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JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

NUTRACLICK, LLC, a limited liability
company, formerly known as
HUNGRY FISH MEDIA, LLC,

Defendant.

Case No.: CV 16-6819-DMG (JPR,x)

ORDER FOR PERMANENT
INJUNCTION AND MONETARY
JUDGMENT [5]

Plaintiff, the Federal Trade Commission (“Commission” or “FTC”), filed its Complaint for Permanent Injunction and Other Equitable Relief (“Complaint”) in this matter, pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 53(b), and Section 5 of the Restore Online Shoppers’ Confidence Act (“ROSCA”), 15 U.S.C. § 8404. The Commission and Defendant have stipulated to the entry of this Stipulated Order for Permanent Injunction and Monetary Relief (“Order”) to resolve all matters in dispute in this action between them.

THEREFORE, IT IS ORDERED as follows:

1 FINDINGS

- 2 1. This Court has jurisdiction over this matter.
- 3 2. The Complaint charges that Defendant participated in deceptive acts or
4 practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and Section 4
5 of ROSCA, 15 U.S.C. § 8403, in the marketing of its negative option
6 memberships for nutritional supplements and beauty products.
- 7 3. Defendant neither admits nor denies any of the allegations in the
8 Complaint, except as specifically stated in this Order. Only for purposes of this
9 action, Defendant admits the facts necessary to establish jurisdiction.
- 10 4. Defendant waives any claim that it may have under the Equal Access to
11 Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action through
12 the date of this Order, and agrees to bear its own costs and attorney fees.
- 13 5. Defendant waives all rights to appeal or otherwise challenge or contest the
14 validity of this Order.

15 DEFINITIONS

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

- 17 A. "Billing Information" means any data that enables any person to access a
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1 disclosure must be made through the same means through which the
2 communication is presented. Any communication made through
3 both visual and audible means, such as a television advertisement,
4 the disclosure must be presented simultaneously in both the visual
5 and audible portions of the communication even if the representation
6 requiring the disclosure is made in only one means.

- 7 2. A visual disclosure, by its size, contrast, location, the length of time
8 it appears, and other characteristics, must stand out from any
9 accompanying text or other visual elements so that it is easily
10 noticed, read, and understood.
- 11 3. An audible disclosure, including by telephone or streaming video,
12 must be delivered in a volume, speed, and cadence sufficient for
13 ordinary consumers to easily hear and understand it.
- 14 4. In any communication using an interactive electronic medium, such
15 as the Internet or software, the disclosure must be unavoidable. A
16 disclosure is not Clear and Concise if a consumer must take any
17 action, such as clicking on a hyperlink or hovering over an icon, to
18 see it.
- 19 5. The disclosure must use tone and syntax understandable to
20 ordinary consumers and must appear in each language in which the
21 representation that requires the disclosure appears.
- 22 6. The disclosure must comply with these requirements in each medium
23 through which it is received, including all electronic devices and
24 face-to face communications.
- 25 7. The disclosure must not be contradicted or mitigated by, or
26 inconsistent with, anything else in the communication.
- 27 8. When the representation or sales practice targets a specific audience,
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1 such as children, the elderly, the terminally ill, “ordinary
2 consumers” includes reasonable members of that group.

3 D. “Close Proximity” means immediately adjacent to the triggering
4 representation. In the case of advertisements disseminated verbally or through
5 audible means, the disclosure shall be made as soon as practicable after the
6 triggering representation.

7 E. “Defendant” means NutraClick, LLC, formerly known as Hungry Fish
8 Media, LLC, and its successors and assigns.

9 F. “Negative Option Feature” means, in an offer or agreement to sell or
10 provide any good or service, a provision under which the consumer’s silence or
11 failure to take affirmative action to reject a good or service or to cancel the
12 agreement is interpreted by the seller or provider as acceptance or continuing
13 acceptance of the offer.

14 ORDER

15 I. PROHIBITION AGAINST MISREPRESENTATIONS

16 IT IS ORDERED that Defendant, Defendant’s officers, agents, employees,
17 and attorneys, and all other persons in concert or participation with any of
18 them, who receive actual notice of this Order, whether acting directly or
19 indirectly, in connection with promoting or offering for sale any good or service
20 with a Negative Option Feature, are permanently restrained and enjoined from
21 misrepresenting, expressly or by implication:

- 22 A. The cost or price of any good or service;
- 23 B. That a good or service is offered on a “free,” “trial,” “sample,”
24 “bonus,” “gift,” “no obligation,” or “discounted” basis, or words of
25 similar import, denoting or implying the absence of an obligation on
26 the part of the recipient of the offer to affirmatively act in order to
27 avoid a charge, including where a charge will be assessed pursuant to
28 the offer unless the consumer takes affirmative action to cancel;

1 C. That consumers can obtain a good or service for a minimal
2 processing, service, or administrative fee with no further obligation;

3 D. That consumers can obtain a good or service for a minimal shipping
4 or handling fee with no further obligation;

5 E. The purpose for which a consumer's payment information will be
6 used;

7 F. The timing or manner of any Charge or bill (including but not
8 limited to the date of the Charge and whether it will be a credit card Charge or
9 checking account debit);

10 G. The length of any trial period before the consumer is Charged or
11 billed;

12 H. That a transaction has been authorized by a consumer; or

13 I. Any other fact material to consumers concerning any good or
14 service, such as qualifications to participate in a program, limited supply of a
15 good or service, the total costs, any material restrictions, limitations, or
16 conditions, or any other material aspect of a good or service's performance,
17 efficacy, nature, or central characteristics.

18 II. REQUIRED DISCLOSURES RELATING TO
19 NEGATIVE OPTION FEATURES
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provision of Billing Information:

1. That the consumer will be Charged for the good or service, or that those Charges will increase after the trial period ends, and, if applicable, that the Charges will be on a recurring basis, unless the consumer timely takes steps to prevent or stop such Charges;
2. The amount (or range of costs) the consumer will be Charged or billed and, if applicable, the frequency of such Charges unless the consumer timely takes steps to prevent or stop them;
3. The deadline (by date or frequency) by which the consumer must act in order to stop all recurring Charges;
4. The name of the seller or provider of the good or service;
5. A description of the good or service; and
6. The mechanism to stop any recurring Charges.

B. For any transaction involving sale of a good or service to a consumer through a Negative Option Feature, within ten (10) days after the date of the sale, failing to send the consumer written confirmation of the transaction, either by email or first class mail, Clear and Conspicuously identified as such in the email subject line or on the outside of the envelope. Such written confirmation shall include Clear and Conspicuous disclosure of all the information required by Section III.A.

1 from using Billing Information to obtain payment from a consumer, unless, prior
2 to using such Billing Information to obtain payment, Defendant obtains the
3 express informed consent of the consumer relating to the Negative Option
4 Feature. Express informed consent shall consist of:

5 A. For all written offers with a Negative Option Feature (including over
6 the Internet or other web-based applications or services), a consumer's express
7 informed consent shall be obtained by Defendant charging the consumer,
8 through a check box, signature, or other substantially similar method, that the
9 consumer must affirmatively select to sign to accept the Negative Option Feature,
10 and no other portion of the offer. Defendant shall disclose Clearly and
11 Conspicuously and in Close Proximity to such check box, signature, or
12 substantially similar method of affirmative consent, only the following (with no
13 additional information):

- 14 1. That the consumer will be Charged for the good or service, or
15 that those Charges will increase, after the trial period ends,
16 and, if applicable, that the Charges will be on a recurring
17 basis, unless the consumer timely takes steps to prevent or
18 stop such Charges;
- 19 2. The amount (or range of cost) the consumer will be
20 Charged or billed and, if applicable, the frequency of such
21 Charges unless the consumer timely takes steps to prevent or
22 stop them; and
- 23 3. The deadline (by date or frequency) by which the consumer
24 must act in order to stop all recurring Charges.

25 B. For all oral offers including a Negative Option Feature, Defendant
26 shall, in addition to disclosing the information identified in Section III.A., and
27 prior to obtaining any Billing Information from a consumer, obtain affirmative
28 and unambiguous oral confirmation that the consumer:

1 indirectly, in connection with promoting offering for sale any good or service,
2 are permanently restrained and enjoined from violating the Restore Online
3 Shoppers' Confidence Act,
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1 D. Defendant acknowledges that Taxpayer Identification Number,
2 which Defendant previously submitted to the Commission, may be used for
3 collecting and reporting on any delinquent amount arising out of this Order, in
4 accordance with 31 U.S.C. §7701.

5 E. All money paid to the Commission pursuant to this Order may be
6 deposited into a fund administered by the Commission or its designee to be used
7 for equitable relief, including consumer redress and any attendant expenses for
8 the administration of any redress fund. If a representative of the Commission
9 decides that direct redress to consumers is wholly or partially impracticable or
10 money remains after redress is completed, the Commission may apply any
11 remaining money for such other equitable relief (including consumer information
12 remedies) as it determines to be closely related to Defendant's practices
13 alleged in the Complaint. Any money not used for such equitable relief is to be
14 deposited to the U.S. Treasury as disbursement. Defendant has no right to
15 challenge any actions the Commission or its representatives may take pursuant to
16 this Subsection.

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1 Service) to: Associate Director for Enforcement, Bureau of Consumer Protection,
2 Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC
3 20580. The subject line must begin with FTC v. NutraClick, LLC

4 XI. RECORDKEEPING

5 IT IS FURTHER ORDERED that Defendant must create certain records
6 for 15 years after entry of the Order, and retain each such record for 5 years.

7 Specifically, Defendant must create and retain the following records:

8 A. accounting records showing the revenues from all goods or services
9 sold;

10 B. personnel records showing, for each person providing services,
11 whether as an employee or otherwise, a person's: name, addresses; telephone
12 numbers; job title or position; dates of hire; and (if applicable) the reason for
13 termination;

14 C. records of all consumer complaints and refund requests, whether
15 received directly or indirectly, such as through a third party, and any response;

16 D. all records necessary to dem
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1 using any of the procedures prescribed by Federal Rules of Civil Procedure 29, 30
2 (including telephonic depositions), 31, 33, 34, 36, 45, and 69.

3 B. For matters concerning this Order the Commission is authorized to
4 communicate directly with each Defendant. Defendant must permit
5 representatives of the Commission to interview any employee or other person
6 affiliated with any Defendant who has agreed to such an interview. The person
7 interviewed may have counsel present.

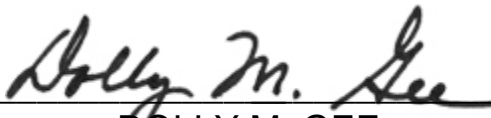
8 C. The Commission may use all other lawful means, including posing,
9 through its representatives as consumers, suppliers, or other individuals or
10 entities, to Defendant or any individual or entity affiliated with Defendant,
11 without the necessity of identification prior notice. Nothing in this Order
12 limits the Commission's lawful use of compulsory process, pursuant to Sections 9
13 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

14 XIII. RETENTION OF JURISDICTION

15 IT IS FURTHER ORDERED that this Court retains jurisdiction of this
16 matter for purposes of construction, modification, and enforcement of this Order.

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18 IT IS SO ORDERED.

19 DATED: September 20, 2016

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22 DOLLY M. GEE
23 UNITED STATES DISTRICT JUDGE
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