

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

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FEDERAL TRADE COMMISSION, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 UNIVERSAL NUTRITION CORPORATION, )  
 )  
 MTM MARKETING AND CONSULTING, INC., )  
 )

CIVIL NO. 1-03-CV-3822

Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b).

The Commission and defendants have agreed to the entry of the following Stipulated Final Judgment and Order for Permanent Injunction and Settlement of Claims for Monetary Relief (“Order”) in settlement of the Commission’s Complaint for Permanent Injunction and Other Equitable Relief (“Complaint”) against defendants. 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 Northern District of Georgia is proper.
2. The Complaint states a claim upon which relief can be granted, and the Commission has the authority to seek the relief it has requested.
3. The acts and practices of defendants were and are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
4. Defendants waive all rights to seek judicial review or otherwise challenge or contest the validity of this Order. Defendants also waive any claim that they 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.

5. Each party shall bear its own costs and attorneys' fees.
6. Entry of this Order is in the public interest.
7. Pursuant to Federal Rule of Civil Procedure 65(d), the provisions of this Order are binding upon defendants, and their officers, agents, servants, representatives, 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.
8. This Order does not constitute and shall not be interpreted to constitute either an admission by Defendants or a finding by the Court that Defendants have engaged in violations of the FTC Act or any other law.
9. This Order resolves only claims against the named defendants and Roma I. Michnal, and does not preclude the Commission from initiating further action or seeking any remedy against any other persons or entities, including without limitation persons or entities who may be subject to portions of this Order by virtue of actions taken in concert or participation with defendants, and persons or

entities in any type of indemnification or contractual relationship with defendants.

### **DEFINITIONS**

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

1. Unless otherwise specified, “defendants” shall mean:
  - A. Universal Nutrition Corporation (“UNC”), a corporation, its divisions and subsidiaries, its successors and assigns;
  - B. MTM Marketing and Consulting, Inc. (“MTM”), a corporation, its divisions and subsidiaries, its successors and assigns; and

audio means, the disclosure may be made through the same means in which the ad is presented. Provided, further, that in any advertisement communicated through interactive media which is presented predominantly through visual or audio means, the disclosure may be made through the same means in which the ad is predominantly presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure shall be of a size and shade, with a degree of contrast to the background against which it appears, and shall appear on the screen for a duration and in a location, sufficiently noticeable for an ordinary consumer to read and comprehend it.

- B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

C. On a product label, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it and in print that contrasts with the background against which it appears. Provided, however, if a disclosure on a bottle label or package label is made in a location other than the principal display panel, the bottle label or package label shall (i) include the statement, “See important safety warning(s) on [insert disclosure location],” in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it and in print that contrasts with the background against which it appears; and (ii) place the disclosure on the bottle label and, if applicable, the package label, within a border that is a color or shade that contrasts with the background against which it appears. Provided further, that in a multi-page insert, the disclosure shall appear on the cover page or first page.

The disclosure shall be in understandable language and syntax.

Nothing contrary to, inconsistent with, or in mitigation of the



- “Ma Huang” or “Chinese Ephedra”) or synthetically produced.
8. “Food,” “drug,” and “device,” shall mean “food,” “drug,” and “device” as defined in Section 15 of the FTC Act, 15 U.S.C. § 55.
  9. “Weight loss product” shall mean any product, program, or service designed or used to produce weight loss, reduction or elimination of fat, slimming, or caloric deficit; or to prevent weight gain, in a user of the product, program, or service.
  10. The term “including” in this Order shall mean “without limitation.”
  11. The terms “and” and “or” in this Order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

## **CONDUCT PROHIBITIONS**

### **I. EPHEDRA WEIGHT LOSS PRODUCTS**

IT IS HEREBY ORDERED that defendants, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and their officers, agents, servants, representatives, employees, and all persons or entities in active concert or participation with them who receive actual notice of this Order, by personal service or otherwise, in connection with the





this Order, by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of ThermoSlim or any other weight loss product, are hereby permanently restrained and enjoined from making any representation, in any manner, expressly or by implication, including through the use of endorsements, that:

- A. Such product causes weight loss;
- B. Such product enables users to lose weight or fat, or any specific amount of weight or fat;
- C. Such product is safe or has no side effects;
- D. Such product enables users to lose weight without the need to increase exercise or reduce caloric intake; and
- E. Such product causes permanent or persistent weight loss;

unless the representation is true and, at the time of making such representation, defendants possess and rely upon competent and reliable scientific evidence that substantiates the representation.

### **III. COVERED PRODUCT OR SERVICE CLAIMS**

IT IS FURTHER ORDERED that defendants, directly or through any

corporation, partnership, subsidiary, division, trade name, or other device, and their officers, agents, servants, representatives, employees, and all persons or entities in active concert or participation with them who receive actual notice of this Order, by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service, 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 absolute or comparative weight loss or other health benefits, performance, efficacy, safety, or side effects, of any covered product or service unless, at the time the representation is made, they possess and rely upon competent and reliable scientific evidence that substantiates the representation.

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manufacturing, labeling, advertising, promotion, offering for sale, sale, endorsement, or distribution of any covered product or service, 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 or study.

**V.  
WARNING OF HEALTH RISKS**

IT IS FURTHER ORDERED that:

A. In any advertisement (other than a television or radio advertisement), promotional material, or product label for any covered product or service containing ephedra, ephedra extract, or ephedrine, and during any discussion relating to the use of such product or service communicated via electronic mail or any telephone line, defendants, their officers, agents, servants, representatives, and employees, shall make, clearly and prominently, the following disclosure:

**WARNING:** This product contains ephedra or ephedrine alkaloids, which can have dangerous effects on the central nervous system and heart and

inhibitor or any allergy, asthma, or cold medication containing ephedrine, pseudoephedrine, or phenylpropanolamine. Discontinue use if you experience rapid heart beat, chest pain, severe headache, shortness of breath, dizziness, sleeplessness, or nausea. This product is not recommended for use if you are or could be pregnant unless a qualified health care provider tells you to use it. The product may not be safe for your developing baby;

unless defendants possess competent and reliable scientific evidence that such product is safe and produces no adverse side effects.

B. In any television or radio advertisement for any covered product or service containing ephedra, ephedra extract, or ephedrine, defendants, their officers, agents, and employees, shall make, clearly and prominently, the following disclosure:

**WARNING:** This product contains [insert name of ephedrine alkaloids contained in product, *e.g.*, Ma Huang], which can have dangerous effects on the central nervous system and heart and can result in serious injury. Risk of injury increases with increased dosage;

unless defendants possess competent and reliable scientific evidence that such product is safe and produces no adverse side effects.

Provided, however, that in the event that the Food and Drug Administration issues a final rule requiring a warning on the labeling of products containing ephedrine alkaloids, defendants may substitute that warning for the

disclosures required under Subparagraphs A and B of this Paragraph.

**VI.  
FDA APPROVED CLAIMS**

IT IS FURTHER ORDERED that:

A. Nothing in this order shall prohibit defendants from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration; and

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

**VII.  
CONSUMER LIST**

IT IS FURTHER ORDERED that, within twenty (20) calendar days after entry of this Order, defendants shall provide the Commission with the full names and addresses of all purchasers of ThermoSlim since January 1, 2001 who have not already been reimbursed, and, to the extent known to the defendants through



B. All funds paid pursuant to this Order shall be deposited into a fund administered by the Commission or its agent to be used for equitable relief, including but not limited to consumer redress, and any attendant expenses for the administration of such equitable relief. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after redress is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to the defendants' practices alleged in the complaint. Any funds not used for such equitable relief shall be deposited to the United States Treasury as disgorgement. Defendants shall have no right to challenge the Commission's choice of remedies under this Paragraph. Defendants shall have no right to contest the manner of distribution chosen by the Commission. No portion of any payments under the judgment herein shall be deemed a payment of any fine, penalty, or punitive assessment.

C. Defendants relinquish all dominion, control and title to the funds paid into the escrow account, and all legal and equitable title to the funds shall vest in the Treasurer of the United States unless and until such funds are disbursed to the designated purchasers of ThermoSlim. Defendants shall make



no claim to or demand for the return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of any defendant, defendants acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

D. In the event of any default of any obligation imposed on Defendants under this Section, the full amount of the judgment set forth in this Section shall immediately become due, plus interest from the date of entry of this Final Order pursuant to 28 U.S.C. § 1961.

E. In accordance with 31 U.S.C. § 7701, defendants are hereby required, unless they have done so already, to furnish to the Commission their taxpayer identifying number and/or social security number, which shall be used for purposes of collecting and reporting on any delinquent amount arising out of defendants' relationship with the government.

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

**IX.**  
**NONDISCLOSURE OF MAILING LISTS**

IT IS FURTHER ORDERED that defendants, and their officers, agents, servants, employees, and attorneys, 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, are permanently restrained and enjoined from selling, renting, leasing, transferring, or otherwise disclosing the name, address, telephone number, credit card number, bank account number, e-mail address, or other identifying information of any person who paid any money to any defendant for ThermoSlim, or shipping and handling therefor, at any time prior to entry of this order. Provided, however, that defendants may disclose such identifying information to a law enforcement agency or as required by any law, regulation, or court order.

**X.**  
**ACKNOWLEDGMENT OF RECEIPT OF ORDER**

IT IS FURTHER ORDERED that each 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.

**XI.**  
**DISTRIBUTION OF ORDER**

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Order,

A. Universal Nutrition Corporation and MTM Marketing and Consulting, Inc. shall deliver a copy of this Order to all principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this Order, and shall secure from each such person a signed and dated statement acknowledging receipt of the Order. Universal Nutrition Corporation and MTM Marketing and Consulting, Inc. shall deliver this Order to current personnel within thirty (30) days after the date of service of this Order, and to new personnel within thirty (30) days after the person assumes such position or responsibilities.

B. Robert J. Michnal shall deliver a copy of this Order to the principals, officers, directors, managers and employees under defendant's control for any business that (a) employs or contracts for personal services from defendant and (b) has responsibilities with respect to the subject matter of this Order. Robert J. Michnal shall 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.

**XII.**

names; and

2. Universal Nutrition Corporation, MTM Marketing and Consulting, Inc., and Robert J. Michnal shall notify the Commission of any

to:

1. Any changes required to be reported pursuant to Subparagraph A of this Paragraph; and
2. A copy of each acknowledgment of receipt of this Order obtained by defendant pursuant to Paragraph XI;

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

Associate Director for the Division of Advertising Practices  
Federal Trade Commission  
601 New Jersey Ave., NW, Washington, D.C. 20580  
Attn: FTC v. Universal Nutrition Corporation, et al., (N.D. Ga.),  
Civil Action No. \_\_\_\_\_.

D. For purposes of the compliance reporting required by this Paragraph, the Commission is authorized to communicate directly with defendants.

### **XIII. 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, Universal Nutrition Corporation, MTM Marketing and Consulting, Inc., and Robert J. Michnal each 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 such 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: Universal Nutrition Corporation, MTM Marketing and Consulting, Inc., and Robert J. Michnal, their employees, or any other entity that they manage or control in whole or in part, without the necessity of identification or prior notice; provided that nothing in this Order shall limit the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to obtain any

documentary material, tangible things, testimony, or information relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C. § 45(a)(1)).

C. Universal Nutrition Corporation, MTM Marketing and Consulting, Inc., and Robert J. Michnal shall permit representatives of the Commission to interview any employer, consultant, independent contractor, representative, agent, or employee who has agreed to such an interview, relating in any way to any conduct subject to this Order. The person interviewed may have counsel present.

#### **XIV. RECORD KEEPING PROVISIONS**

IT IS FURTHER ORDERED that, for a period of eight (8) years from the date of entry of this Order, in connection with any business involved in the advertising, marketing, promotion, offer for sale, distribution, or sale of any covered product or service, operated by any Defendant, or where any Defendant is a majority owner of the business or directly or indirectly manages or controls such a business, Defendants and their agents, employees, officers, corporations, successors, and assigns, and those persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or



otherwise, are hereby restrained and enjoined from failing to create and retain the following records:

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

B. Personnel records accurately reflecting: the name, address, and telephone number of each person employed in any capacity by such business, including as an independent contractor; th

F. All materials that were relied upon in making any representations contained in the materials identified in Subparagraph E of this Paragraph, including all documents evidencing or referring to the accuracy of any claim therein or to the efficacy of any covered product or service, including, but not limited to, all tests, reports, studies, demonstrations, or other evidence that confirm, contradict, qualify, or call into question the accuracy of any such claim or the efficacy of each such covered product or service; and

G. Records accurately reflecting the name, address, and telephone number of each manufacturer or laboratory engaged in the development or creation of any testing obtained for the purpose of manufacturing, labeling, advertising, promoting, offering for sale, selling, or distributing any covered product or service; and

H. Copies of all contracts concerning the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service.

## **XV. 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.

**SO STIPULATED:**

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MATTHEW DAYNARD  
SYDNEY KNIGHT  
FEDERAL TRADE COMMISSION  
600 Pennsylvania Ave., NW  
Washington, D.C. 20580  
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Fax: (404) 656-1379

**SO ORDERED:**

DATED:

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UNITED STATES DISTRICT  
JUDGE

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UNIVERSAL NUTRITION CORPORATION  
by: Robert J. Michnal, President

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MTM MARKETING AND CONSULTING,  
INC.  
by: Robert J. Michnal, Chief Executive  
Officer

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Robert J. Michnal, individually and as  
an officer or director of the above companies

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