

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

CASE NO. 8:14-cv-1155-T-23TGW

NPB ADVERTISING, INC., et al.,

Defendants.

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ORDER

In accord with the November 2, 2016 order (Doc. 76) granting summary judgment for the FTC and against Nicholas Scott Congleton, this order permanently enjoins Congleton and requires that Congleton and “relief defendant” Dylan Loher pay restitution.

FINDINGS

1. Personal and subject-matter jurisdiction are proper.
2. Defendant Nicholas Scott Congleton violated Sections 5 and 12 of the FTC Act by conveying to the public false or unsubstantiated efficacy claims, false establishment claims, deceptive testimonials, and deceptive news websites.
3. “Relief defendant” Dylan Craig Loher received “ill-gotten” gains to which Loher lacks a legitimate claim.

DEFINITIONS

A. “Adequate and well-controlled human clinical testing” means a randomized, double-blind, placebo-controlled human clinical study conducted by a qualified person.

B. “Affiliate marketer(s)” means any person, including a third-party marketer, who participates in an affiliate program.

C. “Affiliate network(s)” means any person who provides another person with an affiliate marketer for an affiliate program or whom any person contracts with as an affiliate marketer to promote any product, service, or program.

D. “Affiliate program(s)” means:

1. Any arrangement under which a marketer or seller of a product, service, or program pays, offers to pay, or provides or offers to provide any consideration to any defendant, either directly or through an affiliate network, to:

a) Provide the marketer or seller with, or refer to the marketer or seller, potential or actual customers; or

b) Otherwise market, advertise, or offer for sale the product, service, or program on behalf of the marketer or seller; or

2. Any arrangement under which any defendant pays, offers to pay, or provides or offers to provide any consideration to a third party, either directly or through an affiliate network, to:

a) Provide any defendant with, or refer to any defendant, potential or actual customers; or

b) Otherwise market, advertise, or offer for sale any product, service, or program on behalf of any defendant.

E. "Assisting others" includes:

1. Arranging for the dissemination or publication of an advertisement;
2. Assisting in the formulation, drafting, or revision of an advertisement;
3. Creating, hosting, or maintaining a website, including funding the domain registration;
4. Recruiting a third party to advertise or market a product, service, or program;
5. Obtaining or generating a customer lead;
6. Performing or providing a marketing, billing, or collection service;
7. Verifying, processing, fulfilling, or arranging for the fulfillment of an order; or
8. Acting as an officer, director, or managing member of a business entity.

F. "Clearly and prominently" means:

1. In text (e.g., a printed publication or a word displayed on the screen of an electronic device), the disclosure must stand out from the accompanying text and be of a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend the disclosure. The text must contrast with the background on which the text appears.
2. In a communication disseminated orally or audibly (e.g., radio or streaming audio), the disclosure must be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend the disclosure.
3. In a communication disseminated through video (e.g., television or streaming video), the disclosure must be in writing in a form consistent with subsection (1) of this definition and must appear on the screen long enough for an ordinary consumer to read and comprehend the disclosure.

4. In a communication made through the Internet or another web-based application or service:

a) The disclosure must be unavoidable and presented in a form consistent with subsection (1) of this definition; and

b) The disclosure must be on the same webpage, online service page, or other electronic page and in close proximity to the triggering representation.

5. In a communication with both an audio and visual component, the disclosure must be presented simultaneously in both the audio and visual portions of the communication. In a communications presented either through visually or audibly, the disclosure must occur through the same means in which the communication is presented.

6. In all instances, the disclosure must be presented prior to the consumer incurring any financial obligation, in language and syntax comprehensible by an ordinary consumer. The disclosure must be in the same language as the predominant language that is used in the communication, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication with the consumer.

G. "Close proximity" means on the same print page, web page, or other electronic page, and proximate to the triggering representation. A disclosure is not closely proximate if accessed or displayed through a hyperlink, popup, or interstitial.

H. "Commerce" is defined in 15 U.S.C. § 44.

I. "Defendants" means all of the following, individually, collectively, or in any combination:

1. Defendant Nicholas Scott Congleton, a/k/a Nick Scott, a/k/a Mike Jackson, individually and as an owner and managing member of NPB Advertising, Inc., Nationwide Ventures, LLC, Olympus Advertising, Inc., JMD Advertising, Inc., and Signature Group, LLC.

2. Relief Defendant Dylan Craig Loher.

J. "Device" means an instrument, apparatus, implement, machine, contrivance, implant, in vitro re-agent, or another similar article, including any component, part, or accessory, which is:

1. Recognized in the official National Formulary, or the United States Pharmacopeia, or any supplement to the National Formulary or the Pharmacopeia;
2. Intended for use in the diagnosis of a disease or condition or in the cure, mitigation, treatment, or prevention of disease, in man or another animal; or
3. Intended to affect the structure or any function of the body of man or other animals; and which does not achieve any principal intended purpose through chemical action within or on the body of man or other animals and which is not dependent for the achievement of any principal intended purpose upon being metabolized.

K. "Dietary Supplement" means:

1. Any product labeled or represented as a dietary supplement; or
2. Any pill, tablet, capsule, powder, softgel, gelcap, liquid, or other similar form containing one or more ingredients that are a vitamin, mineral, herb or other botanical, amino acid, probiotic, or other dietary substance used by humans to supplement the diet by increasing the total dietary intake, or a concentrate, metabolite, constituent, extract, or combination of any ingredient described above that is intended to be ingested, and is not represented to be used as a conventional food or as a sole item of a meal or the diet.

L. "Drug" means:

1. An article recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of these directories;
2. An article intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or another animal;
3. An article (other than food) intended to affect the structure or any function of the body of man or another animal; and

4. An article intended for use as a component of any article specified in clause 1, 2, or 3 above; but “drug” excludes a device or a device’s component, part, or accessory.

M. “Endorsement” means, as defined in 16 C.F.R. § 255.0(b), any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.

N. “Essentially equivalent product” means a product that contains the identical ingredients, except for inactive ingredients (e.g., binders, colors, fillers, excipients), in the same form and dosage, and with the same route of administration (e.g., orally, sublingually), as the Dietary Supplement, Food, or Drug; provided that the Dietary Supplement, Food, or Drug may contain additional ingredients if reliable scientific evidence indicates that the amount and combination of additional ingredients are unlikely to impede or inhibit the effectiveness of the ingredients in the essentially equivalent product.

O. “Food” means, as defined in Section 15 of the FTC Act, 15 U.S.C. § 55:

1. An article used for food or drink for man or another animal;
2. Chewing gum; and
3. An article used for components of any such article.

P. “Material connection” means any relationship that materially affects the weight or credibility of any endorsement and that a reasonable consumer would not expect.

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

R. “Pure Green Coffee” means any dietary supplement, food, or drug, sold alone or in combination with companion products, that is advertised,

marketed, promoted, offered for sale, distributed, or sold with express or implied representations that the product contains green coffee or green-coffee extract.

S. "Reliably reported," for a human clinical test or study ("test"), means a report of the test has been published in a peer-reviewed journal. The report must provide sufficient information about the test for an expert to assess the reliability of the test.

T. "Twelfth Street property" means the improved property situated in Hillsborough, described as:

Lot 21, Block 5, INTERSTATE INVESTMENT CO'S PLAT NO. 3, according to the map or plat thereof as recorded in Plat Book 14, Page 2, Public Records of Hillsborough County, Florida. Parcel Number: A-19-29-19-4X0-000005-00021.0 Together with all the tenements, hereditaments, improvements, and appurtenances thereto belonging or in anywise appertaining.

ORDER

I. PROHIBITED REPRESENTATIONS: WEIGHT-LOSS CLAIMS

Congleton, Congleton's 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, marketing, promotion, offering for sale, sale, or distribution of any dietary supplement, food, or drug, are permanently enjoined from making, or assisting others in making, directly or by implication, including through the use of a product name, endorsement, depiction, or illustration, any representation that such dietary supplement, food, or drug:

A. Causes, or assists in causing, weight loss, fat loss, or any specific amount of weight loss or fat loss;

- B. Causes, or assists in causing, rapid weight loss or fat loss;
- C. Causes, or assists in causing, substantial weight loss or fat loss; or
- D. Consumers who use the dietary supplement, food, or drug can generally expect to achieve the weight loss or fat loss results represented by an endorser of such dietary supplement, food, or drug;

unless the representation is non-misleading and, at the time of making such representation, Congleton relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of this section, competent and reliable scientific evidence shall consist of adequate and well-controlled human clinical testing of the dietary supplement, food, or drug, or of an essentially equivalent product, that conforms to acceptable designs and protocols, and which is sufficient in quality and quantity, based on standards generally accepted by experts in weight loss, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate the representation. Congleton will bear the burden of proving that a product satisfies the definition of essentially equivalent product. In addition, all underlying or supporting data and documents generally accepted by experts in weight loss as relevant to an assessment of such testing as described in the “Preservation of Records Relating to Competent and Reliable Human Clinical Tests or Studies” section must be available for inspection and production to the FTC.

II. PROHIBITED REPRESENTATIONS: OTHER HEALTH-RELATED CLAIMS

Congleton, Congleton’s 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, marketing, promotion, offering for sale, sale, or distribution of any dietary supplement, food, drug, or device, are hereby permanently enjoined from making, or assisting others in making, directly or by implication, including through the use of a product name, endorsement, depiction, or illustration, any representation, other than representations covered under Section I of this order, for any dietary supplement, food, drug, or device about the health benefits, performance, or efficacy of the dietary supplement, food, drug, or device, unless the representation is accurate, and, at the time of making the representation, Congleton relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate the representation. For purposes of this Section, competent and reliable scientific evidence means tests, analyses, research, or studies (1) that have been conducted and evaluated in an objective manner by a qualified person; (2) that are generally accepted in the profession to yield accurate and reliable results; and (3) as to which, when they are human clinical tests or studies, all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of such testing as set forth in the section “Preservation of Records Relating to Competent and Reliable Human Clinical Tests or Studies” are available for inspection and production to the FTC.

**III. PROHIBITED REPRESENTATIONS:
NON-HEALTH RELATED CLAIMS**

Congleton, Congleton's 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, marketing, promotion, offering for sale, sale, or distribution of any product, service, or program that is not a dietary supplement, food, drug, or device, are hereby permanently enjoined from making, or assisting another in making, directly or by implication, including through the use of a product name, endorsement, depiction, or illustration, any representation regarding the benefits, performance, or efficacy of any such product, service, or program unless the representation is accurate, and, at the time of making such representation, Congleton possesses and relies upon competent and reliable evidence that substantiates the representation. For purposes of this Section, competent and reliable evidence means tests, analyses, research, studies, surveys, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by a qualified individual who uses procedures generally accepted in the profession to yield accurate and reliable results.

**IV. PROHIBITED REPRESENTATIONS:
ALL PRODUCTS, SERVICES, OR
PROGRAMS**

Congleton, Congleton's 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, marketing, promotion, offering for sale, sale, or distribution of any product, service, or program, are hereby permanently restrained and enjoined from:

A. Misrepresenting, or assisting others in misrepresenting, any material fact, directly or by implication, including:

1. That any website or other publication is an objective news report;
2. That an objective news reporter has performed an independent test of any product, service, or program;
3. That a comment posted on a website expresses the unbiased opinion of a consumer;
4. The total cost to purchase, receive, or use the product, service, or program;
5. Any material restriction, limitation, or condition to purchase, receive, or use the product, service, or program;
6. Any material aspect of the performance, efficacy, nature, or central characteristic of the product, service, or program; and
7. Any material aspect of the nature or terms of a refund, cancellation, exchange, or repurchase policy for the product, service, or program; and

B. Failing to disclose, clearly and prominently, in close proximity to the triggering representation:

1. For any endorsement of the product, service, or program, all material connections between the person providing the endorsement and Congleton or any other person manufacturing, labeling, advertising, marketing, promoting, offering for sale, selling, or distributing such product, including whether the endorser has been paid or promised payment, directly or indirectly, to use the product, service, or program or to convey the person's opinions, findings, beliefs, or experience regarding such product, service, or program;

2. For any representation that any test or study supports any claims about the benefits, performance, or efficacy of the product, service, or program, all material connections with any person who has conducted, authored, or participated in the test or study; and

3. If applicable, that the content of any website or other publication has not been authored by an objective journalist but is in fact an advertisement placed for compensation; and

C. Misrepresenting that consumers who use such product, service, or program can generally expect to achieve the results represented by an endorser of such product, service, or program.

**V. PROHIBITED REPRESENTATIONS:
TESTS OR STUDIES**

Congleton, Congleton's 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, marketing, promotion, offering for sale, sale, or distribution of any dietary supplement, food, drug, or device, are permanently enjoined from misrepresenting, or assisting others in misrepresenting, directly or by implication, including through the use of any product name or endorsement:

A. The existence, contents, validity, results, conclusions, or interpretations of any test, study, or research; or

B. That the benefits of such dietary supplement, food, drug, or device are scientifically proven.

VI. FDA APPROVED CLAIMS

Nothing in this order shall prohibit Congleton from:

A. Making any representation for any drug that is permitted in labeling for such drug under any tentative or final monograph promulgated by the FDA, or under any new drug application approved by the FDA; and

B. Making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the FDA pursuant to the Nutrition Labeling and Education Act of 1990 or permitted under Sections 303–04 of the Food and Drug Administration Modernization Act of 1997.

VII. PROHIBITED CONDUCT: AFFILIATE MARKETING

Congleton, Congleton's 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, marketing, promotion, offering for sale, sale, or distribution of any products, services, or programs through an affiliate program, are hereby permanently restrained and enjoined from failing to:

A. Require each affiliate marketer or affiliate network used in any affiliate program to provide to Congleton the following identifying information:

1. In the case of a natural person, the affiliate marketer's or affiliate network's first and last name, physical address, country, telephone number, email address, and complete bank account information as to where a payment is to be made to that person;

2. In the case of a business entity that is a direct affiliate marketer with Congleton, the affiliate marketer's name and any and all names under which it does business, state of incorporation, registered agent, and the first and last name, physical address, country, telephone number, and email address for at least one natural person who owns, manages, or

controls the affiliate marketer, and the complete bank account information as to where payments are to be made to the affiliate marketer;

3. In the case of a business entity that is an affiliate network, the affiliate network's name and any and all names under which it does business, state of incorporation, registered agent, and the first and last name, physical address, country, telephone number, and email address for at least one natural person who owns, manages, or controls the affiliate network, and the complete bank account information as to where payments are to be made to the affiliate network; and

4. If Congleton has access to certain affiliate marketers only through an affiliate network, then Congleton must contractually require each affiliate network to obtain and maintain from those affiliate marketers the identifying information set forth in Subsections A.1 and A.2. of this section prior to the affiliate marketer's or affiliate network's participation in any affiliate program of Congleton.

B. As a condition of doing business with any affiliate marketer or affiliate network or such affiliate marketer or affiliate network's acceptance into any Congleton affiliate program:

1. Provide each such affiliate marketer or affiliate network a copy of this order;

2. Obtain from each affiliate marketer or affiliate network a signed and dated statement acknowledging receipt of this order and expressly agreeing to comply with this order; and

3. Clearly and prominently disclose in writing that engaging in acts or practices prohibited by this order will result in immediate termination of any affiliate marketer or affiliate network and forfeiture of all monies owed to such affiliate marketer or affiliate network; provided, however, that if Congleton has access to certain affiliate marketers only through an affiliate network, then Congleton must contractually require that the affiliate network provide the information required by this subsection to each affiliate marketers and retain proof of the same prior to any such affiliate marketer being used in any affiliate program of Congleton; and if Congleton should acquire an entity that has an existing program of selling through affiliate marketers, the entity must complete all steps in this subsection prior to Congleton's acquisition of the entity.

C. Require that each affiliate marketer or affiliate network, prior to the public use or dissemination to consumers of any marketing materials, including websites, emails, and pop-ups used by that affiliate marketer or affiliate network to advertise, promote, market, offer for sale, or sell any products, services, or programs through any Congleton affiliate program, provide Congleton with the following information:

1. Copies of marketing materials to be used by the affiliate marketer or affiliate network, including text, graphics, video, audio, and photographs;
2. Each location the affiliate marketer or affiliate network maintains, or directly or indirectly controls, where the marketing materials will appear, including the URL of any website; and
3. For hyperlinks contained within the marketing materials, each location to which a consumer will be transferred by clicking on the hyperlink, including the URL of any website. Also, Congleton must require each affiliate marketer or affiliate network to maintain and to provide Congleton upon request with records of the dates when the marketing materials are publicly used or disseminated to consumers. However, if Congleton has access to certain affiliate marketers only through an affiliate network, then Congleton must contractually require that the affiliate network obtain and maintain the same information set forth above from each of those affiliate marketers who are part of any Congleton affiliate program prior to the public use or dissemination to consumers of any such marketing materials, and provide proof to Congleton of having obtained the same.

D. Promptly review the marketing materials specified in subsection C of this section as necessary to ensure compliance with this order. Also, Congleton must promptly take steps as necessary to ensure that the marketing materials provided to Congleton under subsection C above of this section are the marketing materials publicly used or disseminated to consumers by the affiliate marketer or affiliate network. If Congleton determines that use of any marketing materials does not comply with this order, then Congleton shall inform the affiliate marketer or affiliate network in writing that approval to use such marketing materials is denied and shall not pay any amounts to the affiliate marketer or affiliate network for such marketing, including any payments for leads, "clickthroughs," or sales resulting therefrom. However, if Congleton has access to an affiliate marketers only through an affiliate network, then Congleton must

contractually require that the affiliate network comply with the procedures set forth in this subsection.

E. Promptly investigate any complaints that Congleton receives through any source to determine whether any affiliate marketer or affiliate network is engaging in acts or practices prohibited by this order, either directly or through any affiliate marketer that is part of any affiliate marketer program of Congleton.

F. Upon determining that any affiliate marketer or affiliate network has engaged in, or is engaging in, acts or practices prohibited by this order, either directly or through any affiliate marketer that is part of any affiliate program of Congleton, immediately:

1. Disable any connection between the affiliate program of Congleton and the marketing materials used by the affiliate marketer or affiliate network to engage in such acts or practices prohibited by this order;
2. Halt all payments to the affiliate marketer or affiliate network resulting from such acts or practices prohibited by this order; and
3. Terminate the Affiliate Marketer or Affiliate Network; provided, however, Congleton shall not be in violation of this subsection if they fail to terminate an Affiliate Network in a case where Congleton's only access to an Affiliate Marketer who has engaged in acts or practices prohibited by this Order is through an Affiliate Network and the Affiliate Network immediately terminates the Affiliate Marketer violating this Order from any Affiliate Program maintained by Congleton.

VIII. MONETARY JUDGMENT AS TO CONGLETON

The clerk is directed to enter a judgment of \$30,000,000 for the FTC and against Congleton as equitable monetary relief, including but not limited to consumer injury and disgorgement of ill-gotten gains. Congleton is jointly and severally liable with any and all other defendants named in the amended complaint.

Congleton must disgorge \$29,131,512 (a sum equal to \$30,000,000 less approximately \$868,488 in payments to be made by Loher and the other defendants in the amended complaint) to the FTC within seven days of entry of this order by electronic fund transfer. The transfer must comply with instructions to be provided by a representative of the FTC.

IX. MONETARY JUDGMENT AS TO LOHER

The clerk is directed to enter judgment of \$549,000 for the FTC and against Dylan Loher.

The Twelfth Street property must be sold and proceeds of the sale given to the FTC as full or partial satisfaction of the disgorgement judgment. An order will appoint a receiver to sell the Twelfth Street property. Within seven days of entry of this order, the FTC must submit a proposed order that implements the sale of the Twelfth Street property through the receiver.

Loher must take all reasonable steps to maintain the value of the Twelfth Street property until the property's sale, including maintaining property and liability insurance on the Twelfth Street property for at least replacement value; remaining current on all amounts due and payable on the Twelfth Street property, including, but not limited to, taxes, utilities, reasonable and necessary maintenance, homeowner's assessments, sewer and water use charges, and similar fees. Loher must take no action to diminish or encumber the value of the Twelfth Street property.

X. ADDITIONAL MONETARY PROVISIONS

All money paid to the FTC pursuant to this Order may be deposited into a fund administered by the FTC or its designee (but excluding any privately owned, managed, or directed organization, fund, or other interest) to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the FTC decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, the FTC may apply any remaining money for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Congleton's practices alleged in the amended complaint. Any money not used for such equitable relief is to be deposited to the U.S. Treasury as disgorgement. Congleton has no right to challenge any actions the FTC or its representatives may take pursuant to this Subsection. Congleton relinquishes dominion and all legal and equitable right, title, and interest in all assets transferred pursuant to this Order and may not seek the return of any assets.

XI. CUSTOMER INFORMATION

Congleton, Congleton's 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, are permanently restrained and enjoined from directly or indirectly:

A. Failing to provide sufficient customer information to enable the FTC to efficiently administer consumer redress. If a representative of the FTC requests in writing any information related to redress, Congleton must provide it, in the form prescribed by the FTC, within fourteen (14) calendar days.

B. Disclosing, using, or benefitting from customer information, including the name, address, telephone number, email address, Social Security number, other identifying information, or any data that enables access to a customer's account (including a credit card, bank account, or other financial account), that Congleton obtained prior to entry of this order in connection with the manufacturing, labeling, advertising, marketing, promotion, offering for sale, sale, or distribution of Pure Green Coffee; and

C. Failing to destroy such customer information in all forms in their possession, custody, or control within thirty (30) calendar days after receipt of written direction to do so from a representative of the FTC. Provided, however, that customer information need not be disposed of, and may be disclosed, to the extent requested by a government agency or required by law, regulation, or court order.

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

For any human clinical test or study ("test") upon which Congleton relies to substantiate any claim covered by this order, Congleton must secure and preserve all underlying or supporting data and documents generally accepted by an expert 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. However, the preceding preservation requirement shall not apply to a Reliably Reported test, unless the test was conducted, controlled, or sponsored, in whole or in part by: (1) Congleton; (2) any of Congleton's officers, agents, representatives, or employees; (3) any other person or entity in active concert or participation with any Congleton; (4) any person or entity affiliated with or acting on behalf of any Congleton; (5) any supplier of any ingredient contained in the product at issue to any of the foregoing or to the product's manufacturer; or (6) the supplier or manufacturer of such product. For any test conducted, controlled, or sponsored, in whole or in part, by Congleton, Congleton must establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of any personal information collected from or about participants. These procedures shall be documented in writing and shall contain administrative, technical, and physical safeguards appropriate to size and complexity, the nature and scope of Congleton's activities, and the sensitivity of the personal information collected from or about the participants.

XIII. ORDER ACKNOWLEDGMENTS

A. Congleton and Loher, within seven calendar days of entry of this order, must submit to the FTC an acknowledgment of receipt of this order sworn under penalty of perjury.

B. For five years after entry of this order, Congleton, for any business that Congleton, individually or collectively with any other defendant named in the amended complaint, is the majority owner or controls directly or indirectly, must deliver a copy of this order to: (1) all principals, officers,

directors, and LLC managers and members; (2) all employees, agents, and representatives who participate in conduct specified in sections I through VII; and (3) any business entity resulting from any change in structure as set forth in the Section "Compliance Reporting." Delivery must occur within seven calendar days of entry of this order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Congleton delivered a copy of this order, Congleton must obtain, within thirty calendar days, a signed and dated acknowledgment of receipt of this order.

XIV. COMPLIANCE REPORTING

A. One year after entry of this Order, Congleton must submit a compliance report, sworn under penalty of perjury:

1. Congleton must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the FTC may use to communicate with Congleton; (b) identify all of Congleton's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the products, services, or programs offered, the means of advertising, marketing, and sales, and the involvement of any defendant named in the amended complaint (which Congleton must describe if he knows or should know due to his own involvement); (d) describe in detail whether and how Congleton is in compliance with each Section of this order; and (e) provide a copy of each order acknowledgment obtained pursuant to this order, unless previously submitted to the FTC.

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

B. For twenty years after entry of this order, Congleton must submit a compliance notice, sworn under penalty of perjury, within fourteen calendar days of any change in the following:

1. Congleton must report any change in: (a) any designated point of contact; or (b) the structure of any entity that Congleton has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this order, including: 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. Congleton 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 Congleton performs services whether as an employee or otherwise and any entity in which Congleton has any ownership interest, and identify the name, physical address, and any Internet address of the business or entity.

C. Congleton must submit to the FTC notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Congleton within fourteen calendar days of its filing.

D. Any submission to the FTC required by this order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: “I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____” and supplying the date, signatory’s full name, title (if applicable), and signature.

E. Unless otherwise directed by an FTC representative in writing, all submissions to the FTC pursuant to this order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: FTC v. NPB Advertising, Inc., Matter No. X140025.

XV. RECORDKEEPING

Congleton must create certain records for twenty years after entry of the Order, and retain each such record for five years. Specifically, Congleton, for any business in which Congleton, either, individually or collectively with any other defendant named in the amended complaint, is a majority owner or controls directly or indirectly, must create and retain the following records:

- A. Accounting records showing the revenues from all products, services, or programs sold;
- B. Personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;
- C. Records of all consumer 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 FTC; and
- E. A copy of each unique advertisement or other marketing material, including any web pages, websites, display banners, mobile web banners, mobile web posters, and any interstitial, email, twitter, short message service (SMS), and multimedia messaging service (MMS) advertisements.

XVI. COMPLIANCE MONITORING

To monitor Congleton's and Loher's compliance with this order, including any failure to transfer any assets as required by this order:

- A. Within fourteen calendar days of receipt of a written request from a representative of the FTC, Congleton must: submit additional compliance reports or other requested information, which must be sworn under penalty

of perjury; appear for depositions; and produce documents for inspection and copying. The FTC is also authorized to obtain discovery, without further leave of court, using any of the procedures prescribed by Federal Rules of Civil Procedure 29, 30 (including telephonic depositions), 31, 33, 34, 36, 45, and 69.

B. For matters concerning this order, the FTC is authorized to communicate directly with Congleton and Loher. Congleton must permit representatives of the FTC to interview any employee or other person affiliated with him who has agreed to such an interview. The person interviewed may have counsel present.

C. The FTC may use all other lawful means, including posing, through its representatives as consumers, suppliers, or other individuals or entities, to Congleton or any individual or entity affiliated with him, without the necessity of identification or prior notice. Nothing in this order limits the FTC's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

D. Upon written request from a representative of the FTC, any consumer reporting agency must furnish consumer reports concerning Congleton and Loher, pursuant to Section 604(1) of the Fair Credit Reporting Act, 15 U.S.C. §1681b(a)(1).

XVII. RETENTION OF JURISDICTION

Jurisdiction is retained in this action for enforcement of this order.

ORDERED in Tampa, Florida, on November 2, 2016.



STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE