



1 Court's orders of April 21, 2009, and June 19, 2009.

2 **THEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED** as follows:

3 **DEFINITIONS**

4 For purposes of this Order, the following definitions shall apply:

5 1. "Individual Defendant" means L. Scott Holmes.

6 2. "Corporate Defendants" means Medlab, Inc.; Pinnacle Holdings, Inc.; Metabolic  
7 Research Associates, Inc.; U.S.A. Health, Inc.; and their successors and assigns.

8 3. "Defendants" means the Individual Defendant and the Corporate Defendants,  
9 individually, collectively, or in any combination.

10 4. "Advertising" and "promotion" shall mean any written or verbal statement,  
11 illustration, or depiction designed to effect a sale or create interest in the purchasing of goods,  
12 whether it appears in a brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book  
13 insert, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of  
14 purchase display, packaging, package insert, label, film, slide, radio, television or cable  
15 television, audio program transmitted over a telephone system, program-length commercial  
16 ("infomercial"), the Internet, email, press release, video news release, or in any other medium.

17 5. "Commerce" shall mean as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

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

22 7. "Defendant Product" shall mean any past, present, and future formulation of any  
23 dietary supplement marketed since January 1, 2005 under the name Zyladex Plus, Questral AC,  
24 Questral AC Fat Killer Plus, Rapid Loss 245, and Rapid Loss Rx.

25 8. "Substantially similar product" shall mean any product containing kola nut,  
26 *Citrus aurantium* (also known as bitter orange), cornflower, bladderwrack, green tea extract,  
27 white willow bark, *Eleutherococcus senticosis*, l-tyrosine, yerba mate, and kelp.

28 9. "Weight-loss product" shall mean any product, program, or service designed,

1 used, or purported to produce weight loss, reduction or elimination of fat, slimming, or caloric  
2 deficit in a user of the product, program, or service and shall include but not be limited to any  
3 Defendant Product and any substantially similar product.

4 10. "Covered Product" shall mean any dietary supplement, food, drug, or device  
5 promoted for weight loss.

6 11. "Eligible Purchasers" shall mean all consumers who purchased any Defendant  
7 Product between January 1, 2005, and the date of entry of this Order.

8 12. "Endorsement" shall mean as defined in 16 C.F.R. § 255.0(b).

9 13. "Food," "drug," and "device" shall mean as defined in Section 15 of the FTC Act,  
10 15 U.S.C. § 55.

11 14. The terms "and" and "or" in this Order shall be construed conjunctively or  
12 disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than  
13 exclusive.

14 15. The term "including" in this Order shall mean "including without limitation."  
15

16 **ORDER**

17 **I.**

18 **PROHIBITED REPRESENTATIONS FOR ANY DEFENDANT PRODUCT**  
19 **AND CERTAIN OTHER PRODUCTS**

20 **IT IS ORDERED** that:

21 A. Defendants, directly or through any corporation, partnership, subsidiary, division,  
22 trade name, device, or other entity, and their officers, agents, servants, employees, and all  
23 persons and entities in active concert or participation with them who receive actual notice of this  
24 Order, by personal service or otherwise, in connection with the manufacturing, labeling,  
25 advertising, promotion, offering for sale, sale, or distribution of any Defendant Product or any  
26 substantially similar product, in or affecting commerce, are hereby permanently restrained and  
27 enjoined from making, or assisting others in making, directly or by implication, including  
28 through the use of endorsements or product names, any representation that such product:

- 1 1. Causes permanent or long-term weight loss; or
- 2 2. Enables users to lose substantial weight or fat without the need to increase
- 3 exercise or reduce caloric intake; and

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

- 12 1. Causes weight loss or fat loss; or
- 13 2. Enables users to lose weight or fat, or any specific amount of weight or
- 14 fat;

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

## 17 II.

### 18 PROHIBITED REPRESENTATIONS FOR COVERED PRODUCTS

19 **IT IS FURTHER ORDERED** that Defendants, directly or through any corporation,  
20 partnership, subsidiary, division, trade name, device, or other entity, and their officers, agents,  
21 servants, employees, and all persons and entities in active concert or participation with them who  
22 receive actual notice of this Order, by personal service or otherwise, in connection with the  
23 manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any  
24 Covered Product, in or affecting commerce, are hereby permanently restrained and enjoined  
25 from making, or assisting others in making, directly or by implication, including through the use  
26 of endorsements or product names, any representation regarding the health benefits,  
27 performance, efficacy, safety, or side effects of any such product, unless the representation is  
28 true, non-misleading, and, at the time it is made, Defendants possess and rely upon competent

1 and reliable scientific evidence that substantiates the representation.

2 **III.**

3 **PROHIBITED REPRESENTATIONS REGARDING TESTS OR STUDIES**

4 **IT IS FURTHER ORDERED** that Defendants, directly or through any corporation,  
5 partnership, subsidiary, division, trade name, device, or other entity, and their officers, agents,  
6 servants, employees, and all persons and entities in active concert or participation with them who  
7 receive actual notice of this Order, by personal service or otherwise, in connection with the  
8 manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any  
9 Covered Product, in or affecting commerce, are hereby permanently restrained and enjoined  
10 from making, or assisting others in making, directly or by implication, including through the use  
11 of endorsements or product names, any misrepresentation about the existence, independence,  
12 contents, validity, results, conclusions, or interpretations of any test or study.

13 **IV.**

14 **FDA-APPROVED CLAIMS**

15 **IT IS FURTHER ORDERED** that nothing in this Order shall prohibit Defendants from  
16 making any representation:

17 A. For any drug that is permitted in labeling for such drug under any tentative or  
18 final standard promulgated by the Food and Drug Administration or for any new drug  
19 application approved by the Food and Drug Administration; and

20 B. For any product that is specifically permitted in labeling for such product by  
21 regulations promulgated by the Food and Drug Administration pursuant to the Nutrition  
22 Labeling and Education Act of 1990.

23 C. For any device that is permitted in labeling for such device under any new  
24 medical device application approved by the Food and Drug Administration.

25 **V.**

26 **MONETARY JUDGMENT**

27 **IT IS FURTHER ORDERED** that:

28 A. Judgment is hereby entered against Defendants jointly and severally in the

1 amount of \$2,693,256 (hereafter the “restitution amount”). Judgment shall be paid to the  
2 Commission within ten (10) days of entry of this Order;

3 B. All funds paid to the Commission pursuant to this Section shall be deposited into  
4 a fund administered by the Commission or its agents to be used for equitable relief, including  
5 consumer restitution and any attendant expenses for the administration of any restitution fund. If  
6 the Commission determines in its sole discretion that restitution to consumers is wholly or  
7 partially impracticable or funds remain after the restitution is completed, the Commission may  
8 apply any remaining funds for such other equitable relief, including consumer information  
9 remedies, as it determines to be reasonably related to Defendants’ practices alleged in the  
10 Complaint. Any funds not used for such equitable relief shall be deposited to the United States  
11 Treasury as disgorgement. Defendants shall have no right to challenge the Commission’s choice  
12 of remedies under this Part;

13 C. If Defendants fail to pay the Commission the restitution amount set forth above,  
14 interest computed at the rate prescribed under 28 U.S.C. § 1961, as amended, shall immediately  
15 begin to accrue on the unpaid balance;

16 D. Defendants shall cooperate fully with the Commission and its agents in all  
17 attempts to collect the amount due pursuant to this Section if the Defendants fail to pay fully the  
18 amount due at the time specified herein. In such event, Defendants shall provide the  
19 Commission with their federal and state tax returns for the preceding three years, and complete  
20 new standard-form financial disclosure forms fully and accurately within ten (10) business days  
21 of receiving a request from the Commission to do so. Defendants shall further authorize the  
22 Commission to verify all information provided on their financial disclosure forms with all  
23 appropriate third parties, including financial institutions; and

24 E. Proceedings instituted under this Part are in addition to, and not in lieu of, any  
25 other civil or criminal remedies that may be provided by law, including any other proceedings  
26 the Commission may initiate to enforce this Order.

27 //

28 //

1 VI.

2 LIST OF CUSTOMERS

3 IT IS FURTHER ORDERED that:

4 A. Defendants shall, within seven (7) days after service of this Order upon  
5 Defendants, deliver to the Commission a list, in the form of a sworn affidavit, of all Eligible  
6 Purchasers. Such list shall include each consumer's name and address, the product(s) purchased,  
7 the total amount of moneys paid less any amount credited for returns or refunds, and, if  
8 available, the consumer's telephone number and email address; and

9 B. Except as provided in this Order, Defendants, directly or through any corporation,  
10 partnership, subsidiary, division, trade name, device, or other entity, and their officers, agents,  
11 servants, employees, and all persons and entities in active concert or participation with them who  
12 receive actual notice of this Order, by personal service or otherwise, are permanently restrained  
13 and enjoined from selling, renting, leasing, transferring, or otherwise disclosing the name,  
14 address, telephone number, credit card number, bank account number, e-mail address, or other  
15 identifying information of any person who paid any money to any Defendant, at any time prior  
16 to entry of this Order, in connection with the purchase of a Defendant Product. *Provided,*  
17 *however,* that Defendants may disclose such identifying information as required in Subparagraph  
18 A above, or to any law enforcement agency, or as required by any law, regulation, or court order.  
19 *Provided further,* that Defendants shall permanently delete or destroy all such information in  
20 their possession, custody or control and shall provide written confirmation to the FTC, sworn  
21 under penalty of perjury, that all such personally identifiable information has been deleted or  
22 destroyed unless Defendants are prohibited from deleting or destroying such information by law,  
23 regulation, or court order, in which case Defendants shall provide a written statement to the  
24 FTC, sworn under penalty of perjury, identifying any personally identifiable information that has  
25 not been deleted or destroyed and the specific law, regulation, or court order that prohibits  
26 Defendants from deleting or destroying such information.

27 //

28 //

VII.

COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring and investigating compliance with any provision of this Order:

A. Within ten (10) days of receipt of written notice from a representative of the Commission, Defendants each shall submit additional written reports, which are true and accurate and sworn to under penalty of perjury; produce documents for inspection and copying; appear for deposition; and provide entry during normal business hours to any business location in each Defendant's possession or direct or indirect control to inspect the business operation;

B. In addition, the Commission is authorized to use all other lawful means, including:

1. Obtaining discovery from any person, without further leave of court, using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, 45, and 69; and
2. Posing as consumers and suppliers to Defendants, their employees, or any other entity managed or controlled in whole or in part by any Defendant, without the necessity of identification or prior notice; and

C. Defendants each shall permit representatives of the Commission to interview any employer, consultant, independent contractor, representative, agent, or employee who has agreed to such an interview, relating in any way to any conduct subject to this Order. The person interviewed may have counsel present.

*Provided however*, that nothing in this Order shall limit the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to obtain any documentary material, tangible things, testimony, or information relevant to unfair or deceptive acts or practices in or affecting commerce, within the meaning of 15 U.S.C. § 45(a)(1).

//

//

//

VIII.

COMPLIANCE REPORTING BY DEFENDANTS

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

A. For a period of five (5) years from the date of entry of this Order,

1. The Individual Defendant shall notify the Commission of the following:

a. Any changes in such Defendant's residence, mailing addresses, and telephone numbers, within ten (10) days of the date of such change;

b. Any changes in such Defendant's employment status (including self-employment), and any change in such Defendant's ownership in any business entity, within ten (10) days of the date of such change. Such notice shall include the name and address of each business that such Defendant is affiliated with, employed by, creates or forms, or performs services for; a detailed description of the nature of the business; and a detailed description of such Defendant's duties and responsibilities in connection with the business or employment; and

c. Any changes in such Defendant's name or use of any aliases or fictitious names; and

2. Defendants shall notify the Commission of any changes in structure of any Corporate Defendant or any business entity that any Defendant directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this Order, including: incorporation or other organization; a dissolution, assignment, sale, merger, or other action; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; or a change in the business name or address, at least thirty (30) days prior to such change,

1                    *provided that*, with respect to any proposed change in the business entity  
2                    about which a Defendant learns less than thirty (30) days prior to the date  
3                    such action is to take place, such Defendant shall notify the Commission  
4                    as soon as is practicable after obtaining such knowledge; and

5                    B.        One hundred eighty (180) days after the date of entry of this Order and annually  
6 thereafter for a period of five (5) years, Defendants each shall provide a written report to the  
7 FTC, which is true and accurate and sworn to under penalty of perjury, setting forth in detail the  
8 manner and form in which they have complied and are complying with this Order. This report  
9 shall include, but not be limited to:

10                    1.        For the Individual Defendant:

- 11                    a.        Such Defendant's then-current residence address, mailing  
12                    addresses, and telephone numbers;
- 13                    b.        Such Defendant's then-current employment status (including self-  
14                    employment), including the name, addresses, and telephone  
15                    numbers of each business that such Defendant is affiliated with,  
16                    employed by, or performs services for; a detailed description of the  
17                    nature of the business; and a detailed description of such  
18                    Defendant's duties and responsibilities in connection with the  
19                    business or employment; and
- 20                    c.        Any other changes required to be reported under Part A of this  
21                    Section; and

22                    2.        For all Defendants:

- 23                    a.        A copy of each acknowledgment of receipt of this Order, obtained  
24                    pursuant to the Section titled "Distribution of Order by  
25                    Defendants;" and
- 26                    b.        Any other changes required to be reported under Part A of this  
27                    Section; and

28                    C.        Each Defendant shall notify the Commission of the filing of a bankruptcy petition

1 by such Defendant within fifteen (15) days of such filing; and

2 D. For the purposes of this Order, Defendants shall, unless otherwise directed by the  
3 Commission's authorized representatives, send by overnight courier all reports and notifications  
4 required by this Order to the Commission, to the following address:

5 Associate Director for Enforcement  
6 Federal Trade Commission  
7 600 Pennsylvania Avenue, N.W., Room NJ-2122  
8 Washington, D.C. 20580  
9 RE: *FTC v. Medlab, Inc., et al.*

10 *Provided that*, in lieu of overnight courier, Defendants may send such reports or notifications by  
11 first-class mail, but only if Defendants contemporaneously send an electronic version of such  
12 report or notification to the Commission at: DEBrief@ftc.gov; and

13 E. For purposes of the compliance reporting and monitoring required by this Order,  
14 the Commission is authorized to communicate directly with each Defendant.

15 **IX.**

16 **RECORD KEEPING PROVISIONS**

17 **IT IS FURTHER ORDERED** that, for a period of eight (8) years from the date of entry  
18 of this Order, Defendants and their agents, employees, officers, corporations, and those persons  
19 in active concert or participation with them who receive actual notice of this Order by personal  
20 service or otherwise, in connection with the manufacturing, labeling, advertising, promotion,  
21 offering for sale, sale, or distribution of any Covered Product, are hereby restrained and enjoined  
22 from failing to create and retain the following records:

23 A. Accounting records that reflect the cost of goods or services sold, revenues  
24 generated, and the disbursement of such revenues;

25 B. Personnel records accurately reflecting: the name, address, and telephone number  
26 of each person employed in any capacity by such business, including as an independent  
27 contractor; that person's job title or position; the date upon which the person commenced work;  
28 and the date and reason for the person's termination, if applicable;

C. Customer files containing the names, addresses, phone numbers, dollar amounts  
paid, quantity of items or services purchased, and description of items or services purchased, to

1 the extent such information is obtained in the ordinary course of business;

2 D. Complaints and refund requests (whether received directly, indirectly, or through  
3 any third party) and any responses to those complaints or requests;

4 E. Copies of all sales scripts, training materials, advertisements, or other marketing  
5 materials utilized in the manufacturing, labeling, advertising, promotion, offering for sale, sale,  
6 or distribution of any Covered Product;

7 F. All materials that were relied upon in making any representations contained in the  
8 materials identified in Part E of this Section, including all documents evidencing or referring to  
9 the accuracy of any claim therein or to the efficacy of any Covered Product, including all tests,  
10 reports, studies, demonstrations, or other evidence that confirm, contradict, qualify, or call into  
11 question the accuracy of any claim or the efficacy of each such product;

12 G. Records accurately reflecting the name, address, and telephone number of each  
13 manufacturer or laboratory engaged in the development or creation of any testing obtained for  
14 the purpose of manufacturing, labeling, advertising, promotion, offering for sale, sale, or  
15 distribution of any Covered Product;

16 H. Copies of all contracts concerning the manufacturing, labeling, advertising,  
17 promotion, offering for sale, sale, or distribution of any Covered Product; and

18 G. All records and documents necessary to demonstrate full compliance with each  
19 provision of this Order, including copies of acknowledgments of receipt of this Order required  
20 by the Sections titled "Distribution of Order by Defendants" and "Acknowledgment of Receipt  
21 of Order by Defendants" and all reports submitted to the FTC pursuant to the Section titled  
22 "Compliance Reporting by Defendants."

23 **X.**

24 **DISTRIBUTION OF ORDER BY DEFENDANTS**

25 **IT IS FURTHER ORDERED** that, for a period of five (5) years from the date of entry  
26 of this Order, Defendants shall deliver copies of the Order as directed below:

27 A. Corporate Defendants: Each Corporate Defendant must deliver a copy of this  
28 Order to (1) all of its principals, officers, directors, and managers; (2) all of its employees,

1 agents, and representatives who engage in conduct related to the subject matter of the Order; and  
2 (3) any business entity resulting from any change in structure set forth in Part A.2 of the Section  
3 titled "Compliance Reporting by Defendants." For current personnel, delivery shall be within  
4 five (5) days of service of this Order upon such Defendant. For new personnel, delivery shall  
5 occur prior to them assuming their responsibilities. For any business entity resulting from any  
6 change in structure set forth in Part A.2 of the Section titled "Compliance Reporting by  
7 Defendants," delivery shall be at least ten (10) days prior to the change in structure;

8 B. Individual Defendant as Control Person: For any business that the Individual  
9 Defendant controls, directly or indirectly, or in which such Defendant has a majority ownership  
10 interest, such Defendant must deliver a copy of this Order to (1) all principals, officers, directors,  
11 and managers of that business; (2) all employees, agents, and representatives of that business  
12 who engage in conduct related to the subject matter of the Order; and (3) any business entity  
13 resulting from any change in structure set forth in Part A.2 of the Section titled "Compliance  
14 Reporting by Defendants." For current personnel, delivery shall be within five (5) days of  
15 service of this Order upon such Defendant. For new personnel, delivery shall occur prior to  
16 them assuming their responsibilities. For any business entity resulting from any change in  
17 structure set forth in Part A.2 of the Section titled "Compliance Reporting by Defendants,"  
18 delivery shall be at least ten (10) days prior to the change in structure;

19 C. Individual Defendant as Employee or Non-control Person: For any business  
20 where the Individual Defendant is not a controlling person of a business but otherwise engages  
21 in conduct related to the subject matter of this Order, such Defendant must deliver a copy of this  
22 Order to all principals and managers of such business before engaging in such conduct; and

23 D. Defendants must secure a signed and dated statement acknowledging receipt of  
24 the Order, within thirty (30) days of delivery, from all persons receiving a copy of the Order  
25 pursuant to this Section.

26 //

27 //

28 //

1 **XI.**

2 **ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANTS**

3 **IT IS FURTHER ORDERED** that each Defendant, within five (5) business days of  
4 receipt of this Order as entered by the Court, must submit to the Commission a truthful sworn  
5 statement acknowledging receipt of this Order.

6 **XII.**

7 **RETENTION OF JURISDICTION**

8 **IT IS FURTHER ORDERED** that this Court shall retain jurisdiction of this matter for  
9 purposes of construction, modification, and enforcement of this Order.

10 **IT IS SO ORDERED**, this \_\_\_ day of \_\_\_\_\_, 2009.

11 

12  
13 HONORABLE SUSAN ILLSTON  
14 United States District Judge

15  
16 Respectfully submitted,

17  
18 DATED: June 23, 2009

19 \_\_\_\_\_ /s/ Kerry O'Brien  
20 KERRY O'BRIEN  
21 SARAH SCHROEDER  
22 EVAN ROSE  
23 Attorneys for Plaintiff  
24 Federal Trade Commission  
25 901 Market Street, Suite 570  
26 San Francisco, CA 94103  
27 (415) 848-5100 (phone)  
28 (415) 848-5184 (facsimile)