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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION
15

16 FEDERAL TRADE COMMISSION,

17 Plaintiff,

18 v.

19 SWISH MARKETING, INC., a corporation,

20 MARK BENNING, individually and as an
21 officer of SWISH MARKETING, INC.,

22 MATTHEW PATTERSON, individually and
23 as an officer of SWISH MARKETING, INC.,
and

24 JASON STROBER, individually and as an
25 officer of SWISH MARKETING, INC.,

26 Defendants.
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Case No. C09-03814 RS

**[PROPOSED] STIPULATED
FINAL JUDGMENT AND ORDER
FOR PERMANENT INJUNCTION
AND OTHER EQUITABLE
RELIEF AS TO DEFENDANT
MATTHEW PATTERSON**

1 Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), has filed a First
2 Amended Complaint for Injunctive and Other Equitable Relief (“Complaint”) against the
3 defendants in this matter pursuant to Sections 5 and 13(b) of the Federal Trade Commission Act
4 (“FTC Act”), 15 U.S.C. §§ 45(a), 53(b). The FTC and Defendant Matthew Patterson
5 (“Defendant”), by and through his counsel, have agreed to settlement of this action without
6 adjudication of any issue of fact or law, and without Defendant admitting any of the non-
7 jurisdictional facts alleged in the Complaint or liability for any of the violations alleged in the
8 Complaint. To resolve all matters of dispute between them in this action, the FTC and
9 Defendant hereby stipulate to the entry of, and request the Court to enter, this Stipulated Final
10 Judgment and Order for Permanent Injunction and Other Equitable Relief (“Order”).

11 **IT IS THEREFORE STIPULATED, AGREED, AND ORDERED as follows:**

12 1. This Court has jurisdiction over the subject matter of this case and jurisdiction
13 over all parties pursuant to 15 U.S.C. §§ 45(a) and 53(b), and 28 U.S.C. §§ 1331, 1337(a), and
14 1345;

15 2. Venue in the Northern District of California is proper under 15 U.S.C. § 53(b)
16 and 28 U.S.C. § 1391(b) and (c);

17 3. The acts and practices of Defendant were and are in or affecting commerce, as
18 defined in Section 4 of the FTC Act, 15 U.S.C. § 44;

19 4. The Complaint states a claim upon which relief can be granted under Section 5(a)
20 of the FTC Act, 15 U.S.C. § 45(a), and the Commission has the authority to seek the relief it has
21 requested;

22 5. Defendant has entered into this Order freely and without coercion, and Defendant
23 acknowledges that he has read the provisions of this Order and is prepared to abide by them;

24 6. The undersigned, individually and by and through their counsel, have agreed that
25 the entry of this Order resolves all matters of dispute between them arising from the Complaint
26 in this action, up to the date of entry of this Order;

27 7. Defendant waives all rights to seek judicial review or otherwise challenge or
28 contest the validity of this Order. Defendant also waives any claims that he may have held under

1 the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action to
2 the date of this Order;

3 8. Pursuant to Federal Rule of Civil Procedure 65(d), the provisions of this Order are
4 binding upon Defendant, and his officers, agents, servants, employees, attorneys, and all other
5 persons or entities in active concert or participation with him, who receive actual notice of this
6 Order by personal service or otherwise;

7 9. This Order is remedial in nature and shall not be deemed or construed as a fine,
8 damages, penalty, or punitive assessment;

9 10. Each party shall bear its own costs and attorneys' fees; and

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

11 **ORDER**

12 **DEFINITIONS**

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

- 14 A. **“Assisting others”** includes, but is not limited to, providing any of the following goods
15 or services to another person: (A) performing customer service functions, including but
16 not limited to receiving or responding to consumer complaints; (B) formulating or
17 providing, or arranging for the formulation or provision of, any telephone sales script or
18 any other marketing material, including but not limited to the text of any Internet
19 website, email, or other electronic communication; (C) providing names of, or assisting
20 in the generation of, potential customers; (D) performing marketing services of any kind;
21 (E) acting or serving as an owner, officer, director, manager, or principal of any entity.
- 22 B. **“Billing information”** means any data that enables any person to access a consumer's
23 account, including but not limited to a credit card, checking, savings, share or similar
24 account, utility bill, mortgage loan account, or debit card.
- 25 C. **“Clearly and conspicuously”** means:
- 26 1. In textual communications (e.g., printed publications or words displayed on the
27 screen of an electronic device), the disclosure shall be of a type size and location
28 sufficiently noticeable for an ordinary consumer to read and comprehend the

1 disclosure, in print that contrasts with the background on which it appears;

2 2. In communications disseminated orally or through audible means (e.g., radio or
3 streaming audio), the disclosure shall be delivered in a volume and cadence
4 sufficient for an ordinary consumer to hear and comprehend the disclosure;

5 3. In communications disseminated through video means (e.g., television or
6 streaming video), the disclosure shall be in writing in a form consistent with
7 Subsection 1 of this definition and shall appear on the screen for a duration
8 sufficient for an ordinary consumer to read and comprehend the disclosure;

9 4. In communications made through interactive media such as the Internet, online
10 services, and software:

11 a. The disclosure shall be unavoidable and presented in a form consistent
12 with Subsection 1 of this definition in addition to any audio or video
13 presentation of them; and

14 b. “In close proximity” shall mean on the same webpage, online service
15 page, or other electronic page, and proximate to the triggering
16 representation, and shall not be accessed or displayed through hyperlinks,
17 pop-ups, interstitials, or other means;

18 5. In communications that contain both audio and visual portions, the disclosure
19 shall be presented simultaneously in both the audio and visual portions of the
20 communication. *Provided however*, that in any communication disseminated
21 solely through visual or audio means, the disclosure may be made through the
22 same means in which the communication is presented.

23 6. In all instances, the disclosure shall be presented prior to the consumer incurring
24 any financial obligation, in an understandable language and syntax, and with
25 nothing contrary to, inconsistent with, or in mitigation of the disclosures used in
26 any communication with the consumer.

27 D. “**Co-Registration**” means the process whereby information initially provided by a
28 consumer for a particular purpose or entity is used for a different purpose or by a

1 different entity, typically in connection with lead generation.

2 E. **“Swish Marketing”** means Swish Marketing, Inc., and its successors and assigns.

3 F. **“Defendant”** means Matthew Patterson.

4 G. **“Marketing Affiliate”** means any third party with which Defendant, or any business for
5 which Defendant is a majority owner, officer, or director, or which Defendant directly or
6 indirectly controls, has an agreement under which:

- 7 1. Defendant or such business agrees to pay a commission or other compensation to
8 the Marketing Affiliate because the Marketing Affiliate has driven or referred
9 customers or potential customers to Defendant or such business; or
- 10 2. The Marketing Affiliate agrees to pay a commission or other compensation to
11 Defendant or such business because Defendant or such business has driven or
12 referred customers or potential customers to the Marketing Affiliate.

13 *Provided* that, for purposes of this Order, a “Marketing Affiliate” is not a third party who
14 merely displays banner ads, sponsored links, or other like advertisements that are created
15 directly and solely by Defendant, or by any business for which Defendant is a majority
16 owner, officer, or director.

17 H. **“Material”** means likely to affect a person’s choice of, or conduct regarding, goods or
18 services.

19 I. **“Negative Option Feature”** means, in an offer or agreement to sell or provide any goods
20 or services, a provision under which the customer’s silence or failure to take an
21 affirmative action to reject goods or services or to cancel the agreement is interpreted by
22 the seller or provider as acceptance of the offer.

23 J. **“Payment Card”** means any card that is backed by an account that holds or can hold
24 funds belonging to the cardholder, or offers credit to the cardholder, including but not
25 limited to a prepaid card, credit card, or debit card.

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I.

BAN ON NEGATIVE OPTION PROGRAMS

IT IS THEREFORE ORDERED that Defendant, whether acting directly or through any other person, is permanently restrained and enjoined from:

- A. Advertising, marketing, promoting, offering for sale, or selling any product or service with a Negative Option Feature; and
- B. Assisting others engaged in advertising, marketing, promoting, offering for sale, or selling any product or service with a Negative Option Feature.

II.

BAN ON AFFILIATION WITH SWISH MARKETING

IT IS FURTHER ORDERED that, thirty (30) days after the date of entry of this Order and thereafter, Defendant, whether acting directly or through any other person, is permanently restrained and enjoined from maintaining any affiliation with Swish Marketing, including but not limited to:

- A. Holding any ownership interest, share, or stock in Swish Marketing; and
- B. Serving as an employee, officer, director, trustee, general manager of, or consultant or advisor to, Swish Marketing.

III.

PROHIBITION AGAINST MAKING MISREPRESENTATIONS

IT IS FURTHER ORDERED that Defendant, and his officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with him who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any sole proprietorship, partnership, limited liability company, corporation, subsidiary, branch, division, Marketing Affiliate, or other entity, in connection with the advertising, promoting, offering for sale, or sale of any Payment Card, loan, any financial product or service, or any other product or service, are hereby permanently restrained and enjoined from:

- A. Misrepresenting, or assisting others in misrepresenting, expressly or by implication,
 - 1. That such product or service is a bonus, free, a gift, or without cost;

- 1 2. The cost or price of such product or service;
- 2 3. The consequences of submitting an application for any such product or service;
- 3 4. The method by which a consumer will be assessed a fee, charge, debit, or bill; and
- 4 5. Any other material fact; and

5 B. Representing, in any manner, expressly or by implication, that such product or service is
6 a bonus, free, a gift, or without cost, without disclosing clearly and conspicuously, and in
7 close proximity to the representation, all material terms, conditions, and obligations
8 relating to the receipt and retention of such product or service.

9 **IV.**

10 **EXPRESS INFORMED CONSENT REGARDING USE OF BILLING INFORMATION**

11 **IT IS FURTHER ORDERED** that Defendant, and his officers, agents, servants,
12 employees, and attorneys, and those persons in active concert or participation with him who
13 receive actual notice of this Order by personal service or otherwise, whether acting directly or
14 through any sole proprietorship, partnership, limited liability company, corporation, subsidiary,
15 branch, division, Marketing Affiliate, or other entity, in connection with the advertising,
16 promoting, offering for sale, or sale of any Payment Card, loan, any financial product or service,
17 or any other product or service, are hereby enjoined from directly or indirectly using billing
18 information to obtain payment from a consumer, unless, prior to using such billing information
19 to obtain payment:

- 20 A. They request that the consumer indicate his or her assent to pay for the product or service
21 using a specified account;
- 22 B. They disclose clearly and conspicuously and in close proximity to the request for the
23 consumer's indication of assent the following information:
 - 24 1. The specific billing information to be used;
 - 25 2. The amount to be paid;
 - 26 3. The method to be used to assess the payment;
 - 27 4. The entity on whose behalf the payment will be assessed; and
 - 28 5. All material restrictions, limitations, or conditions applicable to the purchase,

1 receipt, or use of the product or service that is the subject of the offer; and

2 C. The consumer affirmatively indicates assent to pay for the product or service using the
3 specified account. In connection with communications made through interactive media
4 such as the Internet, online services, and software, the consumer must indicate such
5 assent by clicking on a button that is specifically labeled to convey such assent, or by
6 taking substantially similar affirmative action authorizing the transaction.

7 **V.**

8 **EXPRESS INFORMED CONSENT REGARDING CO-REGISTRATION**

9 **IT IS FURTHER ORDERED** that Defendant, and his officers, agents, servants,
10 employees, and attorneys, and those persons in active concert or participation with him who
11 receive actual notice of this Order by personal service or otherwise, whether acting directly or
12 through any sole proprietorship, partnership, limited liability company, corporation, subsidiary,
13 branch, division, Marketing Affiliate, are hereby enjoined from directly or indirectly advertising,
14 marketing, promoting, offering for sale, or selling any product or service through Co-
15 Registration, unless, prior to engaging in such Co-Registration:

16 A. They request that the consumer indicate his or her assent to have information initially
17 provided by that consumer for a particular purpose or entity be used for a different
18 purpose or by a different entity;

19 B. They disclose clearly and conspicuously and in close proximity to the request for the
20 consumer's indication of assent the following information:

- 21 1. The specific information to be used;
- 22 2. The manner or manners in which the specific information will be used; and
- 23 3. The entity or entities who will be using the information; and

24 C. The consumer affirmatively indicates assent to have information initially provided by
25 that consumer for a particular purpose or entity be used for a different purpose or by a
26 different entity. In connection with communications made through interactive media
27 such as the Internet, online services, and software, the consumer must indicate such
28

1 assent by clicking on a button that is specifically labeled to convey such assent, or by
2 taking substantially similar affirmative action authorizing the transaction.

3 **VI.**

4 **MONITORING BY DEFENDANT**
5 **OF HIS MARKETING AFFILIATES**

6 **IT IS FURTHER ORDERED** that Defendant, and his officers, agents, servants,
7 employees, and attorneys, whether acting directly or through any sole proprietorship,
8 partnership, limited liability company, corporation, subsidiary, branch, division, Marketing
9 Affiliate, or other entity, in connection with the advertising, promoting, offering for sale, or sale
10 of any Payment Card, loan, or any financial product or service, shall take reasonable steps
11 sufficient to monitor and ensure that Defendant's Marketing Affiliates comply with the
12 requirements of Sections III, IV, and V of this Order. Such steps shall include, at a minimum:

13 A. Prior to accepting any prospective Marketing Affiliate, Defendant shall:

- 14 1. Provide the Marketing Affiliate with a copy of this Order;
- 15 2. Obtain a signed and dated acknowledgment from such Marketing Affiliate in
16 which the Marketing Affiliate:
- 17 a. Acknowledges receipt of this Order;
- 18 b. Expressly agrees to distribute a copy of the Order to the Marketing
19 Affiliate's owners, managers, and division heads; and
- 20 c. Expressly agrees to comply with the terms of Sections III, IV, and V; and
- 21 3. Provide written notice to such Marketing Affiliate that failing to comply with the
22 terms of Sections III, IV, and V will result in immediate termination of
23 Defendant's agreement with the Marketing Affiliate;

24 B. Within thirty (30) days of service of this Order upon Defendant, Defendant shall:

- 25 1. Provide any existing Marketing Affiliate with a copy of this Order;
- 26 2. Obtain a signed and dated acknowledgment from such Marketing Affiliate in
27 which the Marketing Affiliate:
- 28 a. Acknowledges receipt of this Order;

1 b. Expressly agrees to distribute a copy of the Order to the Marketing
2 Affiliate's owners, managers, and division heads; and

3 c. Expressly agrees to comply with the terms of Sections III, IV, and V; and

4 3. Provide written notice to each existing Marketing Affiliate that failing to comply
5 with the terms of Sections III, IV, and V will result in immediate termination of
6 Defendant's agreement with the Marketing Affiliate and the forfeiture of all
7 monies earned or owed;

8 *Provided however*, that if Defendant terminates a Marketing Affiliate within thirty (30)
9 days of service of this Order, Defendant shall not be required to satisfy the requirements
10 of this Subsection with respect to any such terminated Marketing Affiliate; and

11 C. Defendant shall terminate, immediately, any Marketing Affiliate that Defendant
12 reasonably concludes has engaged in or is engaging in acts or practices prohibited by this
13 Order, whether directly or through another person or entity.

14 *Provided however*, that this Section does not authorize or require Defendant to take any action
15 that violates any federal, state, or local law.

16 **VII.**

17 **MONETARY JUDGMENT AND CONSUMER RESTITUTION**

18 **IT IS FURTHER ORDERED** that:

19 A. Judgment is hereby entered in favor of the Commission and against Defendant for
20 equitable monetary relief, including but not limited to consumer redress, in the amount of
21 five million, two hundred six thousand, eight hundred seventy-two dollars (\$5,206,872),
22 which is the total amount of consumer injury caused by the activities alleged in the
23 Complaint reduced by the amount already paid by other defendants; *provided, however*,
24 that, until further Order of the Court pursuant to the Section titled "Right to Re-open as to
25 Monetary Judgment," this judgment shall be suspended upon the payment of the first
26 installment of three hundred fifty thousand dollars (\$350,000) toward the total payment
27 of eight hundred thousand dollars (\$800,000) due in accordance with Subsection B of this
28 Section.

1 B. Defendant shall to pay to the Commission eight hundred thousand dollars (\$800,000) in
2 installments as follows:

3 1. Within fifteen (15) days of executing this Order, Defendant shall transfer to his
4 undersigned counsel three hundred fifty thousand dollars (\$350,000) (“first
5 installment”), which, as Defendant stipulates, his undersigned counsel shall hold
6 in escrow solely for the purpose of transferring such funds to the Commission.

7 Within seven (7) days of entry of this Order, Defendant shall to pay to the
8 Commission the first installment.

9 2. After the first installment, Defendant shall pay to the Commission the remaining
10 balance of four hundred fifty thousand dollars (\$450,000) in ten yearly
11 installments of one-tenth (1/10) of the remaining balance plus interest (“yearly
12 installments”);

13 3. The interest due shall be computed on the unpaid balance and from the entry date
14 of this Order pursuant to 28 U.S.C. § 1961;

15 4. The yearly payments shall be paid no later than one year from the date of entry of
16 this Order, and every year thereafter; and

17 5. All payments required by this Order shall be made by electronic fund transfer in
18 accordance with instructions previously provided by a representative of the
19 Commission.

20 C. Upon execution of this Order, Defendant shall not request or receive, directly or
21 indirectly, any remuneration, distribution, or other consideration of any kind from Swish
22 Marketing.

23 D. All funds paid to or received by the Commission pursuant to this Section shall be
24 deposited into a fund administered by the Commission or its agent. In the event that
25 direct restitution to consumers is wholly or partially impracticable or funds remain after
26 restitution is completed, the Commission may apply any remaining funds for such other
27 equitable relief (including consumer information remedies) as it determines to be
28 reasonably related to Defendant’s practices as alleged in the Complaint. Any funds not

1 used for such equitable relief will be deposited with the United States Treasury as
2 disgorgement. Defendant shall have no right to challenge the Commission's choice of
3 remedies under this Section. Defendant shall have no right to contest the manner of
4 distribution chosen by the Commission.

5 E. Defendant relinquishes all dominion, control, and title to the funds paid to the fullest
6 extent permitted by law. Defendant shall make no claim to or demand return of the
7 funds, directly or indirectly, through counsel or otherwise.

8 F. Defendant agrees that the facts as alleged in the Complaint filed in this action shall be
9 taken as true without further proof in any bankruptcy case or subsequent civil litigation
10 pursued by the Commission to enforce its rights to any payment or money judgment
11 pursuant to this Order, including but not limited to a nondischargeability complaint in
12 any bankruptcy case. Defendant further stipulates and agrees that the facts alleged in the
13 Complaint establish all elements necessary to sustain an action pursuant to, and that this
14 Order shall have collateral estoppel effect for purposes of, Section 523(a)(2)(A) of the
15 Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A).

16 G. In the event of any default in paying the yearly installments, which default continues for
17 ten (10) days beyond the due date of payment, the entire remaining balance, together with
18 interest, as computed pursuant to 28 U.S.C. § 1961 from the entry date of this Order,
19 shall immediately become due and payable.

20 **VIII.**

21 **RIGHT TO RE-OPEN AS TO MONETARY JUDGMENT**

22 **IT IS FURTHER ORDERED** that:

23 A. By agreeing to this Order Defendant reaffirms and attests to the truthfulness, accuracy,
24 and completeness of the following financial statements and supporting documents that he
25 provided to the Commission:

26 1. The Financial Statement of Individual Defendant Matthew Patterson signed on
27 October 10, 2010, and supporting documents, including the 2006–2008 Individual
28 Federal and State Income Tax Returns; the 2007–2009 Corporate Federal and

1 State Tax Returns for Unbent Media; and the 2010 Profit and Loss and Balance
2 Sheet for Unbent Media.

3 2. The supplemental information document regarding the financial condition of
4 Defendant Matthew Patterson, submitted to Commission counsel Lisa Rosenthal,
5 signed by Matthew Patterson on October 18, 2010, and supporting documents,
6 including the Coldwell Banker Marketing Proposal; the Operating Agreements of
7 Beckenham Group, the Emmerdale Group, and the Tressel Goup; Trust
8 Agreements and amendment; the Assignment of Limited Partnership Interest in
9 Patterson Investments, LP; the 2009 Individual Federal and State Income Tax
10 Returns; and the Swish Marketing Common Stock Purchase Agreement.

11 B. This Court's Order, and the FTC's agreement to enter into this Order is expressly
12 premised upon the truthfulness, accuracy, and completeness of Defendant's financial
13 condition, as represented in the documents referenced in Subsection A of this Section
14 ("Financial Statements"), all of which contain material information upon which the
15 Commission relied in negotiating and agreeing to the terms of this Order.

16 C. If, upon motion by the FTC, this Court should find that Defendant failed to disclose any
17 material asset or materially misrepresented the value of any asset, or made any other
18 material misrepresentation in or omission from the Financial Statements, the Court shall
19 reinstate the suspended judgment against Defendant, in favor of the Commission, in the
20 amount of five million, two hundred six thousand, eight hundred seventy-two dollars
21 (\$5,206,872), less any payments made to the Commission by Defendant or other
22 defendants subsequent to the entry of this Order, plus interest computed from the entry
23 date of this Order pursuant to 28 U.S.C. § 1961. *Provided, however*, that in all other
24 respects, this Order shall remain in full force and effect unless otherwise ordered by the
25 Court.

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1 **IX.**

2 **COOPERATION WITH FTC COUNSEL**

3 **IT IS FURTHER ORDERED** that Defendant shall, in connection with this action or
4 any subsequent investigations related to or associated with the transactions or the occurrences
5 that are the subject of the Complaint, cooperate in good faith with the FTC and appear at such
6 places and times as the FTC shall reasonably request, after written notice, for interviews,
7 conferences, pretrial discovery, review of documents, and for such other matters as may be
8 reasonably requested by the FTC. If requested in writing by the FTC, Defendant shall appear
9 and provide truthful testimony in any trial, deposition, or other proceeding related to or
10 associated with the transactions or the occurrences that are the subject of the Complaint, without
11 the service of a subpoena.

12 **X.**

13 **COMPLIANCE MONITORING**

14 **IT IS FURTHER ORDERED** that, for the purpose of (i) monitoring and investigating
15 compliance with any provision of this Order, and (ii) investigating the accuracy of Defendant's
16 Financial Statements upon which the Commission's agreement to this Order is expressly
17 premised:

- 18 A. Within ten (10) days of receipt of written notice from a representative of the
19 Commission, Defendant shall submit additional written reports, which are true and
20 accurate and sworn to under penalty of perjury; produce documents for inspection and
21 copying; appear for deposition; and provide entry during normal business hours to any
22 business location in Defendant's possession or direct or indirect control to inspect the
23 business operation;
- 24 B. In addition, the Commission is authorized to use all other lawful means, including but not
25 limited to:
- 26 1. Obtaining discovery from any person, without further leave of court, using the
27 procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, 45 and 69;
- 28

1 c. Any changes in Defendant's name or use of any aliases or fictitious names
2 within ten (10) days of the date of such change;

3 2. Defendant shall notify the Commission of any changes in structure of any
4 business entity that Defendant directly or indirectly controls, or has an ownership
5 interest in, that may affect compliance obligations arising under this Order,
6 including but not limited to: incorporation or other organization; a dissolution,
7 assignment, sale, merger, or other action; the creation or dissolution of a
8 subsidiary, parent, or affiliate that engages in any acts or practices subject to this
9 Order; or a change in the business name or address, at least thirty (30) days prior
10 to such change, *provided* that, with respect to any such change in the business
11 entity about which Defendant learns less than thirty (30) days prior to the date
12 such action is to take place, Defendant shall notify the Commission as soon as is
13 practicable after obtaining such knowledge.

14 B. One hundred eighty (180) days after the date of entry of this Order and annually
15 thereafter for a period of three (3) years, Defendant shall provide a written report to the
16 FTC, which is true and accurate and sworn to under penalty of perjury, setting forth in
17 detail the manner and form in which he has complied and is complying with this Order.
18 This report shall include, but not be limited to:

- 19 1. Defendant's then-current residence address, mailing addresses, and telephone
20 numbers;
- 21 2. Defendant's then-current employment status (including self-employment),
22 including the name, addresses, and telephone numbers of each business that
23 Defendant is affiliated with, employed by, or performs services for; a detailed
24 description of the nature of the business; and a detailed description of
25 Defendant's duties and responsibilities in connection with the business or
26 employment;
- 27 3. A copy of each acknowledgment of receipt of this Order, obtained pursuant to the
28 Section titled "Distribution of Order;" and

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

2 C. Defendant shall notify the Commission of the filing of a bankruptcy petition by
3 Defendant within fifteen (15) days of filing.

4 D. For the purposes of this Order, Defendant shall, unless otherwise directed by the
5 Commission's authorized representatives, send by overnight courier (not the U.S. Postal
6 Service) all reports and notifications to the Commission that are required by this Order
7 to:

8 Associate Director for Enforcement
9 Bureau of Consumer Protection
10 Federal Trade Commission
11 600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
RE: *FTC v. Swish Marketing, Inc., et al.*, Matter no. X090078

12 *Provided* that, in lieu of overnight courier, Defendant may send such reports or
13 notifications by first-class mail, but only if Defendant contemporaneously sends an
14 electronic version of such report or notification to the Commission at: DEbrief@ftc.gov.

15 E. For purposes of the compliance reporting and monitoring required by this Order, the
16 Commission shall communicate with Defendant through Defendant's counsel, Brian M.
17 Grossman, Tesser & Ruttenberg, 12100 Wilshire Boulevard, Suite 220, Los Angeles, CA
18 90025. Should such counsel cease representation of Defendant, the Commission may
19 communicate directly with Defendant for such purposes.

20 **XII.**

21 **RECORDKEEPING**

22 **IT IS FURTHER ORDERED** that, for a period of eight (8) years from the date of entry
23 of this Order, Defendant, for any business for which he is the majority owner or directly or
24 indirectly controls, is hereby restrained and enjoined from failing to create and retain the
25 following records:

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

28 B. Personnel records accurately reflecting: the name, address, and telephone number of each

1 person employed in any capacity by such business, including as an independent
2 contractor; that person's job title or position; the date upon which the person commenced
3 work; and the date and reason for the person's termination, if applicable;

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

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

9 E. Copies of all sales scripts, training materials, advertisements, or other marketing
10 materials;

11 F. Documents sufficient to demonstrate the experience of consumers on each materially
12 different version of each website on which Defendant, whether acting directly or through
13 any sole proprietorship, partnership, limited liability company, corporation, subsidiary,
14 branch, division, Marketing Affiliate, or other entity, advertise, promote, market, offer
15 for sale, sell, or provide products or services, including, as necessary:

- 16 1. Screenshots or screen capture recordings of such websites;
- 17 2. Source code, database records, or log files for such websites; and
- 18 3. Other documents related to the design and functioning of such websites, including
19 but not limited to feature descriptions, programmer documentation, developer's
20 guides, specification documents, and version histories; and

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

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XIII.

DISTRIBUTION OF ORDER

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

- A. Defendant as control person: For any business that Defendant controls, directly or indirectly, or in which Defendant has a majority ownership interest, 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 of that business who engage in conduct related 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 five (5) days of service of this Order upon 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 ten (10) days prior to the change in structure.
- B. Defendant as employee or non-control person: For any business where Defendant is not a controlling person of a business but otherwise engages in conduct related to the subject matter of this Order, Defendant must deliver a copy of this Order to all principals and managers of such business before engaging in such conduct.
- C. Defendant must secure a signed and dated statement acknowledging receipt of the Order, within thirty (30) days of delivery, from all persons receiving a copy of the Order pursuant to this Section.

XIV.

ACKNOWLEDGMENT OF RECEIPT OF ORDER

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.

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.

IT IS SO ORDERED, this ___ day of _____, 2011.

RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

(The filer attests that concurrence in the filing of this document has been obtained from each of the other signatories.)

SO STIPULATED:

WILLARD K. TOM
General Counsel

/s/

MATTHEW PATTERSON
Individually, and as an officer of Swish
Marketing, Inc.

JEFFREY A. KLURFELD
Regional Director

Dated: ___2/28/11_____

/s/ Lisa D. Rosenthal

/s/

LISA D. ROSENTHAL
KERRY O'BRIEN
EVAN ROSE
ERIC D. EDMONDSON
Federal Trade Commission
901 Market Street, Ste. 570
San Francisco, CA 94103
(415) 848-5150 (voice)
(415) 848-5184 (fax)

BRIAN M. GROSSMAN, ESQ.
Tesser & Ruttenberg
ATTORNEY FOR DEFENDANT

Dated: ___2/28/11_____

Dated: ___3/3/11_____

ATTORNEYS FOR PLAINTIFF

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.

IT IS SO ORDERED, this 8th day of March, 2011.



RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

SO STIPULATED:


WILLARD K. TOM
General Counsel

JEFFREY A. KLURFELD
Regional Director


LISA D. ROSENTHAL
KERRY O'BRIEN
EVAN ROSE
ERIC D. EDMONDSON
Federal Trade Commission
901 Market Street, Ste. 570
San Francisco, CA 94103
(415) 848-5150 (voice)
(415) 848-5184 (fax)

Dated: _____

ATTORNEYS FOR PLAINTIFF

~~~~
MATTHEW PATTERSON
Individually, and as an officer of Swish
Marketing, Inc.

Dated: 2/28/11


BRIAN M. GROSSMAN, ESQ.
Tesser & Ruttenberg
ATTORNEY FOR DEFENDANT

Dated: 2/28/11