

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

FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	
)	
vs.)	CIVIL NO. SA02CA1151 XR
)	
MARK NUTRITIONALS, INC.,)	
)	
HARRY SISKIND, and)	
)	
EDWARD G. D’ALESSANDRO, JR.,)	
)	
Defendants.)	
)	

**PLAINTIFF’S MOTION TO ENFORCE THE STIPULATED FINAL ORDER
AGAINST SISKIND AND REINSTATE THE SUSPENDED JUDGMENT
AND MEMORANDUM AND ATTACHED APPENDIX IN SUPPORT THEREOF**

I. MOTION TO ENFORCE THE STIPULATED FINAL ORDER

Plaintiff, Federal Trade Commission (“FTC” or “Commission”), has obtained evidence that Defendant, Harry Siskind (“Siskind”), knowingly and intentionally hid assets from the Commission and this Court in an effort to obtain a more favorable settlement in the above-referenced case. The Commission, therefore, respectfully moves this Court to enforce the specific terms of the stipulated Final Order¹ entered in this matter and to lift the suspension on the agreed \$155,000,000 monetary judgment contained therein.

¹ *Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief Between Harry Siskind and Federal Trade Commission* (Dkt. #81) (“Final Order”) is attached hereto as Ex. 1. Citations to the Exhibits contained in the Appendix refer to the Exhibit number and, where necessary, the page and line number (*e.g.*, Ex. 3 at 12:5-20 for Exhibit 3, page 12, lines 5 to 20) and/or Section citation (*e.g.*, Ex. 1 at 13 Part VII(A)).

II. INTRODUCTION

The Commission filed its original Complaint in this matter to secure a permanent injunction and other equitable relief against defendants for violations of Sections 5(a) and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 52. The defendants included MarN(d)Tj-8mmia) Ha

² The sworn financial statements provided to the Commission by Siskind include his sworn testimony and a sworn written financial disclosure statement.

³ Siskind concurrently settled suits filed by the states of Texas, Illinois and Pennsylvania for an additional \$500,000. These states also relied on Siskind's false financial disclosures in reaching their negotiated judgments.

assets. Some of these assets had value; others supposedly had little or no value. Following execution of the Final Order, Siskind failed to provide a security interest in an asset which his sworn statements had characterized as worthless stock in a defunct corporation – SecureInfo Corporation (“SecureInfo”). Instead, he informed Commission staff that he had already liquidated this heretofore worthless asset for \$346,866. Because of this disparity, the Commission immediately suspected that Siskind

part, by Siskind.⁴ The Court also ordered Siskind to disclose to the Commission all of his assets and certain other financial information on a standard disclosure form developed by the Commission.

Siskind provided the Commission with a fully-executed, sworn financial disclosure form on January 14, 2003 (hereinafter referred to as “Written Financial Statement”).⁵ Siskind supplemented this disclosure form with documents submitted in letters dated January 6, 2003, March 28, 2003, and May 29, 2003. Siskind also provided the Commission with sworn testimony regarding his finances on June 23, 2003 (hereinafter referred to as “Sworn Financial Testimony”).⁶ The Final Order recites that these enumerated documents and sworn testimony comprise the financial disclosures upon which the Commission’s agreement and this Court’s Final Order are premised.⁷

The Written Financial Statement required Siskind to disclose “ALL assets and liabilities, located within the United States or elsewhere, whether held individually or jointly.”⁸ (Emphasis in original.) The Written Financial Statement required disclosure of numerous specific categories of financial holdings, including: all publicly traded securities; all other business interests, including interests in non-public corporations; and all other amounts owed to the

⁴ See *Stipulated Order for Preliminary Injunction Between Harry Siskind and Federal Trade Commission* (Dkt. #21).

⁵ Siskind’s Written Financial Statement is attached hereto as Ex. 2.

⁶ Excerpts from Siskind’s Sworn Financial Testimony are attached hereto as Ex. 3.

⁷ Ex. 1 at 13 Part VII(A).

⁸ Ex. 2 Written Financial Statement at 1 (“Instructions”) and at 6 (“Reminder”).

defendant.

Siskind attached a schedule to his Written Financial Statement which he titled “HARRY J. SISKIND Stocks [O]wned.” Included in that list were the following entries:

Digital Defense (by HPS*) Cost \$100,000 - Value unknown (no market/value unknown); and

Secure Info* Cost \$300,000 - Value unknown (no market/value unknown).⁹ (Asterisks in the original.)

A notation at the bottom of the schedule explaining the asterisks stated these assets were “Owned by HPS Partners, Ltd.,” an entity owned by Siskind and his wife, Patty.¹⁰ Siskind disclosed no other interest in either of these two companies in his Written Financial Statement.¹¹

In his Sworn Financial Testimony taken by the Commission, Siskind was asked what he meant in his Written Financial Statement when he described the value of his Digital Defense and SecureInfo assets as “Value unknown (no market/value unknown).” Siskind responded: “I believe all of the companies are defunct or close to. So, therefore, there'd be no value.”¹²

B. Siskind’s SecureInfo Assets

Evidence gathered from SecureInfo demonstrates that Siskind misrepresented the nature

⁹ *Id.* at first schedule attached to 7.

¹⁰ In his Sworn Financial Statement, Siskind stated that HPS Partners, Ltd. and HPS Family Limited Partnership are the same entity. Ex. 3 Sworn Financial Testimony at 31:11 to 32:16. According to his Written Financial Statement, Siskind and his wife own a 99% interest in “HPS Family Limited Partnership.” Ex. 2 Written Financial Statement at third schedule attached to 7.

¹¹ *See generally* Ex. 2 Written Financial Statement. Although Siskind listed several debts owed to him in his Written Financial Statement, he made no mention of monies owed to him by either SecureInfo or Digital Defense. Ex. 2 Written Financial Statement at first schedule attached to 8.

¹² Ex. 3 Sworn Financial Testimony at 42:15-20.

¹³ The Commission subpoenaed documents from SecureInfo and deposed Kyle Cole, the company's Chief Financial Officer (excerpts of his testimony are attached hereto as Ex. 4), and Dyke Rogers, the company's Chairman of the Board (excerpts of his testimony are attached hereto as Ex. 5). Pursuant to a stipulated confidentiality agreement with SecureInfo, plaintiff has attached: (1) unredacted versions of Exhibits 4 and 5 for the Court (these exhibits have been placed at the end of the Appendix in sealed envelopes marked "Filed Under Seal, Exhibit ___ to Plaintiff's Motion to Enforce the Stipulated Final Order Against Siskind") (concurrently herewith the Commission has applied to the Court to seal these documents); and (2) redacted public versions of Exhibits 4 and 5. Counsel for Siskind was present for both depositions and was given an opportunity to cross examine.

¹⁴ A warrant is a right to purchase stock at a pre-determined price, similar to a stock option. The warrants Siskind received were exercisable at \$1 per share. To the extent that SecureInfo's stock is valued or might be valued in the future in excess of \$1 per share, these warrants would have positive value.

¹⁵ These documents are attached hereto as Ex. 6; *see also* Ex. 4 Cole Depo at 35:16

Siskind, however, knew this asset was worth over \$300,000, and he knew it prior to providing his Sworn Financial Testimony. On May 2, 2003, SecureInfo sent a package of materials¹⁷ to Siskind explaining that he could receive repayment of the July 17, 2001 Loan in full plus interest, a total of \$346,866, on June 30, 2003.¹⁸ Later in May 2003, SecureInfo's Chief Financial Officer, Kyle Cole ("Cole"), personally explained to Siskind that, if he did not respond to the company, then SecureInfo would repay the loan plus interest not later than June 30, 2003.¹⁹ Siskind replied to Cole that while he did not plan to respond to the company, his legal situation prevented him from collecting his check.²⁰ Thus, Siskind knew that this asset was worth well over \$300,000 on June 23, 2003, when Siskind testified to the Commission, under oath, that this SecureInfo asset had "no value."²¹

Moreover, in September and October 2003, at the same time Siskind was negotiating a settlement with the Commission based on a representation that this asset had no value, Siskind engaged in a number of conversations with Cole in which he sought to verify that his check was

¹⁷ Excerpts of these materials are attached as Ex. 8; *see also* Ex. 5 Rogers Depo at 76:23 to 77:1; Ex. 4 Cole Depo at 149:1 to 151:25. The Federal Express delivery slip is attached hereto as Ex. 9. *See also* Ex. 4 Cole Depo at 152:19 to 153:23.

¹⁸ Ex. 8 at SI00173 box titled "WHAT IF I DO NOT WANT TO PARTICIPATE?"; *see also* Ex. 5 Rogers Depo at 74:13 to 75:19.

¹⁹ Ex. 4 Cole Depo at 154:15 to 157:2.

²⁰ *Id.* at 157:3-17.

²¹ Ex. 3 Sworn Financial Testimony at 42:15-20. The very next week SecureInfo sent Siskind a letter, dated June 30, 2003, informing him that a check for \$346,866 was ready for him to pick-up "at his convenience." A copy of this letter is attached hereto as Ex. 10. *See also* Ex. 4 Cole Depo at 160:4 to 161:18.

still available.²² Then, on November 18, 2003, just weeks after reaching a settlement agreement with Commission staff, Siskind requested and received delivery of the SecureInfo check.²³ Finally, on Monday, December 15, 2003, one business day after this Court entered the Final Order and lifted the asset freeze, Siskind cashed the SecureInfo check for \$346,866.²⁴

2. Siskind's October 12, 2001 Loan to SecureInfo

On October 12, 2001, Siskind loaned a second \$300,000 to SecureInfo (hereinafter referred to as the "October 12, 2001 Loan") and received in exchange: (1) an unsecured note in the amount of \$300,000; and (2) 15,000 common stock purchase warrants.²⁵ Siskind used a check from the operating account of Siskind's company, Mark Nutritionals, to fund the October 12, 2001 Loan.²⁶ Although funds for the October 12, 2001 Loan came from Mark Nutritionals, the Payee on the SecureInfo Note was Harry Siskind personally.²⁷ Siskind failed altogether to list this loan to SecureInfo as a personal asset in his Written Financial Statement provided to the Commission.

In October or November of 2002, Siskind telephoned SecureInfo's President and CEO,

²² Ex. 4 Cole Depo at 163:7 to 164:4.

²³ *Id.* at 165:1-21.

²⁴ A copy of the canceled check to HPS Partners is attached hereto as Ex. 11; *see also* Ex. 4 Cole Depo at 165:17 to 166:1.

²⁵ These documents are attached hereto as Ex. 12; *see also* Ex. 4 Cole Depo at 46:24 to 50:4; Ex. 5 Rogers Depo at 67:17 to 71:7.

²⁶ A copy of Mark Nutritionals check, dated October 12, 2001, in the amount of \$300,000, used to pay SecureInfo is attached hereto as Ex. 13; *see also* Ex. 4 Cole Depo at 74:18 to 75:12; Ex. 5 Rogers Depo at 107:18 to 108:2.

²⁷ Ex. 5 Rogers Depo at 108:3 to 109:2.

Danny Mills (“Mills”), to discuss his October 12, 2001 Loan to the company.²⁸ According to a memo drafted by Cole (“Cole Memo”), who also participated in the telephone call, Siskind asked SecureInfo to make his October 12, 2001 Loan “go away.”²⁹ Cole testified that an oral understanding was reached at that time between Siskind and SecureInfo for Siskind to forgive the loan in exchange for a number of additional warrants to purchase stock in SecureInfo.³⁰ However, SecureInfo’s outside auditors advised the company that Siskind’s oral agreement to forgive the \$300,000 loan was insufficient and that the company needed to secure a written release.³¹ A written release was never secured and as of February 19, 2004, SecureInfo

²⁸ Ex. 4 Cole Depo at 53:14-23 and 123:17 to 124:1; Ex. 5 Rogers Depo at 112:25 to 113:19.

²⁹ A copy of the Cole Memo is attached hereto as Ex. 14. Pursuant to a stipulated confidentiality agreement with SecureInfo, plaintiff has attached: (1) an unredacted version of Exhibit 14 for the Court (this exhibit has been placed at the end of the Appendix in a sealed envelope marked “Filed Under Seal, Exhibit 14 to Plaintiff’s Motion to Enforce the Stipulated Final Order Against Siskind”) (concurrently herewith the Commission has applied to the Court to seal this document); and (2) a redacted public version of Exhibit 14. *See also* Ex. 4 Cole Depo at 83:4-8 and 175:18 to 176:22. It was about this same time that Siskind submitted his first sworn financials to the Commission in an effort to settle the case, pre-complaint. As discussed below, Siskind was at this time also submitting sworn financials to the bankruptcy court (in substantially the same form as those provided to the Commission) to support a release of liability from the bankruptcy estate of Mark Nutritionals, Inc. and its creditors.

³⁰ Ex. 4 Cole Depo at 109:4 to 110:6 and 176:22 to 177:5; Ex. 5 Rogers Depo at 139:19 to 140:16.

[This portion of the original footnote was redacted in the public version of the motion and it remains under seal by order of the Court]

However, when counsel for the Commission asked Siskind about the October 12, 2001 Mark Nutritionals check to SecureInfo, Siskind testified under oath that he thought the check was payment for services rendered. Ex. 3 Sworn Financial Testimony at 40:1-14 and 42:1-3, *but see* 43:18-23.

³¹ Ex. 4 Cole Depo at 128:6-10.

continued to carry the October 12, 2001 Loan as a note payable to Siskind.³²

But for Siskind's attempt to secretly forgive the October 12, 2001 Loan in exchange for warrants, this undisclosed \$300,000 loan would have been repaid to Siskind, with 8% interest, on June 30, 2003.³³

3. Warrants for SecureInfo Stock

Siskind continues to hold two sets of warrants to purchase SecureInfo stock:

- 37,161 warrants associated with the July 17, 2001 Loan; and
- 15,000 warrants associated with the October 12, 2001 Loan.³⁴

None of these warrants were disclosed to the Commission.

Siskind also may have rights to additional warrants due him from his attempted forgiveness of the \$300,000 October 12, 2001 Loan. In the Fall of 2003, Siskind and SecureInfo engaged in lengthy negotiations over the number of warrants to be issued in exchange for forgiveness of the October 12, 2001 Loan. Eventually, in November 2003, Siskind and SecureInfo orally agreed that SecureInfo would issue Siskind a total of 150,000 warrants in exchange for Siskind forgiving the October 12, 2001 Loan, as well as to cover the other warrants already due to Siskind.³⁵ However, at this time, the status of Siskind's SecureInfo warrants is unclear.³⁶

³² *Id.* at 128:13 to 129:2 and 183:5-14; Ex. 5 Rogers Depo at 116:10-23.

³³ Ex. 5 Rogers Depo at 143:9 to 144:25.

³⁴ Ex. 4 Cole Depo at 137:10-22; Ex. 5 Rogers Depo at 85:23 to 86:8.

³⁵ Ex. 4 Cole Depo at 139:4 to 143:7; Ex. 5 Rogers Depo at 152:22 to 153:22.

³⁶ A proposed written agreement, drafted by SecureInfo, which was intended to memorialize their oral agreement, is attached hereto as Ex. 15; *see also* Ex. 4 Cole Depo at 143:8

to 144:7; Ex. 5 Rogers Depo at 160:8 to 161:4. After SecureInfo received the Commission's subpoena in this matter, the company declined to execute a formal, written agreement with Siskind concerning the release of the October 12, 2001 Loan and the issuance of additional warrants. Ex. 4 Cole Depo at 147:14-23; Ex. 5 Rogers Depo at 161:21 to 162:1.

³⁷ The Commission subpoenaed documents from Digital Defense and deposed Dave Hargraves, the company's Chief Financial Officer (excerpts of his testimony are attached hereto as Ex. 16). Counsel for Siskind was provided sufficient notice of the time and place of the deposition but chose not to attend.

³⁸ A copy of HPS Partners, Ltd. check, dated July 18, 2001, in the amount of \$300,000, used to pay Digital Defense is attached hereto as Ex. 17; *see also* Ex. 16 Hargraves Depo at 33:11-21.

³⁹ A copy of the note is attached hereto as Ex. 18; *see also* Ex. 16 Hargraves Depo at 37:1-25. Siskind also received warrants to purchase Digital Defense stock as partial compensation for his loan to the company. *Id.* at 40:7-24. Siskind did not exercise his Digital Defense warrants prior to their expiration date, September 15, 2002.

investors during that same time frame.⁴¹ Nevertheless, Siskind did not attempt to collect the loan when it became due.⁴² This is not surprising, since Siskind, at that time, was attempting to negotiate a settlement agreement with the Commission based on his representation that this asset had no value. The Digital Defense note remains due and payable to Siskind.⁴³

D. Filings in Bankruptcy Court

Siskind, as president of Mark Nutritionals, signed that company's voluntary petition for relief under the reorganization provisions of Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, which petition was filed on September 17, 2002. Siskind failed to inform the bankruptcy court of the existence of the October 12, 2001 Loan to SecureInfo (the loan that was funded by a check from Mark Nutritionals). The schedules of assets and liabilities filed by Mark Nutritionals in its bankruptcy case, both initially and as later amended, did not list the loan as an asset,⁴⁴ nor did Siskind list the loan among his personal assets disclosed to the bankruptcy court.⁴⁵ The bankruptcy court relied on Siskind's false financial statements when it granted a mutual release between Mark Nutritionals' bankruptcy estate and Siskind.

⁴¹ Ex. 16 Hargraves Depo at 41:18 to 44:11.

⁴² *Id.* at 38:6-7.

⁴³ *Id.* at 46:5-11. This note is currently pledged as security to the Commission for the payment of the monetary relief awarded by the Final Order.

⁴⁴ *See generally* filings in Mark Nutritionals, Inc.'s bankruptcy case pending in the United States Bankruptcy Court for the Western District of Texas, Case No. 02-54469-LMC. The other loan to SecureInfo and the loan to Digital Defense were funded by checks from HPS Partners, Ltd., not Mark Nutritionals.

⁴⁵ On November 22, 2002, Siskind tendered as evidence to the bankruptcy court a financial disclosure form containing the identical schedule of "stocks owned" that he used in his Written Financial Statement to the Commission.

IV. ARGUMENT

There is overwhelming evidence that Siskind lied repeatedly to the Commission about his financial condition. As a consequence, the Final Order in this matter, by its own terms, requires that the suspended judgment of \$155,000,000 be reinstated.

A. Commission's Reliance on Financial Statements

The Commission is an independent agency of the United States charged, *inter alia*, with enforcement of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, which prohibit unfair and deceptive acts and practices in or affecting commerce. Section 13(b) of the FTC Act authorizes the Commission to initiate federal district court proceedings to enjoin violations of the FTC Act and to secure such equitable relief as may be appropriate.⁴⁶

One of the most important forms of equitable relief that the Commission attempts to recover is redress for the consumers who have been injured by a defendant's unlawful acts. However, consumer injury is often greater than the defendant's available assets. In this matter, the Commission accepted a settlement with Siskind which provides for only \$500,000 in monetary relief, far less than the \$155,000,000 in consumer injury caused by his unlawful acts and practices.

To settle for less than full consumer redress based upon a defendant's professed inability to pay, the Commission must first receive information about a defendant's assets and finances. Consequently, as a condition precedent to negotiating an agreed settlement, a defendant must

⁴⁶ 15 U.S.C. §§ 53(b), 57b, 6102(c), and 6105(b); *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468-69 (11th Cir. 1996); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1110-13 (9th Cir. 1992).

supply sworn statements setting forth in detail his complete financial situation. Siskind supplied such sworn statements and the Commission relied on them.

Short of conducting an exhaustive and expensive forensic audit, the Commission must

⁴⁷ Ex. 1 at 18.

⁴⁸ *Id.* at 11.

⁴⁹ *Id.* at 13

to disclose a material asset of more than \$1,000.⁵⁰ Most importantly, Part VII(B) of the Final Order provides that the Court shall reinstate the \$155,000,000 suspended judgment if it finds that Siskind's financial disclosures contain a material misrepresentation or omission:

⁵⁰ *Id.*

⁵¹ *Id.*

misrepresentations, to be material.

D. The Entire Suspended Judgment Should Be Reinstated

Harry Siskind engaged in a nationwide scheme to bilk millions of consumers out of \$155,000,000. He did this by falsely representing miraculous benefits of Body Solutions Evening Weight Loss Formula, an entirely worthless product.

Siskind then developed a calculated strategy to hide from authorities those funds that he had unlawfully taken from consumers. He repeatedly lied about his assets and financial condition to the Commission, to this Court, to the federal bankruptcy court, to the trustee appointed in Mark Nutritionals' bankruptcy case, to the creditors of Mark Nutritionals, and to state regulatory agencies and judicial bodies in Texas, Illinois, and Pennsylvania. He lied over and over again; in writing, in oral testimony, and under oath.

Siskind also engaged in an elaborate campaign to coverup his lies. He refused to take repayment from SecureInfo on the first loan until after a settlement had been negotiated with Commission staff; he waited to cash the payment check that he had received from SecureInfo until the first business day following the lifting of the asset freeze; he arranged with SecureInfo to forgive the second loan in exchange for stock warrants; and he elected not to demand payment on a matured note from Digital Defense.

Siskind then willingly executed an agreed Final Order that provided for a \$155,000,000 judgment if he was found to have falsified his financial disclosure statements. The Commission has gathered substantial evidence demonstrating conclusively that Siskind lied on his disclosure statements. The only remedy appropriate under the circumstances of this matter is for this Court to enforce the terms of the agreed Final Order and reinstate the judgment for the full

\$155,000,000.

V. CONCLUSION

For the reasons set forth above, the Commission requests the Court grant its *Motion to Enforce the Stipulated Final Order Against Siskind and Reinstate the Suspended Judgment* and enter the attached proposed Order.

Date: May 20, 2004

Respectfully submitted,

FEDERAL TRADE COMMISSION

By: _____

THOMAS B. CARTER
Texas Bar No. 03932300

**FEDERAL TRADE COMMISSION
SOUTHWEST REGION**

1999 Bryan Street, Suite 2150
Dallas, Texas 75201
(214) 979-9350
(214) 953-3079 (facsimile)

**ATTORNEY FOR PLAINTIFF
FEDERAL TRADE COMMISSION**

CERTIFICATE OF SERVICE

I, the undersigned counsel for Plaintiff Federal Trade Commission, hereby certify that Plaintiff Federal Trade Commission has provided a true and correct copy of the forgoing document and attachments, via U.S. Mail on May 20, 2004, to the attorneys for Defendant Harry Siskind and SecureInfo at the following addresses:

Bradley W. Wilder

William M. McKamie, P.C.
13750 San Pedro, Suite 640
San Antonio, TX 78232
(210) 546-2122
Fax: (210) 546-2130

David O. Bickart
Christopher R. Brewster
Kaye Scholer L.L.P.
901 Fifteenth Street N.W.
Washington, D.C. 20005
(202) 682-3500
Fax: (202)682-3580

Victor Pascucci III, General Counsel
SecureInfo Corporation
211 North Loop 1604 East, Suite 200
San Antonio, TX 78232
(210) 403-5694
Fax: (210) 403-5702

Dated: _____

THOMAS B. CARTER
Attorney for Plaintiff