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1 WILLARD K. TOM  
 General Counsel  
 2  
 3 LISA D. ROSENTHAL, Bar # 179486  
 KERRY O'BRIEN, Bar # 149264  
 EVAN ROSE, Bar # 253478  
 4 ERIC EDMONDSON, D.C. Bar # 450294  
 Federal Trade Commission  
 5 901 Market Street, Ste. 570  
 San Francisco, CA 94103  
 6 (415) 848-5100 (voice)  
 (415) 848-5184 (fax)  
 7 lrosenthal@ftc.gov  
 kobrien@ftc.gov  
 8 erose@ftc.gov  
 eedmondson@ftc.gov  
 9  
 10 Attorneys for Plaintiff  
 Federal Trade Commission

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 12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA  
 14 SAN JOSE DIVISION  
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16 FEDERAL TRADE COMMISSION,

17 Plaintiff,

18 v.

19 SWISH MARKETING, INC., a corporation,

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

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

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

26 Defendants.  
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Case No. C09-03814 RS

**[PROPOSED] STIPULATED  
 FINAL JUDGMENT AND ORDER  
 FOR PERMANENT INJUNCTION  
 AND OTHER EQUITABLE  
 RELIEF AS TO DEFENDANT  
 MARK BENNING**

**Stipulated Final Judgment and Order: Benning - C09-03814 RS**

1 Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), has filed a First  
2 Amended Complaint for Injunctive and Other Equitable Relief (“Complaint”) against the  
3 defendants in this matter pursuant to Sections 5 and 13(b) of the Federal Trade Commission Act  
4 (“FTC Act”), 15 U.S.C. §§ 45(a), 53(b). The FTC and Defendant Mark Benning (“Defendant”),  
5 by and through his counsel, have agreed to settlement of this action without adjudication of any  
6 issue of fact or law, and without Defendant admitting any of the non-jurisdictional facts alleged  
7 in the Complaint or liability for any of the violations alleged in the Complaint. To resolve all  
8 matters of dispute between them in this action, the FTC and Defendant hereby stipulate to the  
9 entry of, and request the Court to enter, this Stipulated Final Judgment and Order for Permanent  
10 Injunction and Other Equitable Relief (“Order”).

11 **IT IS THEREFORE STIPULATED, AGREED, AND ORDERED as follows:**

12 1. This Court has jurisdiction over the subject matter of this case and jurisdiction  
13 over all parties pursuant to 15 U.S.C. §§ 45(a) and 53(b), and 28 U.S.C. §§ 1331, 1337(a), and  
14 1345;

15 2. Venue in the Northern District of California is proper under 15 U.S.C. § 53(b)  
16 and 28 U.S.C. § 1391(b) and (c);

17 3. The acts and practices of Defendant were and are in or affecting commerce, as  
18 defined in Section 4 of the FTC Act, 15 U.S.C. § 44;

19 4. The Complaint states a claim upon which relief can be granted under Section 5(a)  
20 of the FTC Act, 15 U.S.C. § 45(a), and the Commission has the authority to seek the relief it has  
21 requested;

22 5. Defendant has entered into this Order freely and without coercion, and Defendant  
23 acknowledges that he has read the provisions of this Order and is prepared to abide by them;

24 6. The undersigned, individually and by and through their counsel, have agreed that  
25 the entry of this Order resolves all matters of dispute between them arising from the Complaint  
26 in this action, up to the date of entry of this Order;

27 7. Defendant waives all rights to seek judicial review or otherwise challenge or  
28 contest the validity of this Order. Defendant also waives any claims that he may have held under

1 the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action to  
2 the date of this Order;

3 8. Pursuant to Federal Rule of Civil Procedure 65(d), the provisions of this Order are  
4 binding upon Defendant, and his officers, agents, servants, employees, attorneys, and all other  
5 persons or entities in active concert or participation with him, who receive actual notice of this  
6 Order by personal service or otherwise;

7 9. This Order is remedial in nature and shall not be deemed or construed as a fine,  
8 damages, penalty, or punitive assessment;

9 10. Each party shall bear its own costs and attorneys' fees; and

10 11. Entry of this Order is in the public interest.

### 11 **ORDER**

#### 12 **DEFINITIONS**

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

14 A. **“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 B. **“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 C. **“Defendant”** means Mark Benning.

20 D. **“Marketing Affiliate”** means any third party with which Defendant, or any business for  
21 which Defendant is a majority owner, officer, or director, or which Defendant directly or  
22 indirectly controls, has an agreement under which:

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

26 2. The Marketing Affiliate agrees to pay a commission or other compensation to  
27 Defendant or such business because Defendant or such business has driven or  
28 referred customers or potential customers to the Marketing Affiliate.

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

5 E. **“Material”** means likely to affect a person’s choice of, or conduct regarding, goods or  
6 services.

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

10 **I.**

11 **PROHIBITION AGAINST MAKING MISREPRESENTATIONS**

12 **IT IS THEREFORE ORDERED** that Defendant, and his officers, agents, servants,  
13 employees, and attorneys, and those persons in active concert or participation with him who  
14 receive actual notice of this Order by personal service or otherwise, whether acting directly or  
15 through any sole proprietorship, partnership, limited liability company, corporation, subsidiary,  
16 branch, division, Marketing Affiliate, or other entity, in connection with the advertising,  
17 promoting, offering for sale, or sale of any Payment Card, loan, any financial product or service,  
18 or any other product or service, are hereby permanently restrained and enjoined from:

19 A. Misrepresenting, or assisting others in misrepresenting, expressly or by implication,

- 20 1. That such product or service is a bonus, free, a gift, or without cost;  
21 2. The cost or price of such product or service;  
22 3. The consequences of submitting an application for any such product or service;  
23 4. The method by which a consumer will be assessed a fee, charge, debit, or bill; and  
24 5. Any other material fact; and

25 B. Representing, in any manner, expressly or by implication, that such product or service is  
26 a bonus, free, a gift, or without cost, without disclosing clearly and conspicuously, and in  
27 close proximity to the representation, all material terms, conditions, and obligations  
28 relating to the receipt and retention of such product or service.

1 **II.**

2 **EXPRESS INFORMED CONSENT**

3 **IT IS FURTHER ORDERED** that Defendant, and his officers, agents, servants,  
4 employees, and attorneys, and those persons in active concert or participation with him 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 enjoined from directly or indirectly using billing  
10 information to obtain payment from a consumer, unless, prior to using such billing information  
11 to obtain payment:

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

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1 **III.**

2 **MONITORING BY DEFENDANT**  
3 **OF HIS MARKETING AFFILIATES**

4 **IT IS FURTHER ORDERED** that Defendant, and his officers, agents, servants,  
5 employees, and attorneys, whether acting directly or through any sole proprietorship,  
6 partnership, limited liability company, corporation, subsidiary, branch, division, Marketing  
7 Affiliate, or other entity, in connection with the advertising, promoting, offering for sale, or sale  
8 of any Payment Card, loan, or any financial product or service, shall take reasonable steps  
9 sufficient to monitor and ensure that Defendant's Marketing Affiliates comply with the  
10 requirements of Sections I and II of this Order. Such steps shall include, at a minimum:

- 11 A. Prior to accepting any prospective Marketing Affiliate, Defendant shall:
- 12 1. Provide the Marketing Affiliate with a copy of this Order;
  - 13 2. Obtain a signed and dated acknowledgment from such Marketing Affiliate in  
14 which the Marketing Affiliate:
    - 15 a. Acknowledges receipt of this Order;
    - 16 b. Expressly agrees to distribute a copy of the Order to the Marketing  
17 Affiliate's owners, managers, and division heads; and
    - 18 c. Expressly agrees to comply with the terms of Sections I and II; and
  - 19 3. Provide written notice to such Marketing Affiliate that failing to comply with the  
20 terms of Sections I and II will result in immediate termination of Defendant's  
21 agreement with the Marketing Affiliate;
- 22 B. Within thirty (30) days of service of this Order upon Defendant, Defendant shall:
- 23 1. Provide any existing Marketing Affiliate with a copy of this Order;
  - 24 2. Obtain a signed and dated acknowledgment from such Marketing Affiliate in  
25 which the Marketing Affiliate:
    - 26 a. Acknowledges receipt of this Order;
    - 27 b. Expressly agrees to distribute a copy of the Order to the Marketing  
28 Affiliate's owners, managers, and division heads; and

- 1 c. Expressly agrees to comply with the terms of Sections I and II; and  
2 3. Provide written notice to each existing Marketing Affiliate that failing to comply  
3 with the terms of Sections I and II will result in immediate termination of  
4 Defendant's agreement with the Marketing Affiliate and the forfeiture of all  
5 monies earned or owed;

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

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

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

14 **IV.**

15 **MONETARY JUDGMENT AND CONSUMER RESTITUTION**

16 **IT IS FURTHER ORDERED** that:

- 17 A. Judgment is hereby entered in favor of the Commission and against Defendant for  
18 equitable monetary relief, including but not limited to consumer redress, in the amount of  
19 five million, two hundred six thousand, eight hundred seventy-two dollars (\$5,206,872),  
20 which is the total amount of consumer injury caused by the activities alleged in the  
21 Complaint reduced by the amount already paid by other defendants; **provided, however**,  
22 that, until further Order of the Court pursuant to the Section titled "Right to Re-open as to  
23 Monetary Judgment," this judgment shall be suspended upon the disposition of his real  
24 property in accordance with Subsection B of this Section.
- 25 B. Prior to July 15, 2011, Defendant shall sell the property at 1545 Laurel Place, Menlo  
26 Park, California 94025; Parcel ID 061-390-060; with a legal description of Lot 14 Laurel  
27 Manor RSM 32/19 City of Menlo Park ("Laurel Place Property"), upon terms and  
28 conditions acceptable to the FTC. Defendant shall not further encumber the Laurel Place



1 Property beyond the current balances (approximately \$332,000 and \$200,000) of the two  
2 loans identified in the Financial Statement of Individual Defendant Mark Benning signed  
3 on September 1, 2010. Defendant shall promptly comply with all reasonable requests  
4 from the FTC related to that sale, including but not limited to signing listing contracts  
5 with real estate agents, keeping the property in good repair, keeping the property in a  
6 condition suitable for showing to prospective purchasers, signing contracts for the sale of  
7 the property, and signing all documents necessary or appropriate for the transfer of the  
8 property to a new buyer. Upon the sale of the property, all net proceeds shall be paid to  
9 the FTC within ten (10) days of the sale. Any sheriff, title company, or other person  
10 involved in such a sale may rely on this Order as authority to deliver the net proceeds to  
11 the FTC. If the Laurel Place Property has not sold prior to July 15, 2011, Defendant shall  
12 comply promptly with written instructions from the Assistant Director of the Western  
13 Region-San Francisco of the FTC concerning disposition of the property, which may  
14 include transferring the property to a receiver for disposition, transferring the property to  
15 one or more mortgagors or lienholders, or allowing the FTC to place a judgment lien on  
16 the property.

17 C. All funds paid to or received by the Commission pursuant to this Section shall be  
18 deposited into a fund administered by the Commission or its agent. In the event that  
19 direct restitution to consumers is wholly or partially impracticable or funds remain after  
20 restitution is completed, the Commission may apply any remaining funds for such other  
21 equitable relief (including consumer information remedies) as it determines to be  
22 reasonably related to Defendant's practices as alleged in the Complaint. Any funds not  
23 used for such equitable relief will be deposited with the United States Treasury as  
24 disgorgement. Defendant shall have no right to challenge the Commission's choice of  
25 remedies under this Section. Defendant shall have no right to contest the manner of  
26 distribution chosen by the Commission.

27 D. Defendant relinquishes all dominion, control, and title to the funds paid to the fullest  
28 extent permitted by law. Defendant shall make no claim to or demand return of the

1 funds, directly or indirectly, through counsel or otherwise.

2 E. Defendant agrees that the facts as alleged in the Complaint filed in this action shall be  
3 taken as true without further proof in any bankruptcy case or subsequent civil litigation  
4 pursued by the Commission to enforce its rights to any payment or money judgment  
5 pursuant to this Order, including but not limited to a nondischargeability complaint in  
6 any bankruptcy case. Defendant further stipulates and agrees that the facts alleged in the  
7 Complaint establish all elements necessary to sustain an action pursuant to, and that this  
8 Order shall have collateral estoppel effect for purposes of, Section 523(a)(2)(A) of the  
9 Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A).

10 **V.**

11 **RIGHT TO RE-OPEN AS TO MONETARY JUDGMENT**

12 **IT IS FURTHER ORDERED** that:

13 A. By agreeing to this Order Defendant reaffirms and attests to the truthfulness, accuracy,  
14 and completeness of the following financial statements and supporting documents that he  
15 provided to the Commission:

- 16 1. The Financial Statement of Individual Defendant Mark Benning signed on  
17 September 1, 2010, and supporting documents, including the 2007–2008  
18 Individual Federal Income Tax Returns and Trust Agreement.
- 19 2. The document titled, “Supplemental Financial Statement of Individual  
20 Defendant,” submitted to Commission counsel Lisa Rosenthal, signed by Mark  
21 Benning on September 20, 2010, and supporting documents, including Revised  
22 Page 4 of Financial Statement of Individual Defendant Mark Benning; Additional  
23 Page 5a of Financial Statement of Individual Defendant Mark Benning;  
24 Confidential Settlement Agreement and Mutual Release, dated 10/08/09;  
25 2008–2010 Profit & Loss Statements for XQuest, LLC; Balance Sheets as of  
26 December 31, 2009, and September 20, 2010, for XQuest, LLC; and 2008–2009  
27 Federal Corporate Income Tax Returns for XQuest, LLC.

1 B. This Court’s Order, and the FTC’s agreement to enter into this Order, is expressly  
2 premised upon the truthfulness, accuracy, and completeness of Defendant’s financial  
3 condition, as represented in the documents referenced in Subsection A of this Section  
4 (“Financial Statements”), all of which contain material information upon which the  
5 Commission relied in negotiating and agreeing to the terms of this Order.

6 C. If, upon motion by the FTC, this Court should find that Defendant failed to disclose any  
7 material asset or materially misrepresented the value of any asset, or made any other  
8 material misrepresentation in or omission from the Financial Statements, the Court shall  
9 reinstate the suspended judgment against Defendant, in favor of the Commission, in the  
10 amount of \$5,206,872 (five million, two hundred six thousand, eight hundred seventy-  
11 two dollars) less any payments made to the Commission by Defendant or other  
12 defendants subsequent to the entry of this Order, plus interest computed from the entry  
13 date of this Order pursuant to 28 U.S.C. § 1961. *Provided, however*, that in all other  
14 respects, this Order shall remain in full force and effect unless otherwise ordered by the  
15 Court.

16 **VI.**

17 **COOPERATION WITH FTC COUNSEL**

18 **IT IS FURTHER ORDERED** that Defendant shall, in connection with this action or  
19 any subsequent investigations related to or associated with the transactions or the occurrences  
20 that are the subject of the Complaint, cooperate in good faith with the FTC and appear at such  
21 places and times as the FTC shall reasonably request, after written notice, for interviews,  
22 conferences, pretrial discovery, review of documents, and for such other matters as may be  
23 reasonably requested by the FTC. If requested in writing by the FTC, Defendant shall appear  
24 and provide truthful testimony in any trial, deposition, or other proceeding related to or  
25 associated with the transactions or the occurrences that are the subject of the Complaint, without  
26 the service of a subpoena.

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1 **VII.**

2 **COMPLIANCE MONITORING**

3 **IT IS FURTHER ORDERED** that, for the purpose of (i) monitoring and investigating  
4 compliance with any provision of this Order, and (ii) investigating the accuracy of Defendant's  
5 Financial Statements upon which the Commission's agreement to this Order is expressly  
6 premised:

- 7 A. Within ten (10) days of receipt of written notice from a representative of the  
8 Commission, Defendant shall submit additional written reports, which are true and  
9 accurate and sworn to under penalty of perjury; produce documents for inspection and  
10 copying; appear for deposition; and provide entry during normal business hours to any  
11 business location in Defendant's possession or direct or indirect control to inspect the  
12 business operation;
- 13 B. In addition, the Commission is authorized to use all other lawful means, including but not  
14 limited to:
- 15 1. Obtaining discovery from any person, without further leave of court, using the  
16 procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, 45 and 69;
  - 17 2. Having its representatives pose as consumers and suppliers to Defendant, his  
18 employees, or any other entity managed or controlled in whole or in part by  
19 Defendant, without the necessity of identification or prior notice; and
- 20 C. Defendant shall permit representatives of the Commission to interview any employer,  
21 consultant, independent contractor, representative, agent, or employee who has agreed to  
22 such an interview, relating in any way to any conduct subject to this Order. The person  
23 interviewed may have counsel present.

24 ***Provided however,*** that nothing in this Order shall limit the Commission's lawful use of  
25 compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to  
26 obtain any documentary material, tangible things, testimony, or information relevant to unfair or  
27 deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C.  
28 § 45(a)(1)).

1 **VIII.**

2 **COMPLIANCE REPORTING**

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

5 A. For a period of five (5) years from the date of entry of this Order,

6 1. Defendant shall notify the Commission of the following:

7 a. Any changes in Defendant's residence, mailing addresses, and telephone  
8 numbers, within ten (10) days of the date of such change;

9 b. Any changes in Defendant's employment status (including  
10 self-employment), and any change in Defendant's ownership in any  
11 business entity, within ten (10) days of the date of such change. Such  
12 notice shall include the name and address of each business that Defendant  
13 is affiliated with, employed by, creates or forms, or performs services for; a  
14 detailed description of the nature of the business; and a detailed description  
15 of Defendant's duties and responsibilities in connection with the business  
16 or employment; and

17 c. Any changes in Defendant's name or use of any aliases or fictitious names  
18 within ten (10) days of the date of such change;

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

3 B. One hundred eighty (180) days after the date of entry of this Order and annually thereafter  
4 for a period of three (3) years, Defendant shall provide a written report to the FTC, which  
5 is true and accurate and sworn to under penalty of perjury, setting forth in detail the  
6 manner and form in which he has complied and is complying with this Order. This report  
7 shall include, but not be limited to:

- 8 1. Defendant's then-current residence address, mailing addresses, and telephone  
9 numbers;
- 10 2. Defendant's then-current employment status (including self-employment),  
11 including the name, addresses, and telephone numbers of each business that  
12 Defendant is affiliated with, employed by, or performs services for; a detailed  
13 description of the nature of the business; and a detailed description of Defendant's  
14 duties and responsibilities in connection with the business or employment;
- 15 3. A copy of each acknowledgment of receipt of this Order, obtained pursuant to the  
16 Section titled "Distribution of Order;" and
- 17 4. Any other changes required to be reported under Subsection A of this Section.

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

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

23 Associate Director for Enforcement  
24 Bureau of Consumer Protection  
25 Federal Trade Commission  
26 600 Pennsylvania Avenue, N.W.  
27 Washington, D.C. 20580  
28 RE: *FTC v. Swish Marketing, Inc., et al.*, Matter no. X090078

27 **Provided** that, in lieu of overnight courier, Defendant may send such reports or  
28 notifications by first-class mail, but only if Defendant contemporaneously sends an

1 electronic version of such report or notification to the Commission at: DEbrief@ftc.gov.

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

4 **IX.**

5 **RECORDKEEPING**

6 **IT IS FURTHER ORDERED** that, for a period of eight (8) years from the date of entry  
7 of this Order, Defendant, for any business for which he is the majority owner or directly or  
8 indirectly controls, is hereby restrained and enjoined from failing to create and retain the  
9 following records:

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

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

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

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

21 E. Copies of all sales scripts, training materials, advertisements, or other marketing  
22 materials;

23 F. Documents sufficient to demonstrate the experience of consumers on each materially  
24 different version of each website on which Defendant, whether acting directly or through  
25 any sole proprietorship, partnership, limited liability company, corporation, subsidiary,  
26 branch, division, Marketing Affiliate, or other entity, advertise, promote, market, offer for  
27 sale, sell, or provide products or services, including, as necessary:

28 1. Screenshots or screen capture recordings of such websites;

2. Source code, database records, or log files for such websites; and
3. Other documents related to the design and functioning of such websites, including but not limited to feature descriptions, programmer documentation, developer's guides, specification documents, and version histories; and

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

**X.**

**DISTRIBUTION OF ORDER**

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

A. Defendant as control person: For any business that Defendant controls, directly or indirectly, or in which Defendant has a majority ownership interest, Defendant must deliver a copy of this Order to (1) all principals, officers, directors, and managers of that business; (2) all employees, agents, and representatives of that business who engage in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure set forth in Subsection A.2 of the Section titled "Compliance Reporting." For current personnel, delivery shall be within five (5) days of service of this Order upon Defendant. For new personnel, delivery shall occur prior to them assuming their responsibilities. For any business entity resulting from any change in structure set forth in Subsection A.2 of the Section titled "Compliance Reporting," delivery shall be at least ten (10) days prior to the change in structure.

B. Defendant as employee or non-control person: For any business with fewer than 1,500 employees where Defendant is not a controlling person of a business but otherwise engages in conduct related to the subject matter of this Order, Defendant must deliver a copy of this Order to all principals and managers of such business before engaging in such



1 conduct. For any business with more than 1,500 employees where Defendant is not a  
2 controlling person of a business but otherwise engages in conduct related to the subject  
3 matter of this Order, Defendant must deliver a copy of this Order to all managers of the  
4 department or division in which Defendant engages in conduct related to the subject  
5 matter of this Order.

6 C. Defendant must secure a signed and dated statement acknowledging receipt of the Order,  
7 within thirty (30) days of delivery, from all persons receiving a copy of the Order pursuant  
8 to this Section.

9 **XI.**

10 **ACKNOWLEDGMENT OF RECEIPT OF ORDER**

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

14 **XII.**

15 **RETENTION OF JURISDICTION**

16 **IT IS FURTHER ORDERED** that this Court shall retain jurisdiction of this matter for  
17 purposes of construction, modification, and enforcement of this Order.

18  
19  
20 **IT IS SO ORDERED**, this 8th day of March, 2011.

21 

22 RICHARD SEEBORG  
23 UNITED STATES DISTRICT JUDGE

1 (The filer attests that concurrence in the filing of this document has been obtained from each of  
2 the other signatories.)

3 **SO STIPULATED:**

4 WILLARD K. TOM  
5 General Counsel

6 JEFFREY A. KLURFELD  
7 Regional Director

8 /s/ Lisa D. Rosenthal

9 \_\_\_\_\_  
10 LISA D. ROSENTHAL  
11 KERRY O'BRIEN  
12 EVAN ROSE  
13 ERIC D. EDMONDSON  
14 Federal Trade Commission  
15 901 Market Street, Ste. 570  
16 San Francisco, CA 94103  
17 (415) 848-5150 (voice)  
18 (415) 848-5184 (fax)

19 Dated: \_\_\_3/2/11\_\_\_\_\_

20 ATTORNEYS FOR PLAINTIFF

/s/

MARK BENNING

Dated: \_\_\_3/1/11\_\_\_\_\_

/s/

\_\_\_\_\_  
Bergeson LLP  
by JOHN W. FOWLER, ESQ.

ATTORNEYS FOR DEFENDANT

Dated: \_\_\_2/25/11\_\_\_\_\_

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**SO STIPULATED:**

WILLARD K. TOM  
General Counsel

JEFFREY A. KLURFELD  
Regional Director

\_\_\_\_\_  
LISA D. ROSENTHAL  
KERRY O'BRIEN  
EVAN ROSE  
ERIC D. EDMONDSON  
Federal Trade Commission  
901 Market Street, Ste. 570  
San Francisco, CA 94103  
(415) 848-5150 (voice)  
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Dated: \_\_\_\_\_

ATTORNEYS FOR PLAINTIFF

  
\_\_\_\_\_  
MARK BENNING

Dated: \_\_\_\_\_

\_\_\_\_\_  
ATTORNEYS FOR DEFENDANT

Dated: \_\_\_\_\_

1 **SO STIPULATED:**

2 WILLARD K. TOM  
3 General Counsel

\_\_\_\_\_  
MARK BENNING

4 JEFFREY A. KLURFELD  
5 Regional Director

Dated: \_\_\_\_\_

6 \_\_\_\_\_  
7 LISA D. ROSENTHAL  
8 KERRY O'BRIEN  
9 EVAN ROSE  
10 ERIC D. EDMONDSON  
11 Federal Trade Commission  
12 901 Market Street, Ste. 570  
13 San Francisco, CA 94103  
14 (415) 848-5150 (voice)  
15 (415) 848-5184 (fax)

*Bergson LLP*  
*by John W. Fowler*

ATTORNEYS FOR DEFENDANT

Dated: *February 25, 2011*

16 Dated: \_\_\_\_\_

17 ATTORNEYS FOR PLAINTIFF