

1 DAVID C. SHONKA
Acting General Counsel

2
3 KENNETH H. ABBE
Cal. Bar No. 172416; kabbe@ftc.gov
10877 Wilshire Blvd., Suite 700
4 Los Angeles, CA 90024
5 Tel: (310) 824-4343; Fax: (310) 824-4380

6 SARAH E. SCHROEDER
Cal. Bar No. 221528; sschroeder@ftc.gov
7 EMILY COPE BURTON
Cal. Bar No. 221127; eburton@ftc.gov
8 901 Market Street, Suite 570
San Francisco, CA 94103
9 Tel: (415) 848-5100; Fax: (415) 848-5184

10 Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

11
12 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

13
14 FEDERAL TRADE COMMISSION,

15 Plaintiff,

16
17 v.

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

21 Defendant.
22

Case No. _____

**COMPLAINT FOR
PERMANENT INJUNCTION
AND OTHER EQUITABLE
RELIEF**

23 Plaintiff, the Federal Trade Commission (“FTC”), for its Complaint alleges:

24 1. The FTC brings this action under Section 13(b) of the Federal
25 Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 53(b), and Section 5 of the
26 Restore Online Shoppers’ Confidence Act (“ROSCA”), 15 U.S.C. § 8404, to
27 obtain permanent injunctive relief, restitution, the refund of monies paid,
28 disgorgement of ill-gotten monies, and other equitable relief for Defendant’s acts

1 or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and in
2 violation of Section 4 of ROSCA, 15 U.S.C. § 8403.

3 **JURISDICTION AND VENUE**

4 2. This Court has subject matter jurisdiction pursuant to 28 U.S.C.
5 §§ 1331, 1337(a), and 1345; 15 U.S.C. §§ 45(a) and 53(b); and Section 5(a) of
6 ROSCA, 15 U.S.C. § 8404(a).

7 3. Venue is proper in this district under 28 U.S.C. §§ 1391(b)(2) and
8 (b)(3), and 15 U.S.C. § 53(b).

9 **PLAINTIFF**

10 4. The FTC is an independent agency of the United States Government
11 created by statute. 15 U.S.C. §§ 41–58. The FTC enforces Section 5(a) of the
12 FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in
13 or affecting commerce. The FTC also enforces ROSCA, 15 U.S.C. §§ 8401 *et*
14 *seq.*, which prohibits certain methods of negative option marketing on the Internet.

15 5. The FTC is authorized to initiate federal district court proceedings, by
16 its own attorneys, to enjoin violations of the FTC Act and ROSCA, and to secure
17 such equitable relief as may be appropriate in each case, including rescission or
18 reformation of contracts, restitution, the refund of monies paid, and the
19 disgorgement of ill-gotten monies. 15 U.S.C. §§ 53(b), 56(a)(2)(A), 56(a)(2)(B),
20 and 8404.

21 **DEFENDANT**

22 6. Defendant NutraClick, LLC (“NutraClick”) is a Delaware limited
23 liability company with its principal place of business at 24 School Street, 4th Floor,
24 Boston, MA, 02108. NutraClick was formerly known as Hungry Fish Media,
25 LLC. NutraClick transacts or has transacted business in this district and
26 throughout the United States.

1 **COMMERCE**

2 7. At all times material to this Complaint, Defendant has maintained a
3 substantial course of trade in or affecting commerce, as “commerce” is defined in
4 Section 4 of the FTC Act, 15 U.S.C. § 44.

5 **DEFENDANT’S BUSINESS ACTIVITIES**

6 8. Since 2009, Defendant has used tactics that violate the FTC Act and
7 ROSCA to enroll consumers in membership programs for its nutritional
8 supplements and beauty products.

9 9. On its websites, Defendant purports to offer consumers “free” product
10 samples, but fails to disclose, or fails to disclose adequately, that by ordering a
11 sample consumers are enrolled in Defendant’s membership program and will incur
12 a monthly fee until they call Defendant to cancel their membership. The recurring
13 membership fee ranges from \$29.99 to \$79.99 depending on the product.
14 Consumers must cancel their membership within a 18-day trial period to avoid
15 future charges. Although Defendant’s websites contain statements about the
16 recurring charge, those statements are not clear and conspicuous. Accordingly,
17 many consumers are led to believe that Defendant offers consumers “free” product
18 samples with no further payment obligation.

19 10. Defendant has caused tens of millions of dollars in injury to
20 consumers through the sale of its membership programs. At least 70,000
21 consumers have complained about Defendant’s business practices to their bank,
22 credit card company, a law enforcement agency, or the Better Business Bureau.

23 **Defendant’s Products**

24 11. Defendant sells a range of nutritional supplements and beauty
25 products, including Force Factor, Peak Life, ProBioSlim, SomnaPure, VolcaNO,
26 and Stages of Beauty. Defendant sells its products directly to consumers through
27 its websites and in brick-and-mortar retail stores such as Walgreens, Walmart,
28 CVS, and GNC.

1 The page states, in bold and italics, “FREE SAMPLE, PAY ONLY SHIPPING
2 AND HANDLING,” or similar language.

3 18. Step 3 – “Complete Your Sample Order”: Consumers who enter their
4 information on the Shipment Page are directed to a page requesting their credit
5 card information (“Payments Page”). The top of the page states, in large type,
6 “YOU’RE ALMOST DONE [consumer’s name] Just pay for shipping and
7 handling below,” “Pay For S & H Below,” or similar language. The right side of
8 the page contains a box that has fields for consumers to enter their credit card
9 information. The left side of page contains photos of Defendant’s products and a
10 dense paragraph of terms and conditions. Many consumers provided their credit
11 card information to Defendant on the mistaken belief that Defendant would charge
12 them only \$2.99 to \$4.99 for shipping and handling for a free sample.

13 19. In numerous instances, consumers did not know they had been
14 enrolled in Defendant’s membership program until they discovered a charge on
15 their credit card statement. Some consumers did not notice the recurring charge
16 for several billing cycles.

17 Defendant’s Purported Disclosures

18 20. Defendant’s websites have contained purported disclosures about
19 recurring charges associated with its membership programs, none of which are
20 clear and conspicuous. Defendant’s websites feature a small gray bar at the
21 bottom of certain webpages that contains hyperlinks titled “Terms,” “Refund and
22 Return Policy,” “Privacy Policy,” “Copyright Info,” and “Contact Us.” A pop-up
23 box appears describing the membership program and recurring monthly fees only
24 when a consumer affirmatively clicks on the “Terms” hyperlink. The Defendant’s
25 online sign-up flow does not require consumers to click on this link in order to
26 place an order.

27 21. Defendant’s second purported disclosure is on the Payments Page.
28 (*see* Exhibit A). The left-hand side of the Payment Page contains graphics

1 showing Defendant’s products, security firm logos, information about product
2 availability in stores, and a box for consumers to enter their credit card
3 information. The lower left-hand portion of the page also features a long
4 paragraph in small type that describes Defendant’s “Terms & Conditions.”
5 Approximately half-way through the terms and conditions paragraph Defendant
6 describes the recurring charge and cancellation process. The terms and conditions
7 paragraph is in small print and away from the credit card field. Consumers’ eyes
8 are not drawn to the dense type, but instead to the credit card field and large button
9 below the credit card field that states, “RUSH MY SAMPLE.”

10 22. In fall 2015, Defendant added two purported disclosures to the
11 Payments Page. First, it included language near the top of the Payments Page that
12 describes the recurring monthly charge and cancellation methods. However, this
13 disclosure is next to a large seal that states “Money-Back Guarantee.” The first
14 two sentences of the disclosure relate to shipping and product satisfaction, not the
15 recurring charge. The second disclosure Defendant added is a checkbox below the
16 payment information that states “I understand and agree to the terms and
17 conditions to the left.” However, the check box does not contain any information
18 about the recurring charge. Consumers who called Defendant’s customer service
19 center to cancel their membership told Defendant’s agents that they did not see the
20 new disclosures and did not know they were enrolled in a monthly membership
21 program. Exhibit B is materially similar to the Payments Page that consumers saw
22 after fall 2015.

23 **VIOLATIONS OF THE FTC ACT**

24 23. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits “unfair or
25 deceptive acts or practices in or affecting commerce.”

26 24. Misrepresentations or deceptive omissions of material fact constitute
27 deceptive acts or practices prohibited by Section 5(a) of the FTC Act.
28

Count 1

Failure to Adequately Disclose Automatic Renewal Terms

25. Through the means described in Paragraphs 12 to 22 above, Defendant has represented, expressly or by implication, that consumers could obtain free samples of its products for a nominal shipping and handling fee.

26. In numerous instances in which Defendant has made the representation set forth in Paragraph 25, above, Defendant has failed to disclose, or failed to disclose adequately, to consumers the material terms and conditions related to the offer, including:

- a. That Defendant would automatically enroll consumers in a negative option continuity plan with additional charges;
- b. That consumers must affirmatively cancel the negative option continuity plan before the end of a trial period to avoid additional charges;
- c. That Defendant would use consumers' credit card information to charge consumers monthly for the negative option continuity plan;
- d. The costs associated with the negative option continuity plan; and
- e. The means consumers must use to cancel the negative option continuity plan to avoid additional charges.

27. Defendant's failure to disclose, or disclose adequately, the material information described in Paragraph 26, above, in light of the representation described in Paragraph 25, above, constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

1 **VIOLATIONS OF THE RESTORE ONLINE SHOPPERS'**
2 **CONFIDENCE ACT**

3 28. In 2010, Congress passed the Restore Online Shoppers' Confidence
4 Act, 15 U.S.C. §§ 8401 *et seq.*, which became effective on December 29, 2010.
5 Congress passed ROSCA because “[c]onsumer confidence is essential to the
6 growth of online commerce. To continue its development as a marketplace, the
7 Internet must provide consumers with clear, accurate information and give sellers
8 an opportunity to fairly compete with one another for consumers' business.”
9 Section 2 of ROSCA, 15 U.S.C. § 8401.

10 29. Section 4 of ROSCA, 15 U.S.C. § 8403, generally prohibits charging
11 consumers for goods or services sold in transactions effected on the Internet
12 through a negative option feature, as that term is defined in the Commission's
13 Telemarketing Sales Rule (“TSR”), 16 C.F.R. § 310.2(w), unless the seller (1)
14 clearly and conspicuously discloses all material terms of the transaction before
15 obtaining the consumer's billing information, (2) obtains the consumer's express
16 informed consent before making the charge, and (3) provides a simple mechanism
17 to stop recurring charges. *See* 15 U.S.C. § 8403.

18 30. The TSR defines a negative option feature as: “in an offer or
19 agreement to sell or provide any goods or services, a provision under which the
20 consumer's silence or failure to take an affirmative action to reject goods or
21 services or to cancel the agreement is interpreted by the seller as acceptance of the
22 offer.” 16 C.F.R. § 310.2(w).

23 31. As described in Paragraphs 12 to 22 above, Defendant has advertised
24 and sold Defendant's membership program to consumers through a negative option
25 feature as defined by the TSR. *See* 16 C.F.R. § 310.2(w).

26 32. Pursuant to Section 5 of ROSCA, 15 U.S.C. § 8404, a violation of
27 ROSCA is a violation of a rule promulgated under Section 18 of the FTC Act, 15
28 U.S.C. § 57a.

1 **Count 2**

2 **Failure to Disclose All Material Terms**

3 33. In numerous instances, Defendant has charged or attempted to charge
4 consumers for Defendant's membership program through a negative option feature
5 while failing to clearly and conspicuously disclose all material terms of the
6 transaction before obtaining consumers' billing information.

7 34. Defendant's acts or practices, as described in Paragraph 33, above,
8 constitute a violation of Section 4(1) of ROSCA, 15 U.S.C. § 8403(1), and are
9 therefore a violation of a rule promulgated under Section 18 of the FTC Act, 15
10 U.S.C. § 57a.

11 **Count 3**

12 **Failure to Obtain Consumers' Express Informed Consent**

13 35. In numerous instances, Defendant has charged or attempted to charge
14 consumers for Defendant's membership program through a negative option feature
15 while failing to obtain consumers' express informed consent before charging their
16 credit card, debit card, bank account, or other financial account for Defendant's
17 membership program.

18 36. Defendant's acts or practices, as described in Paragraph 35, above,
19 constitute a violation of Section 4(2) of ROSCA, 15 U.S.C. § 8403(2), and are
20 therefore a violation of a rule promulgated under Section 18 of the FTC Act, 15
21 U.S.C. § 57a.

22 **CONSUMER INJURY**

23 37. Consumers have suffered and will continue to suffer substantial injury
24 as a result of Defendant's violations of the FTC Act and ROSCA. In addition,
25 Defendant has been unjustly enriched as a result of its unlawful acts or practices.
26 Absent injunctive relief by this Court, Defendant is likely to continue to injure
27 consumers, reap unjust enrichment, and harm the public interest.

THIS COURT’S POWER TO GRANT RELIEF

38. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and such other relief as the Court may deem appropriate to halt and redress violations of any provision of law enforced by the FTC. The Court, in the exercise of its equitable jurisdiction, may award ancillary relief, including restitution, the refund of monies paid, and the disgorgement of ill-gotten monies, to prevent and remedy any violation of any provision of law enforced by the FTC.

PRAYER FOR RELIEF

Wherefore, Plaintiff FTC, pursuant to Sections 13(b) of the FTC Act, 15 U.S.C. § 53(b), and Section 5 of ROSCA, 15 U.S.C. § 8404, and the Court’s own equitable powers, requests that the Court:

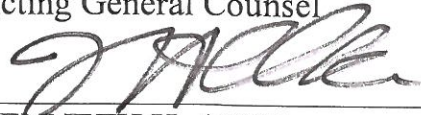
A. Enter a permanent injunction to prevent future violations of the FTC Act and ROSCA by Defendant;

B. Award such relief as the Court finds necessary to redress injury to consumers resulting from Defendant’s violations of the FTC Act and ROSCA, including but not limited to restitution, the refund of monies paid, and the disgorgement of ill-gotten monies; and

C. Award Plaintiffs the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

Respectfully submitted,

DAVID C. SHONKA
Acting General Counsel



KENNETH H. ABBE
SARAH E. SCHROEDER
EMILY COPE BURTON
Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

Dated: Sept. 12, 2016