

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

LEARNINGRX FRANCHISE CORP.,

and

KEN GIBSON, individually and as an officer of
LEARNINGRX FRANCHISE CORP.,

Defendants.

Civil Action No. 1:16-cv-01159-RM

**STIPULATED ORDER FOR
PERMANENT INJUNCTION AND
OTHER EQUITABLE RELIEF
AGAINST DEFENDANTS
LEARNINGRX FRANCHISE
CORP. AND KEN GIBSON**

Plaintiff, the Federal Trade Commission (“Commission” or “FTC”), filed its Complaint for Permanent Injunction and Other Equitable Relief against Defendants LearningRx Franchise Corp. and Ken Gibson (“Defendants”), pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), alleging unfair or deceptive acts or practices and false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

The Commission and Defendants stipulate to the entry of this Stipulated Order for Permanent Injunction and Other Equitable Relief (“Order”) to resolve all matters in dispute in this action between them.

THEREFORE, IT IS ORDERED as follows:

FINDINGS

1. This Court has jurisdiction over this matter.
2. The Complaint charges that Defendants participated in deceptive acts or practices in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, in connection with the deceptive marketing of LearningRx cognitive training services.
3. Defendants neither admit nor deny any of the allegations in the Complaint, except as specifically stated in this Order. Only for purposes of this action, Defendants admit the facts necessary to establish jurisdiction.
4. Defendants waive any claim that they may have under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action through the date of this Order, and agree to bear their own costs and attorney fees.
5. Defendants and the Commission waive all rights to appeal or otherwise challenge or contest the validity of this Order.

DEFINITIONS

For the purpose of this Order, the following definitions apply:

1. **“Defendants”** means the Individual Defendant and the Corporate Defendant, individually, collectively, or in any combination.
2. **“Corporate Defendant”** means LearningRx Franchise Corp. and its successors and assigns.
3. **“Individual Defendant”** means Ken Gibson.

4. **“Advertising”** and **“promotion”** mean any written or verbal statement, illustration, or depiction designed to effect a sale or create interest in the purchasing of products or services.

5. **“Commerce”** means as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

6. **“Covered Product”** means any product, program, device, or service, including any LearningRx Program, for children or adults that purports to alter the brain’s structure or function; improve cognitive abilities or performance, including performance on everyday tasks in school, at work, or in athletics; treat, mitigate, prevent, or delay the onset of cognitive impairment or disorders, including cognitive impairment related to aging, attention deficit hyperactivity disorder (ADHD), autism, Alzheimer’s disease, concussion, stroke, or traumatic brain injury; or provide an assessment of cognitive abilities.

7. **“Clearly and conspicuously”** means that a required disclosure is difficult to miss (, easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

- a. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through cludTJr seasible, thTs to11 sthe

- b. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.
- c. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for Ordinary Consumers to easily hear and understand it.
- d. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.
- e. The disclosure must use diction and syntax understandable to Ordinary Consumers and must appear in each language in which the representation that requires the disclosure appears.
- f. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.
- g. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.
- h. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, “ordinary consumers” includes reasonable members of that group.

8. **“LearningRx Program”** means any cognitive training service developed, distributed, advertised, promoted, marketed, offered for sale, or sold by Defendants or any of their franchisees or licensees and purported to improve cognitive functions.

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

10. **“Reliably Reported,”** for a human clinical test or study (“test”), means a report of the test has been published in a peer-reviewed journal, and such published report provides sufficient information about the test for experts in the relevant field to assess the reliability of the results.

ORDER

I.

PROHIBITED REPRESENTATIONS: IMPROVING PERFORMANCE AT WORK OR IN ATHLETICS; DELAYING AGE-RELATED DECLINE; AND REDUCING OTHER COGNITIVE IMPAIRMENTS

IT IS ORDERED that Defendants, Defendants’ officers, agents, and employees, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, are permanently restrained and enjoined from making any representation, expressly or by implication, that training with such product:

A.

II.

PROHIBITED REPRESENTATIONS: OTHER BENEFITS

IT IS FURTHER ORDERED that Defendants, Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any

assessment of such testing as set forth in the Section entitled Preservation of Records Relating to Competent and Reliable Human Clinical Tests or Studies are available for inspection and production to the Commission.

III.

PROHIBITED REPRESENTATIONS: TESTS OR STUDIES

IT IS FURTHER ORDERED that Defendants, Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, are permanently restrained and enjoined from misrepresenting, in any manner, expressly or by implication:

- A. The existence, contents, validity, results, conclusions, or interpretations of any test, study, or research; or
- B. That the benefits of any Covered Product are scientifically proven.

IV.

PROHIBITIONS CONCERNING PROVIDING MEANS AND INSTRUMENTALITIES

IT IS FURTHER ORDERED that Defendants, Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, are permanently restrained and enjoined from providing to others the means

and instrumentalities with which to make any representation prohibited by Part I through III above.

V.

MONETARY JUDGMENT

IT IS FURTHER ORDERED that:

A. Judgment in the amount of Four Million Dollars (\$4,000,000.00) is entered in favor of the Commission against Corporate Defendant as equitable monetary relief; provided however, the remainder of this judgment shall be suspended upon Corporate Defendant's compliance with Section B, below, and subject to Sections C through E.

B. Corporate Defendant is ordered to pay to the Commission Two-Hundred-Thousand Dollars (\$200,000.00), which, as Corporate Defendant stipulates, its undersigned counsel holds in escrow for no purpose other than to satisfy the Commission's order.

payment or monetary judgment pursuant to this Order, such as a nondischargeability complaint in any bankruptcy case.

- C. The facts alleged in the Complaint establish all elements necessary to sustain an action by the Commission pursuant to Section 523(a)(2)(A) 17 U.S.C. § 1495 0 TD-.006eCode, 11 U.S.C. §-1.495 0 TD

VII.

REQUIREMENT TO PROVIDE CUSTOMER LIST

IT IS FURTHER ORDERED that Defendants, Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, are permanently restrained and enjoined from directly or indirectly failing to provide sufficient customer information to enable the Commission to efficiently administer consumer redress. If a representative of the Commission requests in writing any information related to redress, Defendants must provide it, in the form prescribed by the Commission, within fourteen days.

VIII.

ORDER ACKNOWLEDGMENTS

IT IS FURTHER ORDERED that Defendants obtain acknowledgments of receipt of this Order:

- A. Each Defendant, within seven days of entry of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.
- B. For ten years after entry of this Order, Individual Defendant for any business that such Defendant, individually or collectively with any other Defendants, is

Acknowledgment obtained pursuant to this Order, unless previously submitted to the Commission;

2. Additionally, Individual Defendant must: (a) identify all telephone numbers and all email, Internet, physical, and postal addresses, including all residences; (b) identify all titles and roles in all business activities, including any business for which such Defendant performs services whether as an employee or otherwise and any entity in which such Defendant has any ownership interest; and (c) describe in detail such Defendant's involvement in each such business, including title, role, responsibilities, participation, authority, control, and any ownership.

B. For ten years following entry of this Order, each Defendant must submit a compliance notice, sworn under penalty of perjury, within fourteen days of any change in the following:

1. Each Defendant must report any change in: (a) any designated point of contact; or (b) the structure of the Corporate Defendant or any entity that Defendant has any ownership interest in or directly or indirectly controls that may affect compliance obligations arising under this Order, including: the creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.
2. Additionally, Individual Defendant must report any change in: (a) name, including aliases or fictitious name, or residence address; or (b) title or role in any business activity, including any business for which such Defendant performs

X.

RECORDKEEPING

IT IS FURTHER ORDERED that Defendants must create certain records for ten years after entry of the Order, and retain each such record for five years. Specifically, Corporate Defendant and Individual Defendant for any business that such Defendant, individually or collectively with any other Defendant, is a majority owner or directly or indirectly controls, must create and retain the following records:

- A. Accounting records showing the revenues from all products or services sold, all costs incurred in generating those revenues, and the resulting net profit or loss;
- B. Personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name, addresses, and telephone numbers; job title or position; dates of service; and, if applicable, the reason for termination;
- C. Complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;
- D. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and
- E. A copy of each advertisement or other marketing material.

XI.

**PRESERVATION OF RECORDS RELATING TO COMPETENT AND RELIABLE
HUMAN CLINICAL TESTS OR STUDIES**

IT IS FURTHER ORDERED that, with regard to any human clinical test or study (“test”) upon which Defendants rely to substantiate any claim covered by this Order, Defendants shall secure and preserve all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of the test, including, but not necessarily limited to:

- A. All protocols and protocol amendments, reports, articles, write-ups, or other accounts of the results of the test, and drafts of such documents reviewed by the test sponsor or any other person not employed by the research entity;
- B. All documents referring or relating to recruitment; randomization; instructions, including oral instructions, to participants; and participant compliance;
- C. Documents sufficient to identify all test participants, including any participants who did not complete the test, and all communications with any participants relating to the test; all raw data collected from participants enrolled in the test, including any participants who did not complete the test; source documents for such data; any data dictionaries; and any case report forms;
- D. All documents referring or relating to any statistical analysis of any test data, including, but not limited to, any pretest analysis, intent-to-treat analysis, or between-group analysis performed on any test data; and

- E. All documents referring or relating to the sponsorship of the test, including all communications and contracts between any sponsor and the test's researchers.

FOR DEFENDANTS:

/s/ Ken Gibson

Date: 4/19/16

KEN GIBSON, individually and as an officer of
LearningRx Franchise Corp.
5085 List Drive, Suite 200
Colorado Springs, CO 80919

/s/ William I. Rothbard

Date: 4/14/16

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