

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

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

LEARNINGRX FRANCHISE CORP.,

and

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

Defendants.

Civil Action No. 1:16-cv-1159

**[PROPOSED] STIPULATED
FINAL JUDGMENT AND ORDER
FOR PERMANENT INJUNCTION
AND OTHER EQUITABLE
RELIEF AGAINST DEFENDANTS
LEARNINGRX FRANCHISE
CORP. AND KEN GIBSON**

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

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

THEREFORE, IT IS ORDERED as follows:

FINDINGS

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

DEFINITIONS

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

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

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

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

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

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

- a. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication, even if the representation requiring the disclosure is made in only one means.

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

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

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

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

ORDER

I.

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

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

- A. improves performance at work or in athletics;
- B. delays or protects against age-related decline in memory or other cognitive function, including mild cognitive impairment, dementia, or Alzheimer's disease; or
- C. reduces cognitive impairment or improves cognitive function of individuals with health conditions, including attention deficit hyperactivity disorder (ADHD), autism, traumatic brain injury (TBI), or stroke;

unless the representation is non misleading, and, at the time such representation is made, Defendants possess and rely upon competent and reliable scientific evidence to substantiate that the representation is true. For purposes of this Section, competent and reliable scientific evidence shall consist of human clinical testing of such product that is sufficient in quality and quantity, based on standards generally accepted by experts in the relevant field, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. Such testing shall be (1) randomized, controlled, and blinded to the maximum extent practicable; and (2) conducted by researchers qualified by training and experience to conduct such testing. In addition, all underlying or supporting data and documents generally accepted by experts in the relevant field as relevant to an assessment of such testing as described in the Section entitled Preservation of Records Relating to Competent and Reliable Human Clinical Tests or Studies must be available for inspection and production to the Commission.

II.

PROHIBITED REPRESENTATIONS: OTHER BENEFITS

IT IS FURTHER ORDERED that Defendants, Defendants' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, are permanently restrained and enjoined from making, expressly or by implication, any representation, other than representations covered under Section I of this Order, about the performance, benefits, or efficacy of any Covered Product, including improvement in school grades or scores on standardized academic tests, performance on everyday tasks, increased income, or superiority to academic tutoring, unless the representation is non-misleading, and, at the time of making such representation, Defendants possess and rely 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 that the representation is true.

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 qualified persons; (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 entitled Preservation of Records Relating to Competent and Reliable Human Clinical Tests or Studies are available for inspection and production to the Commission.

III.

PROHIBITED REPRESENTATIONS: TESTS OR STUDIES

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

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

IV.

PROHIBITIONS CONCERNING PROVIDING MEANS AND INSTRUMENTALITIES

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

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

V.

MONETARY JUDGMENT

IT IS FURTHER ORDERED that:

- A. Judgment in the amount of Four Million Dollars (\$4,000,000.00) is entered in favor of the Commission against Corporate Defendant as equitable monetary relief; provided however, the remainder of this judgment shall be suspended upon Corporate Defendant's compliance with Section B, below, and subject to Sections C through E.
- B. Corporate Defendant is ordered to pay to the Commission Two-Hundred-Thousand Dollars (\$200,000.00), which, as Corporate Defendant stipulates, its undersigned counsel holds in escrow for no purpose other than payment to the Commission. Such payment must be made within seven days of entry of this Order by electronic fund transfer in accordance with instructions previously provided by a representative of the Commission.
- C. The Commission's agreement to the suspension of part of the judgment is expressly premised upon the truthfulness, accuracy, and completeness of Corporate Defendant's audited and unaudited financial statements and related documents (collectively, "financial representations") submitted to the Commission, namely:
 1. Financial Disclosure Statements to the Federal Trade Commission for LearningRx Franchise Corporation (September 25, 2015); LearningRx, Inc. (September 25, 2015); Ken Gibson Consulting LLC (September 28, 2015); The Ken Gibson

Family Limited Partnership (September 25, 2015); LearningRx-Colorado Springs North (September 28, 2015); and LearningRx-Colorado Springs South (September 28, 2015).

2. Profit and Loss Statements for LearningRx Franchise Corporation (October 2014-March 2016); LearningRx, Inc. (January 2012-March 2016); Ken Gibson Consulting, LLC (January 2015-April 6, 2016); The Ken Gibson Family Limited Partnership (January 2012-March 2016); and LearningRx-Colorado Springs (January 2012-September 26, 2015; January-March 2016).
3. Balance Sheets for LearningRx Franchise Corporation (August 5, 2015); LearningRx, Inc. (year-end 2012-2014 and August 14, 2015); The Ken Gibson Family Limited Partnership (year-end 2012-2014 and August 14, 2015); and LearningRx-Colorado Springs (year-end 2012-2014 and September 28, 2015).
4. Financial Reports for LearningRx Franchise Corporation (2012-2014).
5. U.S. Income Tax Returns for LearningRx Franchise Corporation (2011-2013); LearningRx, Inc. (2012-2015); The Ken Gibson Family Limited Partnership (2012-2014); and Ken Gibson (2012-2014).
6. Correspondence from Defendants' counsel dated April 14, 2015; October 22, 2015 (including attachment); September 29, 2015; October 26, 2015 (including attachments); February 23, 2016 (including attached spreadsheet); March 4, 2016 (including attached spreadsheet and bank account statements); March 10, 2016;

April 4, 2016 (including attached spreadsheet); April 7, 2016 (including attachments); and April 8, 2016.

7. Letter from Jerry A. Lomax, President, 180 Accounting, regarding LearningRx's financial outlook, dated March 3, 2016.

D. The suspension of the judgment will be lifted as to Corporate Defendant if, upon motion by the Commission, the Court finds that Corporate Defendant failed to disclose any material asset, materially misstated the value of any asset, or made any other material misstatement or omission in the financial representations identified above.

E. If the suspension of the judgment is lifted, the judgment becomes immediately due as to Corporate Defendant in the amount specified in Subsection A above (which the parties stipulate only for purposes of this Section represents consumer injury), less any payment previously made pursuant to this Section, plus interest computed from the date of entry of this Order.

VI.

ADDITIONAL MONETARY PROVISIONS

IT IS FURTHER ORDERED that:

- A. Defendants relinquish 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.
- B. The facts alleged in the Complaint will be taken as true, without further proof, in any subsequent civil litigation by or on behalf of the Commission to enforce its rights to any

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

- C. The facts alleged in the Complaint establish all elements necessary to sustain an action by the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and this Order will have collateral estoppel effect for such purposes.
- D. Corporate Defendant acknowledges that its Taxpayer Identification Numbers (Employer Identification Number), which it previously submitted to the Commission, may be used for collecting and reporting on any delinquent amount arising out of this Order, in accordance with 31 U.S.C. § 7701.
- E. All money paid to the Commission pursuant to this Order may be deposited into a fund administered by the Commission or its designee 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 Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, the Commission may apply any remaining money for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Defendants' practices alleged in the Complaint. Any money not used for such equitable relief is to be deposited to the United States Treasury as disgorgement. Defendants have no right to challenge any actions the Commission or its representatives may take pursuant to this Subsection.

VII.

REQUIREMENT TO PROVIDE CUSTOMER LIST

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

VIII.

ORDER ACKNOWLEDGMENTS

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

- A. Each Defendant, within seven days of entry of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.
- B. For ten years after entry of this Order, Individual Defendant for any business that such Defendant, individually or collectively with any other Defendants, is the majority owner or directly or indirectly controls, and the Corporate Defendant, must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, representatives, franchisees, and licensees who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Section titled Compliance Reporting.

Delivery must occur within seven 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 a Defendant delivered a copy of this Order, that Defendant must obtain, within thirty days, a signed and dated acknowledgment of receipt of this Order.

IX.

COMPLIANCE REPORTING

IT IS FURTHER ORDERED that Defendants make timely submissions to the Commission:

- A. Sixty days after entry of this Order, each Defendant must submit a compliance report, sworn under penalty of perjury.
1. Each Defendant must: (a) designate at least one telephone number and an email, physical, and postal address as points of contact, which representatives of the Commission may use to communicate with that Defendant; (b) identify all of that Defendant's businesses by all of their names, telephone numbers, and email, Internet, physical, and postal addresses; (c) describe the activities of each business, including the products and services offered, the means of advertising, marketing, and sales, and the involvement of any other Defendant (which Individual Defendant must describe if he knows or should know due to his own involvement); (d) describe in detail whether and how that Defendant 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 Commission;

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

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

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

services, whether as an employee or otherwise, and any entity in which such Defendant has any ownership interest, and identify the name, physical address, and any Internet address of the business or entity.

- C. Each Defendant must submit to the Commission notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Defendant within fourteen days of its filing.
- D. Any submission to the Commission 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 a Commission representative in writing, all submissions to the Commission 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, D.C. 20580. The subject line must begin: FTC v. LearningRx Franchise Corp., et al. No. 142-3206.

X.

RECORDKEEPING

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

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

XI.

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

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

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

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

Provided, 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) any Defendant; (2) any Defendant's officers, agents, representatives, or employees; (3) any other person or entity in active concert or participation with any Defendant; (4) any person or entity affiliated with or acting on behalf of any Defendant; (5) any supplier of any component 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 Defendants, Defendants 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 Defendants' size and complexity, the nature and scope of Defendants' activities, and the sensitivity of the personal information collected from or about the participants.

XII.

COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring Defendants' compliance with this Order, including the financial representations upon which part of the judgment was suspended:

- A. Within fourteen days of receipt of a written request from a representative of the Commission, each Defendant: 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 Commission also is 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 Commission is authorized to communicate directly with each Defendant. Each Defendant must permit representatives of the Commission to interview any employee or other person affiliated with such Defendant who has agreed to such an interview. The person interviewed may have counsel present.
- C. The Commission may use all other lawful means, including posing, through its representatives as consumers, suppliers, or other individuals or entities, to Defendants or any individual or entity affiliated with Defendants, without the necessity of identification or prior notice. Nothing in this Order limits 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.

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

XIII.

RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court retains jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.

SO ORDERED this day of , 2016.

UNITED STATES DISTRICT JUDGE

SO STIPULATED AND AGREED:

FOR PLAINTIFF:

FEDERAL TRADE COMMISSION

/s/ Keith Fentonmiller

Date: 5/18/2016

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FOR DEFENDANTS:

/s/ Ken Gibson

Date: 4/9/16

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/s/ William I. Rothbard

Date: 4/14/16

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