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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

11
12 FEDERAL TRADE COMMISSION,

13 Plaintiff,

14 v.

15 NEXTCLICKMEDIA, LLC, *et al.*,

16 Defendants.

Case No. C08-1718-VRW

**STIPULATED FINAL ORDER FOR
PERMANENT INJUNCTION AND
MONETARY RELIEF AGAINST
DEFENDANTS NEXTCLICK
MEDIA, LLC, KENNETH CHAN
AND ALBERT CHEN**

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20 Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), filed a
21 Complaint for a permanent injunction and other equitable relief against Defendants
22 NextClick Media, LLC; Next Internet, LLC; Kenneth Chan; and Albert Chen, pursuant
23 to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b).
24 The Complaint alleges that Defendants engaged in acts and practices in violation of
25 Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, and Section 917(c) of
26 the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693o(c), and Section
27 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b), as more fully set out in Section
28

1 205.10(b) of the Federal Reserve Board's Official Staff Commentary to Regulation E, 12
2 C.F.R. § 205, Supp. I. The parties have agreed to the entry of this Stipulated Final Order
3 for Permanent Injunction and Monetary Relief ("Order") in settlement of the
4 Commission's Complaint. The Court, being advised of the premises, makes the
5 following findings:

6 **FINDINGS**

7 1. This Court has jurisdiction over the subject matter of this case and
8 jurisdiction over all parties. Venue in the Northern District of California is proper.

9 2. The Complaint states a claim upon which relief can be granted, and the
10 Commission has the authority to seek the relief it has requested.

11 3. The acts and practices of Defendants were in or affecting commerce, as
12 defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

13 4. Defendants waive:

14 (a) all rights to seek review or otherwise challenge or contest the validity of
15 this Order;

16 (b) any claim Defendants may have against the Commission, its employees,
17 representatives, or agents;

18 (c) all claims under the Equal Access to Justice Act, 28 U.S.C. § 2412, as
19 amended by Pub. L. 104-121, 110 Stat. 847, 863-64; and

20 (d) any rights to attorneys' fees that may arise under said provision of law.

21 5. The Defendants stipulate and agree to this Order, without trial or
22 adjudication of any issue of fact or law, to settle and resolve all matters alleged in the
23 Complaint to the date of entry of this Order. Defendants do not admit any of the
24 allegations set forth in the Complaint, other than jurisdictional facts, and deny any and all
25 wrongdoing.

26 6. Each party shall bear its own costs and attorneys' fees.

27 7. Entry of this Order is in the public interest.
28

DEFINITIONS

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

1. "Assisting others" includes, but is not limited to, providing any of the following services to any person or entity: (a) performing customer service functions, including, but not limited to, receiving or responding to consumer complaints; (b) formulating or providing, or arranging for the formulation or provision of, any telephone sales script or any other marketing material; (c) performing marketing services of any kind; or (d) providing credit card merchant processing accounts, or otherwise providing access to a billing and collection system (such as a credit card, checking, savings, share or similar services, utility bill, telephone bill, mortgage loan account or debit card), or causing any charges to be made to such an account or utilizing such a system.
2. "Billing information" means any data that enables any person to access a consumer's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.
3. "Clear and conspicuous" statement, or a statement presented "clearly and conspicuously" means:
 - a. in print communications, the message shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears;
 - b. in oral communications, the message shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it;
 - c. in communications made through an electronic medium, including but not limited to television, video, radio, and interactive media (including but not limited to the Internet, online services, and

1 software), the message shall be presented simultaneously in both the
2 audio and visual portions of the communication. In any
3 communication presented solely through visual or audio means, the
4 message may be made through the same means in which the
5 communication is presented. In any communication disseminated
6 by means of an interactive electronic medium, including but not
7 limited to software, the Internet, or online services, a disclosure
8 must be unavoidable and presented prior to the consumer incurring
9 any financial obligation. Any audio message required hereunder
10 shall be delivered in a volume and cadence sufficient for an ordinary
11 consumer to hear and comprehend it. Any visual message required
12 hereunder shall be of a size and shade, with a degree of contrast to
13 the background against which it appears, and shall appear on the
14 screen for a duration and in a location sufficiently noticeable for an
15 ordinary consumer to read and comprehend it; and

16 d. regardless of the medium used to disseminate it, the message
17 required hereunder shall be in understandable language and syntax.
18 Nothing contrary to, inconsistent with, or in mitigation of the
19 message required hereunder shall be used in any communication.

20 4. "Competent and reliable scientific evidence" means tests, analyses,
21 research, studies, or other evidence based on the expertise of professionals
22 in the relevant area, that has been conducted and evaluated in an objective
23 manner by persons qualified to do so, using procedures generally accepted
24 in the profession to yield accurate and reliable results.

25 5. "Covered product or service" means any dietary supplement, food, drug, or
26 device, or any health-related service or program, including but not limited to
27 smoking cessation products.

28 6. "Defendants," unless otherwise specified, means:

- 1 a. NextClick Media, LLC, its divisions, subsidiaries, successors and
2 assigns; and
- 3 b. Kenneth Chan and Albert Chen (collectively “Individual
4 Defendants”),
- 5 individually, collectively, or in any combination.
- 6 7. “Device” means an instrument, apparatus, implement, machine,
7 contrivance, implant, in vitro reagent, or other similar or related article,
8 including but not limited to any component, part, or accessory, which is:
- 9 a. recognized in the official National Formulary, or the United States
10 Pharmacopeia, or any supplement to them;
- 11 b. intended for use in the diagnosis of disease or other conditions, or in
12 the cure, mitigation, treatment, or prevention of disease, in man or
13 other animals; or
- 14 c. intended to affect the structure or any function of the body of man or
15 other animals, and which does not achieve any of its principal
16 intended purposes through chemical action within or on the body of
17 man or other animals and which is not dependent upon being
18 metabolized for the achievement of any of its principal intended
19 purposes.
- 20 8. “Drug” means:
- 21 a. articles recognized in the official United States Pharmacopoeia,
22 official Homoeopathic Pharmacopoeia of the United States, or
23 official National Formulary, or any supplement to any of them;
- 24 b. articles intended for use in the diagnosis, cure, mitigation, treatment,
25 or prevention of disease in man or other animals;
- 26 c. articles (other than food) intended to affect the structure or any
27 function of the body of man or other animals; and
- 28 d. articles intended for use as a component of any article specified in

1 clause a., b., or c.; but does not include devices or their components,
2 parts, or accessories.

3 9. "Negative option feature" means, in an offer or agreement to sell or
4 provide any product or service, a provision under which the consumer's
5 silence or failure to take an affirmative action to reject products or services
6 or to cancel the agreement is interpreted by the seller or provider as
7 acceptance of the offer. Offers or agreements with negative option features
8 include, but are not limited to

9 a. free or introductory price trial offers in which the consumer receives
10 a product or service for free or at a nominal or introductory price for
11 an initial period and will incur an obligation to pay or pay a greater
12 amount for the product or service if he or she does not take
13 affirmative action to cancel, reject, or return the product or service
14 before the end of that period;

15 b. continuity plans in which, subsequent to the consumer's agreement
16 to the plan, the seller or provider automatically ships products to a
17 consumer unless the consumer notifies the seller or provider within
18 a certain time not to ship the products; and

19 c. automatic renewal plans in which the seller or provider
20 automatically renews the agreement and charges the consumer
21 unless the consumer cancels before the renewal.

22 10. "Preauthorized Electronic Fund Transfer" means an electronic fund transfer
23 authorized in advance to recur at substantially regular intervals.

24 **I. FALSE AND UNSUBSTANTIATED REPRESENTATIONS**

25 **IT IS HEREBY ORDERED** that Defendants, directly or through any
26 corporation, partnership, subsidiary, division, or other device, and their officers, agents,
27 servants, employees and all persons or entities in active concert or participation with
28 them who receive actual notice of this Order, by personal service or otherwise, in

1 connection with the manufacturing, labeling, advertising, promotion, offering for sale,
2 sale, or distribution of any covered product or service, in or affecting commerce, are
3 hereby permanently restrained and enjoined from making or assisting others in making

4 A. Any representation that such covered product or service

5 1. is more effective than nicotine-based products for smoking
6 cessation;

7 2. has a 97 percent effectiveness rate for smoking cessation; and

8 3. enables smokers to quit smoking permanently; or

9 B. Any representation about the absolute or comparative health benefits,
10 performance, efficacy, safety, or side effects of any covered product or service unless the
11 representation is true, non-misleading, and, at the time it is made, Defendants possess
12 and rely upon competent and reliable scientific evidence that substantiates the
13 representation.

14 II. MISREPRESENTATION OF TESTS OR STUDIES

15 **IT IS FURTHER ORDERED** that Defendants, directly or through any
16 partnership, corporation, subsidiary, division, or other device, and their officers, agents,
17 servants, employees and all persons or entities in active concert or participation with
18 them who receive actual notice of this Order, by personal service or otherwise, in
19 connection with the manufacturing, labeling, advertising, promotion, offering for sale,
20 sale, or distribution of any covered product or service, are hereby enjoined from
21 misrepresenting or assisting others in misrepresenting, in any manner, expressly or by
22 implication, the existence, contents, validity, results, conclusions, or interpretations of
23 any test, study, or research.

24 III. MISREPRESENTATIONS CONCERNING PRODUCTS OR SERVICES

25 **IT IS FURTHER ORDERED** that Defendants, directly or through any
26 partnership, corporation, subsidiary, division, or other device, and their officers, agents,
27 servants, employees and all persons or entities in active concert or participation with
28 them who receive actual notice of this Order, by personal service or otherwise, in

1 connection with the manufacturing, labeling, advertising, promoting, marketing, offering
2 for sale, sale, or distribution of any products or services through the use of a negative
3 option feature, are hereby enjoined from misrepresenting, or assisting others in
4 misrepresenting, expressly or by implication, any fact, including but not limited to,

5 A. That a product or service is offered on a "free," "trial," or "no obligation"
6 basis, or words of similar import, denoting or implying to a consumer acting reasonably
7 under the circumstances the absence of any obligation on the part of the recipient of the
8 offer to affirmatively act in order to avoid charges if, in fact, a charge will be assessed
9 pursuant to the offer unless the consumer takes affirmative action to cancel;

10 B. The amount that a consumer will be charged or billed;

11 C. That a consumer will not be charged or billed;

12 D. The timing or manner of any charge or bill (including but not limited to the
13 date of the charge and whether it will be a credit card charge or a checking account
14 debit);

15 E. The length of any trial period that consumers receive before being charged
16 or billed; and

17 F. That a consumer purchased or agreed to purchase a product or service, or
18 that a transaction has been authorized by a consumer, including but not limited to
19 through mailings, email, billings, credit card charges, and checking account debits.

20 IV. REQUIRED DISCLOSURES

21 **IT IS FURTHER ORDERED** that Defendants, directly or through any
22 partnership, corporation, subsidiary, division, or other device, and their officers, agents,
23 servants, employees and all persons or entities in active concert or participation with
24 them who receive actual notice of this Order, by personal service or otherwise, in
25 connection with the manufacturing, labeling, advertising, promoting, marketing, offering
26 for sale, sale, or distribution of any products or services, shall

27 A. Clearly and conspicuously disclose, before consumers are asked to pay
28 money, submit consideration, or reveal billing information:

- 1 1. All fees and costs;
- 2 2. All material restrictions, limitations, or conditions applicable to the
- 3 purchase, receipt, or use of the product or service that is the subject of the offer
- 4 (including but not limited to any promotion associated with free products or services, or
- 5 products or services available on a trial basis);
- 6 3. All material terms and conditions of any cancellation or refund
- 7 policy, including but not limited to informing consumers if no cancellations or refunds
- 8 are permitted; and
- 9 4. All material terms and conditions of any offer with a negative option
- 10 feature, including but not limited to:
- 11 a. The dollar amount of the first payment and when it will be
- 12 charged, withdrawn, or become due; the dates or frequency
- 13 (e.g., monthly, quarterly) of all subsequent charges or
- 14 payment(s); and the dollar amount or range of costs of all
- 15 subsequent charges or payments;
- 16 b. When any trial period begins; the length of any trial period;
- 17 the specific steps and means by which a cancellation request
- 18 must be submitted; and the date by, or time period within
- 19 which, a cancellation request must be received to avoid a
- 20 charge;
- 21 c. If applicable, the length of any renewal period; the manner in
- 22 which a notice not to ship or renew must be submitted; the
- 23 date by or time period within which a notice not to ship or
- 24 renew must be received to avoid shipment or renewal (e.g.,
- 25 two weeks after the consumer is advised of an upcoming
- 26 shipment); and the telephone number, email address, or street
- 27 address to which such a notice must be directed; and
- 28 d. All material conditions, limitations and restrictions on the

1 ability of the consumer to use any product or service that is
2 offered as “free,” “risk-free,” “without obligation,” or
3 “discounted,” or using words of similar import denoting or
4 implying the absence of any obligation.

5 B. For any transaction involving a service, within the lesser of ten (10) days
6 after the date of the transaction or half the time of any trial period, send the consumer
7 written confirmation of the transaction that includes all the information required by
8 Subsection A of this Section and a clear and conspicuous statement of the procedures by
9 which the consumer can cancel or obtain a refund;

10 C. For any transaction involving a product, provide written confirmation of
11 the transaction with the first product shipment that includes all of the information
12 required by Subsection A of this Section and a clear and conspicuous statement of the
13 procedures by which the consumer can cancel or obtain a refund; and

14 D. At least thirty (30) days prior to renewing a consumer’s membership,
15 subscription, or agreement to purchase for any service (in the case of a membership,
16 subscription, or agreement whose term is six (6) months or longer) and prior to the
17 submission for payment of a consumer’s billing information for such services, send the
18 consumer written confirmation of such renewal, identified in a clear and conspicuous
19 manner on the outside of the envelope, via first class mail, that includes all of the
20 information required by Subsections A.1, A.2, and A.4 of this Section and a clear and
21 conspicuous statement of the procedures by which the consumer can cancel such
22 renewal.

23 V. EXPRESS INFORMED CONSENT

24 **IT IS FURTHER ORDERED** that Defendants, directly or through any
25 partnership, corporation, subsidiary, division, or other device, and their officers, agents,
26 servants, employees and all persons or entities in active concert or participation with
27 them who receive actual notice of this Order, by personal service or otherwise, in
28 connection with the manufacturing, labeling, advertising, promoting, marketing, offering

1 for sale, sale, or distribution of any products or services, are hereby enjoined from
2 directly or indirectly using billing information to obtain payment in connection with the
3 marketing of any product or service, without the express informed consent of the
4 consumer, which shall include consent to be charged for the product or service using a
5 specified billing account, and the clear and conspicuous disclosure of the information
6 identified in the Section titled "Required Disclosures" in close proximity to the
7 consumer's express consent to purchase such products or services. In connection with an
8 offer or agreement with a negative option feature, the following requirements must be
9 met to evidence express informed consent:

10 A. The consumer's express written or digital authorization to purchase the
11 product or service that is the subject of the transaction and the consumer's authorization
12 to assess a charge against a specified account for payment. Such authorization must
13 include the consumer's signature (the term "signature" includes a verifiable electronic or
14 digital form of signature, to the extent such form of signature is recognized as a valid
15 signature under applicable federal law or state contract law); or

16 B. The consumer's express oral authorization to purchase the product or
17 service that is the subject of the transaction and the consumer's authorization to assess a
18 charge against a specified account for payment that is audio-recorded, as follows:

19 1. The recording must evidence that the consumer, during that
20 transaction, at a minimum, has provided the last four (4) digits of the account number to
21 be charged;

22 2. The recording must evidence that the disclosure requirements of the
23 Section titled "Required Disclosures" have been complied with;

24 3. The recording must include the entirety of the transaction;

25 4. The recording can be identified and located by either the consumer's
26 name or telephone number; and

27 5. A copy of the recording must be provided upon request to the
28 consumer, the consumer's bank, credit or debit card company or other billing entity, state

1 attorney general or consumer protection agency, and the Commission.

2 **VI. RESTRICTIONS ON ELECTRONIC FUND TRANSFERS**

3 **IT IS FURTHER ORDERED** that Defendants, directly or through any
4 partnership, corporation, subsidiary, division, or other device, and their officers, agents,
5 servants, employees and all persons or entities in active concert or participation with
6 them who receive actual notice of this Order, by personal service or otherwise, in
7 connection with any consumer who is enrolled into any plan or program with a negative
8 option feature subsequent to the date of this Order and who uses a debit card or other
9 means of electronic funds transfer, are hereby enjoined from

10 A. Failing to obtain written authorization for preauthorized electronic fund
11 transfers from a consumer's account before initiating any preauthorized electronic fund
12 transfer;

13 B. Failing to maintain procedures reasonably adapted to avoid an
14 unintentional failure to obtain written authorization for a preauthorized electronic fund
15 transfer; and

16 C. Violating any provision of Section 907(a) of the Electronic Fund Transfer
17 Act ("EFTA"), 15 U.S.C. § 1693e(a), or Section 205.10(b) of Regulation E, 12 C.F.R.
18 § 205.10(b), as more fully set out in Section 205.10(b) of the Federal Reserve Board's
19 Official Staff Commentary to Regulation E, 12 C.F.R. § 205, Supp. I, or as they may
20 hereafter be amended.

21 **VII. CANCELLATION REQUESTS AND REFUND PROMISES**

22 **IT IS FURTHER ORDERED** that Defendants, directly or through any
23 partnership, corporation, subsidiary, division, or other device, and their officers, agents,
24 servants, employees and all persons or entities in active concert or participation with
25 them who receive actual notice of this Order, by personal service or otherwise, in
26 connection with the advertising, promoting, offering for sale, or sale of any product or
27 service, are hereby permanently restrained and enjoined from failing to honor any request
28 that complies with any cancellation or refund policy.

1 **VIII. PROCESSING CANCELLATION REQUESTS**

2 **IT IS FURTHER ORDERED** that Defendants, directly or through any
3 partnership, corporation, subsidiary, division, or other device, and their officers, agents,
4 servants, employees and all persons or entities in active concert or participation with
5 them who receive actual notice of this Order, by personal service or otherwise, when
6 providing a telephone number or email address as a means to cancel enrollment or
7 obtain refunds in any plan or program with a negative option feature, shall promptly
8 respond to and process appropriately any consumer's request for cancellation or refunds,
9 including but not limited to by terminating the consumer's enrollment in the plan or
10 program with the negative option feature prior to the next billing cycle.

11 **IX. PROHIBITION ON COLLECTION OF PAYMENTS AND**
12 **DISCLOSURE OF CUSTOMER INFORMATION**

13 **IT IS FURTHER ORDERED** that Defendants, directly or through any
14 partnership, corporation, subsidiary, division or other device, and their officers, agents,
15 servants, employees and all persons or entities in active concert or participation with
16 them who receive actual notice of this Order by personal service or otherwise, in
17 connection with the advertising, promoting, offering for sale, or sale of any product or
18 service by means of a negative option feature, are hereby permanently restrained and
19 enjoined from

20 A. Causing any withdrawal, assessment of a fee, or payment to be made
21 against any consumer account, or otherwise causing collection of, or attempts to collect,
22 payment, directly or indirectly, from a consumer, for any order for any such product or
23 service offered or provided to consumers, where the purported authorization for such
24 order occurred prior to the effective date of this Order, without first obtaining from the
25 consumer express informed consent for such order that complies with the requirements of
26 Section V of this Order; and

27 B. Selling, renting, leasing, transferring or otherwise disclosing, or using or
28 benefitting from customer information, including the name, address, birth date, telephone

1 number, email address, Social Security number, credit or debit card number, bank
2 account number, or other financial or identifying personal information, or any data that
3 enables access to a customer's account (including a credit card, bank account or other
4 financial account), of any person from whom or about whom such information was
5 obtained in connection with the manufacturing, labeling, advertising, promoting,
6 marketing, offering for sale, sale, or distribution of any products or services through the
7 use of a negative option feature, prior to the effective date of this Order; *provided*,
8 *however*, that such financial or identifying personal information may be disclosed to a
9 law enforcement agency or as required by any law, regulation, or court order.

10 X. MONETARY RELIEF

11 IT IS FURTHER ORDERED that Judgment is hereby entered against Defendants,
12 jointly and severally, in the amount of three million four hundred thousand dollars
13 (\$3,400,000); *provided, however*, that this judgment shall be suspended (1) upon the
14 transfer of one hundred forty thousand dollars (\$140,000) to the Commission or its
15 designated agent within ten (10) business days of the entry of this Order by the Court; (2)
16 upon the transfer of an additional one hundred seventy-five thousand dollars (\$175,000)
17 to the Commission or its designated agent within 180 days of the entry of this Order by
18 the Court; and (3) as long as the Court makes no finding, as provided in Section XI of
19 this Order, that any Defendant materially misrepresented or omitted the nature, existence,
20 or value of any asset.

21 A. *Provided* that Defendants shall provide security for such payments in the
22 following form:

23 1. Defendant Kenneth Chan shall provide the Commission with
24 security in the form of a Deed of Trust on the property described in Attachment A hereto,
25 also known as 88 King Street #1208, San Francisco, California;

26 2. Defendant Albert Chen shall provide the Commission with security
27 in the form of Deed of Trust on the property described in Attachment B hereto, also
28 known as 75 Folsom Street #1702, San Francisco, California;

1 *Provided further* that upon payment by the Defendants of the sums set forth
2 above, the Commission shall promptly reconvey said Deeds of Trusts to the respective
3 Defendants.

4 B. Any funds received by the Commission pursuant to this Section X of this
5 Order shall be deposited into a fund administered by the Commission or its agent to be
6 used for equitable relief, including but not limited to consumer redress and any attendant
7 expenses for the administration of any redress funds. In the event that direct redress to
8 consumers is wholly or partially impracticable or funds remain after redress is
9 completed, the Commission may apply any remaining funds for such other equitable
10 relief, including but not limited to consumer information remedies, as the Commission
11 determines to be reasonably related to the practices alleged in the Complaint. Any funds
12 not used for such equitable relief shall be deposited to the U.S. Treasury as equitable
13 disgorgement. Defendants shall have no right to challenge the Commission's choice of
14 remedies or the manner of distribution;

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

22 D. The judgment entered pursuant to this Section X is equitable monetary
23 relief, solely remedial in nature, and not a fine, penalty, punitive assessment or forfeiture;

24 E. Defendants relinquish all dominion, control and title to the funds paid to
25 the fullest extent permitted by law. Defendants shall make no claim to or demand return
26 of the funds, directly or indirectly, through counsel or otherwise;

27 F. Upon request, Defendants are hereby required, in accordance with 31
28 U.S.C. § 7701, to furnish to the Commission their tax identification numbers, which shall

1 be used for purposes of collecting and reporting on any delinquent amount arising out of
2 this Order;

3 G. Pursuant to Section 604(1) of the Fair Credit Reporting Act, 15 U.S.C.
4 § 1681b(1), any consumer reporting agency may furnish a consumer report concerning
5 any Defendant to the Commission, which shall be used for purposes of collecting and
6 reporting on any delinquent amount arising out of this Order.

7 **XI. RIGHT TO REOPEN**

8 **IT IS FURTHER ORDERED** that the Commission's agreement to, and the
9 Court's approval of, this Order are expressly premised on the truthfulness, accuracy and
10 completeness of Defendants' financial statements previously submitted to the
11 Commission: the financial statement of Kenneth Chan, dated March 26, 2009; the
12 financial statement of Albert Chen, dated March 25, 2009; and the financial statement of
13 NextClick Media LLC, dated March 26, 2009. If, upon motion by the Commission, the
14 Court finds that the financial statement listed above of any Defendant contains any
15 material misrepresentation or omission, the suspended judgment entered in Section X,
16 above, shall become immediately due and payable as to that Defendant, less any amounts
17 turned over to the Commission pursuant to Section X, above; *provided, however*, that in
18 all other respects this Order shall remain in full force and effect unless otherwise ordered
19 by the Court; and, *provided further*, that proceedings instituted under this provision
20 would be in addition to, and not in lieu of, any other civil or criminal remedies as may be
21 provided by law, including any other proceedings that the Commission may initiate to
22 enforce this Order. For purposes of this Section XI, Defendants waive any right to
23 contest any of the allegations in the Complaint.

24 **XII. COMPLIANCE MONITORING**

25 **IT IS FURTHER ORDERED** that, for the purpose of (1) monitoring and
26 investigating compliance with any provision of this Order and (2) investigating the
27 accuracy of any Defendant's financial statement upon which the Commission's
28 agreement to this Order is expressly premised,

1 A. Within ten (10) days of receipt of written notice from a representative of
2 the Commission, Defendants each shall submit additional written reports, which are true
3 and accurate and sworn to under penalty of perjury; produce documents for inspection
4 and copying; appear for deposition; and provide entry during normal business hours to
5 any business location in each such Defendant's possession or direct or indirect control to
6 inspect the business operation;

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

9 1. obtaining discovery from any person, without further leave of court,
10 using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, 45 and 69; and

11 2. having its representatives pose as consumers and suppliers to
12 Defendants, their employees, or any other entity managed or controlled in whole or in
13 part by any Defendant, without the necessity of identification or prior notice; and

14 C. Defendants each shall permit representatives of the Commission to
15 interview any employer, consultant, independent contractor, agent or employee who has
16 agreed to such an interview, relating in any way to any conduct subject to this Order.

17 The person interviewed may have counsel present;

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

23 **XIII. COMPLIANCE REPORTING BY DEFENDANTS**

24 **IT IS FURTHER ORDERED** that, in order that compliance with the provisions
25 of this Order may be monitored,

26 A. For a period of three (3) years from the date of entry of this Order,

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

- 1 a. Any changes in such Defendant's residence, mailing
2 addresses, and telephone numbers, within ten (10) days of the
3 date of such change;
- 4 b. Any changes in such Defendant's employment status
5 (including self-employment), and any change in such
6 Defendant's ownership in any business entity, within thirty
7 (30) days of the date of such change. Such notice shall
8 include the name and address of each business that such
9 Defendant is affiliated with, employed by, creates or forms,
10 or performs services for; a detailed description of the nature
11 of the business; and a detailed description of such
12 Defendant's duties and responsibilities in connection with the
13 business or employment; and
- 14 c. Any changes in such Defendant's name or use of any aliases
15 or fictitious names;

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

27 B. One hundred eighty (180) days after the date of entry of this Order, and
28 annually thereafter for a period of three (3) years, Defendants each shall provide a

1 written report to the FTC, which is true and accurate and sworn to under penalty of
2 perjury, setting forth in detail the manner and form in which they have complied and are
3 complying with this Order. This report shall include, but not be limited to,

4 1. For each Individual Defendant:

- 5 a. such Defendant's then-current residence address, mailing
6 addresses, and telephone numbers;
- 7 b. such Defendant's then-current employment status (including
8 self-employment), including the name, addresses, and
9 telephone numbers of each business that such Defendant is
10 affiliated with, employed by, or performs services for; a
11 detailed description of the nature of the business; and a
12 detailed description of such Defendant's duties and
13 responsibilities in connection with the business or
14 employment; and
- 15 c. any other changes required to be reported under Subsection A
16 of this Section.

17 2. For all Defendants:

- 18 a. a copy of each acknowledgment of receipt of this Order,
19 obtained pursuant to the Section titled "Distribution of
20 Order"; and
- 21 b. any other changes required to be reported under Subsection A
22 of this Section.

23 C. Each Defendant shall notify the Commission of the filing of a bankruptcy
24 petition by such Defendant within fifteen (15) days of filing.

25 D. For the purposes of this Order, Defendants shall, unless otherwise directed
26 by the Commission's authorized representatives, send by overnight courier all reports
27 and notifications required by this Order to the Commission, to the following address:
28

1 Associate Director for Enforcement
2 Federal Trade Commission
3 600 Pennsylvania Avenue, N.W., Room NJ-2122
4 Washington, D.C. 20580
5 RE: *FTC v. NextClick Media, LLC*;

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

10 F. For purposes of the compliance reporting and monitoring required by this
11 Order, the Commission is authorized to communicate directly with each Defendant.

12 **XIV. RECORD KEEPING PROVISIONS**

13 **IT IS FURTHER ORDERED** that, for a period of six (6) years from the date of
14 entry of this Order, in connection with the sale or marketing of any covered product or
15 service or of any product or service that is sold or marketed through the use of a negative
16 option feature, Defendants, directly or through any partnership, corporation, subsidiary,
17 division, or other device, and their officers, agents, servants, employees and all persons
18 in active concert or participation with them who receive actual notice of this Order by
19 personal service or otherwise, are hereby restrained and enjoined from failing to create
20 and retain the following records:

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

23 B. Personnel records accurately reflecting: the name, address, and telephone
24 number of each person employed in any capacity by such business, including as an
25 independent contractor; that person's job title or position; the date upon which the person
26 commenced work; and the date and reason for the person's termination, if applicable;

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

1 D. Complaints and refund requests (whether received directly, indirectly, or
2 through any third party) and any responses to those complaints or requests;

3 E. Copies of all sales scripts, training materials, advertisements, or other
4 marketing materials; and

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

10 **XV. DISTRIBUTION OF ORDER**

11 **IT IS FURTHER ORDERED** that, for a period of three (3) years from the date
12 of entry of this Order, Defendants shall deliver copies of the Order as directed below:

13 A. NextClick Media, LLC, must deliver a copy of this Order to (1) all of its
14 principals, officers, directors, and managers; (2) all of its employees, agents, and
15 representatives who engage in conduct related to the subject matter of the Order; and
16 (3) any business entity resulting from any change in structure set forth in Subsection A.2
17 of the Section titled "Compliance Reporting." For current personnel, delivery shall be
18 within five (5) days of service of this Order upon such Defendant. For new personnel,
19 delivery shall occur prior to them assuming their responsibilities. For any business entity
20 resulting from any change in structure set forth in Subsection A.2 of the Section titled
21 "Compliance Reporting," delivery shall be at least ten (10) days prior to the change in
22 structure.

23 B. For any business that an Individual Defendant controls, directly or
24 indirectly, or in which such Defendant has a majority ownership interest, such Defendant
25 must deliver a copy of this Order to (1) all principals, officers, directors, and managers of
26 that business; (2) all employees, agents, and representatives of that business who engage
27 in conduct related to the subject matter of the Order; and (3) any business entity resulting
28 from any change in structure set forth in Subsection A.2 of the Section titled

1 "Compliance Reporting." For current personnel, delivery shall be within five (5) days of
2 service of this Order upon such Defendant. For new personnel, delivery shall occur prior
3 to them assuming their responsibilities. For any business entity resulting from any
4 change in structure set forth in Subsection A.2 of the Section titled "Compliance
5 Reporting," delivery shall be at least ten (10) days prior to the change in structure.

6 C. For any business where an Individual Defendant is not a controlling person
7 of a business but otherwise engages in conduct related to the subject matter of this Order,
8 such Defendant must deliver a copy of this Order to all principals and managers of such
9 business before engaging in such conduct.

10 D. Defendants must secure a signed and dated statement acknowledging
11 receipt of the Order, within thirty (30) days of delivery, from all persons receiving a copy
12 of the Order pursuant to this Section XV.

13 **XVI. ACKNOWLEDGMENT OF RECEIPT OF ORDER**

14 **IT IS FURTHER ORDERED** that each Defendant, within five (5) business days
15 of receipt of this Order as entered by the Court, must submit to the Commission a truthful
16 sworn statement acknowledging receipt of this Order.

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XVII. 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.

Dated: 8-26-09

Albert Chen
NEXTCLICK MEDIA, LLC
By: Albert Chen, President

Dated: 8-26-09

Kenneth Chan
KENNETH CHAN

Dated: 8-26-09

Albert Chen
ALBERT CHEN

Dated: August 27, 2009

D. Reed Freeman
D. REED FREEMAN
MICHAEL C. LYNCH
KELLEY DRYE & WARREN
ATTORNEY FOR DEFENDANTS

Dated: 10-23-09

Janice L. Charter
JANICE L. CHARTER
DAVID M. NEWMAN
THOMAS N. DAHDOUH
ATTORNEYS FOR PLAINTIFF

PURSUANT TO STIPULATION, IT IS SO ORDERED

Dated: November 3, 2009

Vaughn R. Walker
VAUGHN R. WALKER
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
IT IS SO ORDERED
Vaughn R. Walker
Judge Vaughn R Walker