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11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION

15 FEDERAL TRADE COMMISSION,

16 Plaintiff,

17 v.

18 SWISH MARKETING, INC., a corporation,

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

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

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

25 Defendants.

Case No. C09-03814 RS

125
~~PROPOSED~~ FINAL JUDGMENT
AND ORDER FOR PERMANENT
INJUNCTION AND OTHER
EQUITABLE RELIEF AS TO
DEFENDANT SWISH
MARKETING, INC.

26
27 THIS MATTER comes before the Court on the Motion for Summary Judgment as to
28 Defendant Swish Marketing, Inc., filed by Plaintiff Federal Trade Commission ("Commission"),

Final Judgment and Order: Swish - C09-03814 RS

1 which motion was GRANTED on _____. The Court incorporates the findings
2 and conclusions from that Order.

3 **THEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED as follows:**

4 **DEFINITIONS**

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

- 6 A. **“Assisting others”** includes, but is not limited to, providing any of the following goods
7 or services to another person: (A) performing customer service functions, including but
8 not limited to receiving or responding to consumer complaints; (B) formulating or
9 providing, or arranging for the formulation or provision of, any telephone sales script or
10 any other marketing material, including but not limited to the text of any internet website,
11 email, or other electronic communication; (C) providing names of, or assisting in the
12 generation of, potential customers; (D) performing marketing services of any kind; (E)
13 acting or serving as an owner, officer, director, manager, or principal of any entity.
- 14 B. **“Billing information”** means any data that enables any person to access a consumer’s
15 account, including but not limited to a credit card, checking, savings, share or similar
16 account, utility bill, mortgage loan account, or debit card.
- 17 C. **“Clearly and conspicuously”** means:
- 18 1. In textual communications (e.g., printed publications or words displayed on the
19 screen of an electronic device), the disclosure shall be of a type size and location
20 sufficiently noticeable for an ordinary consumer to read and comprehend the
21 disclosure, in print that contrasts with the background on which it appears;
 - 22 2. In communications disseminated orally or through audible means (e.g., radio or
23 streaming audio), the disclosure shall be delivered in a volume and cadence
24 sufficient for an ordinary consumer to hear and comprehend the disclosure;
 - 25 3. In communications disseminated through video means (e.g., television or
26 streaming video), the disclosure shall be in writing in a form consistent with
27 Subsection 1 of this definition and shall appear on the screen for a duration
28 sufficient for an ordinary consumer to read and comprehend the disclosure;

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 D. "**Co-Registration**" means the process whereby information initially provided by a
20 consumer for a particular purpose or entity is used for a different purpose or by a
21 different entity, typically in connection with lead generation.

22 E. "**Defendant**" means Swish Marketing, Inc., and its successors and assigns.

23 F. "**EverPrivate Card**" means any prepaid, or stored-value, debit MasterCard or Visa card
24 offered for sale by VirtualWorks, LLC, f/k/a Private Date Finder, including but not
25 limited to the Secret Cash Card and EverPrivate Card products.

26 G. "**Marketing Affiliate**" means any third party with which Defendant, or any business for
27 which Defendant is a majority owner, officer, or director, or which Defendant directly or
28 indirectly controls, has an agreement under which:

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

4 2. The Marketing Affiliate agrees to pay a commission or other compensation to
5 Defendant or such business because Defendant or such business has driven or
6 referred customers or potential customers to the Marketing Affiliate.

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

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

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

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

20 I.

21 **BAN ON NEGATIVE OPTION PROGRAMS**

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

24 A. Advertising, marketing, promoting, offering for sale, or selling any product or service
25 with a Negative Option Feature; and

26 B. Assisting others engaged in advertising, marketing, promoting, offering for sale, or
27 selling any product or service with a Negative Option Feature.
28

1 **II.**

2 **PROHIBITION AGAINST MAKING MISREPRESENTATIONS**

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

- 10 A. Misrepresenting, or assisting others in misrepresenting, expressly or by implication,
- 11 1. That such product or service is a bonus, free, a gift, or without cost;
- 12 2. The cost or price of such product or service;
- 13 3. The consequences of submitting an application for any such product or service;
- 14 4. The method by which a consumer will be assessed a fee, charge, debit, or bill; and
- 15 5. Any other material fact; and
- 16 B. Representing, in any manner, expressly or by implication, that such product or service is
- 17 a bonus, free, a gift, or without cost, without disclosing clearly and conspicuously, and in
- 18 close proximity to the representation, all material terms, conditions, and obligations
- 19 relating to the receipt and retention of such product or service.

20 **III.**

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

22 **IT IS FURTHER ORDERED** that Defendant, and its officers, agents, servants,
23 employees, and attorneys, and those persons in active concert or participation with it who
24 receive actual notice of this Order by personal service or otherwise, whether acting directly or
25 through any sole proprietorship, partnership, limited liability company, corporation, subsidiary,
26 branch, division, Marketing Affiliate, or other entity, in connection with the advertising,
27 promoting, offering for sale, or sale of any Payment Card, loan, any financial product or service,
28 or any other product or service, are hereby enjoined from directly or indirectly using billing

1 information to obtain payment from a consumer, unless, prior to using such billing information
2 to obtain payment:

- 3 A. They request that the consumer indicate his or her assent to pay for the product or service
4 using a specified account;
- 5 B. They disclose clearly and conspicuously and in close proximity to the request for the
6 consumer's indication of assent the following information:
- 7 1. The specific billing information to be used;
 - 8 2. The amount to be paid;
 - 9 3. The method to be used to assess the payment;
 - 10 4. The entity on whose behalf the payment will be assessed; and
 - 11 5. All material restrictions, limitations, or conditions applicable to the purchase,
12 receipt, or use of the product or service that is the subject of the offer; and
- 13 C. The consumer affirmatively indicates assent to pay for the product or service using the
14 specified account. In connection with communications made through interactive media
15 such as the internet, online services, and software, the consumer must indicate such
16 assent by clicking on a button that is specifically labeled to convey such assent, or by
17 taking substantially similar affirmative action authorizing the transaction.

18 **IV.**

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

20 **IT IS FURTHER ORDERED** that Defendant, and its officers, agents, servants,
21 employees, and attorneys, and those persons in active concert or participation with it who
22 receive actual notice of this Order by personal service or otherwise, whether acting directly or
23 through any sole proprietorship, partnership, limited liability company, corporation, subsidiary,
24 branch, division, Marketing Affiliate, or other entity, are hereby enjoined from directly or
25 indirectly advertising, marketing, promoting, offering for sale, or selling any product or service
26 through Co-Registration, unless, prior to engaging in such Co-Registration:

- 27 A. They request that the consumer indicate his or her assent to have information initially
28 provided by that consumer for a particular purpose or entity be used for a different

1 purpose or by a different entity;

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

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

7 C. The consumer affirmatively indicates assent to have information initially provided by
8 that consumer for a particular purpose or entity be used for a different purpose or by a
9 different entity. In connection with communications made through interactive media
10 such as the internet, online services, and software, the consumer must indicate such
11 assent by clicking on a button that is specifically labeled to convey such assent, or by
12 taking substantially similar affirmative action authorizing the transaction.

13
14 V.

15 **MONITORING BY DEFENDANT
OF ITS MARKETING AFFILIATES**

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

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

- 24 1. Provide the Marketing Affiliate with a copy of this Order;
25 2. Obtain a signed and dated acknowledgment from such Marketing Affiliate in
26 which the Marketing Affiliate:
27 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 II, III, and IV; and

4 3. Provide written notice to such Marketing Affiliate that failing to comply with the
5 terms of Sections II, III, and IV will result in immediate termination of
6 Defendant’s agreement with the Marketing Affiliate;

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

8 1. Provide any existing Marketing Affiliate with a copy of this Order;

9 2. Obtain a signed and dated acknowledgment from such Marketing Affiliate in
10 which the Marketing Affiliate:

11 a. Acknowledges receipt of this Order;

12 b. Expressly agrees to distribute a copy of the Order to the Marketing
13 Affiliate’s owners, managers, and division heads; and

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

15 3. Provide written notice to each existing Marketing Affiliate that failing to comply
16 with the terms of Sections II, III, and IV will result in immediate termination of
17 Defendant’s agreement with the Marketing Affiliate and the forfeiture of all
18 monies earned or owed;

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

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

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

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VI.

ORDER PROVISION REGARDING CUSTOMER INFORMATION

IT IS FURTHER ORDERED that Defendant, and its officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with it who receive actual notice of this Order by personal service or otherwise, are permanently restrained and enjoined from:

- A. Disclosing, using, or benefitting from customer information, including the name, address, telephone number, email address, Social Security number, other identifying information, or any data that enables access to a customer's account (including a credit card, bank account, or other financial account), of any person which Defendant obtained prior to entry of this Order in connection with sale of the EverPrivate Card; and
- B. Failing to dispose of such customer information in all forms in its possession, custody, or control within thirty (30) days after entry of this Order. Disposal shall be by means that protect against unauthorized access to the customer information, such as by burning, pulverizing, or shredding any papers, and by erasing or destroying any electronic media, to ensure that the customer information cannot practicably be read or reconstructed.

Provided, however, that customer information need not be disposed of, and may be disclosed, to the extent requested by a government agency or required by a law, regulation, or court order.

VII.

MONETARY JUDGMENT AND CONSUMER RESTITUTION

IT IS FURTHER ORDERED that:

- A. Judgment is hereby entered in favor of the Commission and against Defendant for equitable monetary relief, including but not limited to consumer redress, in the amount of four million, eight hundred and fifty-six thousand, eight hundred and seventy-two dollars (\$4,856,872), which is the total amount of consumer injury caused by the activities alleged in the Complaint reduced by the amounts already paid by other defendants. Judgment shall be paid to the Commission within ten (10) days of entry of this Order.

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

11 **VIII.**

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
24 procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, 45 and 69;
- 25 2. Having its representatives pose as consumers and suppliers to Defendant, its
26 employees, or any other entity managed or controlled in whole or in part by
27 Defendant, without the necessity of identification or prior notice; and
28

1 C. Defendant shall permit representatives of the Commission to interview any employer,
2 consultant, independent contractor, representative, agent, or employee who has agreed to
3 such an interview, relating in any way to any conduct subject to this Order. The person
4 interviewed may have counsel present.

5 *Provided however*, that nothing in this Order shall limit the Commission's lawful use of
6 compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to
7 obtain any documentary material, tangible things, testimony, or information relevant to unfair or
8 deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C.
9 § 45(a)(1)).

10 **IX.**

11 **COMPLIANCE REPORTING**

12 **IT IS FURTHER ORDERED** that, in order that compliance with the provisions of this
13 Order may be monitored:

14 A. For a period of five (5) years from the date of entry of this Order, Defendant shall notify
15 the Commission of any changes in structure of Defendant or any business entity that
16 Defendant directly or indirectly controls, or has an ownership interest in, that may affect
17 compliance obligations arising under this Order, including but not limited to:
18 incorporation or other organization; a dissolution, assignment, sale, merger, or other
19 action; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any
20 acts or practices subject to this Order; or a change in the business name or address, at
21 least thirty (30) days prior to such change, *provided* that, with respect to any such change
22 in the business entity about which Defendant learns less than thirty (30) days prior to the
23 date such action is to take place, Defendant shall notify the Commission as soon as is
24 practicable after obtaining such knowledge.

25 B. One hundred eighty (180) days after the date of entry of this Order and annually
26 thereafter for a period of three (3) years, Defendant shall provide a written report to the
27 FTC, which is true and accurate and sworn to under penalty of perjury, setting forth in
28 detail the manner and form in which it has complied and is complying with this Order.

1 This report shall include, but not be limited to:

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

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

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

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

11 Associate Director for Enforcement
12 Bureau of Consumer Protection
13 Federal Trade Commission
14 600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
RE: *FTC v. Swish Marketing, Inc., et al.*, Matter no. X090078

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

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

20 X.

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 is hereby restrained and enjoined from failing to create and retain the
24 following records:

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

27 B. Personnel records accurately reflecting: the name, address, and telephone number of each
28 person employed in any capacity by such business, including as an independent

1 contractor; that person's job title or position; the date upon which the person commenced
2 work; and the date and reason for the person's termination, if applicable;

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

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

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

10 F. Documents sufficient to demonstrate the experience of consumers on each materially
11 different version of each website on which Defendant, whether acting directly or through
12 any sole proprietorship, partnership, limited liability company, corporation, subsidiary,
13 branch, division, Marketing Affiliate, or other entity, advertises, promotes, markets,
14 offers for sale, sells, or provides products or services, including, as necessary:

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

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

25 **XI.**

26 **DISTRIBUTION OF ORDER**

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

- 1 A. Defendant must deliver a copy of this Order to (1) all principals, officers, directors, and
- 2 managers; (2) all employees, agents, and representatives who engage in conduct related
- 3 to the subject matter of the Order; and (3) any business entity resulting from any change
- 4 in structure set forth in Subsection A of the Section titled "Compliance Reporting." For
- 5 current personnel, delivery shall be within five (5) days of service of this Order upon
- 6 Defendant. For new personnel, delivery shall occur prior to them assuming their
- 7 responsibilities. For any business entity resulting from any change in structure set forth
- 8 in Subsection A of the Section titled "Compliance Reporting," delivery shall be at least
- 9 ten (10) days prior to the change in structure.
- 10 B. Defendant must secure a signed and dated statement acknowledging receipt of the Order,
- 11 within thirty (30) days of delivery, from all persons receiving a copy of the Order
- 12 pursuant to this Section.

XII.

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.

XIII.

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 14th day of June, 2011.



RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

Respectfully submitted,

DATED:

/s/ Lisa D. Rosenthal

LISA D. ROSENTHAL
KERRY O'BRIEN
EVAN ROSE
ERIC D. EDMONDSON

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

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