

1 WILLARD K. TOM
General Counsel

2 LISA D. ROSENTHAL, Bar # 179486
3 KERRY O'BRIEN, Bar # 149264
4 EVAN ROSE, Bar # 253478
Federal Trade Commission
901 Market Street, Ste. 570
5 San Francisco, CA 94103
(415) 848-5100 (voice)
6 (415) 848-5184 (fax)
lrosenthal@ftc.gov
7 kobrien@ftc.gov
erose@ftc.gov

8 Attorneys for Plaintiff
9 Federal Trade Commission

10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
San Jose Division

13
14 FEDERAL TRADE COMMISSION,
15 Plaintiff,

16 v.

17 SWISH MARKETING, INC., a
18 corporation,
19 MARK BENNING, individually and as an
officer of SWISH MARKETING, INC.,
20 MATTHEW PATTERSON, individually
and as an officer of SWISH
21 MARKETING, INC., and
22 JASON STROBER, individually and as
23 an officer of SWISH MARKETING,
INC.,
24 Defendants.

Case No. C09-03814 RS

**PLAINTIFF'S OPPOSITION
TO DEFENDANT MARK
BENNING'S MOTION TO
DISMISS COMPLAINT**

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. STATEMENT OF ISSUES PURSUANT TO LOCAL RULE 7-4 1

III. FACTS AND OVERVIEW OF FTC LAW 1

IV. ARGUMENT 4

 A. The complaint against Benning is not governed by Rule 9(b) 4

 B. The allegations in the complaint against Benning satisfy Rule 8 8

V. CONCLUSION 11

TABLE OF AUTHORITIES

FEDERAL CASES & FTC ADMINISTRATIVE DECISIONS

1 *Alpharma, Inc. v. Pennfield Oil Co.*,

2

3

4 No. 8:03CV401, 2008 U.S. Dist. LEXIS 44178 (D. Neb. June 4, 2008) 5

5 *Ashcroft v. Iqbal*,

6 129 S. Ct. 1937 (2009) 8

7 *Bell Atlantic Corp. v. Twombly*,

8 550 U.S. 544 (2007) 9

9 *In re Cliffdale Assocs., Inc.*,

10 103 F.T.C. 110 (1984) 2

11 *Doe v. United States*,

12 419 F.3d 1058 (9th Cir. 2005) 9

13 *FTC v. Affordable Media, LLC*,

14 179 F.3d 1228 (9th Cir. 1999) 3

15 *FTC v. Amy Travel Serv., Inc.*,

16 875 F.2d 564 (7th Cir. 1989) 3, 4

17 *FTC v. Communidyne, Inc.*,

18 No. 93 C 6043, 1993 U.S. Dist. LEXIS 18708,

19 1993-2 Trade Cas. (CCH) ¶ 70,439 (N.D. Ill. Dec. 3, 1993) 5, 6

20 *FTC v. Figgie Int’l*,

21 994 F.2d 595 (9th Cir. 1993) 7

22 *FTC v. Five-Star Automobile Club*,

23 97 F. Supp. 2d 502 (S.D.N.Y. 2000) 7

24 *FTC v. Freecom Communs., Inc.*,

25 401 F.3d 1192 (10th Cir. 2005) 5, 6, 7

26 *FTC v. Innovative Mktg.*,

27 2009 U.S. Dist. LEXIS 84358,

28 2009-2 Trade Cas. (CCH) ¶ 76,742 (D. Md. Sept. 16, 2009) 5

1 *FTC v. Kitco of Nev., Inc.*,
 2 612 F. Supp. 1282 (D. Minn. 1985) 7
 3 *FTC v. Medical Billers Network, Inc.*,
 4 543 F. Supp. 2d 283 (S.D.N.Y. 2008) 5
 5 *FTC v. Nat’l Testing Servs., LLC*,
 6 No. 3:05-0613, 2005 U.S. Dist. LEXIS 46485
 7 (M.D. Tenn. Aug. 18, 2005) 5, 6
 8 *FTC v. Pantron I Corp.*,
 9 33 F.3d 1088 (9th Cir. 1994) 2, 6
 10 *FTC v. Publ’g Clearing House, Inc.*,
 11 104 F.3d 1168 (9th Cir. 1997) 3, 7, 11
 12 *FTC v. Sec. Rare Coin & Bullion Corp.*,
 13 931 F.2d 1312 (8th Cir. 1991) 7
 14 *FTC v. Skybiz.com, Inc.*,
 15 No. 01-CV-396-K(E), 2001 U.S. Dist. LEXIS 26314
 16 (N.D. Okla. Aug. 2, 2001) 5
 17 *FTC v. SlimAmerica*,
 18 77 F. Supp. 2d 1263 (S.D. Fla. 1999) 7
 19 *Ferron v. Search Cactus, LLC*,
 20 No. 2:06-cv-327, 2007 U.S. Dist. LEXIS 44473
 21 (S.D. Ohio June 19, 2007) 5
 22 *Gilmore v. First Am. Title Ins. Co.*,
 23 No. 07-12123, 2009 U.S. Dist. LEXIS 82783
 24 (E.D. Mich. Sept. 11, 2009) 5
 25 *Kearns v. Ford Motor Co.*,
 26 567 F.3d 1120 (9th Cir. 2009) 4, 6
 27 *Kraft, Inc. v. FTC*,
 28 970 F.2d 311 (7th Cir. 1992) 2

1 *Kreidler v. Pixler*,
 2 No. C06-0697RSL, 2006 U.S. Dist. LEXIS 88702
 3 (W.D. Wash. Dec. 7, 2006) 5
 4 *Marolda v. Symantec Corp.*,
 5 No. C 08-05701, 2009 U.S. Dist. LEXIS 65201
 6 (N.D. Cal. July 27, 2009) 6, 7
 7 *Meridian Project Sys., Inc. v. Hardin Constr. Co., LLC*,
 8 404 F. Supp. 2d 1214 (E.D. Cal. 2005) 7, 8
 9 *Neilson v. Union Bank of Cal., N.A.*,
 10 290 F. Supp. 2d 1101 (C.D. Cal. 2003) 7, 8
 11 *Nordberg v. Trilegiant Corp.*,
 12 445 F. Supp. 2d 1082 (N.D. Cal. 2006) 6
 13 *Pelman v. McDonald’s Corp.*,
 14 396 F.3d 508 (2d Cir. 2005) 5
 15 *Removatron Int’l Corp. v. FTC*,
 16 884 F.2d 1489 (1st Cir. 1989) 7
 17 *Swierkiewicz v. Sorema N.A.*,
 18 534 U.S. 506 (2002) 5
 19 *Vernon v. Qwest Communs. Int’l, Inc.*,
 20 643 F. Supp. 2d 1256 (W.D. Wash. 2009) 5
 21 *Vess v. Ciba-Geigy Corp. USA*,
 22 317 F.3d 1097 (9th Cir. 2003) 4, 6
 23
 24

STATE CASES

25 *B.L.M. v. Sabo & Deitsch*,
 26 55 Cal. App. 4th 823, 64 Cal. Rptr. 2d 335 (Ct. App. 1997) 8
 27
 28

FEDERAL STATUTES & RULES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Fed. R. Civ. P. 8 1

Fed. R. Civ. P. 9(b) 1, 4

Section 5 of the FTC Act,
15 U.S.C. § 45 (2006) 1, 2

STATE STATUTES

Section 1770 of the California Consumer Legal Remedies Act,
CAL. CIV. CODE § 1770 (2009) 6

TREATISES

AM JUR 2D FRAUD AND DECEIT (2010) 6

MOORE’S FEDERAL PRACTICE - CIVIL (Matthew Bender 3d ed.) 8

1 **I. INTRODUCTION**

2 Defendant Mark Benning has moved to dismiss the complaint pursuant to Rule
3 9(b) of the Federal Rules of Civil Procedure and, in the alternative, Rule 8. Motion to
4 Dismiss (Dkt. #41); *see* FED. R. CIV. P. 8, 9(b). As described below, the complaint need
5 not comply with Rule 9(b) because it does not allege that Benning engaged in fraud, nor
6 must the Federal Trade Commission (“FTC” or “Commission”) show fraud to prove the
7 alleged violations. Moreover, the complaint contains more than sufficient detail to meet
8 the liberal pleading requirements of Rule 8. For these reasons, the Court should deny
9 defendant Benning’s motion.

10 **II. STATEMENT OF ISSUES PURSUANT TO LOCAL RULE 7-4**

11 A. Does the FTC’s complaint need to comply with Rule 9(b)?

12 B. Do the allegations in the FTC’s complaint against Benning satisfy Rule 8?

13 **III. FACTS AND OVERVIEW OF FTC LAW**

14 The FTC’s complaint alleges that, between September 2006 and August 2007, the
15 defendants engaged in unlawful conduct in violation of Section 5 of the FTC Act, 15
16 U.S.C. § 45 (2006), in connection with the advertisement and sale of a prepaid debit card.
17 As described below, the complaint describes in detail the conduct at issue and how it
18 violates the FTC Act.

19 Paragraphs 12 to 25 describe the defendants’ business practices that are the subject
20 of this lawsuit. Specifically, the complaint describes the prepaid debit card that
21 consumers were sold. Complaint (Dkt. #1) ¶¶ 12–14. The complaint describes how the
22 defendants operated websites offering “payday loans” (*i.e.*, short-term, high-interest
23 loans), which contained offers for the prepaid debit card. *Id.* ¶¶ 16–21. It also attaches
24 examples of those websites as exhibits to the complaint. *Id.* Exhibits A–C. The
25 complaint asserts that the defendants participated in creating the prepaid debit card offers
26 that appeared on their websites, and the complaint describes how they benefitted from
27 those offers. *Id.* ¶ 22. The complaint states that the defendants, *inter alia*, displayed the
28 offers on websites they operated, controlled the manner in which the advertisements

1 appeared, and earned money based on the number of consumers who “signed up” for the
2 offers. *Id.* The complaint also alleges that consumers complained about the charges to
3 the defendants and that many of the charges were reversed, or “charged back,” by the
4 consumers’ banks. *Id.* ¶¶ 24–25.

5 The complaint alleges that the defendants’ conduct violated Section 5 of the FTC
6 Act, 15 U.S.C. § 45. Section 5 of the FTC Act prohibits “unfair or deceptive acts or
7 practices in or affecting commerce.” 15 U.S.C. § 45. The complaint challenges the
8 websites described in the complaint as being deceptive. Complaint ¶¶ 28–33. To prove
9 deception in violation of Section 5, the FTC need establish only that: (1) the defendants
10 made a representation or omission or engaged in a practice; (2) the representation,
11 omission, or practice was likely to mislead consumers acting reasonably under the
12 circumstances; and (3) the representation, omission, or practice was material. *FTC v.*
13 *Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994) (citing *In re Cliffdale Assocs., Inc.*,
14 103 F.T.C. 110, 164–65 (1984)); *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992).
15 The complaint alleges that, on one subset of the defendants’ websites, the defendants
16 represented to consumers that they were applying only for a payday loan when they
17 submitted a payday loan application. Complaint ¶ 28. The complaint alleges that, when
18 defendants made that representation, they failed to adequately disclose to those
19 consumers that they also would be charged for the prepaid debit card. *Id.* ¶ 29. The
20 complaint also alleges that, on other websites operated by the defendants, the defendants
21 falsely represented that consumers who submitted a payday loan application would
22 receive a “BONUS” prepaid card at no charge. *Id.* ¶¶ 31–32. In this manner, the
23 complaint alleges two violations of the FTC Act under a deception theory.

24 The complaint also makes specific factual allegations as to defendant Benning. It
25 states that defendant Benning, during the times alleged in the complaint, was the CEO of
26 the corporate defendant. *Id.* ¶ 8. Furthermore, it alleges that, “acting alone or in concert
27 with others, he has formulated, directed, controlled, had the authority to control, or
28

1 participated in the acts and practices of [the corporate defendant], including the acts and
2 practices set forth in this Complaint.” *Id.*

3 The complaint seeks a permanent injunction against defendant Benning. An
4 individual may be held liable for injunctive relief for corporate violations of the FTC Act
5 if a court finds that the individual (1) participated in the violative practices or (2) had
6 authority to control the deceptive practices. *FTC v. Publ’g Clearing House, Inc.*, 104
7 F.3d 1168, 1170 (9th Cir. 1997). An individual’s status as a corporate officer and
8 authority to sign documents on behalf of the corporate defendant can be sufficient to
9 demonstrate the requisite control. *Id.* “Authority to control the company can be
10 evidenced by active involvement in business affairs and the making of corporate policy,
11 including assuming the duties of a corporate officer.” *FTC v. Amy Travel Serv., Inc.*, 875
12 F.2d 564, 573 (7th Cir. 1989). Accordingly, the FTC need not submit any evidence
13 relating to an individual defendant’s mental state to establish individual liability for
14 injunctive relief. Consistent with this case law, the complaint alleges that defendant
15 Benning, as CEO of the corporation, participated in the conduct or had the authority to
16 control the conduct, and thus should be liable for injunctive relief.

17 The complaint also seeks such relief as the Court finds necessary to redress injury
18 to consumers. To obtain such relief from an individual for corporate misconduct, the
19 FTC must show that the individual had knowledge of the deception. *Publ’g Clearing*
20 *House*, 104 F.3d at 1171. The FTC can establish that the individual had the requisite
21 knowledge by showing one of the following: (1) actual knowledge of material
22 misrepresentations, (2) reckless indifference to the truth or falsity of the
23 misrepresentations, or (3) an awareness of a high probability of fraud along with an
24 intentional avoidance of the truth. *Id.* The FTC is not required to show that a defendant
25 intended to defraud consumers to hold the defendant individually liable for monetary
26 relief. *Id.* (citing *Amy Travel*, 875 F.2d at 574). The extent of an individual’s
27 participation in the violative conduct alone is sufficient to establish the requisite
28 knowledge for monetary relief. *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1235 (9th

1 Cir. 1999). In addition to alleging that Benning was the CEO of the corporate defendant
2 and participated in or had the authority to control the deceptive practices at issue, the
3 complaint also alleges that consumers complained about the charges to the defendants.
4 Complaint ¶ 24. Moreover, the problematic conduct challenged in the complaint was not
5 a function of, for example, a hidden defect embedded in a product or a deceptive script
6 covertly used by telemarketers. Rather, it was displayed on the defendants' publicly
7 available websites. Thus, it could be readily inferred that Benning, as CEO, was or
8 should have been aware of the deceptive appearance of his company's websites. The
9 complaint seeks monetary relief from Benning based upon these allegations from which
10 the requisite "knowledge" may be inferred.

11 **IV. ARGUMENT**

12 **A. The complaint against Benning is not governed by Rule 9(b).**

13 In his motion, defendant Benning appears to argue that the FTC's complaint must
14 comply with Rule 9(b) because allegations of deception under the FTC Act are claims of
15 fraud. Motion to Dismiss at 9–10. Benning, however, misapplies the relevant case law to
16 the allegations contained in the complaint. An allegation of deception under the FTC Act
17 is not a claim of fraud. Neither Section 5 of the FTC Act nor the complaint mention
18 "fraud," and the elements of a Section 5 action under a deception theory are not
19 synonymous with those of fraud. Therefore, Rule 9(b) does not apply.

20 Rule 9(b) states: "In alleging fraud or mistake, a party must state with particularity
21 the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other
22 conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). By its
23 terms, Rule 9(b) applies to causes of action based upon fraud (*i.e.*, causes of action where
24 fraud is an essential element of the claim). *Id.*; see *Vess v. Ciba-Geigy Corp. USA*, 317
25 F.3d 1097, 1105 (9th Cir. 2003). It also applies if a complaint alleges fraud or alleges
26 facts that necessarily constitute fraud. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124
27 (9th Cir. 2009) (citing *Vess*, 317 F.3d at 1105). Although Rule 9(b) applies to such
28 averments of fraud, the Supreme Court has declined to extend Rule 9(b) to other causes of

1 action. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) (“Rule 9(b), for
 2 example, provides for greater particularity in all averments of fraud or mistake. This
 3 Court, however, has declined to extend such exceptions to other contexts.”).

4 A claim that the defendants violated Section 5 by engaging in “deceptive acts and
 5 practices” is not a claim of fraud. As defendant Benning points out in his motion, Motion
 6 to Dismiss at 10 n.1, courts consistently have held that a Section 5 claim “is not a claim of
 7 fraud as that term is commonly understood or as contemplated by Rule 9(b).” *See FTC v.*
 8 *Freecom Communs., Inc.*, 401 F.3d 1192, 1204 n.7 (10th Cir. 2005) (holding that Rule
 9 9(b) does not apply to Section 5 claims under the FTC Act); *see also FTC v. Innovative*
 10 *Mktg.*, 2009 U.S. Dist. LEXIS 84358, at *20, 2009-2 Trade Cas. (CCH) ¶ 76,742 (D. Md.
 11 Sept. 16, 2009) (same); *FTC v. Medical Billers Network, Inc.*, 543 F. Supp. 2d 283, 314
 12 (S.D.N.Y. 2008) (same); *FTC v. Nat’l Testing Servs., LLC*, No. 3:05-0613, 2005 U.S.
 13 Dist. LEXIS 46485, at *4–5 (M.D. Tenn. Aug. 18, 2005) (same); *FTC v. Skybiz.com,*
 14 *Inc.*, No. 01-CV-396-K(E), 2001 U.S. Dist. LEXIS 26314, at *11 (N.D. Okla. Aug. 2,
 15 2001) (same); *FTC v. Communidyne, Inc.*, No. 93 C 6043, 1993 U.S. Dist. LEXIS 18708,
 16 at *3–5, 1993-2 Trade Cas. (CCH) ¶ 70,439 (N.D. Ill. Dec. 3, 1993) (same).¹ Defendant

17
 18 ¹ Courts have not applied Rule 9(b) to cases brought under other statutes that, like
 19 the FTC Act, prohibit a broad range of deceptive practices when a plaintiff has alleged
 20 only the elements of deception as the basis for its claim. *See, e.g., Pelman v. McDonald’s*
 21 *Corp.*, 396 F.3d 508, 511–12 (2d Cir. 2005) (regarding deceptive trade practices under the
 22 New York Consumer Protection Act); *Gilmore v. First Am. Title Ins. Co.*, No. 07-12123,
 23 2009 U.S. Dist. LEXIS 82783, at *8–16 (E.D. Mich. Sept. 11, 2009) (regarding
 24 Washington Consumer Protection Act and substantially similar laws of several other
 25 states, which prohibit deceptive acts or practices); *Vernon v. Qwest Communs. Int’l, Inc.*,
 26 643 F. Supp. 2d 1256, 1264–65 (W.D. Wash. 2009) (regarding Washington and
 27 Minnesota consumer protection act claims, which prohibit deceptive practices);
 28 *Alpharma, Inc. v. Pennfield Oil Co.*, No. 8:03CV401, 2008 U.S. Dist. LEXIS 44178, at
 *4–5 (D. Neb. June 4, 2008) (regarding Nebraska Uniform Deceptive Trade Practices
 Act, which prohibits deceptive trade practices); *Ferron v. Search Cactus, LLC*, No.
 2:06-cv-327, 2007 U.S. Dist. LEXIS 44473, at *11–12 (S.D. Ohio June 19, 2007)
 (regarding Ohio Consumer Sales Practices Act, which prohibits deceptive consumer sales
 practices); *Kreidler v. Pixler*, No. C06-0697RSL, 2006 U.S. Dist. LEXIS 88702, at
 *36–37 (W.D. Wash. Dec. 7, 2006) (regarding Washington Consumer Protection Act).

1 Benning does not point to a single case in which a court faced with this question has held
2 otherwise.

3 In examining this issue, courts have highlighted how a cause of action for
4 deception under the FTC Act differs from that of fraud. As set forth above, to establish a
5 Section 5 violation, the FTC need show only that a defendant engaged in a representation
6 or omission that is likely to mislead consumers acting reasonably under the circumstances
7 and that the representation or omission is material. *Pantron I*, 33 F.3d at 1095. By
8 contrast, the traditional elements of fraud include “a false representation; in reference to a
9 material fact; made with knowledge of its falsity; with the intent to deceive; and on which
10 an action is taken in justifiable reliance upon the representation.” 37 AM JUR 2D FRAUD
11 AND DECEIT § 23 (2010). In some fraud cases, plaintiffs also are required to show
12 “resulting damage or injury proximately resulting from the representation and action.” *Id.*

13 Courts that have examined this issue have held that, unlike fraud, the FTC need not
14 prove intent, reliance, or injury to establish a violation of Section 5. *See Freecom*, 401
15 F.3d at 1204 n.7 (“Unlike the elements of common law fraud, the FTC need not prove
16 scienter, reliance, or injury to establish a § 5 violation.”); *Nat’l Testing Servs.*, 2005 U.S.
17 Dist. LEXIS 46485, at *4–5 (holding that Rule 9(b) does not apply to Section 5 claims
18 because neither intent to deceive, proof of consumer reliance, nor proof of consumer
19 injury are necessary elements of Section 5); *Communi-dyne*, 1993 U.S. Dist. LEXIS
20 18708, at *3–5 (holding that a claim under Section 5 is not a claim of fraud or mistake
21 subject to Rule 9(b) because it has no scienter or reliance requirement).² One rationale

22
23 ² For this reason, the Northern District of California has declined to always apply
24 Rule 9(b) to allegations of misrepresentations under Section 1770 of the California
25 Consumer Legal Remedies Act, CAL. CIV. CODE § 1770 (2009), which prohibits certain
26 unfair or deceptive acts and practices. *See Nordberg v. Trilegiant Corp.*, 445 F. Supp. 2d
27 1082, 1098–99 (N.D. Cal. 2006) (“Rule 9(b) is not strictly applicable to the current action
28 as the CLRA is not a fraud statute.”); *Marolda v. Symantec Corp.*, No. C 08-05701, 2009
U.S. Dist. LEXIS 65201, at *26 (N.D. Cal. July 27, 2009) (Citing *Kearns*, 567 F.3d at
1125, and *Vess*, 317 F.3d at 1103, the court stated that the “Ninth Circuit has also
maintained that while Rule 9(b) can apply to claims brought under the CLRA, fraud is not

1 for this conclusion is that an FTC action is “not a private or common law fraud action
2 designed to remedy a singular harm, but a government action brought to deter deceptive
3 acts and practices aimed at the public and to obtain redress on behalf of a large class of
4 third-party consumers who purchased defendants’ products and services over an extended
5 period of time.” *Freecom*, 401 F.3d at 1204 n.7 (citing *FTC v. Sec. Rare Coin & Bullion*
6 *Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991)). These decisions are consistent with Ninth
7 Circuit cases that similarly have held that the FTC need not prove elements that are
8 traditionally required in a fraud case to establish a violation of the FTC Act. *See, e.g.*,
9 *FTC v. Publ’g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997) (proof of intent
10 to defraud not required); *FTC v. Figgie Int’l*, 994 F.2d 595, 605–06 (9th Cir. 1993)
11 (unlike common law fraud, proof of subjective reliance by each individual consumer not
12 required); *see also Removatron Int’l Corp. v. FTC*, 884 F.2d 1489, 1495 (1st Cir. 1989)
13 (proof of “a willful, knowing or deliberate act” not required); *FTC v. Kitco of Nev., Inc.*,
14 612 F. Supp. 1282, 1293 (D. Minn. 1985) (unlike common law fraud, proof of subjective
15 reliance by each individual consumer not required); *FTC v. Five-Star Auto Club*, 97 F.
16 Supp. 2d 502, 526 (S.D.N.Y. 2000) (proof of intent to defraud or deceive not required);
17 *FTC v. SlimAmerica*, 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999) (proof of actual reliance
18 by each individual consumer is not required).

19 Defendant Benning appears to argue that deception under the FTC Act is a form of
20 fraud because misrepresentations or deceptive omissions may also be elements of fraud.
21 This argument is without merit. He rests this argument only on dicta from a decision
22 involving allegations of intentional misrepresentations committed “with malice, fraud and
23 oppression.” *Meridian Project Sys., Inc. v. Hardin Constr. Co., LLC*, 404 F. Supp. 2d
24 1214, 1219 (E.D. Cal. 2005). In that case, the court, citing *Neilson v. Union Bank of Cal.*,
25 *N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003), stated, “It is well-settled in the Ninth

26 _____
27 an essential element of a proper CLRA claim. . . . After all, only three of the five
28 elements of fraud are necessary to state a claim under the CLRA: misrepresentation,
reliance, and damages.”).

1 Circuit that misrepresentation claims are a species of fraud.” *Meridian*, 404 F. Supp. 2d
2 at 1219. In fact, however, in *Neilson*, the court was evaluating a very narrow and specific
3 type of misrepresentation claim—negligent misrepresentation under California common
4 law—which specifically has been held by district courts in the Ninth Circuit to be a
5 species of fraud. 290 F. Supp. 2d at 1141–42. Unlike with the FTC Act, proof of
6 negligent misrepresentation under California common law requires, among other things,
7 proof of intent to induce reliance, justifiable reliance, and damages. *Neilson*, 290 F.
8 Supp. 2d at 1141 (restating the elements of negligent misrepresentation as, *e.g.*, “(1) a
9 misrepresentation of a past or existing material fact, (2) without reasonable grounds for
10 believing it to be true, (3) with intent to induce another’s reliance on the fact
11 misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to
12 whom the misrepresentation was directed, and (5) damages,” quoting *B.L.M. v. Sabo &*
13 *Deitsch*, 55 Cal. App. 4th 823, 834, 64 Cal. Rptr. 2d 335 (Ct. App. 1997)) Accordingly,
14 the *Meridian* court’s liberal use of the term “misrepresentation claims” has no application
15 to claims of deceptive practices in violation of Section 5.³

16 In sum, allegations of deception under the FTC Act are not claims of fraud. For
17 this reason, courts consistently have held that Rule 9(b) does not apply to a cause of
18 action brought under the FTC Act under a deception theory. For the same reason, this
19 Court should deny the defendant’s motion to dismiss based upon Rule 9(b).

20 **B. The allegations in the complaint against Benning satisfy Rule 8.**

21 In his motion, Defendant Benning argues that the factual allegations contained in
22 the FTC’s complaint fail to comply with the requirements of Rule 8, as the Supreme
23 Court has characterized those requirements in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009),
24

25 ³ The *Neilson* and *Meridian* courts considered state, not federal, law claims. See 2-9
26 MOORE’S FEDERAL PRACTICE - CIVIL § 9.03[1][e] (Matthew Bender 3d ed.) (In evaluating
27 a complaint under Rule 9(b), state substantive law defines fraud if a claim derives from
28 state law, while federal substantive law typically defines fraud if a claim derives from
federal law.).

1 and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). He argues that the FTC has not
2 made a plausible claim against Benning on the facts alleged. The FTC’s complaint,
3 however, more than suffices to meet the liberal pleading requirements of Rule 8 as
4 characterized in those cases.

5 To survive a motion to dismiss, a complaint need only allege “enough facts to state
6 a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. In evaluating a
7 Rule 12(b)(6) motion, the court is obligated to “construe the complaint in the light most
8 favorable to the plaintiff, taking all [of plaintiff’s] allegations as true and drawing all
9 reasonable inferences from the complaint in [the plaintiff’s] favor.” *Doe v. United States*,
10 419 F.3d 1058, 1062 (9th Cir. 2005). Accordingly, the following factual allegations,
11 among others, must be accepted as true: (1) the defendants operated websites, such as
12 Exhibits A, B, and C to the complaint, which contained a payday loan application; (2) the
13 defendants transferred to the prepaid debit card company certain information that
14 consumers had provided on the application, and that information was used to debit money
15 from consumers’ bank accounts; (3) the defendants were paid for each consumer who
16 “signed up” for a prepaid debit card; (4) the defendants participated in creating the
17 prepaid debit card offers that appeared on their websites; (5) thousands of consumers
18 were charged for the prepaid debit card after visiting the defendants’ websites and many
19 incurred fees and penalties because they did not have sufficient funds in their accounts to
20 cover the charge; (6) consumers complained about these charges to various entities,
21 including defendants; (7) many of the charges were reversed, or “charged back,” by
22 consumers’ banks; (8) defendant Benning was the CEO of the corporate defendant; and
23 (9) Benning, alone or with others, formulated, directed, controlled, had the authority to
24 control, or participated in the acts and practices of the corporate defendant, including the
25 acts and practices set forth in the complaint.

26 Accepting the above facts as true, the FTC has stated two claims for relief under
27 the FTC Act that are more than merely plausible. In Count I, the FTC alleges that certain
28 websites operated by the defendants, such as Exhibits A–B, contain a deceptive omission

1 of material fact. Examining these websites on their face, it is plausible that they contain a
2 representation that consumers who completed an online application and clicked on a
3 button labeled “Finish matching me with a payday loan provider” were applying only for
4 a payday loan, as stated in Count I of the complaint. *See* Complaint ¶¶ 17, 28. Similarly,
5 by examining those websites, it would be reasonable to infer that the defendants did not
6 adequately disclose the prepaid debit card offer because of the manner in which the
7 defendants disclosed the offer on those sites. *See id.* ¶¶ 18, 29. In particular, those
8 websites displayed the prepaid debit card offer as one of four offers and the prepaid debit
9 card was the only offer in which the consumer’s consent to that offer was pre-clicked
10 “Yes.” *Id.* ¶ 18. Given that consumers were charged for the card, it is more than
11 plausible that that information would have been material to consumers. *See id.* ¶ 29.

12 The same holds true for Count II of the complaint. After examining Exhibit C of
13 the complaint, it certainly is plausible that the defendants represented that consumers who
14 submitted a payday loan application would receive a “BONUS” prepaid card at no
15 charge. Given that consumers did not receive a bonus prepaid debit card at no charge,
16 consumers were likely to have been misled by the statement. Furthermore, it is
17 reasonable to presume that such a representation would be material to consumers since it
18 involves the cost of the product.

19 The complaint alleges a plausible claim against defendant Benning, in particular,
20 for these violations of the FTC Act. In addition to describing in detail how the defendants
21 deceived consumers on their publicly available websites, the complaint alleges that
22 Benning was the CEO of the corporate defendant and that he formulated, directed,
23 controlled, had the authority to control, or participated in the deceptive practices, which
24 the complaint describes in detail. The complaint also alleges that consumers complained
25 about the charges to defendants. If true, such facts are sufficient to find that Benning is

26 \\
27 \\
28 \\
29

1 liable for injunctive relief under the FTC Act, especially given his status as CEO.⁴ *See*
2 *Publ’g Clearing House*, 104 F.3d at 1170. They also are sufficient to infer that Benning
3 had the requisite “knowledge,” as described above, for him to be liable for monetary
4 relief under Section 5. *Id.* These factual allegations far exceed the requirements for
5 plausibility under *Iqbal* and *Twombly*.

6 **V. CONCLUSION**

7 For the reasons set forth above, the FTC respectfully requests this Court to deny
8 defendant Benning’s motion to dismiss.

9
10 Respectfully submitted,

11
12
13 Dated: January 20, 2010

14 /S/ Lisa D. Rosenthal
15 LISA D. ROSENTHAL
16 KERRY O’BRIEN
17 EVAN ROSE

18 Attorneys for Plaintiff
19 Federal Trade Commission
20 901 Market Street, Suite 570
21 San Francisco, CA 94103
22 (415) 848-5100 (phone)
23 (415) 848-5184 (facsimile)
24
25

26 ⁴ Benning may attempt to rebut the assertion that he had sufficient control, despite
27 his status as CEO, during this litigation. The existence of any such rebuttal evidence,
28 however, is not relevant to whether the FTC’s complaint satisfies the pleading
requirements of Rule 8.