

1 Laura Fremont
CA Bar No. 159670
2 David M. Newman
CA Bar No. 54218
3 Attorneys for Plaintiff
Federal Trade Commission
4 901 Market Street, Suite 570
San Francisco, CA 94103
5 (415) 848-5100 (voice)
(415) 848-5184 (fax)
6
7

8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10
11 FEDERAL TRADE COMMISSION,

12 Plaintiff,

13 v.

14 BIOPULSE INTERNATIONAL, INC.,
15 BIOPULSE, INC.,
16 JONATHAN NEVILLE, and
LORAN SWENSON,

17 Defendants.
18

**STIPULATED FINAL
JUDGMENT AND ORDER RE
JONATHAN NEVILLE**

Case No:

19 On July 23, 2002, plaintiff, the Federal Trade Commission ("FTC" or "Commission"), filed a
20 Complaint for permanent injunction and other relief ("Complaint"), pursuant to Section 13(b) of the
21 Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), against BioPulse International, Inc.,
22 BioPulse, Inc., Jonathan Neville, and Loran Swenson.

23 The Commission and Defendant Jonathan Neville ("Defendant" or "Defendant Neville"), having
24 been represented by their attorneys whose names appear hereafter, have stipulated to the entry of this
25 Final Judgment and Order ("Order") in settlement of the Commission's Complaint against the
26 Defendant. The Court, being advised in the premises, finds as follows:
27

1 **FINDINGS**

2 1. In its Complaint, the Commission alleged that the Defendant violated Sections 5(a) and
3 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. The Commission sought permanent injunctive relief
4 for alleged deceptive acts or practices by the Defendant in connection with the marketing and sale of
5 health and medical services, including insulin-induced hypoglycemic sleep therapy, also known as
6 induced hypoglycemic treatment or IHT (“IHT”), which involves injecting insulin into cancer patients,
7 purportedly to “starve” tumors; and acoustic lightwave treatment (“ALW”), which involves having
8 patients sit in front of a light source purportedly to receive treatment for a variety of diseases and
9 conditions.

10 2. The Commission has the authority under Section 13(b) of the FTC Act, 15 U.S.C.
11 § 53(b), to seek the relief it has requested.

12 3. This Court has jurisdiction over the subject matter of this case, and jurisdiction over the
13 Defendant. Venue in the Northern District of California is proper, and the Complaint states a claim
14 upon which relief may be granted against the Defendant.

15 4. The activities of the Defendant as alleged in the Commission’s Complaint were or are in
16 or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

17 5. The Commission and the Defendant stipulate and agree to this Order, without trial or
18 final adjudication of any issue of fact or law, to settle and resolve all matters in dispute arising from the
19 Complaint to the date of entry of this Order. By entering this stipulation, the Defendant does not admit
20 or deny any of the allegations set forth in the Complaint, other than jurisdictional facts; *provided*,
21 *however*, the Defendant agrees that the facts as alleged in the Complaint filed in this action shall be
22 taken as true in any subsequent litigation filed by the Commission to enforce its rights pursuant to this
23 Order, including but not limited to a nondischargeability complaint in any bankruptcy proceeding.

24 6. The Defendant waives all rights to seek judicial review or otherwise challenge or
25 contest the validity of this Order, and further waives and releases any claim he may have against the
26 FTC or its employees, agents or representatives . The Defendant also waives any claim that he may
27 have held under the Equal Access to Justice Act, 28 U.S.C. § 2412, *as amended* by Pub.L. 104-121,

1 110 Stat. 847, 863-64 (1996) concerning the prosecution of this action to the date of entry of this
2 Order. Each party to this Order shall bear its own costs and attorneys' fees incurred in connection with
3 this action.

4 7. Entry of this Order is in the public interest.

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

9 9. Any voluntary bankruptcy petition filed by the Defendant does not automatically stay
10 this action, which the Court finds is the “commencement or continuation of any action or proceeding by
11 a governmental unit to enforce such governmental unit’s police or regulatory power,” as set forth in 11
12 U.S.C. § 362(b)(4).

13 10. Any voluntary bankruptcy petition filed by the Defendant does not divest this Court of
14 jurisdiction to enter this final judgment against the Defendant.

15 **ORDER**

16 **I. DEFINITIONS**

17 IT IS THEREFORE STIPULATED AND ORDERED, that, for the purposes of this Order,
18 the following definitions shall apply:

19 A. “Defendant” shall mean Jonathan Neville, individually and as a former officer and
20 director of BioPulse, Inc. and BioPulse International, Inc.

21 B. “Participating associates” shall refer to Defendant’s agents, servants, employees,
22 attorneys and all persons or entities in active concert or participation with Defendant who receive actual
23 notice of this Order by personal service or otherwise.

24 C. “Food,” “drug,” and “device” shall mean as “food,” “drug,” and “device” are defined in
25 Section 15 of the FTC Act, 15 U.S.C. § 55.

26 D. “Covered product or service” shall mean any dietary supplement, food, drug, or device,
27 or any health-related service or program.

1 E. “Substantially similar service” shall mean any service in which a person receives insulin
2 injections for any purpose other than the treatment of diabetes.

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

7 G. “Document(s)” or “record(s)” shall refer to:

8 1. The original or a true copy of any written, typed, printed, electronically stored,
9 transcribed, taped, recorded, filmed, punched, or graphic matter or other data
10 compilations of any kind, including, but not limited to, letters, e-mail or other
11 correspondence, messages, memoranda, interoffice communications, notes,
12 reports, summaries, manuals, magnetic tapes or discs, tabulations, books,
13 records, checks, invoices, workpapers, journals, ledgers, statements, returns,
14 reports, schedules, or files; and

15 2. Any information stored on any desktop personal computer (“PC”) and
16 workstations, laptops, notebooks, or other portable computers, whether
17 assigned to individuals or in pools of computers available for shared use; and
18 home computers used for work-related purposes; backup disks and tapes,
19 archive disks and tapes, and other forms of offline storage, whether stored
20 onsite with the computer used to generate them, stored offsite in another
21 company facility or stored offsite by a third-party, such as in a disaster recovery
22 center; and computers and related offline storage used by Defendant’s
23 participating associates, which may include persons who are not employees of
24 the company or who do not work on company premises.

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

27 I. The term “including” shall mean “without limitation.”

1 J. Any requirement that the Defendant “notify” or “provide” any information or material to
2 the Commission, shall mean that the Defendant shall send the necessary information or material via first-
3 class mail, costs prepaid, to:

4 Director, Western Region
5 Federal Trade Commission
6 901 Market Street, Suite 570
7 San Francisco, CA 94103
8 Attn: FTC v. BioPulse International, Inc.
9 Matter No. 0123057

10 II. PROHIBITED REPRESENTATIONS

11 A. IT IS FURTHER STIPULATED AND ORDERED that, in connection with the
12 advertising, promotion, offering for sale, sale, or distribution of IHT or any substantially similar service,
13 the Defendant and his participating associates are permanently enjoined from making any
14 misrepresentation, or assisting others in making any misrepresentation, in any manner, expressly or by
15 implication, about the safety of IHT or any such service.

16 B. IT IS FURTHER STIPULATED AND ORDERED that, in connection with the
17 advertising, promotion, offering for sale, sale, manufacturing, labeling, or distribution of IHT, ALW, or
18 any other covered product or service, the Defendant and his participating associates are permanently
19 enjoined from making any representation, or assisting others in making any representation, in any
20 manner, expressly or by implication:

- 21 (1) That such product or service is an effective treatment for cancer;
- 22 (2) That such product or service has any effect on cancer tumors;
- 23 (3) That such product or service is an effective treatment for any disease or health
24 condition, including, but not limited to, arthritis, candida yeast infection,
25 influenza, headaches, parasites, lyme disease, or pneumonia; or
- 26 (4) About the health benefits, performance, safety or efficacy of any such product
27 or service;

28 unless, at the time the representation is made, they possess and rely upon competent and reliable
scientific evidence that substantiates the representation.

1 **III. SUSPENDED JUDGMENT AND RIGHT TO REOPEN**
2 **AND TERMINATE SUSPENSION**

3 IT IS FURTHER STIPULATED AND ORDERED that:

4 A. Judgment is hereby entered against the Defendant in the amount of Four Million, Three
5 Hundred Twenty Eight Thousand Dollars (\$4,328,000.00); *provided, however*, that this judgment
6 shall be suspended subject to the conditions set forth in subsection D of this Paragraph; *and provided*
7 *further* that the suspension of this judgment may only be revoked by further order of the Court entered
8 pursuant to subsection D of this Paragraph.

9 B. All funds paid pursuant to this Paragraph shall be deposited into a fund administered by
10 the Commission or its agent to be used for equitable relief, including but not limited to consumer redress
11 and any attendant expenses for the administration of any redress fund. In the event that direct redress
12 to consumers is wholly or partially impracticable or funds remain after redress is completed, the
13 Commission may apply any remaining funds for such other equitable relief (including consumer
14 information remedies) as it determines to be reasonably related to the Defendant's practices alleged in
15 the Complaint. Any funds not used for such equitable relief shall be deposited to the Treasury as
16 disgorgement. Defendant Neville shall have no right to challenge the Commission's choice of remedies
17 under this Paragraph.

18 C. Proceedings instituted under this Paragraph are in addition to, and not in lieu of,
19 any other civil or criminal remedies that may be provided by law, including any other
20 proceedings the Commission may initiate to enforce this Order.

21 D. The Commission's agreement to this Order is expressly premised upon the truthfulness,
22 accuracy and completeness of the sworn financial statements of Defendant Neville, executed on March
23 9, 2002, and supplied to the Commission. Said financial statements contain material information upon
24 which the FTC has relied in negotiating and agreeing to the terms of this Order. If, upon motion by the
25 Commission to the Court, the Court finds that the Defendant failed to disclose, in such sworn financial
26 statements, any material asset with a value exceeding One Thousand Dollars (\$1,000), or materially
27 misrepresented the value of any asset, or made any other material misrepresentation in or omission from

1 his financial statement, the suspension of the monetary judgment will be terminated and the entire
2 judgment amount of \$4,328,000.00 will be immediately due and payable. For purposes of this Section,
3 and any subsequent proceedings to enforce payment – including, but not limited to, a non-
4 dischargeability complaint filed in a bankruptcy proceeding – the Defendant stipulates to all of the
5 allegations in the Commission’s complaint.

6 **IV. ACKNOWLEDGMENT OF RECEIPT OF ORDER**

7 IT IS FURTHER STIPULATED AND ORDERED that, within five (5) business days after
8 receipt by the Defendant of this Order as entered by the Court, Defendant Neville shall execute and
9 submit to the Commission a truthful sworn statement, in the form shown on Appendix A, that shall
10 acknowledge receipt of this Order.

11 **V. DISTRIBUTION OF ORDER**

12 IT IS FURTHER STIPULATED AND ORDERED that, for a period of five (5) years from the
13 date of entry of this Order, Defendant shall:

14 A. Provide a copy of this Order to, and obtain a signed and dated acknowledgment of
15 receipt of same from, each officer or director, each individual serving in a management capacity, all
16 personnel involved in responding to consumer complaints or inquiries, all medical or health care
17 personnel, and all sales personnel, whether designated as employees, consultants, independent
18 contractors or otherwise, immediately upon employing or retaining any such persons, or, if such
19 persons are currently employed or retained, within five (5) days of the date of entry of this order, of any
20 business directly or indirectly owned, operated or controlled by Defendant Neville, where the business
21 is engaged in the advertising, promotion, offering for sale, sale, manufacturing, labeling or distribution of
22 any covered product or service; and

23 B. Maintain for a period of three (3) years after creation, and upon reasonable notice,
24 make available to representatives of the Commission, the original signed and dated acknowledgments
25 of the receipt of copies of this Order, as required in Subsection A of this Paragraph.

26 **VI. COMMISSION’S AUTHORITY TO MONITOR COMPLIANCE**

27 IT IS FURTHER STIPULATED AND ORDERED that the Commission is authorized to

1 monitor Defendant's compliance with this Order by all lawful means, including but not limited to the
2 following:

3 A. The Commission is authorized, without further leave of court, to obtain discovery from
4 any person in the manner provided by Chapter V of the Federal Rules of Civil Procedure, Fed. R. Civ.
5 P. 26 - 37, including the use of compulsory process pursuant to Fed. R. Civ. P. 45, for the purpose of
6 monitoring and investigating the Defendant's compliance with any provision of this Order;

7 B. The Commission is authorized to use representatives posing as consumers and suppliers
8 to Defendant, Defendant's employees, or any other entity managed or controlled in whole or in part by
9 Defendant, without the necessity of identification or prior notice;

10 C. Nothing in this Order shall limit the Commission's lawful use of compulsory process,
11 pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to investigate whether
12 Defendant has violated any provision of this Order or Sections 5 or 12 of the FTC Act, 15 U.S.C.
13 §§ 45 and 52.

14 **VII. COMPLIANCE REPORTING**

15 IT IS FURTHER STIPULATED AND ORDERED that, in order that compliance with the
16 provisions of this Order may be monitored:

17 A. For a period of five (5) years from the date of entry of this Order, Defendant Neville
18 shall notify the Commission of the following:

19 1. Any changes in his residence, mailing address, and telephone number(s), within
20 ten (10) days of the date of such change;

21 2. Any changes in his employment status (including self-employment) within ten
22 (10) days of such change. Such notice shall include the name and address of each
23 business that Defendant is affiliated with or employed by, a statement of the nature of
24 the business, and a statement of Defendant's duties and responsibilities in connection
25 with the business or employment;

26 3. Any proposed change in the structure of any business entity owned or
27 controlled by him, such as creation, incorporation, dissolution, assignment, sale,

1 creation or dissolution of subsidiaries, the proposed filing of a bankruptcy petition, or
2 any other changes that may affect compliance obligations arising out of this Order,
3 within thirty (30) days prior to the effective date of any proposed change; *provided,*
4 *however,* that with respect to any proposed change in structure of such business about
5 which Defendant learns, less than thirty (30) days prior to the date such action is to take
6 place, he shall notify the Commission as soon as practicable after learning of such
7 proposed change; and

8 B. Sixty (60) days after the date of entry of this Order, Defendant shall provide a written report to
9 the FTC, sworn to under penalty of perjury, setting forth in detail the manner and form in which
10 he has complied and is complying with this Order. This report shall include but not be limited
11 to:

- 12 1. Defendant Neville's then current residence address and telephone number(s);
- 13 2. Defendant Neville's then current employment, business address(es), and
14 telephone number(s), a description of the business activities of each such employer, and
15 Defendant's title and responsibilities for each employer;
- 16 3. A copy of each acknowledgment of receipt of this Order obtained by
17 Defendant pursuant to Paragraph V;
- 18 4. A statement describing the manner in which the Defendant has complied and is
19 complying with Paragraph II; and

20 C. Upon written request by a representative of the Commission, Defendant Neville shall
21 submit additional written reports (under oath, if requested) and produce documents on fifteen (15)
22 days' notice with respect to any conduct subject to this Order.

23 D. For the purposes of this Paragraph, "employment" includes the performance of services
24 as an employee, consultant, or independent contractor; and "employers" include any individual or entity
25 for whom Defendant Neville performs services as an employee, consultant, or independent contractor.

26 E. For purposes of the compliance reporting required by this Paragraph, the Commission
27 is authorized to communicate directly with Defendant Neville.

1 **VIII. ACCESS TO BUSINESS PREMISES**

2 IT IS FURTHER STIPULATED AND ORDERED that, for a period of five (5) years from the
3 date of entry of this Order, for the purpose of further determining compliance with this Order,
4 Defendant shall permit representatives of the Commission, within three (3) business days of receipt of
5 written notice from the Commission:

6 A. Access during normal business hours to any office, or facility storing documents, of any
7 business directly or indirectly owned, operated or controlled by Defendant Neville, where the business
8 is engaged in the advertising, promotion, offering for sale, sale, manufacturing, labeling, or distribution of
9 any covered product or service. In providing such access, Defendant shall permit representatives of the
10 Commission to inspect and copy all documents relevant to any matter contained in this Order; and shall
11 permit Commission representatives to remove documents relevant to any matter contained in this Order
12 for a period not to exceed five (5) business days so that the documents may be inspected, inventoried,
13 and copied; and

14 B. To interview the officers, directors, and employees, including all personnel involved in
15 responding to consumer complaints or inquiries, and all sales personnel, whether designated as
16 employees, consultants, independent contractors or otherwise, of any business to which Subsection (A)
17 of this Paragraph applies, concerning matters relating to compliance with the terms of this Order. The
18 person interviewed may have counsel present.

19 *Provided* that, upon application of the Commission and for good cause shown, the Court may
20 enter an *ex parte* order granting immediate access to Defendant’s business premises for the purposes
21 of inspecting and copying all documents relevant to any matter contained in this Order.

22 **IX. RECORD KEEPING PROVISIONS**

23 IT IS FURTHER STIPULATED AND ORDERED that, for a period of eight (8) years from
24 the date of entry of this Order, in connection with any business directly or indirectly owned, operated or
25 controlled by Defendant Neville, where the business is engaged in the advertising, promotion, offering
26 for sale, sale, manufacturing, labeling or distribution of any covered product or service, Defendant is
27 hereby restrained and enjoined from failing to create, or have such business create, and from failing to

1 retain, unless otherwise specified:

2 A. All documents evidencing or referring to the health benefits, performance, safety, or
3 efficacy of any covered product or service advertised, promoted, offered for sale, sold, manufactured,
4 labeled, or distributed by Defendant, including, but not limited to, all tests, reports, studies,
5 demonstrations, or other evidence that confirm, contradict, qualify, or call into question the health
6 benefits, performance, safety, or efficacy of such product or service;

7 B. Books, records and accounts that, in reasonable detail, accurately and fairly reflect the
8 cost of any covered product or service sold and revenues generated;

9 C. Records accurately reflecting the name, address, and telephone number of each
10 manufacturer or laboratory engaged in the development or creation of any covered product or service
11 obtained by Defendant for the purpose of advertising, marketing, promoting, offering for sale, selling, or
12 distributing such product or service;

13 D. Records accurately reflecting the name, address, and telephone number of each person
14 employed by Defendant, including as an independent contractor, who is engaged in the advertising,
15 promotion, offering for sale, sale, manufacturing, labeling, distribution, or provision of any covered
16 product or service; that person's job title or position; the date upon which the person commenced
17 work; and the date and reason for the person's termination, if applicable;

18 E. Records containing the names, addresses, telephone numbers, dollar amounts paid,
19 quantity of items or services purchased, and description of items or services purchased or provided, for
20 all persons or entities to whom Defendant has sold, invoiced or shipped any covered product or
21 service;

22 F. Records that reflect, for every customer complaint or refund request relating to any
23 covered product or service, whether received directly or indirectly or through any third party: (1) the
24 customer's name, address, telephone number and the dollar amount paid by the customer; (2) the
25 written complaint or refund request, if any, and the date of the complaint or refund request; (3) the basis
26 of the complaint, including the name of any Defendant or participating associate complained against,
27 and the nature and result of any investigation conducted concerning any complaint; (4) each response

1 and the date of the response; (5) any final resolution and the date of the resolution; and (6) in the event
2 of a denial of a refund request, the reason for the denial; and

3 G. Copies of all advertisements, promotional materials, sales scripts, training materials, or
4 other marketing materials utilized relating to any covered product or service.

5 **X. INDEPENDENCE OF OBLIGATIONS**

6 IT IS FURTHER STIPULATED AND ORDERED that the expiration of any requirements
7 imposed by this Order shall not affect any other obligation arising under this Order.

8 //

9 //

10 //

11 //

12 //

13 //

14 //

15 //

16 //

17 //

18 //

19 //

20 **XI. RETENTION OF JURISDICTION**

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

23 SO STIPULATED:

24 _____
25 LAURA FREMONT
26 DAVID M. NEWMAN
27 Attorneys for Plaintiff
28 FEDERAL TRADE COMMISSION
901 Market Street, Suite 570
San Francisco, CA 94115

JONATHAN NEVILLE

SCOTT C. WALKER
Attorney for Defendant Jonathan Neville

1 (415) 848-5100 (voice)
2 (415) 848-5184 (facsimile)

Abbott & Walker
3651 North 100 East, Suite 300
Provo, UT 84604
(801) 373-1112 (voice)
(801) 852-1961 (facsimile)

3
4 IT IS SO ORDERED, this _____ day of _____, 2002.

5
6 _____
7 UNITED STATES DISTRICT COURT
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

1 APPENDIX A

2 UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF CALIFORNIA

4
5
6 FEDERAL TRADE COMMISSION,

7 Plaintiff,

8 v.

9 BIOPULSE INTERNATIONAL, INC.,
10 BIOPULSE, INC.,
11 JONATHAN NEVILLE, and
LORAN SWENSON,

12 Defendants.

**AFFIDAVIT OF
JONATHAN NEVILLE**

Case No:

13
14 Jonathan Neville, being duly sworn, hereby states and affirms as follows:

15 1. My name is Jonathan Neville. I am a Defendant in the above-captioned civil action. I
16 am a citizen of the United States and am over the age of eighteen. I have personal knowledge of the
17 facts set forth in this Affidavit, and if called as a witness, I could and would competently testify as to the
18 matter stated herein.

19 2. My current business address is *[insert address]*. My current business telephone
20 number is *[insert number]*. My current residential address is *[insert address]*. My current residential
21 telephone number is *[insert number]*.

22 3. On *[insert date]* I received a copy of the Stipulated Final Judgment and Order, which
23 was signed by the Honorable *[insert judge's name]* and entered by the Court on *[insert date]*. A true
24 and correct copy of the Order that I received is appended to this Affidavit.

25 I declare under penalty of perjury under the laws of the United States that the foregoing is true
26 and correct. Executed on *[insert date]*, at *[insert city and state]*.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Jonathan Neville

BEFORE ME this day personally appeared Jonathan Neville, who being first duly sworn, deposes and says that he has read and understands the foregoing statement and that he has executed the same for the purposes contained therein.

SUBSCRIBED AND SWORN to before me this ____ day of _____, 2002, by Jonathan Neville. He is personally known to me or has presented [*state type of identification*] as identification.

PRINT NAME

SIGNATURE

NOTARY PUBLIC,
STATE OF _____

Commission Number: _____
My Commission Expires: _____