

**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.)	

**STIPULATED FINAL ORDER FOR PERMANENT INJUNCTION
BETWEEN MARK NUTRITIONALS, INC. 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 foods, drugs, devices, services or cosmetics in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

The Commission and Mark Nutritionals, Inc., by and through its Chapter 7 bankruptcy trustee Randolph N. Osherow while denying liability for any of the alleged violations referred to in the Complaint, have stipulated to the entry of the following Stipulated Final Order for

Permanent Injunction (“Order”) by this Court to resolve all matters of dispute between the settling parties with respect to the conduct alleged in the Complaint in this action. Defendant Mark Nutritionals, Inc., on September 17, 2002, 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 (“Bankruptcy Court”), Case No. 02-54469-LMC (“Bankruptcy Case”). On April 2, 2003, the Bankruptcy Court converted Mark Nutritionals, Inc.’s Bankruptcy Case to a Chapter 7 liquidation case. Randolph N. Osherow was appointed the Chapter 7 trustee for Mark Nutritionals, Inc. (the “Bankruptcy Trustee”). 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 Mark Nutritionals, Inc., are in or affecting commerce, as defined in 15 U.S.C. § 44.
4. The Commission’s action against defendant Mark Nutritionals, Inc. is not stayed by the defendant’s bankruptcy filing under 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. Since conversion of the Bankruptcy Case from Chapter 11 to Chapter 7 of the Bankruptcy Code, 11 U.S.C. Sec. 101, *et seq.*, Mark Nutritionals, Inc. is not an operating entity

and the Bankruptcy Trustee has ceased all operations including, but not limited to, manufacturing, advertising, marketing and sales, and Mark Nutritionals, Inc. currently has no officers, directors, agents, servants, employees, endorsers, successors or assigns.

6. Mark Nutritionals, Inc. has entered into this Order freely and without coercion. Mark Nutritionals, Inc. further acknowledges that it has read the provisions of this Order and is prepared to abide by them.

7. The Commission and Mark Nutritionals, Inc. 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. Mark Nutritionals, Inc., waives all rights to seek judicial review or otherwise challenge or contest the validity of this Order. Mark Nutritionals, Inc., also waives any claim that it 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 its 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 Mark Nutritionals, Inc., by and through its Bankruptcy Trustee Randolph N. Osherow.

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, program, or service designed or used to prevent weight gain or to produce weight loss, reduction or elimination of fat, slimming, change in body composition, or caloric deficit in a user of such food, drug, dietary supplement, product, program, or service.

5. “Evening Weight Loss Formula” is a liquid product sold by Defendant, the active ingredients of which have changed over time. The product’s active ingredients currently include stevia, conjugated linoleic acid, and “proprietary blends” of chromium (as chromium picolinate, chromium polynicotinate, and chromium cruciferate), aloe vera gel, hydrolyzed collagen, chicory, plant teas, and amino acids (L-lysine, L-ornithine, L-arginine, L-carnitine, L-glycine and trimethylglycine).

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.”

ORDER

I. CESSATION OF BUSINESS ACTIVITIES

IT IS THEREFORE ORDERED that Defendant shall not engage in any business and

Randolph N. Osherow, as the Bankruptcy Trustee, shall not seek authority to operate the business of Defendant pursuant to Section 721 of the Bankruptcy Code, 11 U.S.C. § 721, or otherwise. Should this Chapter 7 case be dismissed or converted to a case under Chapter 11 of the Bankruptcy Code, this Order will bind the resulting entity.

II. CONDUCT PROHIBITIONS

IT IS FURTHER ORDERED that:

A. In connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of Body Solutions Evening Weight Loss Formula, or any other weight loss product, in or affecting commerce, Defendant and its successors, assigns, officers, directors, agents, servants, and employees, and all other persons or entities in active concert or participation with them, if any, 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:

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

its successors, assigns, officers, directors, agents, servants, and employees, and all other persons or entities in active concert or participation with them, if any, 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 employing the term “weight loss” in the name of such product or on the packaging for such product, or employing any other term that communicates the same or similar meaning, unless, at the time such term is used, Defendant possesses and relies upon competent and reliable scientific evidence that substantiates that such product will cause, or will assist in causing, clinically significant weight loss.

C. 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 its successors, assigns, officers, directors, agents, servants, and employees, and all other persons or entities in active concert or participation with them, if any, 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, 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 its successors, assigns, officers, directors, agents, servants, and employees, and all other persons or entities in active concert or participation with them, if any, 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 its successors, assigns, officers, directors, agents, servants, and employees, and all other persons or entities in active concert or participation with them, if any, 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.

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 Administration or under any new drug application approved by the Food and Drug Administration.

IV. NOTIFICATION AND MONITORING OF ENDORSERS

IT IS FURTHER ORDERED that:

A. In connection with advertising, marketing, promotion, offering for sale, distribution or sale of any product or service covered by this Order, Defendant and its successors, assigns, officers, directors, agents, servants, and employees, and all other persons or entities in active concert or participation with them, if any, 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 not authorize any endorser to make any representation prohibited by this Order.

B. Within thirty (30) days after entry of this Order, Defendant shall send by first class mail a notice, in the form shown on Appendix A, to each current endorser of its products or services covered by this Order, as of the date of entry of this Order. The mailing shall not include any other documents. Defendant shall require each endorser to execute and return the original of the letter as a condition of remaining an endorser for Defendant.

C. For a period of five (5) years following entry of this Order, Defendant shall also send by first class mail a notice, in the form shown on Appendix A, to each prospective endorser of any product or service covered by this Order who has not previously received the notice. Such notice shall be sent to the prospective endorser before said person makes any public endorsement of Defendant's products or services. Defendant shall require each prospective endorser to

execute and return the original of the letter as a condition of becoming an endorser.

D. Defendant shall maintain, and upon request, make available to the Commission for inspection and copying, all letters executed by endorsers and returned to Defendant.

E. Defendant shall apprise authorized endorsers of claims that are authorized by Defendant for weight loss products manufactured, labeled, advertised, promoted, offered for sale, sold, or distributed by Defendant, and shall require such endorsers to provide Defendant with true and correct copies or transcriptions of any representation that the endorsers make about such products, not later than seven business days after such representations are made. On the basis of such copies or transcriptions, or on reliable information otherwise made known to it, Defendant shall terminate any authorized endorser who has knowingly made any representation about any weight loss product that is prohibited by Part II of this Order. Defendant may take thirty (30) days after receipt to review and evaluate information concerning representations made by the 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 II of this Order.

V. MONITORING OF ADVERTISING AND MARKETING

IT IS FURTHER ORDERED that Defendant and its successors, assigns, officers, directors, agents, servants, and employees, and all other persons or entities in active concert or participation with them, if any, 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 regarding any food, drug, dietary supplement, or other health-related product or service.

Defendant, at a minimum, shall:

1. Conduct periodic monitoring of representations concerning any weight loss product, and any other covered product or service, made by persons engaged in sales or other customer service functions, including representations made orally or through electronic communications on behalf of Defendant; and
2. Conduct periodic monitoring of representations made about any weight loss product, and any other covered product or service, on all Internet websites operated and maintained by Defendant or the agents of Defendant.

B. Terminate any employee or agent who knowingly engages in any conduct prohibited by this Order; provided, nothing herein shall limit the right of Defendant to take disciplinary action against any of Defendant's employees or agents, including but not limited to, termination for other than knowing violations of conduct prohibited by this Order.

VI. WITHDRAWAL OF FTC'S PROOF OF CLAIM

IT IS FURTHER ORDERED that, within ten (10) business days of receipt of this Order as entered by the Court, the FTC shall withdraw any and all proofs of claim it has filed in Defendant's Chapter 7 liquidation case and the FTC shall not hereafter assert any monetary

claims against Defendant in said Bankruptcy Case based on or arising out of the allegations of the Complaint made the basis of this suit. Provided, however, that nothing contained herein shall be construed to constitute a waiver by the FTC of any claims against any entities other than Mark Nutritionals, Inc. and the Bankruptcy Trustee. Provided, further, that Defendant shall not assert and nothing in this Order shall be construed to provide a defense to any entity, whether or not a party to this Order, of *res judicata* or as estoppel by judgment against claims by consumers or entities representing consumers which arise out of transactions or occurrences that are the subject of this case.

VII. 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 any changes in corporate structure that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the proposed dismissal or conversion of the Bankruptcy Case; the filing of a bankruptcy petition (other than with respect to the Bankruptcy Case); or a change in the corporate name or address, at least thirty (30) days prior to such change, provided that, with respect to any proposed change in the corporation about which the Defendant learns less than thirty (30) days prior to the date such action is to take place, Defendant shall notify the Commission as soon as is practicable after obtaining such knowledge.

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 it 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 XI; 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).

D. For purposes of the compliance reporting required by this Part VII, the Commission is authorized to communicate directly with the Bankruptcy Trustee.

VIII. 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 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 Defendant's employees, or any other entity managed or controlled in whole or in part by Defendant, 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. Defendant shall permit representatives of the Commission to interview any 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.

IX. COOPERATION WITH THE COMMISSION

IT IS FURTHER ORDERED, that the Defendant and the Bankruptcy Trustee to the extent possible shall cooperate with the Commission in the prosecution of any further proceedings in this case, including providing testimony by affidavit or otherwise to assist the

FTC in establishing the admissibility of Defendant's business records.

X. RECORD KEEPING PROVISIONS

IT IS FURTHER ORDERED that, except as otherwise provided below, for a period of eight (8) years from the date of entry of this Order, if Defendant engages in advertising, marketing, promotion, offering for sale, distribution or sale of any product or service covered by this Order, then Defendant is 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; that person's job title or position; the date upon which the person commenced work; 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 materials, or other marketing materials utilized in the advertising, marketing, promotion, offering for sale, distribution or sale of any product or service covered by this Order;

F. Copies of all materials that were relied upon in making any representation

contained in the materials identified in Subpart E, including all documents evidencing or referring to the accuracy of any claim therein or to the efficacy of any product or service, including, but not limited to, all tests, reports, studies, surveys, demonstrations, as well as all evidence that confirms, contradicts, or calls into question the accuracy of such claims regarding the efficacy of such 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 advertising, marketing, promoting, offering for sale, distributing, or selling any covered product or service.

Provided that the Bankruptcy Trustee shall provide notice to the FTC of the proposed abandonment or disposition of all such records of Defendant and, upon the FTC's request, the Bankruptcy Trustee shall transfer such books and records to the FTC.

Provided further that upon entry of the order of the Bankruptcy Court closing the Bankruptcy Case and discharging the Bankruptcy Trustee from his duties and bond, the Bankruptcy Trustee's obligations hereunder shall cease.

XI. DISTRIBUTION OF ORDER BY DEFENDANT

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

Provided that upon entry of the order of the Bankruptcy Court closing the Bankruptcy Case and discharging the Bankruptcy Trustee from his duties and bond, the Bankruptcy Trustee's obligations hereunder shall cease.

XII. 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.

XIII. RETENTION OF JURISDICTION

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

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

IT IS SO ORDERED.

Dated this _____ day of _____, 2003.

XAVIER RODRIGUEZ
United States District Judge

SO STIPULATED:

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

MARK NUTRITIONALS, INC., Defendant
By Randolph N. Osherow, Chapter 7 Trustee
for the Bankruptcy Estate of Mark
Nutritionals.

JAMES A. HOFFMAN
CLEMENS & SPENCER
112 East Pecan St., Suite 1500
San Antonio, Texas 78205
(210) 227-7121
(210) 227-0732 (facsimile)

Attorney for BANKRUPTCY TRUSTEE
and for Estate of MARK NUTRITIONALS,
INC., Defendant

APPENDIX A

FIRST CLASS MAIL

[To be printed on Mark Nutritionals, Inc. letterhead or the letterhead of the Bankruptcy Trustee]

[date]

[endorser's address]

Dear [endorser's name]:

This letter is to inform you that Mark Nutritionals, Inc. recently settled a civil dispute with the Federal Trade Commission and that a Stipulated Final Order for Permanent Injunction ("Order") was entered against the company 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 Mark Nutritionals, Inc., directly or through any endorser of its 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.

Mark Nutritionals, Inc. will apprise you of authorized claims for its products or services. **If you make false or unsubstantiated claims, Mark Nutritionals, Inc. is required by the Order to stop using you as an endorser.**

To continue to serve as an endorser of Mark Nutritionals, Inc. 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