

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

MARK NUTRITIONALS, INC.,

HARRY SISKIND, and

EDWARD G. D’ALESSANDRO, JR.,

Defendants.

CIVIL NO. SA02CA1151 XR

**STIPULATED FINAL ORDER FOR PERMANENT INJUNCTION AND
SETTLEMENT OF CLAIMS FOR MONETARY RELIEF
BETWEEN HARRY SISKIND AND FEDERAL TRADE COMMISSION**

Plaintiff, the Federal Trade Commission (“FTC,” “Commission” or “Plaintiff”), filed a Complaint against defendants Mark Nutritionals, Inc., Harry Siskind, and Edward G. D’Alessandro, Jr., pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b). Plaintiff filed its Complaint to secure a permanent injunction and other equitable relief against defendants for their alleged deceptive acts or practices and false advertisements for fo(entshe Federal Tra T0nie)TslI liability as rrAi ndadrMr-gi relie8 ag1st def, hag]Tstipu),artices and false

Claims for Monetary Relief (“Order”) in settlement of the Commission’s Complaint against Harry Siskind. The Court being advised in the premises, finds:

FINDINGS

1. This Court has jurisdiction over the subject matter of this case and jurisdiction over all parties. Venue in the Western District of Texas is proper.

2. The Complaint states a claim upon which relief can be granted, and the Commission has authority to seek the relief it has requested.

3. The activities of Harry Siskind in connection with the advertising and sale of “Evening Weight Loss Formula” products were in or affecting commerce, as defined in 15 U.S.C. § 44.

4. On September 17, 2002, defendant Mark Nutritionals, Inc. filed a voluntary petition for relief under the reorganization provisions of Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, in the United States Bankruptcy Court for the Western District of Texas, Case No. 02-54469-LMC (the “Corporate Bankruptcy Case”). On April 2, 2003, the Bankruptcy Court converted Mark Nutritionals, Inc.’s bankruptcy case to a Chapter 7 liquidation case. The Commission’s action against Mark Nutritionals, Inc., *et al.* is not stayed by 11 U.S.C. § 362(a) because it is an exercise of the Commission’s police or regulatory power as a governmental unit pursuant to 11 U.S.C. § 362(b)(4) and thus falls within an exemption to the automatic stay.

5. In conjunction with the Corporate Bankruptcy Case, the Bankruptcy Court has approved the appointment of a Chief Executive Officer of Mark Nutritionals, Inc. Harry Siskind currently has no active role in the day-to-day management of Mark Nutritionals, Inc.

6. Harry Siskind has entered into this Order freely and without coercion. Harry Siskind further acknowledges that he has read the provisions of this Order and is prepared to abide by them.

7. The Commission and Harry Siskind stipulate and agree to this Order, without trial or final adjudication of any issue of fact or law, to settle and resolve all matters in dispute

between them arising from the Complaint up to the date of entry of this Order.

8. Harry Siskind waives all rights to seek judicial review or otherwise challenge or contest the validity of this Order. Harry Siskind also waives any claim that he may have held under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action to the date of this Order.

9. Each settling party shall bear their own costs and attorneys' fees.

10. Entry of this Order is in the public interest.

DEFINITIONS

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

1. "Defendant" shall mean Harry Siskind.

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

3. "Food" and "drug" shall mean "food" and "drug" as defined in Section 15 of the FTC Act, 15 U.S.C. § 55(b)-(c).

4. "Weight loss product" shall mean any food, drug, dietary supplement, product, or service designed or used to reduce body weight or to suppress appetite.

6. The terms “endorsement” and “endorser” shall mean as defined in 16 C.F.R. § 255.0(b).

7. “Person” shall mean a natural person, organization, or other legal entity, including a partnership, corporation, proprietorship, association, cooperative, or any other group acting together as an entity.

8. The term “including” in this Order shall mean “without limitation.”

9. “Asset” shall mean any legal or equitable interest in, right to, or claim to, any real and personal property, including, but not limited to, “goods,” “instruments,” “equipment,” “fixtures,” “general intangibles,” “inventory,” “checks,” “notes” (as these terms are defined in the Uniform Commercial Code), and all chattel, leaseholds, contracts, mail or other deliveries, shares of stock, lists of consumer names, accounts, credits, premises, receivables, funds, and cash, wherever located.

10. “Assisting others” shall mean knowingly providing any of the following goods or services to another entity: (1) serving as an owner, partner, officer, director, or manager; (2) performing customer service functions, including, but not limited to, receiving or responding to consumer complaints; (3) formulating or providing, or arranging for the formulation of any

employees, and all other persons or entities in active concert or participation with them who receive actual notice of this Order, by personal service or otherwise, whether acting directly or through any affiliate, corporation, partnership, subsidiary, division, or other device, are hereby permanently restrained and enjoined from making any representation, in any manner, expressly or by implication, including through the use of endorsements, that is false or misleading, including, but not limited to, representations that:

1. Such product will cause substantial weight loss without reducing caloric intake or increasing exercise;
2. Such product will cause substantial weight loss even if users eat substantial amounts of high calorie foods; and
3. Such product will cause substantial long-term or permanent weight loss.

B. In connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any weight loss product, in or affecting commerce, Defendant and

through any affiliate, corporation, partnership, subsidiary, division, or other device, are hereby permanently restrained and enjoined from making any representation, in any manner, expressly or by implication, including through the use of endorsements, about the safety, health benefits, performance, or efficacy of such product or service, unless, at the time the representation is made, Defendant possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

D. In connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any food, drug, dietary supplement, or other health-related product or service, in or affecting commerce, Defendant and his assigns, agents, servants, and employees, and all other persons or entities in active concert or participation with them who receive actual notice of this Order, by personal service or otherwise, whether acting directly or through any affiliate, corporation, partnership, subsidiary, division, or other device, are hereby permanently restrained and enjoined from misrepresenting in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

E. In connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any goods or services, in or affecting commerce, Defendant and his assigns, agents, servants, and employees, and all other persons or entities in active concert or participation with them who receive actual notice of this Order, by personal service or otherwise, whether acting directly or through any affiliate, corporation, partnership, subsidiary, division, or other device, are hereby permanently restrained and enjoined from misrepresenting, expressly or by implication, any fact material to a consumer's decision to purchase Defendant's products or services.

II. BOND REQUIREMENT

IT IS FURTHER ORDERED that Defendant Harry Siskind, whether acting directly or indirectly through any persons or entities under his control, is hereby permanently enjoined and

restrained from engaging in or assisting others engaged in the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any weight loss product, in or affecting commerce, unless, prior to engaging in or assisting others engaged in such activities,

D. At least ten (10) days before commencing in any activity that requires obtaining the Bond, Defendant shall provide notice to the Commission describing in reasonable detail said activities, and include in such notice a copy of the Bond obtained; and

E. Defendant shall not disclose the existence of the Bond to any consumer, or other purchaser or prospective purchaser, without simultaneously disclosing clearly and prominently the following: THIS BOND IS REQUIRED BY ORDER OF THE U.S. DISTRICT COURT AS PART OF A FINAL ORDER AGAINST HARRY SISKIND IN *FEDERAL TRADE COMMISSION V. MARK NUTRITIONALS, INC., HARRY SISKIND, AND EDWARD G. D'ALESSANDRO, JR.*, NO. SA-02-CA-1151-XR, IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, FOR ALLEGED FALSE AND DECEPTIVE ADVERTISEMENTS FOR WEIGHT LOSS PRODUCTS.

III. FOOD AND DRUG REGULATIONS

IT IS FURTHER ORDERED that:

A. Nothing in this Order shall prohibit Defendant from making any representation for any product that is specifically permitted in the labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

B. Nothing in this Order shall prohibit Defendant from making any representation for any drug that is permitted in the labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Admi

participation with them who receive actual notice of this Order, by personal service or otherwise, whether acting directly or through any affiliate, corporation, partnership, subsidiary, division, or

Defendant's authorized endorsers, but nothing herein shall preclude the Defendant from terminating such endorsers before or after the conclusion of such thirty day review, nor shall any provision of this Order otherwise condition the right of Defendant to terminate a relationship with any of Defendant's authorized endorsers, including termination for other than knowingly making representations prohibited by Part I of this Order.

V. MONITORING OF ADVERTISING AND MARKETING

IT IS FURTHER ORDERED that, in connection with advertising, marketing, promotion, offering for sale, distribution or sale of any product or service covered by this Order, Defendant and his assigns, agents, servants, and employees, and all other persons or entities in active concert or participation with them who receive actual notice of this Order, by personal service or otherwise, whether acting directly or through any affiliate, corporation, partnership, subsidiary, division, or other device, shall in accordance with applicable laws:

A. Take reasonable steps sufficient to monitor and ensure that all employees and agents engaged in advertising, promotion, sales, order verification, or customer service functions comply with this Order. Such steps shall include adequate monitoring of all advertisements, promotions, sales presentations, and other oral and written communication with customers. Defendant, at a minimum, shall:

Commission may direct.

C. Time is of the essence for the payment specified above. In the event that Defendant Harry Siskind does not fulfill, or only partially fulfills, the payment obligations set forth in this Part, he shall be immediately liable for payment of ONE HUNDRED AND FIFTY-FIVE MILLION DOLLARS (\$155,000,000), which is the entire amount of the judgment, plus interest, less any payments already made. Notwithstanding any other provision of this Order, Defendant agrees that, if he fails to meet the payment obligations set forth in this Part, the facts as alleged in the Complaint filed with this Order shall be taken as true in any subsequent litigation filed by the Commission to enforce its rights pursuant to this Order, including, but not limited to, a non-dischargeability complaint in any subsequent bankruptcy proceeding.

D. In order to secure the payment of Defendant Harry Siskind's indebtedness to the Commission, within five (5) days of the entry of this Order, Defendant Harry Siskind shall cause to be transferred to the Commission security interests in each item of property described in Appendix B as security for the payments required to be made by Defendant under this Part. The Defendant shall furnish to counsel for the Commission an executed statement sufficient to perfect the filing and recording of security interests in the property described in Appendix B under the appropriate state laws. The FTC will release its security interests in (a) all property described in Appendix B upon receipt of all payments required by this Part or (b) individual items of property as necessary to effectuate the good faith transfer of an interest in such property, provided that all proceeds received by Defendant Harry Siskind pursuant to such transfer are paid immediately to the Commission.

E. All funds paid to the Commission pursuant to this Order shall be deposited to the

this Order.

VII. FINANCIAL STATEMENTS

IT IS FURTHER ORDERED that:

A. The Commission's agreement to and the Court's approval of this Order are expressly premised upon the truthfulness, accuracy, and completeness of the financial statements and information of Defendant Harry Siskind provided to the Commission by Defendant Harry Siskind, dated January 14, 2003, and supplemented thereafter by Defendant Harry Siskind through documents submitted in letters dated January 6, 2003, March 28, 2003, and May 29, 2003, and by Defendant Harry Siskind's sworn statement taken June 23, 2003, which contain material information relied upon by the Commission in negotiating and agreeing to the terms of this Order.

B. If the Commission should have evidence that the above-referenced financial statements and information failed to disclose any material asset the value of which exceeds ONE THOUSAND DOLLARS (\$1,000), materially misrepresented the value of any asset, or made any other material misrepresentation or omission, the Commission may move that the Court reopen this Order for the sole purpose of allowing the Commission to modify the monetary liability of Defendant Harry Siskind. If the Court finds that Defendant Harry Siskind failed to disclose any material asset, materially misrepresented the value of any asset, or made any other material misrepresentation or omission in the above-referenced financial statements and information, the Court shall reinstate the suspended judgment against the Defendant Harry Siskind, in favor of the Commission, in the amount of ONE HUNDRED AND FIFTY-FIVE MILLION DOLLARS (\$155,000,000), which Defendant Harry Siskind and the Commission stipulate is the amount of consumer injury caused by the Defendant Harry Siskind, as set forth in Part VI of this Order. Provided, however, that Defendant Harry Siskind shall be entitled to offset this amount by any sums already paid under this Order. Provided, further, that in all other

respects this Order shall remain in full force and effect unless otherwise ordered by the Court. Any proceedings instituted under this Part shall be in addition to and not in lieu of any other proceedings the Commission may initiate to enforce this Order. For the purposes of reopening or enforcing this Part VII B, Defendant Harry Siskind waives any right to contest any of the allegations set forth in the Complaint filed in this matter.

VIII. COLLECTING PAST DUE AMOUNTS

IT IS FURTHER ORDERED that Defendant shall:

A. Furnish the Commission, in accordance with 31 U.S.C. § 7701, social security numbers and/or employer identification numbers, which shall be used for purposes of collecting and reporting on any delinquent amount arising out of his relationship with the government.

B. Cooperate fully with the Commission and its agents in all attempts to collect the amount due pursuant to Part VI if the Defendant fails to pay fully the amounts due at the times specified by this Order. In such event, Defendant agrees to provide the Commission with his respective federal and state tax returns for the preceding three (3) years, and with fully updated financial disclosures within ten (10) days of receiving a request from the Commission to do so. Defendant further authorizes the Commission to verify all information provided on these disclosure forms with all appropriate third parties, including, but not limited to, financial institutions.

IX. COMPLIANCE REPORTING BY DEFENDANT

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

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

1. Any changes in Defendant's residence, mailing addresses, and telephone numbers, within ten (10) days of the date of such change;
2. Any changes in Defendant's employment status (including self-employment)

within ten (10) days of the date of such change. Such notice shall include the name and address of each business that Defendant is affiliated with, employed by, or performs services for; a statement of the nature of the business; and a statement of Defendant's duties and responsibilities in connection with the business; and

3. Any changes in Defendant's name or use of any aliases or fictitious names.

B. One hundred eighty (180) days after the date of entry of this Order, Defendant shall provide a written report to the FTC, sworn to under penalty of perjury, setting forth in detail the manner and form in which he has complied and is complying with this Order. This report shall include, but not be limited to:

1. Any changes required to be reported pursuant to Subpart A above;

2. A copy of each acknowledgment of receipt of this Order obtained by Defendant pursuant to Part XII; and

3. A list of the names and addresses of each person and entity that received a copy of the letter sent by Defendant to each endorser pursuant to Part IV.

C. For the purposes of this Order, Defendant shall, unless otherwise directed by the Commission's authorized representatives, mail all written notifications to the Commission to:

Regional Director
Federal Trade Commission, Southwest Region
1999 Bryan Street, Suite 2150
Dallas, TX 75201
Re: FTC v. Mark Nutritionals, Inc., et al. (W.D. Texas).

X. COMPLIANCE MONITORING

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

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

or indirect control to inspect the business operation;

B. In addition, the Commission is authorized to monitor compliance with this Order by all other lawful means, including, but not limited to, the following:

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

and the date and reason for the person's termination, if applicable;

C. Customer files containing the names, addresses, phone numbers, dollar amounts paid, quantity of items or services purchased, and description of items or services purchased, to the extent such information is obtained in the ordinary course of business;

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

E. Copies of all advertisements, promotional materials, sales scripts, training

1. The Defendant is the majority owner of the business or directly or indirectly manages or controls the business, and

2. The business is engaged in activity covered by this Order.

B. Secure from each such person a signed and dated statement acknowledging receipt of the Order within thirty (30) days after the date of service of the Order or the commencement of the employment relationship.

XIII. ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANT

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

XIV. RETENTION OF JURISDICTION

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

Signatures appear on the following page.

JUDGMENT IS THEREFORE ENTERED in favor of Plaintiff and against Defendant pursuant to all the terms and conditions above.

SO ORDERED:

Dated this _____ day of _____, 2003.

XAVIER RODRIGUEZ
United States District Judge

SO STIPULATED:

Harry Siskind, Individually

Jonathan David Pauerstein
Texas State Bar No. 15637500
Loeffler, Jones, & Tuggey LLP
755 East Mulberry Avenue, Suite 200
San Antonio, TX 78212
Attorney for Defendant HARRY SISKIND

THOMAS B. CARTER
Texas State Bar No. 03932300
DEBORAH W. DAWSON
New York State Bar No.1658889
FREDERIC DUNSKY
Texas State Bar No. 06262950
Federal Trade Commission
1999 Bryan St., Suite 2150
Dallas, TX 75201
(214) 979-9372 (Carter)
(214) 979-9395 (Dawson)
(214) 979-9362 (Dunsky)
(214) 953-3079 (facsimile)

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

**APPENDIX A
TO
STIPULATED FINAL ORDER FOR PERMANENT INJUNCTION AND
SETTLEMENT OF CLAIMS FOR MONETARY RELIEF
BETWEEN HARRY SISKIND AND FEDERAL TRADE COMMISSION**

FIRST CLASS MAIL

[To be printed on Defendant's or his company's letterhead]

[date]

[endorser's address]

Dear [endorser's name]:

This letter is to inform you that I recently settled a civil dispute with the Federal Trade Commission and that a Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief ("Order") was entered against me by the United States District Court for the Western District of Texas on _____[date]. This Order was entered in a civil case brought by the Federal Trade Commission regarding my advertising of Body Solutions Evening Weight Loss Formula.

The Order specifically prohibits me, directly or through any endorser of my products, from making a claim for a food, drug, dietary supplement, or health-related product or service unless there is competent and reliable scientific evidence to support the claim.

I will apprise you of authorized claims for my products or services. **If you make false or unsubstantiated claims, I am required by the Order to stop using you as an endorser.**

To continue to serve as an endorser of my products or services, you must sign, date, and return this letter to the above address, acknowledging your agreement to the terms set forth herein.

Thank you very much for your assistance.

[Defendant's signature]

ACKNOWLEDGMENT AND AGREEMENT

The undersigned acknowledges receipt of this letter and hereby agrees to its terms and conditions.

Print Name

Print Name of Employer

Signature

Date

**APPENDIX B
TO
STIPULATED FINAL ORDER FOR PERMANENT INJUNCTION AND
SETTLEMENT OF CLAIMS FOR MONETARY RELIEF
BETWEEN HARRY SISKIND AND FEDERAL TRADE COMMISSION**

1. Real property and improvements located at 13734 Morning Bluff Dr., San Antonio, Bexar County, Texas.
2. Real property and improvements located at 431 Woodway Forest, San Antonio, Bexar County, Texas.
3. All shares of stock in Digital Defense, Inc. identified in Siskind's January 14, 2003, Financial Statement.
4. All shares of stock in SecureInfo Corp. identified in Siskind's January 14, 2003, Financial Statement.
5. Automobiles:
 - a. 1999 Escalade, Registration: Texas; VIN _____.
 - b. 1999 Cadillac DeVille, Registration: Texas; VIN _____.