

1 WILLARD K. TOM
General Counsel

2 LISA D. ROSENTHAL, Bar # 179486
3 KERRY O'BRIEN, Bar # 149264
EVAN ROSE, Bar # 253478
4 ERIC EDMONDSON, D.C. Bar # 450294
Federal Trade Commission
5 901 Market Street, Ste. 570
San Francisco, CA 94103
6 (415) 848-5100 (voice)
(415) 848-5184 (fax)
7 lrosenthal@ftc.gov
kobrien@ftc.gov
8 erose@ftc.gov
eedmondson@ftc.gov

9 Attorneys for Plaintiff
10 Federal Trade Commission

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

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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
JASON STROBER

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 Jason Strober (“Defendant”),
5 by and through his counsel, have agreed to settlement of this action without adjudication of any
6 issue of fact or law, and without Defendant admitting any of the non-jurisdictional facts alleged
7 in the Complaint or liability for any of the violations alleged in the Complaint. To resolve all
8 matters of dispute between them in this action, the FTC and Defendant hereby stipulate to the
9 entry of, and request the Court to enter, this Stipulated Final Judgment and Order for Permanent
10 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) and
16 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

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Stipulated Final Judgment and Order

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

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

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

10 5. In communications that contain both audio and visual portions, the disclosure
11 shall be presented simultaneously in both the audio and visual portions of the
12 communication. ~~Provided however~~ that in any communication disseminated
13 solely through visual or audio means, the disclosure may be made through the
14 same means in which the communication is presented.

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

19 C. **“Defendant”** means Jason Strober.

20 D. **“Individual Defendants”** means Mark Benning, Matthew Patterson, and Jason Strober.

21 E. **“Marketing Affiliate”** means any third party with which Defendant, or any business for
22 which Defendant is a majority owner, officer, or director, or which Defendant directly or
23 indirectly controls, has an agreement under which:

24 1. Defendant or such business agrees to pay a commission or other compensation to
25 the Marketing Affiliate because the Marketing Affiliate has driven or referred
26 customers or potential customers to Defendant or such business; or

27 2. The Marketing Affiliate agrees to pay a commission or other compensation to
28 Defendant or such business because Defendant or such business has driven or

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

5 **II.**

6 **EXPRESS INFORMED CONSENT**

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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 **III.**

4 **MONITORING BY DEFENDANT**

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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 I and II; and

4 3. Provide written notice to each existing Marketing Affiliate that failing to comply
5 with the terms of Sections I and II 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 or other third party that
12 Defendant reasonably concludes has engaged in or is engaging in acts or practices
13 prohibited by this 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 **IV.**

17 **CONSUMER RESTITUTION**

18 **IT IS FURTHER ORDERED** that:

19 A. Defendant and his counsel represent that, concurrently with their execution of this Order,
20 Defendant has transferred the sum of eight-hundred fifty thousand dollars (\$850,000)
21 ("Restitution Funds") into an interest bearing trust account controlled by Baker &
22 Hostetler LLP, which shall hold the entire sum for no purpose other than payment to the
23 Commission after entry of this Order by the Court. Within five (5) days of receipt of
24 notice of the entry of this Order, Defendant's counsel shall transfer the Restitution Funds,
25 not including accrued interest, to the Commission in the form of an electronic funds
26 transfer. ~~Provided however that~~upon notice that either the FTC or the Court has
27 rejected acceptance or entry of this Order, Baker & Hostetler LLP will be relieved of its
28 duties regarding the Restitution Funds and may distribute them as directed by Defendant.

1 B. All funds paid to or received by the Commission pursuant to this Order shall be deposited
2 into a fund administered by the Commission or its agent to be used for equitable relief,
3 including consumer redress and any attendant expenses for the administration of any
4 redress fund. In the event that direct redress to consumers is wholly or partially
5 impracticable or funds remain after redress is completed, the Commission may apply any
6 remaining funds for such other equitable relief (including consumer information
7 remedies) as it determines to be reasonably related to Defendant's practices as alleged in
8 the Complaint. Any funds not used for such equitable relief will be deposited with the
9 United States Treasury as disgorgement. Defendant shall have no right to challenge the
10 Commission's choice of remedies under this Section. Defendant shall have no right to
11 contest the manner of distribution chosen by the Commission.

12 C. Subject to Subsection IV.A, Defendant relinquishes all dominion, control, and title to the
13 funds paid to the fullest extent permitted by law. Defendant shall make no claim to or
14 demand return of the funds, directly or indirectly, through counsel or otherwise.

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

23 **V.**

24 **MONETARY JUDGMENT AND COOPERATION WITH FTC**

25 **IT IS FURTHER ORDERED** that:

26 A. In addition to the payment of consumer restitution paid by Defendant pursuant to Section
27 IV above, judgment in the amount of three hundred fifty thousand dollars (\$350,000) is
28 hereby entered against Defendant as equitable monetary relief, in favor of the

1 Commission. Provided however that this judgment shall be suspended until further
2 order of the Court pursuant to this Section.

3 B. If, upon motion by the Commission to the Court, the Court finds that Defendant failed to
4 comply fully with Section V, the suspension of judgment shall be lifted and the Court
5 may order that the judgment amount, plus interest from the entry date of this Order,
6 pursuant to 28 U.S.C. § 1961, shall be immediately due and payable by Defendant.
7 Provided however that in all other respects, this Order shall remain in full force and
8 effect, unless otherwise ordered by the Court.

9 C. If no motion pursuant to Subsection V.B has been filed or is pending as of the time of
10 final resolution of this matter, as defined below, the FTC shall file a satisfaction of
11 judgment in favor of Defendant as to the suspended judgment described in this Section in
12 the form shown on Attachment A to this Stipulated Order within thirty (30) days of such
13 final resolution of this matter. A final resolution of this matter occurs:

- 14 1. After all appellate rights have been exhausted; or
- 15 2. Upon the entry of a final stipulated judgment or judgments that resolve all matters
16 of dispute between the FTC and all remaining defendants arising from the
17 Complaint, in which the remaining defendants have waived all rights of judicial
18 review.

19 D. Defendant, in connection with this action and any subsequent FTC investigations related
20 to or associated with the transactions or the occurrences that are the subject of the FTC's
21 Complaint, until such time as a satisfaction of judgment in favor of the Defendant as to
22 the suspended judgment described in this Section is filed with the Court, shall cooperate
23 in good faith with the FTC, including its attorneys, employees, consultants, and experts,
24 to the full extent of his abilities and personal knowledge. Upon request by the FTC,
25 Defendant shall:

- 26 1. Appear at such places within this Judicial District and times as the FTC shall
27 request upon five (5) days written notice, or otherwise reasonably request, for
28 interviews, conferences, pretrial discovery, review of documents, and for

1 otherwise providing cooperation consistent with this Section;

2 2. Upon five (5) days written notice, appear and provide truthful testimony in any
3 trial, deposition, or other proceeding related to or associated with the transactions
4 or the occurrences that are the subject of the Complaint, without the service of a
5 subpoena; provided that for any such trial, deposition, or other FTC proceeding
6 that occurs outside of this District, the Defendant shall be entitled to standard
7 expenses pursuant to 28 U.S.C. § 1821, but shall appear without the service of a
8 subpoena.

9 3. Cooperate with the FTC to prepare, and then sign under penalty of perjury, a
10 truthful affidavit regarding:

11 a. Defendant's duties and responsibilities at Swish, as well as those of the
12 other Individual Defendants;

13 b. Defendant's participation in the transactions or occurrences that are the
14 subject of the Complaint, as well as such participation by the other
15 Individual Defendants; and

16 c. Defendant's knowledge of the transactions or occurrences that are the
17 subject of the Complaint, as well as such knowledge possessed by the
18 other Individual Defendants;

19 4. With respect to documents and electronically stored information produced or
20 generated in connection with this action:

21 a. Authenticate such documents and electronically stored information by
22 testifying truthfully, where Defendant possesses personal knowledge of
23 such facts, as to the place, date, creator, and circumstances of the creation
24 of such documents and electronically stored information; and

25 b. Certify such documents and electronically stored information that
26 constitute records of regularly conducted business activity by testifying
27 truthfully, where Defendant is qualified to do so, that such records were
28 made at or near the time of the occurrence of the matters set forth by (or

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1 services that at any point were defaulted to “Yes;”

- 2 b. Explain the meanings of the fields and values used in Swish’s databases
3 during the Period of Inquiry and provide an entity relationship diagram or
4 data dictionary for such databases;
- 5 c. Provide a logical data flow for Swish’s lead-generating and affiliate-
6 marketing algorithms during the Period of Inquiry;
- 7 d. Describe the accounting mechanisms Swish used to track conversions and
8 generate conversion rates; and
- 9 e. Answer questions posed by the FTC related to the calculation of the
10 conversion rates.

11 **VI.**

12 **COMPLIANCE MONITORING**

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

- 15 A. Within ten (10) days of receipt of written notice from a representative of the
16 Commission, Defendant shall submit additional written reports, which are true and
17 accurate and sworn to under penalty of perjury; produce documents for inspection and
18 copying; appear for deposition; and provide entry during normal business hours to any
19 business location in Defendant’s possession or direct or indirect control to inspect the
20 business operation;
- 21 B. In addition, the Commission is authorized to use all other lawful means, including but not
22 limited to:
- 23 1. Obtaining discovery from any person, without further leave of court, using the
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1 2. Defendant shall notify the Commission of any changes in structure of any
2 business entity that Defendant directly or indirectly controls, or has an ownership
3 interest in, that may affect compliance obligations arising under this Order,
4 including but not limited to: incorporation or other organization; a dissolution,
5 assignment, sale, merger, or other action; the creation or dissolution of a
6 subsidiary, parent, or affiliate that engages in any acts or practices subject to this
7 Order; or a change in the business name or address, at least thirty (30) days prior
8 to such change, provided that, with respect to any such change in the business
9 entity about which Defendant learns less than thirty (30) days prior to the date
10 such action is to take place, Defendant shall notify the Commission as soon as is
11 practicable after obtaining such knowledge.

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

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

- 1 C. Defendant shall notify the Commission of the filing of a bankruptcy petition by
2 Defendant within fifteen (15) days of filing.
- 3 D. For the purposes of this Order, Defendant shall, unless otherwise directed by the
4 Commission's authorized representatives, send by overnight courier (not the U.S. Postal
5 Service) all reports and notifications to the Commission that are required by this Order
6 to:

7 Associate Director for Enforcement
8 Federal Trade Commission
9 600 Pennsylvania Avenue, N.W
Washington, D.C. 20580
RE: FTC v. Swish Marketing, Inc., et al.

- 10 Provided that, in lieu of overnight courier, Defendant may send such reports or
11 notifications by first-class mail, but only if Defendant contemporaneously sends an
12 electronic version of such report or notification to the Commission at: DEbrief@ftc.gov.
- 13 E. For purposes of the compliance reporting and monitoring required by this Order, the
14 Commission shall communicate with Defendant through Defendant's counsel, Barry J.
15 Cutler, Baker Hostetler LLP, 1050 Connecticut Avenue NW, Suite 1100, Washington,
16 D.C. 20036, or Brian M. Grossman, Tesser & Ruttenberg, 12100 Wilshire Boulevard,
17 Suite 220, Los Angeles, CA 90025. Should both such counsel cease representation of
18 Defendant, the Commission may communicate directly with Defendant for such
19 purposes.

20 **VIII.**

21 **RECORD KEEPING PROVISIONS**

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;
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1 **IX.**

2 **DISTRIBUTION OF ORDER**

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

5 A. Defendant as Control Person: For any business that Defendant controls, directly or
6 indirectly, or in which Defendant has a majority ownership interest, Defendant must
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XI.

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 28th day of September, 2010.

RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

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SO STIPULATED:

WILLARD K. TOM
General Counsel

JEFFREY A. KLURFELD
Regional Director

\s\ Lisa D. Rosenthal

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: September 27, 2010

ATTORNEYS FOR PLAINTIFF

\s\ Jason Strober

JASON STROBER

Dated: July 1, 2010

\s\ Barry J. Cutler

BARRY J. CUTLER
Baker Hostetler, LLP
1050 Connecticut Avenue NW
Suite 1100
Washington, D.C. 20036
(202) 861-1572 (voice)
(202) 861-1783 (fax)

Attorney for Defendant Jason Strober

Dated: July 1, 2010

\s\ Brian M. Grossman

BRIAN M. GROSSMAN
Tesser & Ruttenberg
12100 Wilshire Blvd., Suite 220
Los Angeles, CA 90025
(310) 207-4022 (voice)
(310) 207-4033 (fax)

Attorney for Defendant Jason Strober

Dated: July 2, 2010



Attachment A

WILLARD K. TOM
General Counsel

LISA D. ROSENTHAL, Bar # 179486
KERRY O'BRIEN, Bar # 149264
EVAN ROSE, Bar # 253478
ERIC EDMONDSON, D.C. Bar # 450294
Federal Trade Commission
901 Market Street, Ste. 570
San Francisco, CA 94103
(415) 848-5100 (voice)
(415) 848-5184 (fax)
lrosenthal@ftc.gov
kobrien@ftc.gov
erose@ftc.gov
eedmondson@ftc.gov

Attorneys for Plaintiff
Federal Trade Commission

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Jose Division

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

SWISH MARKETING, INC., a corporation,

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

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

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

Defendants.

Case No. C09-03814 RS

**SATISFACTION OF JUDGMENT
AS TO DEFENDANT JASON
STROBER**

On _____, the Court entered a Stipulated Final Judgment and Order for
Permanent Injunction and Other Equitable Relief as to Defendant Jason Strober (Dkt. #121)

