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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

13 FEDERAL TRADE COMMISSION,

14 Plaintiff,

15 v.

16 SWISH MARKETING, INC.,
a corporation, *et al.*,

17 Defendants.

Case No. C09-03814-RS

Hearing Date: May 26, 2011
Hearing Time: 1:30 p.m.
Courtroom: 3, 17th Floor

**PLAINTIFF'S REPLY TO
DEFENDANT SWISH
MARKETING, INC.'S
NOTICE OF CONDITIONAL
NON-OPPOSITION TO
MOTION FOR SUMMARY
JUDGMENT**

22 **I. INTRODUCTION**

23 In response to the Motion for Summary Judgment (Dkt. #144) ("Motion")
24 filed by Plaintiff Federal Trade Commission ("FTC" or "Commission"), Defendant
25 Swish Marketing, Inc. ("Swish") has filed a Notice of Conditional Non-Opposition
26 (Dkt. #148) ("Notice"), pursuant to Local Rule 7-3(b). What is most significant
27 about the Notice is that Swish does not oppose the central aspects of the FTC's
28 Motion. Swish does not oppose, among other things, its liability for violating

1 Section 5 of the FTC Act as alleged in the FTC’s First Amended Complaint or the
2 amount of injury that resulted from such violations. Moreover, Swish does not
3 oppose the substantive conduct or monetary judgment provisions set forth in the
4 FTC’s Proposed Final Judgment and Order as to Swish (Dkt. #143-1) (“Order”).
5 Rather, Swish challenges only a handful of provisions that seek to ensure Swish’s
6 compliance with those substantive provisions. Accordingly, this Court should
7 grant the FTC’s motion for summary judgment against Swish and enter – at a
8 minimum – the uncontested provisions of the Order. Moreover, as set forth below,
9 the challenged provisions are necessary to accomplish complete justice in this
10 matter – regardless of Swish’s purported plans to dissolve – and fall well within
11 this Court’s authority. As such, the FTC respectfully requests this Court to enter
12 the Order as proposed, including the challenged provisions.

13 **II. ARGUMENT**

14 At issue in Swish’s Notice are five requirements that seek to ensure that
15 Swish complies with the substantive provisions of the Order. Section VIII requires
16 Swish to facilitate and cooperate with FTC efforts to monitor its compliance with
17 the substantive provisions of the Order. (Order § VIII) Section IX requires Swish
18 to submit compliance reports. (*Id.* § IX) Section X requires Swish to create and
19 maintain certain records documenting its compliance. (*Id.* § X) Section XI
20 requires Swish to distribute the order to, in essence, its principals, employees, and
21 successor business entities. (*Id.* § XI) Section XII requires Swish to acknowledge
22 its receipt of the order. (*Id.* § XII) These requirements (hereinafter referred to as
23 the “Compliance Provisions”) are well within this Court’s authority and each is
24 necessary to ensure a just outcome here.

25 **A. This Court has authority to order the Compliance Provisions.**

26 Swish’s unsubstantiated assertion that this Court lacks the authority to order
27 the Compliance Provisions because they are “mandatory” injunctions is without
28 merit. (*See* Notice at 2) It is well settled that Section 13(b) of the FTC Act, 15

1 U.S.C. § 53(b), provides a federal district court with authority to grant permanent
2 injunctions and other equitable relief for violations of the FTC Act. *FTC v.*
3 *Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994) (citing *FTC v. H.N. Singer,*
4 *Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982)). The term “injunction” encompasses
5 orders commanding or preventing an action, *i.e.*, both mandatory and prohibitory
6 injunctions. *Black’s Law Dictionary* 800 (8th ed. 2004); *see Gilmore v. California,*
7 220 F.3d 987, 1001 (9th Cir. 2000) (“[W]hen a decree commands or prohibits
8 conduct, it is called an injunction.”) (quoting *Gates v. Shinn*, 98 F.3d 463, 468 (9th
9 Cir. 1996)).

10 In cases brought by the Commission, courts routinely grant mandatory
11 permanent injunctions, including the very requirements that Swish now challenges.
12 *See, e.g., FTC v. Network Svcs. Depot, Inc.*, No. 2:05cv00440 LDG LRL, Dkt.
13 #236 (D. Nev. Mar. 5, 2009) (final order requiring defendants to respond to written
14 requests, to submit compliance reports, to create and maintain records, to distribute
15 the order, and to acknowledge receipt of the order), *aff’d*, 617 F.3d 1127 (9th Cir.
16 2010); *FTC v. Stefanchik*, No. 2:04-cv-01852-RSM, Dkt. #144 (W.D. Wash. Apr.
17 3, 2007) (same), *aff’d*, 559 F.3d 924 (9th Cir. 2009); *FTC v. Gill*, 71 F. Supp. 2d
18 1030, 1051–52 (C.D. Cal. 1999) (ordering defendants, *inter alia*, to submit
19 compliance reports, to acknowledge receipt of the order, and to notify all their
20 clients that their contracts were rescinded), *aff’d*, 265 F.3d 944 (9th Cir. 2001); *see*
21 *also FTC v. Inc21.com*, 2010 U.S. Dist. LEXIS 98944, at *85–88 (N.D. Cal. Sept.
22 21, 2010) (district court order requiring provisions analogous to those challenged
23 here); *FTC v. Medlab, Inc.*, No. C-08-00822 SI, Dkt. #83 (N.D. Cal. June 26,
24 2009) (same); *FTC v. Medicor, LLC*, 2002 U.S. Dist. LEXIS 16220, at *6–14,
25 2002-2 Trade Cas. (CCH) ¶ 73,759 (C.D. Cal. July 18, 2002) (same); *FTC v. J.K.*
26 *Publ’ns, Inc.*, 2000 U.S. Dist. LEXIS 14688, at *15–27, 2000-2 Trade Cas. (CCH)
27 ¶ 73,027 (C.D. Cal. 2000) (same).

1 **B. The Compliance Provisions are necessary to ensure Swish’s**
2 **ongoing compliance.**

3 As a preliminary matter, Swish has submitted no evidence to substantiate its
4 assertion that it plans to dissolve. (*See* Notice at 2) The Compliance Provisions
5 are necessary to secure Swish’s compliance with the substantive Order
6 requirements in the event it does not in fact dissolve.

7 The Compliance Provisions are also necessary to secure compliance even if
8 Swish does dissolve. Pursuant to the definition of “Defendant” in the Order, the
9 Compliance Provisions – as with all of the provisions in the Order – apply to Swish
10 as well as to its successors and assigns. Thus, even if Swish were to permanently
11 dissolve, maintaining the Order Provisions as drafted would enable the FTC to
12 monitor compliance by Swish’s successors and assigns. Likewise, maintaining the
13 Compliance Provisions as proposed also would ensure that Swish cannot evade
14 having to adhere to the Compliance Provisions by dissolving only temporarily and
15 then reinstating its corporate status.

16 In its Notice, Swish raised the argument that the Compliance Provisions
17 would obligate it to “remain in business.” (Notice at 2) This argument is not
18 persuasive. With few necessary exceptions, the provisions require Swish to take
19 action only to the extent it is still in business. The impact of these requirements on
20 Swish is described below.

21 Section VIII requires Swish to facilitate and cooperate with FTC efforts to
22 monitor its compliance with the Order. (Order § VIII) This section provides the
23 tools necessary for the FTC to ensure that Swish, its successors, and assigns adhere
24 to the requirements of the Order. If Swish were no longer actively in business, this
25 provision would require minimal – if any– effort.

26 Section IX requires Swish to submit compliance reports. (*Id.* § IX) It
27 explicitly contemplates the possibility of a dissolution, requiring Swish to “notify
28 the Commission of any changes in structure of Defendant or any business entity

1 that Defendant directly or indirectly controls, or has an ownership interest in, that
2 may affect compliance obligations arising under this Order, including but not
3 limited to: incorporation or other organization; a dissolution, assignment, sale,
4 merger, or other action.” (*Id.* § IX.A) Indeed, absent this provision, Swish would
5 not be required to inform the FTC of its dissolution, whether it happens now or in
6 the future.

7 Section X requires Swish to create and maintain certain records
8 documenting its compliance. (*Id.* § X) This section contemplates only the types of
9 records generated by an on-going concern, such as accounting, personnel, and
10 marketing records. To the extent that Swish is not in business, these requirements
11 would be moot. Arguably, this section would require the maintenance of certain
12 records already in existence, but this task presumably could be accomplished
13 without Swish having to remain in business.

14 Section XI, which requires distribution of the Order to, in essence, Swish’s
15 principals, employees, and successor business entities (*id.* § XI), would be moot if
16 Swish or its successors and assigns no longer had principals or employees. If
17 Swish did have successor business entities, it would be important that such entities
18 received actual notice of the Order.

19 Finally, Section XII requires Swish to acknowledge its receipt of the Order.
20 (*Id.* § XII) This provision is important to facilitate the enforceability of the Order
21 going forward.

22 Accordingly, Swish’s argument that the Compliance Provisions should be
23 removed from the Order because they obligate Swish to remain in business just so
24 that it may comply with them (*see* Notice at 2) is not persuasive. These
25 requirements place only a negligible burden on Swish if it carries out its plans to
26 dissolve and are necessary to ensure meaningful compliance going forward.

1 **III. CONCLUSION**

2 For the reasons stated above, the FTC respectfully requests this Court to
3 enter the Order against Swish as proposed.

4
5 Respectfully submitted,

6
7 DATED: April 13, 2011

8 /s/ Lisa D. Rosenthal
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