

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 04-11136-GAO

FEDERAL TRADE COMMISSION,
Plaintiff,

vs.

DIRECT MARKETING CONCEPTS, INC., d/b/a TODAY'S HEALTH and DIRECT FULFILLMENT, ITV DIRECT, INC., d/b/a DIRECT FULFILLMENT, DONALD W. BARRETT, TRIAD ML MARKETING, INC., KING MEDIA, INC., ALLEN STERN, LISA STERN, and BP INTERNATIONAL, INC.,
Defendants.

**FINAL ORDER AND JUDGMENT FOR PERMANENT INJUNCTION AND
OTHER EQUITABLE RELIEF AGAINST DEFENDANTS
ALLEN STERN, KING MEDIA, INC, AND TRIAD ML MARKETING, INC.**

Pursuant to the Orders of the Court dated July 14, 2008 (dkt. no. 187) and August 13, 2009 (dkt. no. 256),

IT IS ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

DEFINITIONS

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

1. "Individual Defendant" means Allen Stern.
2. "Corporate Defendants" means King Media, Inc., Triad ML Marketing, Inc., and their successors and assigns.
3. "Defendants" means all of the Individual Defendants and the Corporate Defendants, individually, collectively, or in any combination.
4. "Advertising" shall mean any written or verbal statement, illustration or depiction that is designed to effect a sale or create interest in the purchasing of goods or services, whether it appears in a brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert,

free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, packaging, package insert, label, film, slide, radio, television or cable television, audio program transmitted over a telephone system, program-length commercial(“infomercial”), the Internet, email, video news release, press release, or in any other medium.

5. “Assets” shall mean any legal or equitable interest in, right to, or claim to, any real, personal, or intellectual property, including, but not limited to, chattel, goods, instruments, equipment, fixtures, general intangibles, effects, lease holds, mail or other deliveries, inventory, checks, notes, accounts, credits, receivables (as those terms are defined in the Uniform Commercial Code), and all cash, wherever located.

6. “Assisting others” shall mean knowingly providing any of the following services to any person or entity: (a) performing customer service functions for any person or entity, including, but not limited to, receiving or responding to consumer complaints; (b) formulating or providing, or arranging for the formulation or provision of, any telephone sales script or any other advertising or marketing material for any person or entity; or (c) performing advertising, marketing or consulting services of any kind for any person or entity.

7. “Commerce” shall have the meaning set forth in Section 4 of the FTC Act, 15 U.S.C. § 44.

8. “Competent and reliable scientific evidence” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has 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.

9. “Covered product” shall mean any food, drug, dietary supplement, cosmetic, or device, including but not limited to Coral Calcium Daily or any substantially similar product.

10. “Endorsement” shall have the meaning set forth in 16 C.F.R. § 255.0(b).

11. “Food” and “drug” shall have the meaning set forth in Section 15 of the FTC Act, 15 U.S.C. § 55.

12. “FTC” or “Commission” shall mean the Federal Trade Commission.

13. “Misrepresentation” shall exclude a claim that is supported by competent and reliable scientific evidence as that term is defined herein.

14. “Person” or “persons” shall mean all natural persons, corporations, partnerships, or other business associations and all other legal entities, including all members, officers, predecessors, assigns, divisions, affiliates and subsidiaries.

15. “Substantially similar product” shall mean any dietary supplement that is (a) marketed or titled as a “cal” or “calcium” product, or as a product that contains calcium; or (b) contains calcium.

16. The terms “and” and “or” in this Order shall be construed conjunctively or disjunctively as necessary, to make the applicable sentence or phrase inclusive rather than exclusive.

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

PROHIBITED BUSINESS ACTIVITIES

I.

IT IS HEREBY ORDERED that the Defendants, directly or through any corporation, partnership, subsidiary, division, trade name, or other entity, and their officers, agents, servants,

employees, and all persons and entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, including by facsimile, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Coral Calcium Daily or any substantially similar product, in or affecting commerce, are hereby permanently enjoined from misrepresenting, assisting others in misrepresenting, in any manner, expressly or by implication, including through the use of endorsements or the product name, that:

A. Such product is an effective treatment or cure for cancer, autoimmune diseases (including multiple sclerosis and lupus), Parkinson's disease or heart disease;

B. The body absorbs 100 percent of the calcium contained in such product; or

C. The body absorbs significantly more of the calcium contained in such product than it does the calcium in other commonly available calcium products, or does so at a rate significantly faster than it absorbs the calcium contained in those other calcium products;

D. Scientific research published in the Journal of the American Medical Association and the New England Journal of Medicine proves that calcium supplements are able to reverse or cure cancer in humans.

II.

IT IS FURTHER ORDERED that the Defendants, directly or through any corporation, partnership, subsidiary, division, trade name, or other entity, and their officers, agents, servants, employees, and all persons and entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, including by facsimile, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, in or affecting commerce, are hereby permanently enjoined from making, or assisting others in making, any representation, in any manner, expressly or by implication,

including through the use of endorsements or the product name, about the health benefits, performance, or efficacy, of that product or service unless the representation is true, non-misleading, and, at the time the representation is made, the Defendants possess and rely upon competent and reliable scientific evidence that substantiates the representation.

MISREPRESENTATION OF TESTS OR STUDIES

III.

IT IS FURTHER ORDERED that the Defendants, directly or through any corporation, partnership, subsidiary, division, trade name, or other entity, and their officers, agents, servants, employees, and all persons and entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, including by facsimile, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, in or affecting commerce, are hereby permanently enjoined from misrepresenting, or assisting others in misrepresenting, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

FDA APPROVED CLAIMS

IV.

IT IS FURTHER ORDERED that:

A. Nothing in this order shall prohibit the 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 or the Dietary Supplement Health and Education Act of 1994; and

B. Nothing in this order shall prohibit the Defendants 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.

CONSUMER REDRESS AND OTHER EQUITABLE RELIEF

V.

IT IS FURTHER ORDERED that:

A. Judgment in the amount of \$20,458,801.95, plus post-judgment interest calculated at the statutory rate, is hereby entered in favor of the Commission and against the Defendants, jointly and severally, for consumer redress. The amount represents the sales of Coral Calcium Daily for which the Defendants are liable.

B. All payments shall be made by certified check or other guaranteed funds payable to and delivered to the Commission, or by wire transfer in accord with instructions provided by the Commission.

C. 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.

D. Within fourteen (14) days after entry of this Order, the Defendants shall provide a customer list to the Commission containing:

1. the name, address, email address, phone number and any other contact information for, and the number and cost of coral calcium products purchased by, each consumer who purchased a coral calcium product from the Defendants, or from Direct

Marketing Concepts, Inc. or ITV Direct, Inc., from January 1, 2002 through July 31, 2003 (excluding those purchasers who purchased at retail).

This customer list shall be provided in the form of a searchable electronic document formatted in Word, Word Perfect, Excel, or Access, and supplied on CD-R74 CD-ROM readable disks formatted to ISO 9660 specifications (650 MB capacity).

E. In the event that the Commission in its sole discretion determines 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 Amended Complaint. Any funds not used for such equitable relief shall be deposited to the United States Treasury as disgorgement. The Defendants shall have no right to challenge the Commission's choice of remedies under this Paragraph or 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.

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

ACCOUNTING

VI.

IT IS FURTHER ORDERED that the Defendants shall, within fourteen (14) days of entry of this Order, provide the Commission with an up-to-date accounting of all assets held,

controlled, or maintained by, on behalf of, or for the benefit of, in whole or in part, any Defendant. Such accounting shall include a list of all such assets and their value, and shall include but not be limited to a list of all cash, bank accounts, money market accounts, securities, and deferred income arrangements (such as 401(k) plans and IRAs). Such listing also shall indicate the nature of the Defendant's interest, the ownership structure of each asset (e.g., whether such asset is owned jointly) and the name and contact information of any other person or entity that has or asserts an interest in such asset. The Defendants shall swear to the truthfulness of the accounting under penalty of perjury.

DISCOVERY

VII.

IT IS FURTHER ORDERED that fourteen (14) days after entry of this Order, the Commission, in accordance with Rule 69 of the Federal Rules of Civil Procedure, may conduct discovery in the manner provided by the Federal Rules of Civil Procedure, or in the manner provided by the practice of the state of Pennsylvania, in aid of this judgment and execution thereof. Such permissible discovery includes, but is not limited to, the deposition of any Defendant or employee thereof.

ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANTS

VIII.

IT IS FURTHER ORDERED that each Defendant, within seven (7) business days after receipt of this Order as entered by the Court, must submit to the Commission a truthful sworn statement in the form shown on Exhibit A acknowledging receipt of this Order.

COMPLIANCE MONITORING

IX.

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

A. Within fourteen (14) days of receipt of written notice from a representative of the Commission, the Defendants each shall submit additional written reports sworn to under penalty of perjury; produce documents for inspection and copying; appear for deposition; and provide entry during normal business hours to any business location in each Defendant's possession or direct or indirect control to inspect the business operation;

B. In addition, the Commission is authorized to use all other lawful means, including but not limited to:

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, 45 and 69;
2. posing as consumers and suppliers to the Defendants, their employees, or any other entity managed or controlled in whole or in part by any Defendant, without the necessity of identification or prior notice; and

C. The Defendants each 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.

Provided, however, 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)).

COMPLIANCE REPORTING

X.

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:

1. Each Individual Defendant shall each notify the Commission of the following:

a. Any change in such Defendant's residence, mailing address, and telephone number, within fourteen (14) days of the date of such change;

b. Any change in such Defendant's employment status (including self-employment), and any change in such Defendant's ownership of any business entity, within fourteen (14) days of such change. Such notice shall include the name, address, and telephone number of each business that such Defendant is affiliated with, employed by, creates or forms, or performs services for; a detailed description of the nature of the business; and a detailed description of such Defendant's duties and responsibilities in connection with the business or employment; and

c. Any change in such Defendant's names or use of any aliases or fictitious names;

2. The Defendants shall notify the Commission of any changes in structure of any Corporate Defendant or any business entity that any Defendant directly or

indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this Order, including but not limited to: incorporation or other organization; a dissolution, assignment, sale, merger, or other action; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; or a change in the business name or address, at least thirty (30) days prior to such change, *provided* that, with respect to any proposed change about which a Defendant learns less than thirty (30) days prior to the date such action is to take place, such 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 and annually thereafter for a period of five (5) years, the Defendants each shall provide a written report to the Commission, which is true and accurate and sworn to under penalty of perjury, setting forth in detail the manner and form in which they have complied and are complying with this Order. This report shall include, but not be limited to:

1. For each Individual Defendant:
 - a. Such Defendant's then-current residence addresses, mailing addresses, and telephone numbers;
 - b. Such Defendant's then-current employment (including self-employment), including the name, address, and telephone numbers of each business that such Defendant is affiliated with, employed by, or performs services for; a detailed description of the nature of the business; and a detailed description of such Defendant's duties and responsibilities in connection with the business or employment; and

c. Any other changes required to be reported under Subsection A of this Section;

2. For all Defendants:

a. A copy of each acknowledgment of receipt of this Order, obtained pursuant to the Section titled "Distribution of Order;" and

b. Any other changes required to be reported under Subsection A of this Section.

C. Each Defendant shall notify the Commission of the filing of a bankruptcy petition by such Defendant within fourteen (14) days of filing.

D. For the purposes of this Order, the Defendants shall, unless otherwise directed by the Commission's authorized representatives, send by overnight courier all reports and notifications required by this Order to the Commission, to the following address:

Associate Director for Enforcement
Federal Trade Commission
600 Pennsylvania Avenue N.W., Room NJ-2122
Washington, D.C. 20580
RE: FTC v. Direct Marketing Concepts, Inc., et al.

Provided that, in lieu of overnight courier, the Defendants may send such reports or notifications by first-class mail, but only if the Defendants contemporaneously send an electronic version of such report or notification to the Commission at DEBrief@ftc.gov.

E. For purposes of the compliance reporting required by this Order, the Commission is authorized to communicate directly with each Defendant.

RECORD KEEPING PROVISIONS

XI.

IT IS FURTHER ORDERED that for a period of five (5) years from the date of entry of this Order, the 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 Order by personal service or otherwise, in connection with any business where: (1) any Defendant owns at least fifty percent (50%) of the business, or directly or indirectly controls the business, and (2) the business is engaged, participating, or assisting in any manner whatsoever, directly or indirectly, in the advertising, marketing, promotion, offering for sale, distribution, or sale of any covered product, are hereby permanently 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 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. All documents referring or relating to the advertising, marketing, promotion, offering for sale, distribution or sale of any covered product, including but not limited to infomercials, print ads, product inserts, product labels, sales scripts, and training materials;

F. All documents upon which the Defendants rely to substantiate any representation covered by Section II above; and

G. All records and documents necessary to demonstrate full compliance with each provision of this Order, including but not limited to, copies of acknowledgments of receipt of this Order required by the Sections titled "Distribution of Order" and "Acknowledgment of Receipt of Order" and all reports submitted to the FTC pursuant to the Section titled "Compliance Reporting."

DISTRIBUTION OF ORDER

XII.

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Order, the Defendants shall deliver copies of the Order as directed below:

A. Corporate Defendants: Each Corporate Defendant must deliver a copy of this Order to (1) all of its principals, officers, directors, and managers; (2) all of its employees, agents, and representatives who engage in conduct relating to the subject matter of the Order; and (3) any business entity resulting from any change in structure set forth in Subsection A.2 of the Section titled "Compliance Reporting." For current personnel, delivery shall be within seven(7) days of service of this Order upon such Defendant. For new personnel, delivery shall occur prior to them assuming their responsibilities. For any business entity resulting from any change in structure set forth in Subsection A.2 of the Section titled "Compliance Reporting," delivery shall be at least fourteen (14) days prior to the change in structure.

B. Individual Defendant as Control Person: For any business that an Individual Defendant controls, directly or indirectly, or in which such Defendant has a ownership interest of at least fifty percent (50%), such Defendant must deliver a copy of this Order to (1) all principals, officers, directors, and managers of that business; (2) all employees, agents, and representatives who engage in conduct relating to the subject matter of the Order; and (3) any business entity resulting from any change in structure set forth in Subsection A.2 of the Section titled "Compliance Reporting." For current personnel, delivery shall be within seven (7) days of service of this Order upon such Defendant. For new personnel, delivery shall occur prior to them assuming their responsibilities. For any business entity resulting from any change in structure set forth in Subsection A.2 of the Section titled "Compliance Reporting," delivery shall be at least fourteen (14) days prior to the change in structure.

C. Individual Defendant as an employee non-control person: For any business where an Individual Defendant is not a controlling person of a business but otherwise engages in conduct related to the subject matter of this Order, such must deliver a copy of this Order to all principals and managers of such business before engaging in such conduct.

D. The Defendants must secure a signed and dated statement acknowledging receipt of the Order, within forty-two (42) days of delivery, from all persons receiving a copy of the Order pursuant to this Section.

RETENTION OF JURISDICTION

XIII.

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

It is SO ORDERED, this 13th day of August 2009.

/s/ George A. O'Toole, Jr.
United States District Judge