

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

FEDERAL TRADE COMMISSION,)	
)	
)	
Plaintiff,)	Case No. 4:96CV02225 SNL
v.)	
)	Judge Limbaugh
RICHARD C. NEISWONGER, <i>et al.</i> ,)	
)	
Defendants.)	

**FEDERAL TRADE COMMISSION'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), respectfully submits the following proposed findings of fact and conclusions of law, based on the written record and the testimony accepted into evidence in this matter on October 25-26, 2006, and the legal authorities cited herein.

The Commission has requested a copy of the hearing transcript. The transcript was, understandably, not available by the date set for the filing of the parties’ proposed findings. Consequently, citations to hearing testimony below reflect counsel’s good faith representation that the hearing testimony substantiates the proposed findings. If the Court wishes, the FTC can supplement its proposed findings following receipt and review of the hearing transcript.

PROPOSED FINDINGS OF FACT

I. The Case and Parties

A. The Federal Trade Commission

1. Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), is a federal law enforcement agency founded by Act of Congress. 15 U.S.C. §§ 41 *et seq.* The Commission enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce.

2. In 1996, the Commission filed a complaint against defendant Richard C. Neiswonger (“Neiswonger”), charging him and others with marketing training and business programs with false and misleading income claims, among other deceptive practices, in violation of Section 5(a) of the FTC Act. Compl., *FTC v. Neiswonger*, No. 4:96CV02225 SNL (1996).

3. After the filing of the complaint, Neiswonger and his co-defendants stipulated to the entry of this Court’s Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief (“Permanent Injunction”). *See* PX01, Permanent Injunction, *FTC v. Neiswonger*, No. 4:96CV02225 SNL (E.D. Mo. Feb. 28, 1997).

4. On July 17, 2006, the Commission brought a civil contempt action against defendant Neiswonger, his business partner, contempt defendant William S. Reed (“Reed”), and their firm, contempt defendant Asset Protection Group, Inc. (“APG”).

5. In its filings, the FTC alleged that the defendants had violated the Permanent Injunction by marketing and selling a training and business program with misrepresentations and by failing to disclose material facts, in violation of Permanent Injunction ¶¶ I, I.A, II, and II.A. The FTC also alleged that Neiswonger failed to provide a current performance bond to the FTC and to notify the agency of his affiliation with APG, in violation of Permanent Injunction ¶¶ V and XI. The FTC presented five volumes of evidence in support of its allegations. The FTC’s action was filed *ex parte* due to risks of asset dissipation and spoliation of evidence.

6. Upon due consideration, this Court found good cause to believe that all three contempt defendants had actual notice of the Permanent Injunction and the ability to comply with that Order. The Court also found good cause to believe that the contempt defendants had violated the Permanent Injunction. The Court entered a Temporary Restraining Order containing these findings and providing for an asset freeze, the appointment of a receiver, and other relief. TRO, July 17, 2006, at 2 ¶¶ 2, 3. The Court also ordered the contempt defendants to show cause why they should not be held in civil contempt for their violations of the Permanent Injunction.

B. Defendant Neiswonger

7. Defendant Neiswonger is a convicted felon with a documented history of dishonest conduct committed in connection with the marketing and sale of training and business opportunity programs.

8. In September 1998, Neiswonger pled guilty and was convicted of wire fraud and money laundering in connection with the marketing activities of S&K Group, Inc. and Medical Recovery Service, Inc. PX03, Neiswonger Plea Tr., *United States v. Neiswonger*, No. 4:98CR364 RWS (E.D. Mo. Sept. 3, 1998); PX03A, Judgment of Conviction, *United States v. Neiswonger*, No. 4:98CR0364-RWS (E.D. Mo. Dec. 1998). Both of these companies marketed and sold training and business programs to consumers and both were co-defendants in the prior FTC case against defendant Neiswonger. *See* PX03A at 27-32; PX01 at 2 ¶ 2.¹

9. As he admitted in his plea colloquy, Neiswonger deceptively marketed programs for upwards of \$10,000 that purportedly equipped aspiring entrepreneurs to become well-paid consultants in the areas of finance and expense reduction, among other topics. PX03 at 27-32. Neiswonger falsely claimed that consumers who bought the programs were likely to earn six-figure incomes from fees generated using the programs. *Id.* He also urged consumers to speak with “references” before purchasing the program without disclosing that the references were paid to serve as references. *Id.*

10. The Honorable Rodney W. Sippel, U.S. District Judge, sentenced Neiswonger to eighteen months’ incarceration for his crimes. Judge Sippel also required Neiswonger to pay the additional sum of \$2,750,000 in restitution to consumer victims. PX03A at 5.

¹ In addition to the convictions noted above, Neiswonger has been subject to numerous orders from state regulatory agencies for deceptive or improper practices in the marketing and sale of business programs and services. *See, e.g.*, PX105, Neiswonger Dep. at 16-33 (discussing state agency actions). Notably, one such order signed by defendant Neiswonger prohibited the sale of business opportunities in a state unless the parties “compl[y] with any and all disclosure requirements of . . . the Federal Trade Commission Act, 15 USC 41, *et seq.*, and the Franchise Rule, 16 CFR 436, *et seq.*” PX03E, Amended Assurance of Discontinuance, *In re Leasehold Analysis, Inc.*, No. 93-10092 at 3 (Mich. Att’y Gen. Dep’t Mar. 10, 1994); *id.* at 6 (Neiswonger signature).

11. Shortly before going to prison, defendant Neiswonger joined contempt defendant Reed in constituting the first board of directors of contempt defendant APG. PX02 at 1.

C. Contempt Defendant Reed

12. Contempt defendant Reed is a former Colorado attorney whose license to practice law has been suspended by the Colorado Supreme Court for “engag[ing] in misrepresentations and dishonesty.” *Colorado v. Reed*, 942 P.2d 1204, 1205 (Colo. 1997).

13. According to defendant Neiswonger, Reed and Neiswonger were business partners well before the issuance of the Permanent Injunction. PX09 at 7, Tr., R. Neiswonger (Dec. 29, 2005) (“I’ve been here for 10 years as Bill’s partner.”).

14. Contempt defendant Reed learned of the Court’s Permanent Injunction and its pertinent provisions from defendant Neiswonger.

15. Neiswonger testified that he discussed the Permanent Injunction with Reed “many times.” PX105, Neiswonger Dep. at 49-50 (“Q. Did you ever discuss this order with Mr. Reed? A. Oh, yes, many times.”). Neiswonger offered this testimony after being presented with a copy of the Permanent Injunction at his deposition. *See id.* at 47-49.

16. When Neiswonger was asked whether he ever discussed with Reed the prospect of an FTC lawsuit against them, he responded: “Absolutely.” PX105 at 253.

17. Neiswonger testified that he notified Reed of the pertinent provisions of the Permanent Injunction. *See, e.g.*, PX105, Neiswonger Dep., at 49-50.

18. Reed’s deposition testimony confirms Neiswonger’s testimony and further evidences Reed’s prior notice and knowledge of the Permanent Injunction. PX104, Reed Dep. at 15-16 (“[T]here were three restrictions that he had to be careful of, and he told me the same. Number one, he said he had to keep a bond, and he said he would do that. Number two, he said he was prohibited or couldn’t make income claims; and, number three, he said that he had to disclose to any prospects that references were being paid.”).

19. The contempt defendants’ recent testimony discredits Reed’s earlier statement “[t]hat prior to the filing of the instant case he had *no knowledge* of an Injunction entered . . . against Neiswonger.” *See* Reed Mot. to Dismiss, Reed Aff’d (Sept. 29, 2006) (emphasis added).

20. Additionally, the record shows that Reed received additional information about the prior FTC action against Neiswonger from other sources.

21. In 2004, an APG consultant complained to Reed about Neiswonger’s background and showed him a copy of the FTC’s complaint in this case. Pianga Test., Hr’g (Oct. 25, 2006).

22. As APG's President, PX02, Reed also received another complaint, submitted on behalf of two APG consultants in January 2005, which cited the FTC's previous action against Neiswonger by its case number. PX110 at 2.

23. Reed, a former attorney, acknowledged that he received this letter, and sent a reply, referencing Neiswonger's "problems with the FTC" and court orders. PX111 at 2; Hammond Test., Hr'g (Oct. 25, 2006).²

24. The contempt defendants' testimony concerning the Permanent Injunction, the consumer testimony relating to this action, and the documentary evidence all support the Court's prior finding of actual notice to contempt defendant Reed. *See supra*; *see also infra* Pl.'s Proposed Concl. of Law ¶¶ 4-11.

D. Contempt Defendant APG and its Personnel

25. Contempt defendant APG is a Nevada corporation. PX02. From 1999 to mid-July 2006, APG and its personnel offered and sold a training and business opportunity program, the "APG program," to consumers nationwide. PX06, Special Free Report; PX112, Receiver's Report; *see also infra* Section III.A (discussing APG program).

26. The promotional materials for the APG program consistently identified contempt defendant APG as the company offering to sell the program to consumers. PX06 at 16; PX15 at 16; PX06 at 21 (sales brochure from "Asset Protection Group, Incorporated"); *id.* at 26 (same); *id.* at 23 (brochure copyrighted, "Asset Protection Group, Inc."); *id.* at 29, 31 (same).

27. Contempt defendant Reed served as APG's Director and President from late 1999 until mid-July 2006. PX02 at 2-9.

28. According to defendant Neiswonger, contempt defendant Reed was APG's chief executive. PX105, Neiswonger Dep., at 59. In APG promotional materials, Reed described APG as an "asset protection services 'factory'" that he "personally supervise[d]." PX06 at 8; PX15 at 8; PX105, Neiswonger Dep., at 115-17 (stating that text attributed to Reed actually consisted of Reed's statements).

29. Reed actively participated in promoting and marketing the APG program. His name, picture, statements, and signature all appeared in promotional materials for the program. PX06 at 6-8; PX15 at 6-8; *id.* at 41-45 (with picture); PX106 (sales letter signed by Reed); PX107 (another sales letter signed by Reed). Reed also promoted the APG program via phone and other means. PX09 at 36-38; PX16 at 71-72; PX42C at 10.

² Yet another consumer emailed both Reed and Neiswonger with a complaint in July 2005, referencing the Federal Trade Commission and referring to "Neiswonger and his past record of false income amount claims." PX84.

30. Reed also actively participated in the development of promotional material for the APG program. When asked whether Reed played any role with respect to the review of written promotional materials, Neiswonger testified that Reed “would review almost everything that [he] did.” *Id.* at 94. According to Neiswonger, Reed reviewed the text of printed promotional materials before they were finalized. *Id.* at 179; *see id.* at 116. Reed also joined Neiswonger in approving written promotional materials such as the Special Free Report sales letter. *Id.* at 207.

31. When FTC counsel asked Reed whether he reviewed drafts of APG promotional materials and approved them, Reed pled the Fifth Amendment. PX104, Reed Dep., at 23-26.

32. Contempt defendant Reed was Neiswonger’s superior at APG. Reed was President and Director of APG from 1998 through July 2006. *E.g.*, PX02 at 1-9. Neiswonger served as a Director of APG in 1998 and 1999, PX02 at 1-2, and then served as APG’s Marketing Director. PX10 at 1. Neiswonger acted as an agent of APG from 1998 to 2006. *Id.*; PX09 at 7; PX112.

33. When FTC counsel asked Reed whether Neiswonger reported to him, Reed pled the Fifth Amendment. PX104 at 10.

34. Defendant Neiswonger also actively and personally participated in promoting and marketing the APG program. He promoted the APG program to prospective purchasers, both in person and over the phone. *See, e.g.*, PX09; PX19; PX21. Neiswonger’s name, statements, and signature also appeared in promotional materials for the APG program. *See, e.g.*, PX06 at 1-16; PX10 at 2-11; PX15 at 1-16; PX42C; PX42D.

35. Neiswonger used an entity called APG Marketing, Inc. to assist in marketing the APG program. PX105 at 64; Neiswonger Test., Hr’g (Oct. 26, 2006).

36. For several years, APG Marketing was a part of contempt defendant APG, operating as a fictitious division of that firm. PX112, Receiver’s Report at 1 (July 26, 2006).

37. APG internal documents did not consistently distinguish between APG and APG Marketing. *E.g.*, PX51; PX105 at 85-86.

38. Moreover, Reed and Neiswonger sometimes split the costs of the APG enterprise. PX105 at 108; *see* PX58; PX94. Reed even paid for advertising for APG with his Visa card. *See* PX90; PX91.

39. Reed and Neiswonger actively marketed the APG program as partners. *See supra*; PX07 at 39, Tr., D. Lemay; PX09 at 7, Tr., R. Neiswonger.

II. The Permanent Injunction

40. The Commission has charged contempt defendants Neiswonger, Reed, and APG

with violating Paragraphs I, I.A, II, and II.A of the Permanent Injunction, and has further charged defendant Neiswonger with violating Paragraphs V and XI of that Order.

41. Paragraph I of the Permanent Injunction prohibits defendant Neiswonger, and all others in active concert or participation with him who receive actual notice of the Order, from misrepresenting any material fact in connection with advertising, promoting, marketing, selling or otherwise inducing participation in any program. *See id.* at 3-4, ¶ I.

42. Prohibited misrepresentations include, but are expressly not limited to, claims that consumers will earn a six-figure income, or words of similar import, from client fees generated from any program. *Id.* at ¶ I.A.

43. The Permanent Injunction prohibits any misrepresentation of material fact in connection with advertising, promoting, marketing, selling or otherwise inducing participation in any program, regardless of whether such misrepresentations are made directly or by implication. *Id.*

44. Additionally, Paragraph II of the Court's Order requires Neiswonger, and all others in active concert or participation with him who receive actual notice of the Order, to affirmatively disclose all material facts to prospective purchasers of any program. *See id.* ¶ II.

45. Material facts include, but are expressly not limited to, "the amount of remuneration or any other benefit received by each reference whose name is provided to the prospective purchaser." PX01 at 4-5, ¶ II, II.A.

46. The Permanent Injunction requires the advance disclosure of all material facts to prospective purchasers in connection with advertising, promoting, selling or otherwise inducing participation in any program. *Id.* ¶ II.

47. Paragraph V of the Permanent Injunction prohibits defendant Neiswonger from marketing or selling any program without first providing the FTC with written proof of a current performance bond before commencing marketing activities. PX01 at 8-9, ¶ V, V.E.

48. Paragraph XI of the Permanent Injunction required Neiswonger to report to the FTC, in writing, any new business affiliation with any program for a period of three years, commencing in 1997. PX01 at 12, ¶ XI. This provision has since elapsed. *See id.*

49. The terms of the Permanent Injunction were the product of negotiations between FTC counsel and counsel for defendant Neiswonger, among others. Neiswonger Test., Hr'g (Oct. 26, 2006). Defendant Neiswonger read the Permanent Injunction before he signed it. *Id.*

50. The Permanent Injunction addresses the marketing of programs—the precise type of activity that Reed and Neiswonger pursued together. PX01; *see supra* Section I.C; *see infra*.

III. Contempt Defendants' Course of Conduct

A. The Marketing and Sale of the APG Program

51. Contempt defendants Neiswonger, Reed, and APG marketed a training and business opportunity program referred to as the "APG program." *See supra* ¶¶ 25, 29-30, 34-35.

52. The APG program included training materials, a one-day training session, and a business affiliation with APG as an "asset protection consultant." *E.g.*, PX06 at 12, 14.

53. In promoting the APG program, the contempt defendants represented that consumers who paid \$9,800 for the APG program and became APG consultants would make "very substantial profits" selling the firm's "asset protection" services, chiefly the formation of Nevada and offshore companies for "COMPLETE PROTECTION AGAINST ASSET SEIZURE BY THE IRS or other government agencies." PX06 at 11 ("You will . . . be making very substantial profits.") (emphasis in original); *id.* at 9.

54. The contempt defendants marketed the APG program throughout the nation through various means, including, but not limited to, print ads, radio ads, mailed promotional letters, and interstate phone calls between APG agents and prospective purchasers. PX13, APG Print Ad, BusinessWeek; PX06, PX10, PX15 (mailed promotional materials); PX38 at ¶2, PX42 at ¶2 (consumer declarations); Consumer Test., Hr'g (Oct. 25, 2006).

55. APG solicited consumers with ads that held out the promise of substantial income in a "lucrative business." PX13; PX14 at 16. Consumers who called the advertised phone number received introductory materials from Neiswonger, Reed, and APG. PX06; PX15; PX106; PX107. APG and its personnel also offered consumers the names of selected consultants as "references." *E.g.*, Stahl Test., Hr'g (Oct. 25, 2006); PX42, Young Decl., at 2 ¶ 6. Contacts from prospective purchasers often led to a direct solicitation by Neiswonger via phone marketing ("telemarketing") and mail. *E.g.*, PX09; PX11; PX19; PX22; PX23; PX42, Young Decl., at 2 ¶ 7; PX117; Consumer Test., Hr'g (Oct. 25, 2006). Reed also solicited prospective buyers with letters or phone calls. PX11; PX106; PX107.

B. Misrepresentations Made in the Marketing and Sale of the APG Program

56. In selling the APG program, the contempt defendants misrepresented, directly or by implication, that purchasers of the APG program could or would likely make a substantial or six-figure income as APG consultants. These representations were made verbally and in writing.

1. Written Representations Regarding Income

57. The contempt defendants consistently promoted the APG program with express written claims of a "6-figure income potential, from less than full-time schedule." PX06 at 1;

PX42C at 1, APG “Second Notice” Letter (same); PX42D at 1, APG “Third and Final Notice” Letter (same); PX21 at 2 (same).

58. The contempt defendants repeatedly represented to consumers, in writing, that APG consultants could readily obtain clients and achieve a substantial or six-figure income. For example, a solicitation letter sent to prospective purchasers stated:

Obviously it takes only a couple of clients each week to produce a very substantial six-figure income — and the full-time potential is unlimited!

It doesn't take much imagination to see that getting just six or eight clients in an entire month's time is a VERY reasonable, very achievable goal.

Of course, 20 would be better! – providing as much as \$128,000 income to you. Whatever your first year income goal, it will require only a small number of clients. Actually just ONE satisfied client has the ability to refer several, so a \$64,000 to \$128,000 income your very first year can be “triggered” by just three or four clients.

PX10 at 3-4, New Consultant Authorization Letter (statement of defendant Neiswonger) (all emphasis in original); PX38A at 2-3 (same).

59. Similarly, contempt defendant Reed represented: “Everything you need to do very, very well financially . . . is provided to you. If all you did “part time” was place 15 full asset protection cases with us in a year – about one a month – you'd receive more than \$90,000.” PX06 at 8; PX15 at 8; PX42C at 6 (same); PX105, Neiswonger Dep., at 115-17 (stating that text attributed to Reed actually consisted of Reed's statements).

60. Remarkably, the contempt defendants prepared promotional materials that referred to an even more substantial, larger six-figure income for APG consultants.

61. One such sales letter described the APG business opportunity as a “business that can generate a substantial income,” “a true **\$250,000+++ yearly income.**” PX63 at 1 (emphasis in original). At his deposition, Neiswonger conceded that he participated in writing this sales letter. PX105 at 165. Neiswonger denied that the letter was used even though it was signed. *Id.*; PX63 at 2.

62. Another such piece of promotional material stated, using large, bold numbers: “**\$350,000+** First year potential income. Part or full time. Unique products with no competition.” PX65 (emphasis in original). At his deposition, Neiswonger conceded that APG prepared this print ad. PX105 at 181. Neiswonger denied that the print ad ever ran—even though USA Today sent a proof back to him, which Neiswonger retained in his files. *Id.*; PX65.

63. The contempt defendants reinforced their numerous representations regarding a substantial or six-figure income with repeated references to the demand for APG's services and the ease of selling those services. *See* PX06 at 3; PX10 at 8 (“**With our training, proven methods and support, I promise you will find it is easy to obtain your clients**”) (emphasis in original); PX15 at 3; PX64 at 1 (citing “the potential of this lucrative business and the relative ease of finding and signing clients”).

64. The contempt defendants also reinforced their income representations by promoting and recommending the services of a “appointment setting” firm. They trumpeted APG's “proprietary strategic alliance” with a telemarketing firm, which supposedly used a successful prospecting script devised by APG to provide consultants with appointments with carefully-screened, “qualified prospective clients.” PX06 at 12-13.

65. The contempt defendants further reinforced their substantial or six-figure income claims by citing the income of a single APG consultant, Barbara Black, who purportedly had “absolutely no sales background.” The headline of one piece of promotional material featuring Ms. Black was titled, “Florida Woman Makes Six-Figures First Year in Unique New Service Business.” PX64.

66. APG's advertisement featuring APG consultant Barbara Black did not disclose the fact that Neiswonger provided Ms. Black with the names of prospective clients prepared to purchase corporations, giving her literally thousands of dollars' worth of business. *Compare id. with* PX105, Neiswonger Dep., at 124 (admitting that Neiswonger provided clients to Black); PX06 at 11 (citing profit margin exceeding one thousand dollars per client).³

67. The contempt defendants also represented that prospective purchasers did not need prior experience in sales, management, or professional businesses to become successful APG consultants. PX06 at 4; PX15 at 4.

68. In their promotional materials, the contempt defendants occasionally purported to disclaim their representations regarding a substantial or six-figure income, but these statements appeared infrequently, they were inconspicuous in size and placement, and they were often undercut with additional claims.

69. For example, in the sixteen-page introductory Special Free Report, near the bottom

³ At his deposition, Neiswonger would not admit that Ms. Black's experience was extraordinary, but he conceded that Ms. Black's experience was “atypical.” PX105 at 181. At the hearing in this matter, however, the Court's receiver representative clarified that Ms. Black is the *only* person—out of nearly two thousand (2,000) APG consultants—known to have obtained a six-figure income at any time from the APG program. Miller Test., Hr'g (Oct. 26, 2006). Ms. Black obtained that level of income for only two years. *Id.* None of these facts were disclosed in APG's sales material citing the experience of Ms. Black. *See* PX64.

of page fourteen, defendant Neiswonger briefly stated that APG “do[es] not guarantee any specific or certain income, nor should you consider any of the examples used in this letter as projections of your income. Individual results vary.” PX06 at 14. He asserted that “your income will depend on your initiative, time and effort invested . . . and other factors over which we have no control.” *Id.* However, this statement then continued: “You can certainly see, however, at a profit of \$1,700 to \$6,400 per client served, it takes only a small number of clients each year to create a very substantial income.” *Id.*

70. Similarly, contempt defendant Reed stated in another APG promotional letter that a first-year consultant, working part time, can earn \$114,000 selling a certain ratio of Nevada and Bahamas corporations to clients. PX106 at 4. He purported to disclaim this representation “as a mathematical example only,” *id.* (emphasis in original), but then immediately contradicted this disclaimer, stating: “Our current experience is that the ratio is actually much more favorable than our example.” *Id.*; *see also* PX107 at 2 (same).

71. Consumer testimony confirms that the contempt defendants successfully conveyed to consumers, in writing, that purchasers of the APG program could or would likely make a substantial or “six-figure” income as APG consultants, and that consumers relied on those representations. Consumer Test., Hr’g (Oct. 25, 2006); *see also* PX98, Drayer Dep., at 10; PX37, Hinzman Decl., at 1 ¶3; PX42, Young Decl., at 7 ¶19.

2. Verbal Representations Regarding Income

72. The contempt defendants also verbally represented to prospective purchasers that they could reasonably expect to earn a substantial or six-figure income from fees generated using the APG program.

73. Defendant Neiswonger repeatedly referred to a \$100,000 or “six-figure” income in enticing consumers to purchase the APG program. For example, defendant Neiswonger told one FTC investigator posing as a prospective APG consultant, PX09 at 15:

MR. NEISWONGER: . . . Give me a ballpark as to the kind of income that you're accustomed to, just approximately.

MS. WILKE: Approximately \$60,000 a year.

MR. NEISWONGER: Okay. So, that’s good money.

MS. WILKE: Right.

MR. NEISWONGER: That’s good money, certainly, for a salaried position, you know.

MS. WILKE: Right. It’s --

MR. NEISWONGER: But if we could put you well over 100, then you would consider the possibility of going full-time?

MS. WILKE: Right.

74. Neiswonger conveyed to another FTC investigator posing as a prospective buyer that obtaining one hundred clients and a six-figure income as an APG consultant was just a matter of time. *See* PX19 at 10 (“Whether it takes three months or six months or nine months, once we get you up to 100 clients, now you’ve got six figures coming in just on residuals.”) (statement of defendant Neiswonger). APG references made similar substantial or “six-figure” income claims. *See, e.g.*, PX17 at 7, Tr., B. Black (Mar. 2, 2005).

75. Consumer testimony confirms that the contempt defendants and their references told consumers that they could reasonably expect to earn a substantial or six-figure income from working as APG consultants. *See* Consumer Test., Hr’g (Oct. 25, 2006); PX98, Drayer Dep. at 10 (“But it was always six figures, six figures So that’s a minimum hundred thousand dollars.”); PX42, Young Decl., at 1 ¶3, 2 ¶6.

76. The contempt defendants presented no consumer witnesses and no independent testimony or evidence whatsoever regarding consumer perception of their written promotional materials or their verbal representations. *See* Hr’g Test. (Oct. 26, 2006).

3. The Contempt Defendants’ Representations Were False or Misleading.

77. The contempt defendants’ claims of a substantial or “six-figure” income were false or misleading.

78. Although the contempt defendants purported to sell a business opportunity with a “6-figure income potential, from less than full-time schedule, PX06 at 1, expressly offering “a lucrative high-income opportunity” for APG consultants to earn a “top income,” *id.* at 14, the contempt defendants delivered a business opportunity in which nearly all of their consultants lost money.

79. Nearly two thousand (2,000) consumers bought the APG business opportunity program and became APG consultants. PX112 at 5. Yet, according to APG’s own records, over a period of more than six years, only three (3) consultants succeeded in selling more than 50 corporations in total. *Id.*; PX119.

80. The majority of APG consultants failed to sell any corporations. PX112; PX113; PX119; Miller Test., Hr’g (Oct. 26, 2006).

81. After analysis of APG’s own database records, the receiver found that the vast majority of APG consultants lost money. According to the receiver’s estimate, 93.7% of the consultants did not earn back the business opportunity fee. PX112 at 5.

82. As many consumers have testified, APG consultants suffered financial losses or made meager earnings nowhere near the six-figure income described by the contempt defendants. *See, e.g.*, Consumer Test., Hr’g (Oct. 25, 2006); PX98, Drayer Dep. at 26; PX99, Falcone Dep. at

18-19; PX100, Greaves Dep. at 12, 16-17; PX102, Sorrentino Dep. at 18, 22; PX103, Morgan Dep. at 29-32; PX37, Hinzman Decl., at 2 ¶ 6-8 (“I had been . . . ripped-off royally by APG.”); PX38, Langley Decl.; PX42, Young Decl., at 5-6 (“I quickly learned there was no client base I lost a good sum of other money attempting to run the APG business . . .”).⁴

83. The findings of the Court-appointed receiver confirm that the sales volume obtained by these consumers is consistent with the results of the vast majority of APG consultants. PX112; PX113; PX118.

84. The receiver’s findings were based on the contents of an computer database containing business records kept by APG personnel, including Neiswonger, in the usual course of APG’s regularly conducted business. These records accurately reflected the number of consumers who purchased the APG program and the number of corporations that each APG consultant succeeded in selling. Miller Test., Hr’g (Oct. 26, 2006).

85. Using APG’s database, the receiver’s staff produced a list of APG consultants ranked by the number of corporations they sold, according to APG records. PX113; Miller Test., Hr’g (Oct. 26, 2006). A review of this list reveals that the median number of corporations sold is zero. PX113 at 10.

86. All of the contempt defendants had access to the database records of APG revealing the number of consumers who purchased the APG program and the number of corporations that each APG consultant succeeded in selling. Miller Test., Hr’g (Oct. 26, 2006). The contempt defendants did not challenge the receiver’s findings. *See* Hr’g (Oct. 26, 2006).

87. The record shows that the contempt defendants did not rely on the data available in their records in making their income representations.

88. In September 2006, pursuant to Paragraph III of the Permanent Injunction, the Commission requested that defendant Neiswonger produce all materials that were relied upon in disseminating certain representations, including APG’s claims of a “6-figure income potential, from less than full-time schedule” and that “getting just six or eight clients in an entire month’s time is a VERY reasonable, very achievable goal.” PX67 at 1-2 (citing PX01 ¶ 3; PX06 at 1; PX10 at 4 (boldface emphasis removed from original promotional material)).

89. Neiswonger produced no documents in response to the FTC’s request for substantiation, save a two-page letter on his attorney’s letterhead, which Neiswonger adopted as his response in his deposition testimony. PX68; PX105 at 191.

⁴ Although the contempt defendants recommended the services of a “appointment setting” firm, many APG consultants have reported little success selling APG’s services, whether through telemarketing, print advertising, personal meetings, or other means. *See id.*; *see also* PX37 at 2 ¶ 6; PX38 at 2-3 ¶¶ 6-10; PX42 at 3-5 ¶¶ 10-15; PX98 (citing PX95-97).

90. In his response, Neiswonger admitted that APG's claims of a "6-figure income potential, from less than full-time schedule" were based not on data, but on an assumption. Neiswonger stated that he and Reed just "assumed a consultant willing to work hard and put in the time and energy, could reasonably expect . . . to make a potential 6-figures." PX68 at 1; *see also* PX105 at 198-99.

91. In his response, Neiswonger also admitted that APG's claim that "getting just six or eight clients in an entire month's time is a VERY reasonable, very achievable goal" was based not on data, but on what Neiswonger and Reed felt. PX68 at 2; *see also* PX105 at 208.

92. When FTC counsel asked Reed whether he failed to verify that the income representations made in APG promotional materials were consistent with the actual sales data by individual APG consultants, Reed refused to testify, citing the Fifth Amendment. PX104 at 25.

93. Defendant Neiswonger testified at his deposition that the receiver took possession of documents that would substantiate the claims for the APG program. PX105 at 192. However, after analysis of APG's documents and records, the receiver concluded that the APG program could not be lawfully marketed. Miller Test., Hr'g (Oct. 26, 2006).

94. Defendant Neiswonger suggested in his hearing testimony that APG's database was incomplete, but he offered no evidence whatsoever to support that contention. Neiswonger Test., Hr'g (Oct. 26, 2006).

95. Neiswonger also testified that he believed that consumers were satisfied with their purchase of the APG program, but he presented no evidence to support that assertion either. *Id.*

96. On cross-examination, Neiswonger conceded that he knew many existing consultants were having difficulties, and that they were not making the sales they wanted to make. *Id.*; PX105 at 199.⁵

⁵ Defendant Neiswonger also testified that, when he marketed the APG program, he was actually selling information—he was "in the seminar business." Neiswonger Test., Hr'g (Oct. 26, 2006). That is not what the promotional materials for the APG program stated. *See, e.g.*, PX06 at 1 ("HOW TO ENJOY AN EXCEPTIONAL INCOME, IDEAL LIFESTYLE AND PRESTIGE IN YOUR OWN BUSINESS AS AN ASSET PROTECTION CONSULTANT") (emphasis in original).

It was not necessary for consumers to purchase the APG program in order to consult with contempt defendant Reed or obtain information regarding the use of Nevada corporations. Contempt defendant Reed held regular teleconferences with individuals who purchased Nevada corporations. PX105 at 130. Purchasers of Nevada corporations were able to confer with Reed via telephone. *Id.*; Neiswonger Test., Hr'g (Oct. 26, 2006). Moreover, APG recommended that its consultants provide prospective clients with a book purportedly written by Reed, concerning asset protection and the use of Nevada and offshore corporations. Consumers could peruse this

97. None of the contempt defendants presented any consumers or any independent, non-party witnesses to testify concerning the experiences or income of APG consultants. *See* Hr'g Test. (Oct. 26, 2006).⁶

98. None of the contempt defendants presented any data or other documentary evidence concerning the actual income of APG consultants. *See* Hr'g Test. (Oct. 26, 2006).

C. Material Facts Not Disclosed in the Marketing and Sale of the APG Program

1. The Contempt Defendants Did Not Disclose the Amount of Remuneration Received by APG References.

99. Although the Permanent Injunction required the contempt defendants to disclose to prospective purchasers of the APG program, in advance of purchase, the amount of remuneration paid to references, PX01 at 5 ¶ II.A, the contempt defendants failed to comply with that requirement.

100. APG paid references to promote the APG program to prospective purchasers. References received \$50 for each initial phone call they accepted from a prospective purchaser of the APG program. PX105 at 171-72; PX101 at 21-22; PX112 at 3.

101. References increased their earnings by accepting more phone calls from prospective purchasers. Defendant Neiswonger cut monthly checks to references in amounts exceeding \$1,000. In some cases, Neiswonger cut checks to references exceeding \$3,000. PX105 at 176; Neiswonger Test., Hr'g (Oct. 26, 2006).

102. Despite the Permanent Injunction, APG and its personnel did not affirmatively disclose the amount of remuneration paid to its references. Neiswonger has conceded this fact. Neiswonger Test., Hr'g (Oct. 26, 2006); PX105 at 173 (“We did not mention the \$50 number”).

book for information; they did not have to buy the APG program to obtain such information. *See, e.g.*, PX06 at 13; PX42B at 13; PX18 at 6 (“that [book] outlines very quickly in just a few hours of reading exactly what we do”) (statement of contempt defendant Reed).

⁶ Neiswonger testified that APG provided confidential refunds to some consumers. PX105 at 226-27. No exception was made for complaints to law enforcement agencies. Consumer Test., Hr'g (Oct. 25, 2006). Neiswonger also testified at his deposition that contempt defendant Reed “lost his temper a couple of times” and threatened consumers with lawsuits. PX105 at 227. Indeed, one consumer testified that Reed threatened him with a slander lawsuit in response to his complaint. Pianga Test., Hr'g (Oct. 25, 2006). Reed has refused to answer questions regarding his threats of litigation against complaining consumers, and the making of refunds on terms that did not allow consumers to disclose complaints to law enforcement. PX104 at 27-29.

103. In his testimony, defendant Neiswonger stated that APG disclosed that references received some “nominal” compensation. The record reflects only two instances in which such a statement was ever made. PX07 at 7; Pianga Test., Hr’g (Oct. 25, 2006). However, the record is replete with many instances in which the contempt defendants and their agents failed to disclose that APG references were paid at all. *See supra*; *see also* PX06; PX10; PX21 at 17, 22, 29 (no disclosure in sales pitch by Neiswonger); PX22 at 12, 38-44, Tr., D. Lemay (no disclosure in sales pitch by APG personnel); PX23 at 30-31 (no disclosure in sales pitch by Neiswonger); PX20 at 4-19, Tr., B. Hutchinson (no disclosure in sales pitch by APG reference); PX24 at 3-16, Tr., J. Hutchinson (same).

104. Consumer testimony further confirms that the contempt defendants did not affirmatively disclose the amount of remuneration paid to their references. Consumer Test., Hr’g (Oct. 25, 2006); PX103, Morgan Dep., at 23-24; PX42, Young Decl., at 2 ¶4, 6-7 ¶18. Indeed, several consumers have testified that they still do not know whether APG paid its references. Hammond Test., Hr’g (Oct. 25, 2006); PX98, Drayer Dep. at 11; PX102, Sorrentino Dep., at 28.

2. The Contempt Defendants Did Not Disclose Defendant Neiswonger’s Criminal History Relating to the Marketing and Sale of Programs.

105. Although the Permanent Injunction required the contempt defendants to disclose all material facts to prospective purchasers of programs, PX01 at PX01 at 4-5, ¶ II, the contempt defendants failed to disclose the material fact of defendant Neiswonger’s criminal convictions in connection with the marketing of two prior business opportunity programs to prospective purchasers of the APG program.

106. Defendant Neiswonger’s convictions occurred after the issuance of the Permanent Injunction and are already of record. PX03A; *see* PX03.

107. Defendant Neiswonger’s prior convictions in connection with the marketing of business opportunity programs would have been material to consumers weighing whether to pay \$9,800 for the APG business opportunity program. This conclusion finds ample support in the testimony of consumers who discovered the undisclosed facts for themselves. Consumer Test., Hr’g (Oct. 25, 2006); PX42, Young Decl., at 6 ¶17 (“I would never have invested in APG had I known its principals had these kinds of backgrounds.”); PX89.

108. The materiality of these facts is further underscored by the fact that consumers were entitled to know, under the Franchise Rule, 16 C.F.R. Part 436.1(a)(2), (4), of defendant Neiswonger’s criminal convictions. *See infra* Pl.’s Proposed Concl. of Law ¶ 48.

109. Defendant Neiswonger kept a copy of the Franchise Rule at his office at APG. PX70; PX105 at 220-21; Neiswonger Test., Hr’g (Oct. 26, 2006).

110. The contempt defendants did not disclose defendant Neiswonger's criminal convictions to prospective purchasers of the APG program. *See* Neiswonger Test., Hr'g (Oct. 25, 2006); PX105 at 221; *see also* PX06 (no disclosure in APG promotional material); PX10 (same); PX21 at 17, 22, 29 (no disclosure in recorded sales pitch by defendant Neiswonger); PX23 at 30-31 (same). Indeed, multiple consumers have testified that they still do not know of Neiswonger's criminal history. *E.g.*, PX98 at 25; PX99 at 20; PX100 at 19.

111. Even more egregiously, defendant Neiswonger also sought to *suppress* the public disclosure of his criminal history.

112. Neiswonger paid a computing consultant to counteract information appearing on a website called assetprotectioncorp.com. PX105 at 242; Neiswonger Test., Hr'g (Oct. 26, 2006). The information on that website included the text of the docket from his criminal case, and his federal inmate number. PX74; PX105 at 234.

113. Neiswonger received an email message from the computing consultant reporting that he had crashed the services of assetprotectioncorp.com. PX77. Neiswonger responded, "Do whatever necessary. . . . anything and everything aggressively. Serious rewards for you upon completion and on an on-going basis as we discussed." *Id.*; PX105 at 242-43; Neiswonger Test., Hr'g (Oct. 26, 2006).

D. The Contempt Defendants' Additional Violations and Related Conduct

114. The FTC has alleged additional violations of the Permanent Injunction by defendant Neiswonger, and there is evidence of other dishonest conduct on the record.

115. Defendant Neiswonger did not provide the FTC with proof of a current performance bond while marketing the APG program as required by Paragraph V of the Permanent Injunction. Neiswonger obtained a performance bond in 1997 in connection with another business enterprise, but the surety of that bond cancelled the bond in 2004. Neiswonger did not provide proof of a new bond to the FTC. A diligent search of agency records indicates that the FTC did not receive such proof. PX116, Monteiro Dep., at 9-11. If Neiswonger secured a current bond, the record shows that he did not provide proof of the bond to the FTC as required by the Permanent Injunction.

116. Additionally, Neiswonger did not comply with a basic compliance-monitoring provision of the Permanent Injunction. Paragraph XI of the Permanent Injunction required Neiswonger to report to the FTC, in writing, any new business affiliation with any program for a period of three years, commencing in 1997. PX01 at 12, ¶ XI. While this provision of the Order was in effect, Neiswonger entered into a new business affiliation by forming APG's first Board of Directors with Reed in late 1998. PX02 at 1. Neiswonger did not report this new business affiliation to the FTC. A diligent search of agency records indicates that the FTC did not receive such notification. PX116, Monteiro Dep., at 9-11. From these facts, and those set forth above,

it appears that Neiswonger sought to avoid the scrutiny of federal law enforcement authorities while he participated in marketing the APG program.

117. The record further shows that defendant Neiswonger used a false name while marketing the APG program. At the hearing in this matter, after being confronted with a document by FTC counsel, Neiswonger admitted under oath that he used the name "Rick Bradley" in placing certain advertising for APG. Neiswonger Test., Hr'g (Oct. 26, 2006).

118. Neiswonger's admission directly contradicted his own sworn deposition testimony in this matter, taken only two weeks before the hearing, on October 11, 2006. In his earlier sworn testimony, Neiswonger denied using any name other than his own for any business purpose related to this matter, and stoutly denied using any aliases at any time. PX105 at 9.

119. During his appearance as a witness at the hearing in this matter on October 26, 2006, defendant Neiswonger was impeached several other times by reference to his deposition testimony. *See id.*; Neiswonger Test., Hr'g (Oct. 26, 2006). For example, Neiswonger initially denied that he knew many existing APG consultants were having difficulties, or that he hired computer consultant Mike Ireland to perform services related to assetprotectioncorp.com. *Compare* Neiswonger Test., Hr'g (Oct. 26, 2006) *with* PX105, Neiswonger Dep., at 199, 242. Defendant Neiswonger was not a credible witness.

120. For his part, contempt defendant Reed has engaged in other misrepresentations related to the APG enterprise. For example, Reed falsely represented himself as an attorney in APG advertisements, and received complaints regarding the unauthorized practice of law from his home state, Nevada, regarding that representation. PX85-86. In responding to another such complaint from the state of Texas, Reed falsely claimed that APG "do[es] not sell a 'business opportunity.'" PX87. Reed later denied receiving such complaints: "Neither I nor APG has ever been accused of engaging in the 'unauthorized practice of law.'" PX88 at 3 (statement of Reed).

IV. The Contempt Defendants' Sales and Income from the APG Scheme

121. The Court's receiver found records at APG's place of business evidencing the contempt defendants' gross sales of the APG program and the income and expenses attributed to that program. PX112; Miller Test., Hr'g (Oct. 26, 2006). These records were kept in electronic format, using Quicken, a computer software program for financial recordkeeping. Miller Test., Hr'g (Oct. 26, 2006).

122. The receiver found records evidencing the gross sales of the APG program and the income and expenses attributed to that program on the computer in defendant Neiswonger's APG office. Neiswonger advised the receiver's representative that he made those records using the Quicken software program, and the receiver concluded from an examination of Neiswonger's records that the individual entries in those records were made on a regular basis, at or near the time that the recorded transactions occurred. The receiver's staff preserved the records and

generated a two-page written report of income and expenses on July 20, 2006. PX118; Miller Test., Hr'g (Oct. 26, 2006). The receiver representative reviewed the report as well as bank statements and other documents to verify that the report accurately represented APG financial data as of July 19, 2006. Miller Test., Hr'g (Oct. 26, 2006).

123. The receiver also found records evidencing the contempt defendants' income attributed to the sale of the APG program on the computer of APG Vice-President Kimberly Toy. These records were also made in Quicken format, on a regular basis, at or near the time that the recorded transactions occurred, and were preserved by the receiver's staff. The receiver's staff generated a current computation of the contempt defendants' income from the sale of the APG program using this data as well as the data on defendant Neiswonger's computer. Miller Test., Hr'g (Oct. 26, 2006).

124. APG's accounting records indicate that, between January, 2000 and July, 2006, the contempt defendants amassed at least \$19,854,937.64 from the sale of the APG program. PX118; Miller Test., Hr'g (Oct. 26, 2006).

125. Data entry for gross sales began in 2000, and for a period of five years, from 2001 to 2005, the recorded gross sales for the APG program were in excess of \$3 million per year. *Id.*

126. Contempt defendants Neiswonger and Reed each obtained a significant amount of the multi-million dollar proceeds of the APG scheme.

127. Neiswonger took the income of the APG business opportunity to pay his personal expenses for a period of six years, logging those expenditures as "personal" expenses in corporate accounting records. PX118 at 1; PX114 at 2-22.

128. Neiswonger recorded personal expenses totaling \$2,802,371.19 in his expense records for the APG program. PX118 at 1. Combining this data with the data obtained from the computer of APG Vice-President Kimberly Toy, the receiver's staff produced a full list of Neiswonger's expenses, including many credit card payments as well as payments on Mercedes-Benz and Lexus automobiles. PX114 at 2-16, 17-20. The total amount of payments made to, or on behalf of, defendant Neiswonger from the proceeds of the APG program is over three million dollars—\$3,089,031.10. PX114 at 1, 22; Miller Test., Hr'g (Oct. 26, 2006).

129. Reed obtained income from the proceeds of the APG program both through cash withdrawals and through payments to related entities—companies controlled by Reed, to which APG paid millions of dollars. PX114 at 1; Miller Test., Hr'g (Oct. 26, 2006). Using the data obtained from the APG accounting records maintained by defendant Neiswonger and Kimberly Toy, the receiver concluded that Reed made \$1,223,195.78 in cash withdrawals, and that payments to companies controlled by Reed for "training" totaled \$3,688,861.13. PX114 at 1. Including other personal payments, Reed received the benefit of nearly five million dollars (\$4,932,831.86) in the APG scheme. *Id.*; Miller Test., Hr'g (Oct. 26, 2006).

130. The receiver believes that its computation of income for the contempt defendants is actually understated because APG's bank accounts have not yet been fully reconstructed. PX114 at 1; PX112; Miller Test., Hr'g (Oct. 26, 2006).

131. As of late October 2006, the receiver has reported that only approximately \$1.2 million in receivership defendant accounts have been frozen. Miller Test., Hr'g (Oct. 26, 2006).

132. Additionally, and most recently, the receiver has advised the Court that contempt defendant Reed has engaged in numerous financial transfers in violation of the provisions of the Temporary Restraining Order of July 17, 2006. *See* Hr'g (Oct. 26, 2006).⁷

PROPOSED CONCLUSIONS OF LAW

I. Jurisdiction

1. This Court has jurisdiction over this matter for all purposes, as reserved in Paragraph XIII ("Retention of Jurisdiction") of the Permanent Injunction. PX01 at 13.

II. The Permanent Injunction Applies to the Contempt Defendants.

2. As discussed below, the Permanent Injunction applies to all of the contempt defendants. Federal Rule of Civil Procedure 65 provides that injunctions are binding on the parties to the action, as well as "those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." FED. R. CIV. P. 65(d).

A. Defendant Neiswonger

3. The Permanent Injunction binds defendant Neiswonger because he was a party to the original litigation in this matter and signed the Permanent Injunction before it was entered. Findings ¶¶ 3, 49; FED. R. CIV. P. 65(d).

B. Contempt Defendant Reed

4. The Permanent Injunction binds contempt defendant Reed because he acted in concert or participation with defendant Neiswonger and received actual notice of the Permanent Injunction. Findings ¶¶ 13-24, 51-55; FED. R. CIV. P. 65(d).

5. Reed acted in concert or participation with defendant Neiswonger in advertising, marketing, promoting, and selling the APG program. This conclusion is based on the testimony

⁷ FTC counsel asked defendant Neiswonger at his deposition whether he has transferred any assets since becoming aware of this contempt action. Neiswonger's counsel instructed the defendant not to answer the question. PX105 at 262-64.

concerning Reed's participation, review, and approval of promotional materials for the APG program, Findings ¶¶ 30, 31; the widespread use of Reed's name, photograph, statements, and signature in those sales materials, Findings ¶ 29; and the testimony and evidence concerning Reed's personal participation in marketing activities for the APG program. Findings ¶¶ 29-30.

6. Reed received actual notice of the Permanent Injunction. This conclusion finds substantial support in the record, including: (1) Neiswonger's testimony that he communicated both the requirements of the Permanent Injunction and the need to comply with that Order to Reed, Findings ¶¶ 14-17; (2) Neiswonger's testimony that he discussed that Order with Reed "many times," Findings ¶¶ 15-17; (3) Reed's testimony revealing his prior awareness of the Order and its most pertinent provisions, Findings ¶ 18; and (4) the testimony and evidence that several APG consultants brought the prior FTC action to Reed's attention, even providing him with the case number and a copy of the FTC Complaint, Findings ¶¶ 20-23.⁸

7. This evidence of notice is more than sufficient to support a finding of actual notice. *Hill v. United States*, 33 F.2d 489, 491 (8th Cir. 1929) (upholding criminal contempt convictions against non-parties where there was evidence of notice or knowledge of the order itself, citing circumstantial evidence that the defendants "kn[e]w of this injunction").

8. The surrounding circumstances provide additional support for a finding of actual notice, especially given the lengthy partnership and close working relationship between Reed and Neiswonger, Findings ¶¶ 13, 39, and the fact that the contempt defendants together marketed a program, *i.e.*, the precise type of product or service addressed by the Permanent Injunction. Findings ¶ 25. *See Hill*, 33 F.2d at 491:

The evidence establishes the relationship of these parties; indicates concert of action in the maintenance of the unlawful business; . . . and the obvious interest of the defendants in evading any interference with their unlawful business as long as possible. These and other circumstances indicated to the trial judge, and indicate to us, that it was so highly improbable that these defendants did not know of this injunction as to make a finding that they did know proper.

9. Personal service of an order is not required for actual notice. FED. R. CIV. P. 65(d).

10. Actual notice is notice of an order's existence, not of its precise terms. *Hill*, 33 F.2d at 491; *see Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 646 F.2d 800, 808 (2d Cir. 1981); *Central States S.E. & S.W. Areas Health & Welfare & Pension Funds v. Transcon Lines*, 1995 WL 47205, Civ. No. 90-1853 (N.D. Ill. Aug. 8, 1995).

⁸ In view of the foregoing testimony and facts, Reed's earlier statement "[t]hat prior to the filing of the instant case he had *no knowledge* of an Injunction entered . . . against Neiswonger," Reed Aff'd (Sept. 29, 2006) (emphasis added), is simply not credible.

11. Reed cannot avoid notice of the Permanent Injunction by failing to acquaint himself with the Court's Order. *Transcon Lines*, 1995 WL 47205 at *8 ("A rule which would allow a corporate officer to remain deliberately ignorant of the particulars of a court order, and thereby avoid a contempt citation, would defy common sense.").

C. Contempt Defendant APG

12. The Permanent Injunction binds contempt defendant APG because that firm acted in concert or participation with defendant Neiswonger and received actual notice of the Permanent Injunction from him. FED. R. CIV. P. 65(d).

13. APG acted in concert or participation with defendant Neiswonger in advertising, marketing, promoting, and selling the APG program. Findings ¶¶ 29-31. APG did so both directly and through the auspices of a fictitious division, later a separate company, called APG Marketing. Findings ¶¶ 35-37.

14. APG received actual notice of the Permanent Injunction as a matter of law. APG had notice because defendant Neiswonger had notice and was an agent of the corporation. Neiswonger was a founding Director of APG and served as its Marketing Director as well. Findings ¶ 32. It is axiomatic that "a corporation 'knows' through its agents." *United States v. One Parcel of Land Located at 7326 Highway 45 North, Three Lakes, Oneida County, Wisconsin*, 965 F.2d 311, 316 (7th Cir. 1992); *see also Cablevision Sys. Corp. v. Muneyyirci*, No. 90-2997, 1995 WL 362541 at *3 n.1 (E.D.N.Y. Aug. 24, 1990).

15. The evidence clearly supports the conclusion that the contempt defendants were subject to the Permanent Injunction and possessed the ability to comply with that Order.

III. The Contempt Defendants Violated the Permanent Injunction.

16. The contempt defendants engaged in prohibited activity in advertising, marketing, promoting, and selling the APG business opportunity program, in violation of Paragraphs I, I.A, II, and II.A of this Court's Permanent Injunction. The evidence shows that defendant Neiswonger also violated Paragraphs V and XI of the Permanent Injunction.

17. To establish the defendants' liability for civil contempt, the plaintiff bears the initial burden of showing, with clear and convincing evidence, that (1) there is a specific and definite order of the court; and (2) the defendants have violated that order. *Chicago Truck Drivers v. Brotherhood Labor Leasing Corp.*, 207 F.3d 500, 505 (8th Cir. 2000); *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999).

18. Once the plaintiff makes this showing, the burden shifts to the defendants to demonstrate why they were unable to comply with the court's order. *Chicago Truck Drivers*, 207 F.3d at 505 (citing *United States v. Rylander*, 460 U.S. 752, 757 (1983)).

19. Defendants may not raise a defense that they did not intentionally violate the order: “It matters not with what intent the defendant did the prohibited act.” *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); see *NLRB v. Ralph Printing & Lithogr. Co.*, 433 F.2d 1058, 1062 (8th Cir. 1970).

A. The Permanent Injunction is a Clear and Definite Order.

20. The Permanent Injunction forbids the misrepresentation of any material fact in connection with the specific business activity of advertising, promoting, marketing, or selling a program, and it requires the affirmative disclosure of material facts to prospective purchasers of a program. Findings ¶¶ 41-46. The Permanent Injunction provides examples of representations covered by the Order, and plainly states that the Order is not limited to those representations alone. Findings ¶¶ 42, 43, 45. By its express terms, the Permanent Injunction covers claims made directly or by implication. Findings ¶ 43. The terms of the Permanent Injunction were the product of negotiations and a stipulation by defendant Neiswonger. Findings ¶¶ 3, 49. There has been no suggestion that the Court’s Order is unclear. Findings ¶ 49. The Permanent Injunction is a clear and definite order.

B. The Contempt Defendants Misrepresented Material Facts in Marketing the APG Program, in Violation of Permanent Injunction ¶¶ I and I.A.

21. The evidence clearly shows that the contempt defendants have misrepresented material facts, directly and by implication, in marketing the APG business opportunity program, in violation of Permanent Injunction ¶ I and I.A.

22. The APG program was a “program” as that term is defined in the Permanent Injunction. The APG program included training materials, a one-day training session, and a business affiliation with APG as an “asset protection consultant.” Findings ¶¶ 51-52. As defined in the Permanent Injunction, the term “program” includes training sessions, courses of instruction, class materials, support, affiliations, associations, or any combinations thereof. PX01 at 3.

23. The contempt defendants misrepresented the income that consumers who purchased the APG business opportunity program would likely earn from client fees generated using the program. The contempt defendants marketed and sold the APG program with repeated representations of a substantial or “six-figure” income, when, in truth and fact, nearly all APG consultants lost money or failed to recoup the cost of the business opportunity.

24. The contempt defendants made their income representations to consumers verbally and in writing, both directly and through persons acting as references, via telemarketing, various national and local media, and the United States mails. Findings ¶¶ 54, 57, 72, 100.

25. In evaluating these representations and other issues in these contempt proceedings in a case brought by the FTC pursuant to Section 5(a) of the FTC Act, the Court should consider the substantial body of case law developed by the federal courts under the FTC Act. *See FTC v. Kuykendall*, 371 F.3d 745, 766 n.11 (10th Cir. 2004) (en banc) (relying upon FTC Act case law in FTC contempt action, stating: “While we acknowledge the differences between a case arising directly under the FTC Act and a contempt proceeding, such cases provide a useful analogy.”).

26. The contempt defendants’ income representations were material. A material representation is one that “involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.” *Novartis Corp. v. FTC*, 223 F.3d 783, 787 (D.C. Cir. 2000); *accord Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992). “The case law is clear that representations regarding the profit potential of a business opportunity are important to consumers, and therefore such are material [r]epresentations” *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 502, 529 (S.D.N.Y. 2000) (citations omitted). Consumer decisions to purchase the APG program were influenced by income representations. Findings ¶¶ 55, 71.

27. The contempt defendants’ income representations were false or misleading. Findings ¶¶ 77-98. In truth and fact, nearly all APG consultants lost money or failed to recoup the cost of the business opportunity. Findings ¶¶ 78-83. The testimony and declarations submitted by the Commission further illustrate that many consumers suffered financial losses or made meager earnings nowhere near the substantial, six-figure incomes repeatedly touted by the contempt defendants. Findings ¶ 82.⁹

28. The contempt defendants did not rely on available data in making income representations. They relied on undisclosed assumptions. Findings ¶ 90.

29. The contempt defendants misrepresented the potential for a “six-figure” income, giving consumers the misleading impression that such income reasonably could be achieved when, in fact, nearly all APG consultants failed to recoup their costs. *Id.*; *see FTC v. Febre*, 1996 U.S. Dist. LEXIS 9487, at *8-9 (N.D. Ill. 1996) (emphasis in original):

Even though the advertisements did not *guarantee* the stated level of earnings, they made express claims regarding the earnings *potential* of the programs. Such express claims are presumed to be material [A] consumer would reasonably believe that the statements of earnings potential represent typical or average earnings.

1996 U.S. Dist. LEXIS 9487, *aff’d*, 128 F.3d 530 (7th Cir. 1997); *see also id.* at *9 (citing *In re*

⁹ The contempt defendants reinforced their income representations with repeated references to the demand for APG services, the ease of selling those services, and claims that prospective purchasers did not need prior experience. Consumers found these claims to be false and misleading as well. Findings ¶¶ 63, 67, 82.

Amway, 93 F.T.C. 618, 729-32 (1979), in which statement that a participant could “develop an income of as much as \$1,000 per month” was found deceptive, despite disclaimer that some would earn more and some would earn less, because neither a substantial nor an appreciable number of consumers regularly achieved those earnings).

30. The contempt defendants’ use of the word “potential” with respect to their income representations was false or misleading. *See id.*; *see also Bailey Employment Sys., Inc. v. Hahn*, 545 F. Supp.62, 70 (D. Conn. 1982), *aff’d*, 723 F.2d 895 (2d Cir. 1983) (holding that projected earnings claims were deceptive where such did not “bear a reasonable relationship to the average amounts earned in the past by a majority of existing franchisees”).

31. The contempt defendants further misrepresented the opportunity for a “six-figure” income by touting the income earned by one APG consultant without disclosing that this consultant was the only one to have made such income. Findings ¶¶ 65, 66. Reference to the experience of other purchasers conveys a claim to prospective purchasers. *See Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 301, 303 (7th Cir. 1979). Defendant Neiswonger has admitted that this consultant’s experience was “atypical,” indeed, he referred new clients directly to her. Findings ¶ 66, n.3. The contempt defendants failed to disclose these facts. *Id.* In failing to disclose these facts, the contempt defendants misrepresented the opportunity for income from the APG business. *Febre*, 1996 U.S. Dist. LEXIS 9487 at *6-9, *aff’d*, 128 F.3d 530; *FTC v. National Dynamics Corp.*, 492 F.2d 1333, 1335 (2d Cir. 1974) (holding that defendant should be prohibited from “making deceptive use of unusual earnings claims realized only by a few”).

32. The contempt defendants occasionally purported to disclaim their representations regarding a substantial or six-figure income, but these statements appeared infrequently, they were inconspicuous in size and placement, and they were often undercut with additional claims. Findings ¶¶ 68-71. These statements were wholly inadequate. “Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.” *Removatron, Int’l v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989).

33. When analyzing the claims made in an advertisement, courts consider the overall net impression of the advertisement. *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992); *National Bakers Services, Inc. v. FTC*, 329 F.2d 365 (7th Cir. 1964) (“The important criterion in determining the meaning of an advertisement is the net impression that it is likely to make on the general populace.”). Sporadic and isolated disclosures such as those made by the contempt defendants cannot overcome prominent claims. *See, e.g., Removatron, Int’l*, 884 F.2d at 1497; *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975).

34. The contempt defendants’ representations were false and misleading, even if some persons could have interpreted them differently. “An otherwise false advertisement is not rendered acceptable merely because one possible interpretation of it is not untrue.” *National*

Comm'n on Egg Nutrition v. FTC, 570 F.2d 157, 161 n.4 (7th Cir. 1977); *Resort Car Rental Sys.*, 518 F.2d at 964 (“Advertising capable of being interpreted in a misleading way should be construed against the advertiser”); *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270, 272 (2d Cir. 1962) (“[s]tatements susceptible of both a misleading and a truthful interpretation will be construed against the advertisers.”).

35. Of the contempt defendants, only defendant Neiswonger has attempted to justify the representations made in the advertising, marketing, promotion, and sale of the APG program. As briefly discussed below, Neiswonger’s arguments are unpersuasive; indeed, many are irrelevant and invalid as a matter of law.

36. Neiswonger’s assertion that consumers were satisfied with the APG program is both unproven and immaterial. First, the defendant has offered no independent evidence to support his self-serving assertion. Second, the existence of “satisfied” consumers is irrelevant to the question of whether the defendants misrepresented material facts to consumers. See *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir. 1989) (“The existence of some satisfied customers does not constitute a defense under the [FTC Act].”); *Basic Books, Inc. v. FTC*, 276 F.2d 718, 721 (7th Cir. 1960).

37. Neiswonger has argued that few consumers have complained about APG’s practices. This argument is incorrect.¹⁰ More importantly, this argument is irrelevant to whether the defendants engaged in misrepresentations in violation of the Permanent Injunction. See *United States v. Lasseter*, 2005 U.S. Dist. LEXIS 23426, 10-11 (D. Tenn. 2005) (“failure by consumer victims to file a complaint with the FTC does not indicate that the [d]efendant has complied”). Indeed, the Eighth Circuit has held that it is inappropriate to require the FTC to show that all consumers relied on misrepresentations at issue.

It would be virtually impossible for the FTC to offer such proof, and to require it would thwart and frustrate the public purposes of FTC action. This is not a private fraud action, but a government action brought to deter unfair and deceptive trade practices and obtain restitution on behalf of a large class of defrauded investors. It would be inconsistent with the statutory purpose for the court to require proof of subjective reliance by each individual consumer.

Security Rare Coin & Bullion Corp v. FTC, 931 F.2d 1312, 1316 (8th Cir. 1991).

¹⁰ This argument wrongly dismisses consumers whose testimony or declarations have been admitted into evidence, the other consumers whose declarations were not moved into evidence, the numerous complaints made directly to APG, and the additional complaints that the FTC has given to defense counsel. Moreover, the record shows that the contempt defendants are now also subject to a class action lawsuit filed in the District of Nevada by aggrieved purchasers of the APG program. *Stevens v. Reed*, No. 2:06CV1007KJD (D. Nev. filed Aug. 17, 2006).

38. Neiswonger has pointed to the fact that APG provided partial or full refunds to some complaining consumers, but refunds are no defense to misrepresentation. Such a defense “would make the false advertising prohibitions of the [FTC] Act a nullity. Anything might then be advertised as long as unsatisfied customers were returned their money.” *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1103 (9th Cir. 1994) (citing *Montgomery Ward & Co. v. FTC*, 379 F.2d 666, 671 (7th Cir. 1967)).

39. Similarly, Neiswonger’s purported reliance on counsel while marketing and selling the APG program offers no defense to violations of the Permanent Injunction. *See Amy Travel Serv.*, 875 F.2d at 575 (upholding lower court’s finding that “[o]btaining the advice of counsel did not change the fact that the business was engaged in deceptive practices”).

40. Turning to contempt defendant Reed, the record shows that Reed has pled the Fifth Amendment on every single issue raised by the FTC excepting that of notice. Pursuant to *Baxter v. Palmigiano*, 425 U.S. 308 (1976), this court may enter adverse inferences against Reed consistent with the Fifth Amendment because he has refused to testify in response to probative evidence offered against him. *See Findings* ¶¶ 31, 92, 97 n.6; *Baxter*, 425 U.S. at 318; *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471, 1480 (8th Cir. 1987); *Nat’l Acceptance Co. v. Bathalter*, 705 F.2d 924, 926-30 (7th Cir. 1983) (observing that “[a]fter *Baxter* there is no longer any doubt that at trial a civil defendant’s silence may be used against him”).

41. The contempt defendants have failed to show good cause why they should not be held in contempt for misrepresenting material facts, directly and by implication, in marketing the APG business opportunity program, in violation of Permanent Injunction ¶ I and I.A.

C. The Contempt Defendants Failed to Disclose Material Facts in Marketing the APG Program, in Violation of Permanent Injunction ¶¶ II and II.A.

42. The evidence clearly shows that the contempt defendants have failed to disclose material facts in marketing the APG business opportunity program, in violation of Permanent Injunction ¶ II and II.A.

43. Although the Permanent Injunction specifically required the contempt defendants to disclose to prospective purchasers of a program, in advance of purchase, the amount of remuneration paid to references, PX01 at 5 ¶ II.A, the contempt defendants failed to comply.

44. APG paid its references \$50 per phone call to promote the APG program to prospective purchasers, cutting monthly checks in amounts exceeding \$1,000, and in some cases, \$3,000. Findings ¶¶ 100-01. Nevertheless, APG and its personnel did not affirmatively disclose the amount of remuneration paid to its references. Findings ¶¶ 102-04.

45. Additionally, although the Permanent Injunction required the contempt defendants to disclose all material facts to prospective purchasers of programs, PX01 at PX01 at 4-5, ¶ II, the contempt defendants failed to disclose the material fact of defendant Neiswonger's criminal convictions in connection with the marketing of two prior business opportunity programs to prospective purchasers of the APG program. Findings ¶¶ 105-06, 110.

46. Indeed, defendant Neiswonger affirmatively sought to *suppress* the public disclosure of his criminal history by paying a computer consultant to counteract truthful information regarding his criminal record appearing on a third party's Internet website. When the computer consultant informed Neiswonger that he had "crashed" that website, Neiswonger responded: "Do whatever necessary. . . anything and everything aggressively. Serious rewards for you upon completion and on an on-going basis as we discussed." Findings ¶¶ 111-13.

47. It is readily apparent why the contempt defendants would elect not to disclose defendant Neiswonger's criminal history to prospective purchasers. Neiswonger's criminal conduct in connection with the marketing of business opportunity programs would have been material to consumers weighing whether to pay \$9,800 for the APG business opportunity program. This conclusion finds ample support in consumer testimony. Findings ¶ 107; *see also* *CFTC v. Wall Street Underground*, 281 F. Supp. 2d 1260, 1265-66 (D. Kan. 2003) (finding that defendant's prior convictions for mail fraud and wire fraud were material facts, and that defendants wrongly failed to disclose those material facts to prospective clients).

48. The materiality of defendant Neiswonger's criminal history is further underscored by the fact that consumers were entitled by law to know of his criminal convictions. The Franchise Rule, 16 C.F.R. Part 436.1, independently required the contempt defendants to disclose the criminal history of defendant Neiswonger, among other material facts, to prospective buyers of the APG program. *See* 16 C.F.R. § 436.1(a)(2), (4).¹¹ Neiswonger kept a copy of the Franchise Rule at his office at APG, Findings ¶ 109, but he did not comply with its disclosure requirements.

49. Neiswonger's purported reliance on counsel in withholding information from consumers is no defense to his failure to disclose that information as required by the Permanent

¹¹ The Franchise Rule requires persons or entities selling certain types of business opportunities to provide prospective purchasers with a complete and accurate disclosure statement so prospective purchasers can weigh the risks involved in a business venture.

APG was subject to the Franchise Rule because it offered a business opportunity in which the company sold its services through others, PX06 at 2, promised assistance in locating clients, *id.* at 12-13, and required the payment of over \$500 to start the business opportunity. *Id.* at 13; 16 C.F.R. § 436.2(a)(1)(ii)(A) & (B), 436.2(a)(2) (defining business opportunities subject to Rule). APG claimed that it was not a franchise, PX15 at 17, referring to the \$9,800 cost of the business opportunity not as a franchise fee but as a "refundable performance deposit." PX06 at 13. This terminology and arrangement does not change the fact that consumers had to pay more than \$500 to become APG consultants. APG was not exempt from the requirements of the Franchise Rule.

Injunction. *See Amy Travel*, 875 F.2d at 575.

50. The contempt defendants have failed to show good cause why they should not be held in contempt for failing to disclose material facts to consumers in marketing the APG business opportunity program, in violation of Permanent Injunction ¶¶ II and II.A.

D. Defendant Neiswonger Has Committed Other Order Violations.

51. Defendant Neiswonger has also clearly violated Paragraphs V and XI of the Permanent Injunction.

52. Paragraph V required Neiswonger to provide the FTC with written proof of a current performance bond while engaging in the marketing of a business opportunity program. The Commission has received no proof of a current performance bond from Neiswonger. Findings ¶¶ 115.

53. Paragraph XI required defendant Neiswonger, for a period of three years from the date of the order in 1997, to provide written notice to the FTC of each new affiliation with any program. The Commission did not receive notice from Neiswonger as to his affiliation with the APG program when his affiliation began in 1998, or at any time thereafter. Findings ¶¶ 116.

54. Defendant Neiswonger has offered no evidence to show that he complied with these provisions of the Permanent Injunction. He has not shown good cause why he should not be held in contempt for his violation of Paragraph V of the Permanent Injunction.¹²

E. The Contempt Defendants Profited Handsomely in Marketing the APG Program in Violation of the Permanent Injunction.

55. The contempt defendants took money from the purchasers of the APG program—persons to whom the contempt defendants purported to sell “a lucrative high-income opportunity,” but delivered a business opportunity in which nearly all purchasers lost money. Findings ¶¶ 78.

56. Each of the contempt defendants obtained millions of dollars in proceeds from the promotion and sale of the APG program. Findings ¶¶ 126-30.

57. Over a period of six years, defendant Neiswonger took income from the proceeds of the APG business opportunity program to pay his personal expenses, expenses totaling over three million dollars—\$3,089,031.10, according to the receiver’s computation. Findings ¶¶ 128.

¹² The Commission does not seek contempt sanctions for Neiswonger's violation of Paragraph XI, which has expired. Instead, the FTC requests that the Court adopt new and enhanced compliance-monitoring provisions with respect to Neiswonger. *See infra* ¶¶ 67-73.

58. Over the same period of time, contempt defendant Reed took income from the proceeds of the APG program both through cash withdrawals and through payments to related entities—\$1,223,195.78 in cash withdrawals, and \$3,688,861.13 in payments to companies that he controlled. Findings ¶ 129. According to the receiver's computation, Reed received the benefit of nearly five million dollars (\$4,932,831.86) in the APG scheme. *Id.*

IV. This Court has the Authority to Order All Relief Necessary to Remedy Violations of the Permanent Injunction and to Prevent Future Violations.

59. District courts have the inherent power to enforce their orders. *Shillitani v. United States*, 384 U.S. 364, 370 (1966). As a party to the original action, the plaintiff may invoke the court's power by initiating a proceeding for civil contempt in the same action. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444-45 (1911).

A. The Contempt Defendants' Violations of the Permanent Injunction Warrant a Civil Contempt Order Imposing Compensatory Sanctions.

60. Civil contempt sanctions may be imposed to coerce compliance with a court order and to compensate for losses sustained as a result of contemptuous acts. *See In re Tetracycline Cases*, 927 F.2d 411, 413 (8th Cir. 1991) (citing *In re Chase & Sanborn Corp.*, 872 F.2d 397, 400-01 (11th Cir. 1989)).

61. The Commission seeks an order requiring the defendants to disgorge all of the money that they received from deceptively promoting and selling the APG program in violation of the Permanent Injunction. The district court has the equitable authority to order such disgorgement. *See Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 455-57 (1932).

62. Disgorgement is an appropriate and narrowly-tailored remedy for the harm caused by the defendants' contemptuous conduct in the advertising, marketing, promotion, and sale of the APG program. When the Commission brings a civil contempt action, it is not limited to seeking disgorgement; the FTC may seek contempt sanctions in an amount reflecting the defendants' gross receipts. *Kuykendall*, 371 F.3d at 764. In this case, however, the FTC seeks only to ensure that the defendants do not profit from their contemptuous conduct.

63. The weight of federal authority holds that in a civil contempt proceeding, once a plaintiff has established the elements of contempt by clear and convincing evidence, it need only prove damages by a preponderance of the evidence. *See McGregor v. Chierico*, 206 F.3d 1378, 1387 (11th Cir. 2000) (applying preponderance standard to FTC contempt action); *Kuykendall*, 371 F.3d at 754 (same); *In re General Motors Corp.*, 110 F.3d 1003, 1018 (4th Cir. 1997); *Graves v. Kemsco Group, Inc.*, 864 F.2d 754, 755 (Fed. Cir. 1988) (applying Seventh Circuit law). *But see Nelson Tool & Mach. Co. v. Wonderland Originals, Ltd.*, 491 F. Supp. 268, 269 (E.D. Pa. 1980) (applying clear and convincing evidence standard).

64. Defendant Neiswonger should be ordered to fully disgorge all of the proceeds he has obtained from the advertising, marketing, promotion, and sale of the APG program, which, based on the unchallenged analysis and computations of the Court-appointed receiver, constitute at least \$3,089,031.10. Findings ¶ 128.

65. Contempt defendant Reed should be ordered to fully disgorge all of the proceeds he has obtained from the advertising, marketing, promotion, and sale of the APG program which, based on the unchallenged analysis and computations of the receiver, constitute at least \$4,932,831.86. Findings ¶ 129.¹³

66. “The paramount purpose of ordering disgorgement of profits is to ‘make sure that wrongdoers will not profit from their wrongdoing.’” *FTC v. Magui Pubs., Inc.*, 1991 U.S. Dist. LEXIS 20452, *48 (C.D. Cal. Mar. 28, 1991) (quoting *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987)). Disgorgement is an appropriate remedy to ensure that the contempt defendants do not profit from their violations of the Permanent Injunction.

B. Defendant Neiswonger’s Violations of the Permanent Injunction Warrant an Order Modifying the Permanent Injunction.

67. The Commission has also asked this Court to modify its Permanent Injunction with respect to defendant Neiswonger. *See* Pl.’s Mot. to Modify Perm. Inj. (Oct. 20, 2006).

68. The Court has the authority to modify its Permanent Injunction under FED. R. CIV. P. 60(b), which provides that the Court may modify its orders for any reason justifying relief from the operation of the judgment. FED. R. CIV. P. 60(b)(6).

69. Moreover, the Court has “inherent jurisdiction in the exercise of its equitable discretion and subject to appropriate appellate review to vacate or modify its injunctions.” *Jenkins v. Missouri*, 931 F.2d 470, 482 (8th Cir. 1991). The Court’s power to modify injunctions specifically extends to the modification of consent decrees. *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968); *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932).

70. Finally, the Court has the authority to modify the Permanent Injunction pursuant to the express terms of that Order. Paragraph VII of the Permanent Injunction grants the Court the authority to permanently ban Neiswonger from advertising, promoting, offering for sale, or selling any program if he is found to have used any misrepresentations in the marketing or sale of programs, in violation of Paragraph I of the Permanent Injunction. PX01 at 9 ¶ VII.

¹³ In an order disgorging the contempt defendants’ ill-gotten gains, the Court may direct its receiver to prepare a final computation of the contempt defendants’ gains from the advertising, marketing, promotion, and sale of the APG program, in view of the receiver’s report that its computation for the contempt defendants may, in fact, be understated. Findings ¶ 130.

71. The Court should exercise its authority pursuant to FED. R. CIV. P. 60(b), case law, and the terms of the Permanent Injunction, because that Order has not accomplished its intended result. Despite the Permanent Injunction and his subsequent incarceration, defendant Neiswonger deceptively marketed another business opportunity program via telemarketing and other means in violation of the Permanent Injunction and its compliance-monitoring provisions. Findings ¶¶ 54, 57, 72, 100.

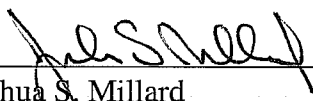
72. Neiswonger's recidivist behavior justifies an order modifying the terms of the Permanent Injunction. Pursuant to Permanent Injunction ¶ VII, the Court should permanently ban Neiswonger from marketing and selling business opportunity programs in the future. Moreover, the Court should extend that ban to telemarketing to prevent Neiswonger from using such means in other schemes.

73. Additionally, because Neiswonger violated the Permanent Injunction's compliance-monitoring provisions in perpetrating the APG scheme, and some of those provisions have since elapsed, Findings ¶ 48, the Court should adopt enhanced compliance-monitoring provisions to ensure that Neiswonger does not violate the Permanent Injunction again in the future.

Respectfully submitted,

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* Mr. Millard and Ms. Claybaugh are attorneys employed by the United States Federal Trade Commission. They are licensed to practice law in States other than Missouri, and appear in this matter consistent with E.D. Mo. L.R. 83-12.01(A).