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9
10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12
13 **SECURITIES AND EXCHANGE**
COMMISSION,

14 **Plaintiff,**

15 **vs.**

16 **PHOENIXSURF.COM, LLC, NEW**
17 **MILLENIUM ENTREPRENEURS,**
18 **LLC, JONATHAN W. MIKULA, AND**
GABRIEL J. FRANKEWICH,

19 **Defendants.**

Case No.

COMPLAINT FOR VIOLATIONS OF
THE FEDERAL SECURITIES LAWS

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1 Plaintiff Securities and Exchange Commission (“Commission”) alleges as
2 follows:

3 **JURISDICTION AND VENUE**

4 1. This Court has jurisdiction over this action pursuant to Sections 20(b),
5 20(d)(1) and 22(a) of the Securities Act of 1933 (“Securities Act”), 15 U.S.C. §§
6 77t(b), 77t(d)(1) & 77v(a), and Sections 21(d)(1), 21(d)(3)(A), 21(e) and 27 of the
7 Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. §§ 78u(d)(1),
8 78u(d)(3)(A), 78u(e) & 78aa. Defendants have, directly or indirectly, made use of
9 the means or instrumentalities of interstate commerce, of the mails, or of the
10 facilities of a national securities exchange, in connection with the transactions,
11 acts, practices, and courses of business alleged in this complaint.

12 2. Venue is proper in this district pursuant to Section 22(a) of the
13 Securities Act, 15 U.S.C. § 77v(a), and Section 27 of the Exchange Act, 15 U.S.C.
14 § 78aa, because certain of the transactions, acts, practices, and courses of conduct
15 constituting violations of the federal securities laws occurred within this district.

16 **SUMMARY**

17 3. This matter involves the fraudulent, unregistered offering of
18 investment contracts constituting securities in a Ponzi scheme offered and sold via
19 the Internet by two entities, defendant Phoenixsurf.com, LLC, also known as
20 Pheonixsurf.com, LLC (“Phoenix Surf”), defendant New Millenium Entrepreneurs,
21 LLC (“NME”), NME’s owner, defendant Jonathan W. Mikula (“Mikula”), and
22 Phoenix Surf’s president, Gabriel J. Frankewich (“Frankewich”) (collectively
23 “Defendants”).

24 4. From February 22, 2006 through May 21, 2006 (the “offering
25 period”), the Defendants operated the Internet website www.phoenixsurf.com.
26 Phoenix Surf purported to be a “traffic exchange program” whose members
27 purportedly earned money for viewing the websites that other paying users had
28 submitted to the Phoenix Surf website. In fact, Phoenix Surf’s offer and sale of

1 “advertising packages” constituted the unregistered offer and sale of securities in
2 the form of investment contracts under federal securities law. Unbeknownst to its
3 investors, Phoenix Surf, in reality, operated a massive Ponzi scheme.

4 5. Through the Phoenix Surf website, the Defendants solicited investors
5 to become paying “advertising package users,” of Phoenix Surf by purchasing
6 advertising packages, in increments of \$8, with a maximum membership level of
7 \$6,000.

8 6. Phoenix Surf promised to pay each advertising package user 15% of
9 cost of his or her advertising package each day for eight days. At the end of eight
10 days, the advertising package user purportedly earned a total of 120% of the cost of
11 his or her advertising package, 20% of which was profit on the advertising package
12 purchase.

13 7. To receive the promised payment, an advertising package user
14 purportedly was required to view at least 15 web pages per day during the eight-
15 day period. Phoenix Surf estimated that viewing the web pages would take two
16 and half minutes per day.

17 8. During the offering period, the Defendants raised a total of \$41.9
18 million from more than 20,000 investors nationwide and overseas.

19 9. The Defendants made materially false and misleading statements in
20 offering and selling the Phoenix Surf investment program. The Defendants
21 represented that they used “revenue generated by ad sales and other
22 businesses/programs within the NME/Phoenix network” to pay advertising
23 members. In fact, the Defendants were operating Phoenix Surf as almost a pure
24 Ponzi scheme—at least 99% of Phoenix Surf’s revenues were generated from
25 advertising package purchases from new or existing investors and used to pay
26 returns to investors. During the offering period, Phoenix Surf paid a total of \$36.7
27 million to investors.

28 10. On or about May 22, 2006, the Defendants’ Ponzi scheme collapsed.

1 On this date, the Defendants were unable to make payouts to investors and closed
2 the Phoenix Surf offering and stopped accepting investments.

3 11. Defendants, by engaging in the conduct described in this complaint,
4 violated, and unless enjoined will continue to violate, the antifraud and securities
5 registration provisions of the federal securities laws. By this complaint, the
6 Commission seeks permanent injunctions, disgorgement with prejudgment interest,
7 and civil penalties against each of the proposed Defendants.

8 THE DEFENDANTS

9 12. Phoenixsurf.com, also known as Pheonixsurf.com, is a Georgia
10 limited liability company located in Marietta, Georgia. On its website,
11 www.phoenixsurf.com, Phoenix Surf was described as an income opportunity
12 program in the traffic exchange industry. No registration statement was filed with
13 the Commission or was in effect with respect to Phoenix Surf's offer or sale of
14 securities. In August 2006, Phoenix Surf ceased all business operations, but
15 remains a legally formed LLC.

16 13. New Millenium Entrepreneurs, LLC is a Georgia limited liability
17 company located in Athens, Georgia. NME owned and purported to operate
18 Phoenix Surf during the offering period. In August 2006, NME ceased all business
19 operations but remains a legally formed LLC.

20 14. Jonathan W. Mikula, age 21, is a resident of Athens, Georgia. Mikula
21 is NME's founder and Chief Executive Officer.

22 15. Gabriel J. Frankewich, age 29, is a resident of Byron, Georgia.
23 Frankewich was Phoenix Surf's president during the offering period.

24 THE PHOENIX SURF OFFERING

25 16. From February 22, 2006 through May 21, 2006, through the Phoenix
26 Surf website, the Defendants offered and sold securities in the form of investment
27 contracts to approximately 20,000 investors nationwide and overseas, which
28 includes more than 1470 accounts of investors who reside in California, many of

1 whom reside in the Central District of California.

2 17. The Defendants operated Phoenix Surf as a “traffic exchange
3 program” whose members purportedly earned money by viewing websites that had
4 been entered onto the Phoenix Surf website by other paying users.

5 18. The traffic exchange program was a form of online advertising
6 program that automatically rotated certain websites into the browsers of members
7 of the traffic exchange program. The advertising websites purportedly paid money
8 to the “host,” Phoenix Surf, which then paid its members to view the rotated
9 websites.

10 19. Through the Phoenix Surf website, the Defendants solicited investors
11 to become users or members of Phoenix Surf.

12 20. The Defendants offered two kinds of membership: (1) registered
13 users, users who registered for free to view the Phoenix Surf website, and (2)
14 advertising users, who were users that purchased advertising packages.

15 21. To become an advertising user, a member purchased an “advertising
16 package” and paid Phoenix Surf \$8 per unit. A member could purchase a
17 maximum of 750 units, or a \$6,000 membership level.

18 22. To pay for the advertising package, users were required to open an
19 account with e-Gold, an Internet payment processor. In early May 2006, users
20 were also given the option of purchasing advertising packages via a debit card
21 issued by Virtual Money, Inc., an Internet bank.

22 23. Phoenix Surf provided advertising users with three benefits that were
23 not provided to registered users.

24 24. First, Phoenix Surf allowed each advertising user to submit one
25 website to be included in the online advertising program. That website would then
26 automatically rotate into the Internet browsers of other Phoenix Surf members.

27 25. Second, Phoenix Surf paid each advertising user (but not registered
28 users) 15% per day on his or her advertising package for eight days. Phoenix Surf

1 purportedly made this payment in exchange for the advertising user's agreement to
2 view a minimum of 15 web pages per day. At the end of eight days, each
3 advertising user purportedly earned 120% on his or her advertising package, 20%
4 of which was profit on the advertising package. The return equated to an
5 annualized return of more than 912%.

6 26. Third, Phoenix Surf paid each advertising user an 8% "referral
7 commission" for referring other investors to Phoenix Surf.

8 **THE PHOENIX SURF MEMBERSHIP UNITS WERE INVESTMENT CONTRACTS**

9 27. The membership fee paid by an advertising user of Phoenix Surf
10 constituted an investment contract because the payment that Phoenix Surf received
11 depended on a member's payment of the membership fee, and not on his or her
12 provision of services.

13 28. Under the terms of the Phoenix Surf program, the Defendants paid the
14 purported 8% daily return only to advertising (i.e., paying) members who agreed to
15 view 15 web pages per day, but paid nothing to a registered (i.e., non-paying)
16 member regardless of how many web pages they viewed.

17 29. The amount of returns that Phoenix Surf paid an advertising member
18 depended solely upon how much money he or she put into the program, not on the
19 amount of service he or she rendered to Phoenix Surf. For instance, an advertising
20 member who received the purported 8% daily return on a \$6,000 investment (\$480
21 per day) was not required to view any more web pages than an upgraded member
22 receiving the purported 8% daily return on a \$8 investment (\$0.64 per day).

23 30. The funds purportedly used to pay the advertising members resulted
24 more from the efforts of the proposed defendants than the efforts of the advertising
25 members. In the Frequently Asked Questions section of Phoenix Surf's website,
26 the defendants stated that "the business model designed by NME ensures the long-
27 term stability of Phoenixsurf.com. *In addition, we use revenue generated by ad*
28 *sales and other businesses/programs within the NME/Phoenix network*" (emphasis

1 added). The advertising members did not have any role in negotiating advertising
2 agreements or collecting revenue from any of these purported income sources.

3 31. The “services” provided by the advertising members were minimal or
4 even nonexistent. On the Phoenix Surf website, the defendants estimated that the
5 web page surfing requirement would take members only about 2 ½ minutes per
6 day. The advertising members did not have to evaluate, comment on, or otherwise
7 respond to the web pages viewed.

8 **THE UNREGISTERED OFFERING OF SECURITIES IN THE FORM OF INVESTMENT**

9 **CONTRACTS BY PHOENIX SURF**

10 32. The membership units offered and sold by the Defendants were
11 securities in the form of investment contracts.

12 33. No registration statement was filed with the Commission or was in
13 effect with respect to the Defendants’ offer or sale of membership units in Phoenix
14 Surf.

15 **DEFENDANTS’ INVOLVEMENT IN AND OPERATION OF A PONZI SCHEME**

16 34. In July 2005, Mikula decided to form NME to build a multiple income
17 stream business targeting network marketers. At its inception, Mikula, NME’s
18 founder and CEO, appointed Frankewich as NME’s head of Internet security.
19 Frankewich held that position until February 2006.

20 35. In February 2006, Mikula appointed Frankewich as Phoenix Surf’s
21 president. As president, Frankewich was responsible for running the day-to-day
22 operations of Phoenix Surf. His responsibilities included paying purported returns
23 to Phoenix Surf investors, paying salary to Phoenix Surf staff, and assisting in
24 Phoenix Surf’s outside investments. Frankewich was required to update Mikula on
25 major expenditures and any anomalies in the Phoenix Surf account.

26 36. At Mikula’s instruction, Frankewich purchased a traffic exchange
27 “script.” The script was the basis of both the Phoenix Surf website and its
28 database. Mikula hired outside consultants to “fill in the script’s holes” and

1 complete the Phoenix Surf website layout and database programming. Mikula
2 helped create the website by providing the consultants the critical language
3 describing the Phoenix Surf program. Mikula also approved the forms and
4 language on the website.

5 37. In the Frequently Asked Questions section of the Phoenix Surf
6 website, the Defendants represented that Phoenix Surf would earn revenues
7 through “ad sales and other businesses/programs within the NME/Phoenix
8 network.” This statement was false.

9 38. In reality, Phoenix Surf operated almost purely as a Ponzi scheme,
10 generating over 99% of its revenues from other investors through “ad sales.”
11 During the offering period, Phoenix Surf raised \$41.9 million from “ad sales” to
12 investors. In contrast, the NME network of businesses/programs generated a total
13 of only \$200,000. That money was kept in accounts separate from the Phoenix
14 Surf account into which ad sales were deposited and investor payouts were
15 disbursed. During the offering period, Phoenix Surf paid a total of \$36.7 million to
16 investors.

17 39. The Defendants failed to disclose to investors that new and existing
18 investors’ advertising package purchases accounted for nearly all of the funds paid
19 to investors. Nor did the Defendants disclose that the revenue generated from
20 other businesses/programs within the NME/Phoenix network constituted a very
21 small fraction of Phoenix Surf’s revenue and was insufficient to pay the returns
22 Phoenix Surf owed to its advertising members.

23 40. On May 22, 2006, NME closed the Phoenix Surf offering and stopped
24 accepting investments because of liquidity problems. In early June 2006, Phoenix
25 Surf, NME, and Mikula began the process of issuing refunds to those investors
26 who lost money. In mid-July 2006, Phoenix Surf’s website stated that NME was
27 temporarily pausing the refund process due to the lack of available funds but that
28 refunds would resume when additional funds became available. On August 19,

1 2006, both NME and Phoenix Surf ceased all business operations and appointed an
2 administrator to oversee the recovery of funds allegedly owed to NME and
3 Phoenix Surf. A total of \$4,332,400 remains owing to Phoenix Surf investors.

4 **FIRST CLAIM FOR RELIEF**

5 **UNREGISTERED OFFER AND SALE OF SECURITIES**

6 **Violations of Sections 5(a) and 5(c) of the Securities Act**

7 41. The Commission realleges and incorporates by reference paragraphs 1
8 through 39, above.

9 42. Defendants, by engaging in the conduct described above, directly or
10 indirectly, made use of means or instruments of transportation or communication
11 in interstate commerce or of the mails, to offer to sell or to sell securities, or to
12 carry or cause such securities to be carried through the mails or in interstate
13 commerce for the purpose of sale or for delivery after sale.

14 43. No registration statement has been filed with the Commission or has
15 been in effect with respect to the offering alleged herein.

16 44. By engaging in the conduct described above, Defendants violated, and
17 unless restrained and enjoined will continue to violate, Sections 5(a) and 5(c) of
18 the Securities Act, 15 U.S.C. §§ 77e(a) and 77e(c).

19 **SECOND CLAIM FOR RELIEF**

20 **FRAUD IN THE OFFER OR SALE OF SECURITIES**

21 **Violations of Section 17(a) of the Securities Act**

22 45. The Commission realleges and incorporates by reference paragraphs 1
23 through 39, above.

24 46. Defendants, by engaging in the conduct described above, directly or
25 indirectly, in the offer or sale of securities by the use of means or instruments of
26 transportation or communication in interstate commerce or by use of the mails:

- 27 a. with scienter, employed devices, schemes, or artifices to
28 defraud;

- b. obtained money or property by means of untrue statements of a material fact or by omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
- c. engaged in transactions, practices, or courses of business which operated or would operate as a fraud or deceit upon the purchaser.

47. By engaging in the conduct described above, Defendants violated, and unless restrained and enjoined will continue to violate, Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a).

THIRD CLAIM FOR RELIEF

FRAUD IN CONNECTION WITH THE PURCHASE OR SALE OF SECURITIES

Violations of Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder

48. The Commission realleges and incorporates by reference paragraphs 1 through 39, above.

49. Defendants, by engaging in the conduct described above, directly or indirectly, in connection with the purchase or sale of a security, by the use of means or instrumentalities of interstate commerce, of the mails, or of the facilities of a national securities exchange, with scienter:

- a. employed devices, schemes, or artifices to defraud;
- b. made untrue statements of a material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
- c. engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon other persons.

50. By engaging in the conduct described above, Defendants violated, and

1 unless restrained and enjoined will continue to violate, Section 10(b) of the
2 Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. §
3 240.10b-5.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, the Commission respectfully requests that the Court:

6 **I.**

7 Issue findings of fact and conclusions of law that the Defendants committed
8 the alleged violations.

9 **II.**

10 Issue judgments, in a form consistent with Rule 65(d) of the Federal Rules
11 of Civil Procedure, permanently enjoining Defendants and their officers, agents,
12 servants, employees, and attorneys, and those persons in active concert or
13 participation with any of them, who receive actual notice of the judgment by
14 personal service or otherwise, and each of them, from violating Sections 5(a), 5(c)
15 of the Securities Act, 15 U.S.C. §§ 77e(a), 77(e)(c) & 77q(a), and Section 10(b) of
16 the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. §
17 240.10b-5.

18 **III.**

19 Order each Defendant to disgorge all ill-gotten gains from their illegal
20 conduct, together with prejudgment interest thereon.

21 **IV.**

22 Order the Defendants to pay civil penalties pursuant to Section 20(d) of the
23 Securities Act, 15 U.S.C. § 77t(d), and Section 21(d)(3) of the Exchange Act, 15
24 U.S.C. § 78u(d)(3).

25 **V.**

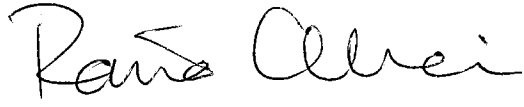
26 Retain jurisdiction of this action in accordance with the principles of equity
27 and the Federal Rules of Civil Procedure in order to implement and carry out the
28 terms of all orders and decrees that may be entered, or to entertain any suitable

1 application or motion for additional relief within the jurisdiction of this Court.

2 **VII.**

3 Grant such other and further relief as this Court may determine to be just and
4 necessary.

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6 DATED: July 23, 2007



7 KELLY C. BOWERS
8 MOLLY WHITE
9 RABIA CEBECI
Attorneys for Plaintiff
Securities and Exchange Commission

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