hereunder.

(c) In the event of a breach or threatened breach or intended breach of this Agreement by either party, the other party, in addition to any other rights and remedies available to it at law or in equity, shall be entitled to preliminary and final injunctions, enjoining and restraining such breach or threatened breach or intended breach.

(d) This Agreement, and all other agreements related hereto, shall be construed in accordance with and governed by the laws of the State of Florida. It is the parties' intent and direction that Florida law govern this Agreement and that the venue for any litigation involving this Agreement lie in Collier County, Florida.

(e) If any litigation or other legal proceeding relating to this Agreement occurs, the prevailing party shall be entitled to recover from the other party (in addition to any other relief awarded or granted) its reasonable costs and expenses, including attorney's fees, incurred in the proceeding.

(f) Section and paragraph titles are included herein for descriptive purposes only and shall not control or alter the meaning of this Agreement as set forth in text. As used in this

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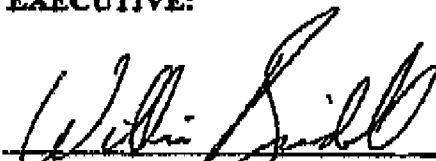
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Agreement or any amendment hereto, the masculine shall include the feminine, the singular shall include the plural, and the plural shall include the singular, as the context may require. Any and all references to the pronouns "it" or "its" in relation to Executive shall mean "he" or "his" as the context may require.

(g) Each provision of this Agreement shall be considered separable. To the extent any provision of this Agreement is prohibited or ineffective under applicable law, this Agreement shall be considered amended to the smallest degree in order to make the Agreement effective.


This Agreement constitutes the sole understanding concerning the receipt of Confidential and Proprietary Information between the parties and may not be amended or modified except in writing signed by each of the parties to the Agreement. This Agreement shall specifically supersede the Non-Disclosure Agreement dated May 21, 2001 between Hawaii Kava Company, LLC (now known as HerbalScience, LLC) and Executive. Nothing herein shall void, supersede, modify or alter the provisions of the Services and Non-Competition Agreement between the parties of even date herewith.

EXECUTIVE:


WILLIAM M. BIRDSALL

COMPANY:

HERBALSCIENCE, LLC,
a Delaware limited liability company

By: 
Print Name: Robert T. Gow
Its: Authorized Member

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