

1 WILLARD K. TOM  
General Counsel

2 LISA D. ROSENTHAL, Bar # 179486  
3 KERRY O'BRIEN, Bar # 149264  
4 EVAN ROSE, Bar # 253478  
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

8 Attorneys for Plaintiff  
Federal Trade Commission

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

13 FEDERAL TRADE COMMISSION,

14 Plaintiff,

15 v.

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

17 Defendants.  
18

Case No. C09-03814-RS

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

**PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT**

19  
20 PLEASE TAKE NOTICE THAT, on May 26, 2011, pursuant to Federal Rule of Civil  
21 Procedure 56, the Federal Trade Commission ("FTC") will move this Court for summary  
22 judgment against defendant Swish Marketing, Inc. ("Swish" or "Defendant") for violations of  
23 Section 5(a) of the FTC Act, 15 U.S.C. § 45(a) (2006).

24 The uncontroverted evidence establishes that Swish violated Section 5 of the FTC Act,  
25 15 U.S.C. § 45, in connection with the online marketing of a debit card. The FTC has  
26 established sufficient material facts about which there is no genuine dispute to support a finding  
27 of liability as a matter of law. Judgment should be entered in favor of the FTC, and should  
28 include a permanent injunction and an award of monetary relief for injured consumers.

**TABLE OF CONTENTS**

1

2 TABLE OF AUTHORITIES ..... iv

3 TABLE OF EXHIBITS ..... vii

4 MEMORANDUM OF POINTS AND AUTHORITIES ..... 1

5 I. INTRODUCTION ..... 1

6 II. STATEMENT OF MATERIAL FACTS ..... 1

7 A. The Defendant ..... 1

8 B. Swish’s deceptive and unfair marketing of the EverPrivate Card ..... 2

9 1. Background ..... 2

10 2. Swish’s customers ..... 3

11 3. Coreg websites that hid and defaulted to “Yes” the Card offer ..... 3

12 a. Presentation of Coreg Offers as a vertical list ..... 5

13 b. Presentation of Coreg Offers as a two-by-two grid ..... 6

14 c. The Coreg websites failed to adequately disclose the fee. .... 8

15 4. Websites that touted the Card as a “Bonus” and hid the fee ..... 9

16 C. Additional extrinsic evidence of deception ..... 11

17 1. More than 100,000 consumers lost a total of more than \$6 million. .... 11

18 2. Less than 1% of purchasers activated their Card. .... 12

19 3. The transactions yielded a massive return rate. .... 12

20 4. The transactions triggered voluminous complaints. .... 13

21 D. Swish profited handsomely from its unlawful conduct. .... 15

22 III. THE FTC IS ENTITLED TO SUMMARY JUDGMENT ..... 15

23 A. The FTC meets the summary judgment standard. .... 15

24 B. Jurisdictional and venue requirements are met. .... 16

25 C. Swish’s deceptive and unfair conduct violated the FTC Act. .... 16

26 1. Swish’s deceptive conduct violated the FTC Act (Counts I and II). .... 17

27 a. Count I: Swish’s practice of burying and defaulting to “Yes” the

28 EverPrivate Card offer was deceptive. .... 17



**TABLE OF AUTHORITIES**

**FEDERAL CASES**

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

*Celotex Corp. v. Catrett*,  
477 U.S. 317 (1986) ..... 15

*In re Cliffdale Assocs.*,  
103 F.T.C. 110 (1984) ..... 17, 20

*Feil v. FTC*,  
285 F.2d 879 (9th Cir. 1960) ..... 17

*FTC v. Bronson Partners, LLC*,  
564 F. Supp. 2d 119 (D. Conn. 2008) ..... 18

*FTC v. Colgate-Palmolive Co.*,  
380 U.S. 374 (1965) ..... 23

*FTC v. Cyberspace.com, LLC*,  
453 F.3d 1196 (9th Cir. 2006) ..... 17–20, 22

*FTC v. Gill*,  
71 F. Supp. 2d 1030 (C.D. Cal. 1999),  
*aff’d*, 265 F.3d 944 (9th Cir. 2001) ..... 17, 18

*FTC v. H. N. Singer, Inc.*,  
668 F.2d 1107 (9th Cir. 1982) ..... 22

*FTC v. Hope Now Modifications, LLC*  
2010 U.S. Dist. LEXIS 35550 (D.N.J. Apr. 12, 2010) ..... 22

*FTC v. Inc21.com Corp.*,  
2010 U.S. Dist. LEXIS 98944,  
2010-2 Trade Cas. (CCH) ¶ 77,174 (N.D. Cal. Sept. 21, 2010) ..... 16, 21, 22, 24

*FTC v. J.K. Publ’ns, Inc.*,  
99 F. Supp. 2d 1176 (C.D. Cal. 2000) ..... 21

*FTC v. J.K. Publ’ns, Inc.*,  
2000 U.S. Dist. LEXIS 14688, at \*15–27,  
2000-2 Trade Cas. (CCH) ¶ 73,027 (C.D. Cal. Aug. 30, 2000) ..... 24

*FTC v. MacGregor*,  
360 Fed. Appx. 891 (9th Cir. 2009) ..... 20

*FTC v. Medicor, LLC*,  
2002 U.S. Dist. LEXIS 16220,  
2002-2 Trade Cas. (CCH) ¶ 73,759 (C.D. Cal. July 18, 2002) ..... 24

*FTC v. Medlab, Inc.*,  
615 F. Supp. 2d 1068 (N.D. Cal. 2009) ..... 18

1 *FTC v. Natural Solution, Inc.*,  
 2 2007 U.S. Dist. LEXIS 60783,  
 2007-2 Trade Cas. (CCH) ¶ 75,866 (C.D. Cal. Aug. 7, 2007) ..... 18

3 *FTC v. Neovi, Inc.*,  
 4 604 F.3d 1150 (9th Cir. 2010) ..... 16, 17, 21, 22

5 *FTC v. Network Svcs. Depot, Inc.*,  
 2:05cv00440 LDG LRL, Dkt. #236 (D. Nev. 2009),  
 6 *aff'd*, 617 F.3d 1127 (9th Cir. 2010) ..... 24

7 *FTC v. Pantron I Corp.*,  
 33 F.3d 1088 (9th Cir. 1994) ..... 17, 22

8 *FTC v. QT, Inc.*,  
 9 448 F. Supp. 2d 908 (N.D. Ill. 2006),  
*aff'd*, 512 F.3d 858 (7th Cir. 2008) ..... 18

10 *FTC v. Sabal*,  
 11 32 F. Supp. 2d 1004 (N.D. Ill. 1998) ..... 21

12 *FTC v. Stefanichik*,  
 559 F.3d 924 (9th Cir. 2009) ..... 17, 22

13 *FTC v. Think Achievement Corp.*,  
 14 144 F. Supp. 2d 1013 (N.D. Ind. 2000) ..... 24

15 *FTC v. US Sales Corp.*,  
 785 F. Supp. 737 (N.D. Ill. 1992) ..... 18

16 *FTC v. VirtualWorks, LLC*,  
 17 5:09-cv-03815-RS (N.D. Cal. 2009) ..... 2, 23

18 *FTC v. Wolf*,  
 1996 U.S. Dist. LEXIS 1760 (S.D. Fla. Jan. 30, 1996) ..... 23

19 *FTC v. World Travel Vacation Brokers, Inc.*,  
 20 861 F.2d 1020 (7th Cir. 1988) ..... 17

21 *In re Kraft, Inc.*,  
 114 F.T.C. 40 (1991) ..... 18, 20

22 *Kraft, Inc. v. FTC*,  
 23 970 F.2d 311 (7th Cir. 1992) ..... 18

24 *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*,  
 210 F.3d 1099 (9th Cir. 2000) ..... 15

25 *In re Novartis Corp.*,  
 127 F.T.C. 580 (1999) ..... 17

26 *In re Thompson Med. Co.*,  
 27 104 F.T.C. 648 (1984),  
 28 *aff'd*, 791 F.2d 189 (D.C. Cir. 1986) ..... 18

1 *United States v. Reader’s Digest Ass’n, Inc.*,  
2 464 F. Supp. 1037 (D. Del. 1978),  
3 *aff’d*, 662 F.2d 955 (3d Cir. 1981) ..... 22

4 **FEDERAL STATUTES & RULES**

5 28 U.S.C. § 1331 (2006) ..... 16  
6 28 U.S.C. § 1391(b)–(c) (2006) ..... 16  
7 FED. R. CIV. P. 56 ..... i, 1, 15  
8 Federal Trade Commission Act,  
9 Section 4, 15 U.S.C. § 44 (2006) ..... 16  
10 Section 5, 15 U.S.C. § 45 (2006) ..... i, 1, 16, 21  
11 Section 13(b), 15 U.S.C. § 53 (2006) ..... 1, 22  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF EXHIBITS**

<b>Exhibit Number</b>	<b>Source of Authentication</b>
4	Declaration of Kelly C. Ortiz (“Ortiz Dec.”) ¶ 8
6	Ortiz Dec. ¶ 8
49	Ortiz Dec. ¶ 8
50	Ortiz Dec. ¶ 8
84	<i>Stipulation as to Consumer Experience on Swish Marketing, Inc.’s Websites</i> (Dkt. #130) (“Websites Stip.”) ¶ 2
85	<i>Websites Stip.</i> ¶ 1
90	Ortiz Dec. ¶ 8
96	Ortiz Dec. ¶ 9
97	Ortiz Dec. ¶ 9
100	Ortiz Dec. ¶ 9
103	Ortiz Dec. ¶ 8
104	Ortiz Dec. ¶ 8
105	Ortiz Dec. ¶ 9
111	Ortiz Dec. ¶ 9
112	Ortiz Dec. ¶ 8
113	Ortiz Dec. ¶ 8
116	Ortiz Dec. ¶ 8
118	Ortiz Dec. ¶ 9
120	Ortiz Dec. ¶ 9
141	Ortiz Dec. ¶ 9
142	Ortiz Dec. ¶ 9
147	Ortiz Dec. ¶ 9
151	Ortiz Dec. ¶ 9
161	Ortiz Dec. ¶ 9
163	<i>Websites Stip.</i> ¶ 1
164	<i>Websites Stip.</i> ¶ 2
165	<i>Websites Stip.</i> ¶ 3

<b>Exhibit Number</b>	<b>Source of Authentication</b>
166	<i>Websites Stip.</i> ¶ 5
167	<i>Websites Stip.</i> ¶ 5
168	<i>Websites Stip.</i> ¶ 5
169	<i>Websites Stip.</i> ¶ 5
170	<i>Websites Stip.</i> ¶ 5
171	<i>Websites Stip.</i> ¶ 5
172	<i>Websites Stip.</i> ¶ 5
173	<i>Websites Stip.</i> ¶ 5
174	<i>Websites Stip.</i> ¶ 5
175	<i>Websites Stip.</i> ¶ 5
176	<i>Websites Stip.</i> ¶ 5
177	<i>Websites Stip.</i> ¶ 5
178	<i>Websites Stip.</i> ¶ 5
179	<i>Websites Stip.</i> ¶ 5
180	<i>Websites Stip.</i> ¶ 5
182	<i>Stipulation as to Certain Documents Produced by Defendants (Dkt. #139) (“Docs. Stip.”) ¶ 2</i>
185	<i>Docs. Stip.</i> ¶ 2
193	<i>Docs. Stip.</i> ¶ 2
196	<i>Docs. Stip.</i> ¶ 2
197	<i>Docs. Stip.</i> ¶ 2
198	<i>Docs. Stip.</i> ¶ 2
208	<i>Docs. Stip.</i> ¶ 2
226	Ortiz Dec. ¶ 9
228	Ortiz Dec. ¶ 9
229	Ortiz Dec. ¶ 2
230	Ortiz Dec. ¶ 3
231	Ortiz Dec. ¶ 4
232	Ortiz Dec. ¶ 5
233	Ortiz Dec. ¶ 6



Exhibit Number	Source of Authentication
234	Ortiz Dec. ¶ 7
235	Ortiz Dec. ¶ 9
236	Ortiz Dec. ¶ 9
237	Ortiz Dec. ¶ 9
238	Ortiz Dec. ¶ 9
239	Ortiz Dec. ¶ 9
240	Ortiz Dec. ¶ 9
241	Ortiz Dec. ¶ 9
242	Ortiz Dec. ¶ 9
243	Ortiz Dec. ¶ 9
244	Ortiz Dec. ¶ 9
245	Ortiz Dec. ¶ 9
247	Ortiz Dec. ¶ 9
249	Ortiz Dec. ¶¶ 11, 12
250	Ortiz Dec. ¶¶ 11, 12
251	Ortiz Dec. ¶¶ 11, 12
254	Ortiz Dec. ¶ 12
255	Ortiz Dec. ¶¶ 13, 14
256	Ortiz Dec. ¶¶ 13, 14
257	Ortiz Dec. ¶¶ 13, 14
258	Ortiz Dec. ¶ 14
259	Ortiz Dec. ¶ 33

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The FTC charges in its Amended Complaint (Dkt. #82) (“Complaint”) that Swish  
 4 violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a) (2006), in connection with the  
 5 advertisement and sale of a prepaid debit card over the internet. The Complaint alleges that,  
 6 between September 2006 and August 2007, Swish induced hundreds of thousands of consumers  
 7 to unwittingly pay \$39.95 to \$54.95 for a debit card called the “EverPrivate Card.” (Complaint  
 8 ¶¶ 15–17) Swish presented the EverPrivate Card as a secondary offering on websites that  
 9 featured payday loan matching services. (*Id.* ¶¶ 22–24, 28) On some of its websites, Swish  
 10 obscured the fact that the EverPrivate Card offer was pre-clicked “Yes.” (*Id.* ¶¶ 16, 22–27) On  
 11 other websites, Swish falsely characterized the card as a free “bonus” when, in fact, it was not  
 12 free. (*Id.* ¶¶ 16, 28–30) These websites failed to adequately disclose that the bank account  
 13 information that consumers had provided on their loan application would be used to pay for the  
 14 card. (Complaint ¶¶ 12–25, 28–30) These practices generated thousands of complaints, and  
 15 caused more than \$6 million in injury. (*Id.* ¶¶ 17–18; *see* Section II.C.1 *infra*)

16 The Complaint requests injunctive relief and restitution for injured consumers pursuant to  
 17 Section 13(b) of the FTC Act, 15 U.S.C. § 53(b) (2006). As shown by the stipulated facts,  
 18 corporate records, expert testimony, and the defendants’ admissions, no genuine dispute as to  
 19 any material fact exists with respect to Defendant’s liability or the amount of injury. Summary  
 20 judgment under Rule 56 of the Federal Rules of Civil Procedure is therefore appropriate.

21 **II. STATEMENT OF MATERIAL FACTS**

22 **A. The Defendant**

23 Swish is a closely held Delaware corporation. (Swish/Patterson Answer (Dkt. #87)  
 24 (“Answer”) ¶ 7) Matthew Patterson, Mark Benning, and Jason Strober founded the company in  
 25 2004.<sup>1</sup> (*Id.* ¶ 31) Swish had approximately twenty-five or fewer employees during the relevant  
 26 period. (*Id.*) It maintained its principal place of business at 555 Bryant Street, No. 349, Palo

27  
 28 <sup>1</sup> This Court has entered Stipulated Final Judgments against individual defendants Strober,  
 Patterson, and Benning. (*See* Stipulated Final Judgments (Dkt. #122, #141, #142))

1 Alto, CA 94301. (*See, e.g.*, Ex. 235 at 2) Swish transacts or has transacted business in this  
 2 District. (Answer ¶ 7)

3 **B. Swish’s deceptive and unfair marketing of the EverPrivate Card**

4 **1. Background**

5 Swish operated numerous payday loan matching websites. (Answer ¶ 12) The websites  
 6 featured a payday loan matching form, referred to hereinafter as a loan application, which could  
 7 be completed and submitted online. (*See, e.g.*, Exs. 84,<sup>2</sup> 164) Swish then sold to lenders the  
 8 information that consumers had submitted (Answer ¶ 13), or the “lead.” The lead included,  
 9 among other things, bank account information. (*Id.*) Payday lenders used such information to  
 10 directly deposit the payday loan into the consumer’s bank account. (*Id.*) In addition to payday  
 11 loans, Swish’s websites advertised unrelated products and services. (*Id.* ¶ 14) Swish also sold  
 12 the leads to the sellers of such other products and services. (*Id.*)

13 From about September 2006 to about August 2007, two such other products included  
 14 prepaid debit cards sold by a company called VirtualWorks, LLC (“VirtualWorks”).<sup>3</sup>  
 15 (*Stipulation as to Consumer Experience on Swish Marketing, Inc.’s Websites* (Dkt. #130)  
 16 (“*Websites Stip.*”) ¶¶ 1–2; (Answer ¶ 15) Swish actively marketed the cards on dozens of its  
 17 websites. (*Id.*) The first card, called the Secret Cash Card, was a MasterCard-brand debit card.  
 18 (*Id.*) In early 2007, that card was replaced with a Visa-brand debit card, called the EverPrivate  
 19 Card. (*Id.*; *Stipulation as to Lead Data* (Dkt. #131) (“*Data Stip.*”) ¶ 3) The cards sold for an  
 20 enrollment fee ranging from \$39.95 to \$54.95. (*Data Stip.* ¶ 7.a) They came with a zero balance  
 21 and could be loaded with cash at designated locations.<sup>4</sup> (Exs. 249–51; *Data Stip.* ¶ 1) Swish  
 22

---

23 <sup>2</sup> Exhibit 84 cited herein is the same as Exhibit A to the FTC’s Amended Complaint.  
 24 (*Compare* Ex. 164 to Complaint Ex. A)

25 <sup>3</sup> This Court entered stipulated final judgments against VirtualWorks and its two principals in  
 26 a related case, *FTC v. VirtualWorks, LLC*, 5:09-cv-03815-RS (N.D. Cal. 2009). (*See* Dkt. #9 in  
 that matter)

27 <sup>4</sup> The Secret Cash Card was a “virtual” card. (*Data Stip.* ¶ 3.a) A virtual debit card consists  
 28 of the information that would usually be found on a plastic debit card, but does not include an  
 actual plastic card. (*Id.*) The EverPrivate Card was a plastic card. (*Id.* ¶ 3.b)

1 stopped advertising the EverPrivate Card in August 2007 when VirtualWorks' bank accounts  
 2 were shut down, forcing it to stop selling the product. (Answer ¶ 38; Ex. 241) Hereinafter, the  
 3 Secret Cash Card and the EverPrivate Card are referred to collectively as the "EverPrivate Card"  
 4 or the "Card."

5 Swish and VirtualWorks communicated and worked together regarding the presentation  
 6 of the EverPrivate Card offer on Swish websites (*see, e.g.*, Exs. 237, 242 at 1–2, 247 at 1–2), but,  
 7 as described below, Swish had ultimate control over how the offer appeared. Indeed, Swish  
 8 described the card sales as having been "made according to a marketing campaign developed by  
 9 Swish." (Ex. 236 at 54; *see also* Answer ¶ 42)

## 10 **2. Swish's customers**

11 According to Swish, consumers drawn to its payday loan matching sites are "***Impatient***  
 12 and looking for an immediate loan." (Ex. 226 at 19) Surveys show that payday loan applicants  
 13 are "disproportionately likely to be young, single female household heads who have low to  
 14 moderate incomes, do not have college degrees, have limited liquid assets and limited access to  
 15 credit, and face an unexpected expense that cannot be postponed." (Shimp Dec. ¶ 10<sup>5</sup>) Swish  
 16 customers who successfully obtained a payday loan likely received only a few hundred dollars.  
 17 (Ex. 193 at 3; Ex. 230 at 34:12–21<sup>6</sup>; *see also* Shimp Dec. ¶ 12)

## 18 **3. Coreg websites that hid and defaulted to "Yes" the Card offer**

19 Between November 2006 and August 2007, Swish created, maintained, and operated  
 20 numerous websites whose homepages were materially similar to the ones depicted in Exhibits 84  
 21 and Exhibit 164. (*Websites Stip.* ¶ 2; Answer ¶¶ 20, 27) These websites had URLs such as  
 22 ChristianFaithFinancial.com and PrescottFinancial.com. (*Id.*) Their homepages featured a form  
 23 to match consumers with payday loan providers. (Answer ¶ 23; *see, e.g.*, Exs. 84, 164)

24 These homepages conveyed the general message that the consumer was merely applying  
 25 for a loan, as opposed to buying something. For example, as shown in Figure 1 below, the

---

27 <sup>5</sup> Declarations are referred to herein by the last name of the declarant followed by "Dec."

28 <sup>6</sup> References to deposition testimony refer to the page and line number of the transcript.

1 headlines contained text in large, bolded font about payday loans, such as the available loan  
 2 amounts and possible uses for the loan. (See, e.g., Exs. 84, 164) The homepages said nothing  
 3 about any charges associated with submitting the application and made no reference  
 4 to the Card or to any product or service other than the payday loan matching service. (Answer  
 5 ¶ 23; see, e.g., Exs. 84, 164)



15 **Figure 1 - excerpt from Exhibit 84**

16 Finally, as shown in Figure 2 below, at the bottom of the form appeared a submit button, with a  
 17 prominent label, such as, “**Get matched for your payday loan!**” (Answer ¶ 23; see, e.g., Exs.  
 18 84, 164)

 A screenshot of a web form for a payday loan application. The form has several input fields: a phone number field with a label "3 Phone", a section titled "Please provide a second reference" with three sub-fields: "1 Name", "2 Relationship to you" (with a dropdown menu showing "Friend"), and "3 Phone". At the bottom of the form is a large, pink, rounded button with the text "Get matched for your payday loan!".

26 **Figure 2 - excerpt from Exhibit 84**

27 Consumers who clicked on this submit button landed on a webpage materially similar to  
 28 Exhibit 165, which asked them to “Please wait while we process your application...” (Ex. 165)

1 While a consumer waited on this page, Swish sent the lead to certain payday lenders who  
2 decided whether to buy it. (*Websites Stip.* ¶ 3)

3 Swish directed consumers who were not initially matched with a lender to a webpage that  
4 displayed offers for several products or services unrelated to the loan. (*Websites Stip.* ¶ 4;  
5 Answer ¶ 24) This type of offer is commonly referred to as a “Coregistration Offer” or “Coreg  
6 Offer,” and webpages that display them are referred to as “Coreg Pages.” Swish had control  
7 over the appearance of its Coreg Pages generally and of each offer specifically, including the  
8 EverPrivate Card offer. (Exs. 96; 97; 100; 105; 120; 196–98; 208; 233 at 62:9–66:6 (*re creation*  
9 *of Ex. 50*); at 66:7–69:1 (*re creation of Ex. 85*); Ex. 103; Ex. 233 at 73:2–79:20 (*re Ex.103*); Ex.  
10 104; Ex. 233 at 70:14–73:1 (*re Ex.104*); Ex. 112; Ex. 233 at 81:25–85:1 (*re Ex.112*); Ex. 113;  
11 Ex. 233 at 104:9–106:17 (*re Ex.113*)) As described below, these pages changed over time. (*See*  
12 Exs. 166–80)

### 13 a. Presentation of Coreg Offers as a vertical list

14 During the early stage of the Card program, from early November 2006 to mid-February  
15 2007, the Coreg Pages displayed two, three, or four offers, *e.g.*, a catalog credit card, a credit  
16 repair kit, a free color printer, and the EverPrivate Card offer. (*See, e.g.*, Exs. 167, 169, 171) As  
17 shown in Figure 3 below, they appeared in a vertical list, with tiny Yes/No option buttons – or

19 **Special Bonus offers just for you!**

20  yes  no **Would you like a NEW Computer with Free Color Inkjet Printer?**

21 MyComputerClub allows members to purchase quality computers while also rebuilding their credit. Receive your Free 21-day trial today. If you decide to keep your membership, an annual membership fee of \$89.00 will be automatically charged to your account of record as 2 monthly payments of \$44.50 after your Free trial. [Click Here for Terms and Conditions.](#)

22  yes  no **I want a \$2,500 prepaid debit Mastercard with no credit check required.**

23 Everyone Qualifies for a \$2,500- Prepaid debit MasterCard@ - NO credit check, NO SSN required to enroll. Secret Cash Card members receive a Virtual PrivaCash@ prepaid debit MasterCard@, the only way to shop online without anyone else knowing. Just load the card with cash and make purchases privately. NO credit check, NO link to personal credit information, NO bill mailed. INSTANT APPROVAL AND ISSUE. It's the perfect solution to protect your privacy. Also receive lifetime free access to Secret Cash Card privacy tools to protect your identity. YOU HEREBY AUTHORIZE SECRET CASH CARD to debit your bank account for the one-time enrollment fee of \$49.95. See FAQs for additional details.

24  yes  no **I want Academy Law to repair my credit report.**

25 By accepting this offer I authorize Academy Law Firm to use the same information that I provided above. I hereby authorize Academy to debit my bank account for a one time credit report and setup fee of \$97.00, Academy will continue working on my case for a monthly fee of \$49.95 until cancellation. I agree that as soon as my initial fee is withdrawn Academy will pull my credit report and begin disputing the negative items therein. I also acknowledge that I have read the Disclosure Statement and Cancellation Notice and give my Digital Signature and Limited Power of Attorney for Academy to complete the Credit Report Audit and Verification Services.

26 **Finish Matching Me With A Payday Loan Provider!**

27 **Figure 3 - excerpt from Exhibit 171**



1 “radio buttons”— next to each. (*See, e.g.*, Exs. 167, 169, 171) The Card offer appeared second in  
 2 the list. (*See, e.g.*, Exs. 167, 169, 171)

3 After just a week displaying the EverPrivate Card offer with the “No” button pre-  
 4 checked, Swish switched the button’s default setting to “Yes” (*compare* Ex. 167 to Ex. 166; Ex.  
 5 247 at 1–2), which caused a notable increase in the volume of leads it sold to VirtualWorks  
 6 (Answer ¶ 43; Exs. 247 at 1–2, 252). Yet, with headlines at the top, such as, “**Special Bonus**  
 7 **offers just for you!**” and a prominent submit button on the bottom, labeled, “**Finish Matching**  
 8 **Me With A Payday Loan Provider!**”, the Coreg Pages suggested that the offers were not linked  
 9 to the loan process and could be bypassed without consequence. (*See, e.g.*, Ex. 171)

10 As shown in Figure 3 above, the Card offer did not highlight the fee in any way. It began  
 11 with the bolded headline, “**I want a \$2,500 prepaid debit Mastercard with no credit check**  
 12 **required.**” (*Id.*) It then displayed five lines of lighter color, fine print text. (*Id.*) After seven  
 13 sentences touting the Card’s features, it set forth the purported authorization for VirtualWorks  
 14 “to debit your bank account for the one time enrollment fee of \$49.95.” (*Id.*)

#### 15 **b. Presentation of Coreg Offers as a two-by-two grid**





16 Beginning in mid-February 2007, Swish switched from displaying the Coreg Offers in a  
 17 vertical list to displaying them in a two-by-two grid, as shown in Figure 4 below. (*See, e.g.*, Exs.  
 18 173<sup>7</sup>, 178<sup>8</sup>) Each box in the grid contained an offer accompanied by Yes/No buttons. (*See, e.g.*,  
 19 Exs. 173, 178) One box displayed the EverPrivate Card offer. (*See, e.g.*, Exs. 173, 178) The  
 20 other three boxes displayed other offers, which varied over time, *e.g.*, a credit repair kit, a free  
 21 color printer, and an auto loan quote. (*See, e.g.*, Exs. 173, 178) The EverPrivate Card offer was  
 22 always prechecked “Yes,” while the others were prechecked “No.” (*See, e.g.*, Exs. 173, 178)  
 23 The placement of all the offers in the grid changed over time. (*See, e.g.*, Exs. 172, 174, 176,  
 24 178)

---

25  
 26 <sup>7</sup> Exhibit 173 cited herein is materially the same as Exhibit B to the Complaint. (*Compare*  
 27 Ex. 173 to Complaint Ex. B)

28 <sup>8</sup> Exhibit 178 cited herein is materially the same as Exhibit C to the Complaint. (*Compare*  
 Ex. 178 to Complaint Ex. C)

**Before you get your loan, check out the limited time offers below!**

<p><b>Improve your credit score</b></p> <p><input type="radio"/> Yes <input type="radio"/> No</p> <p><b>I want to repair my credit for \$24.95</b> Brought to you by DollarBlvd.com, <a href="#">101 Secrets to Boost Your FICO Score</a> can improve your credit score dramatically to buy that home or qualify for a car loan without expensive lawyers. This e book contains detailed instructions and amazing tips from a businessman who cleaned up his credit score on his own. By clicking Yes, I authorize DollarBlvd.com to debit my bank account for \$24.95 backed by a <a href="#">money back guarantee</a>. Instructions to retrieve the e book will be sent to the email address provided in your loan request.</p> 	<p><b>Get a \$2,500 Visa Card</b></p> <p><input type="radio"/> Yes <input type="radio"/> No</p> <p><b>Everyone Qualifies for a \$2,500 Visa® Prepaid Card - NO CREDIT CHECK.</b></p> <p>A Visa® Prepaid Card with EverPrivate is the only way to shop online without anyone else knowing. Just load the card with cash and make purchases anonymously. NO credit check, NO link to personal credit information, NO bill mailed. INSTANT APPROVAL! It's the perfect solution if you want to protect your privacy. Check "Yes" and you will receive your Visa® Prepaid Card including lifetime free access to EverPrivate Card privacy tools to protect your identity. YOU HEREBY AUTHORIZE EVERPRIVATE CARD to debit your bank account for the one time enrollment fee of \$54.95. See <a href="#">Terms and Privacy information</a>.</p> 
<p><b>Get a FREE Color Printer</b></p> <p><input type="radio"/> Yes <input type="radio"/> No</p> <p><b>Would you like a NEW Computer with a FREE wireless keyboard and mouse or a brand NEW iPod?</b></p> <p>MyComputerClub allows members to purchase quality computers while also rebuilding their credit. Receive your Free 21 day trial today. If you decide to keep your membership, an annual membership fee of \$89.00 will be automatically charged to your account of record as 2 monthly payments of \$44.50 after your Free trial. <a href="#">Click Here</a> for Terms and Conditions.</p> 	<p><b>Get CASH for a New Car</b></p> <p><input type="radio"/> Yes <input type="radio"/> No</p> <p><b>I want a FREE Auto Loan Quote.</b></p> <p>Get a fast, FREE, no obligation quote for an auto loan whether you need a used car or a new car. All credit welcome. By clicking the button below, you agree to the CarsBlvd <a href="#">privacy policy</a> and <a href="#">terms and conditions</a>. You also authorize a credit check to be performed by our lending partners in order to evaluate the financing options that can be provided to you.</p> 

**Finish matching me with a payday loan provider!**

Figure 4 - excerpt from Exhibit 178

As with the vertical list version of the Coreg Pages, the grid version conveyed the impression that the offers could be bypassed without consequence. It featured bolded headlines such as **“Before you get your loan, check out the limited time offers below!”** and submit button labels such as **“Finish matching me with a payday loan provider!”** (See, e.g., Exs. 176, 178) In fact, after launching the grid design, Swish added an animated arrow flashing down the center, to “[b]ring more attention to [the] submit button.” (Ex. 197; see, e.g., Ex. 178 (html version))<sup>9</sup>

The Card fee was not highlighted or otherwise made prominent. (See, e.g., Exs. 173, 178) As shown in Figure 4, the offer featured the sub-heading **“Get a \$2,500 [MasterCard/Visa Card]”** in bold. (See, e.g., Exs. 173, 178) Next to the radio buttons

<sup>9</sup> Certain exhibits filed with the *Websites Stip.* are available in the html version in addition to the static pdf version filed herewith. To see the html versions of such exhibits, access the CD-ROM manually filed with the stipulation. For the html version of Ex. 178, for example, open the folder labeled “Exhibit 178” on that CD and then open the subfolder labeled “html version.” The html version of Ex. 178 is called “Revision 222 -ARCHIVE-sec-scc-mcc-cl.htm.”



1 appeared either the bolded phrase “**I want a \$2,500 prepaid debit [Mastercard/Visa card]**  
2 **with no credit check required**” (*see, e.g.*, Exs. 174-75) or “**Everyone Qualifies for a \$2,500**  
3 **Visa® Prepaid Card - NO CREDIT CHECK**” (*see, e.g.*, Ex. 178). Between twelve to  
4 fourteen lines of light gray fine print appeared below the radio buttons. (*See* Exs. 172–79) Only  
5 after six or seven sentences touting the Card’s features did the text set forth the purported  
6 authorization for VirtualWorks “to debit your bank account for the one time enrollment fee of  
7 [\$49.95–\$54.95].” (*See, e.g.*, Exs. 173, 178)

8 **c. The Coreg websites failed to adequately disclose the fee.**

9 The Complaint alleges that Swish failed to adequately disclose to consumers who  
10 completed Swish’s payday loan application and clicked on the submit button on the Coreg Pages  
11 that they were also purchasing an EverPrivate Card for a fee and that this fee would be debited  
12 from their bank accounts. (Complaint ¶ 59) To establish that these webpages did not adequately  
13 disclose the Card offer, the FTC submits the webpages themselves, as identified and described  
14 above. (Exs. 167–78) As set forth in Section III.C.1.a *infra*, this Court is empowered to  
15 examine Defendant’s advertisements at summary judgment and determine what claims and  
16 omissions are contained in them.

17 The FTC, in addition, introduces other evidence that supports this allegation. In  
18 particular, the FTC introduces the testimony of Terence Shimp, D.B.A., Distinguished Professor  
19 Emeritus at the University of South Carolina’s Moore School of Business, and a recognized  
20 expert on consumer psychology and marketing communications. Professor Shimp opines that  
21 many consumers who visit Swish’s websites “are *highly motivated* to process information  
22 relevant to the availability of payday loans and are *little motivated* to process non-payday-loan  
23 information that is tangential, or peripheral, to their primary reason for being online and seeking  
24 a payday loan.” (Shimp Dec. ¶ 17) “Given their goal to complete the loan application swiftly,  
25 many **applicants would devote little more than perfunctory attention to any of the offers**  
26 prior to clicking on the button at the bottom of the page . . . .” (*Id.* ¶ 25 (emphasis added))

27 Professor Shimp also explains that the website appears to be designed to draw a  
28 consumer’s attention **away from** the Card offer by its use of animated arrows in some of the

1 Coreg Pages. (*Id.*; *see, e.g.*, Ex. 178 (html version)) He opines that, even for those who actually  
 2 looked at the product offers, only a “vigilant reading” would enable a consumer “to understand,  
 3 first, what specifically the Yes/No buttons are indicating the prospect to do and to recognize,  
 4 second, that upon clicking the activation button at the bottom . . . that the prospect has  
 5 automatically committed her- or himself into paying the fee for the prepaid debit card.” (*Id.* ¶  
 6 26; *see also id.* ¶ 33 (re. other coreg pages)) Although Dr. Shimp cannot peg a specific  
 7 percentage of consumers who would have been misled, he poses the following query: “**If the**  
 8 **intent was not to mislead or deceive, why then was the radio button for the debit card offer**  
 9 **not set to No as were the other product offers?”** (*Id.* ¶ 34 (bolded emphasis added))

10 Moreover, as described in Section II.C *infra*, the FTC submits additional extrinsic  
 11 evidence – consisting of extremely low activation rates, high rates of returns, and voluminous  
 12 complaints – as being probative of Swish’s failure to adequately disclose the Card offer.

#### 13 4. Websites that touted the Card as a “Bonus” and hid the fee

14 Between September 2006 and August 2007, Swish created, maintained, and operated  
 15 numerous websites whose homepages were materially similar to the ones depicted in Exhibits 85  
 16 and 163.<sup>10</sup> (*Websites Stip.* ¶ 1; Answer ¶¶ 20, 28, 30) These websites had URLs such as  
 17 WillowGlenFinancial.com, WhittierFinancial.com, and MyPayday.org/credit2. (*Websites Stip.*  
 18 ¶ 1) As with Swish’s other websites, these pages featured an application that required a  
 19 consumer’s bank account information. (Exs. 85, 163) Submit buttons appeared below the form  
 20 with labels such as, “**Activate your Prepaid Debit Visa card and get matched for a payday**  
 21 **loan!**” and “**Apply For a Payday Loan and Get Your Prepaid Debit MasterCard.**” (Exs. 85,  
 22 163)

23 As with the Coreg Pages, Swish controlled the overall appearance of these websites and  
 24 the manner in which the Card offer appeared. (Exs. 111, 118, 161) In fact, before it ever started  
 25 working with VirtualWorks, Swish had operated virtually identical websites in which it  
 26 advertised another product, the National Platinum Card. (Exs. 94, 111, 118, 182, 185; *compare*

---

27  
 28 <sup>10</sup> Exhibit 85 cited herein is the same as Exhibit D to the FTC’s Amended Complaint.  
 (*Compare* Ex. 85 to Complaint Ex. D)

1 Ex. 85 to Ex. 185 at 3–4) On these webpages, Swish simply substituted the EverPrivate Card for  
 2 the National Platinum Card. (Exs. 94, 111, 118)

3 The Complaint alleges that these websites represent that consumers who submitted a loan  
 4 application would receive a “BONUS” prepaid card at no charge. (Complaint ¶ 61) To establish  
 5 that they made these representations, the FTC submits the webpages themselves. (Exs. 85, 163)  
 6 As shown in Figure 5 below, these sites characterized the Card as a “BONUS” that comes with  
 7 the loan, with the headline claim: **“Apply now for a Payday Loan of up to \$1500 and a**  
 8 **BONUS \$2,500 Prepaid Debit Visa\* [MasterCard\*].”** (See Exs. 85, 163)



18 **Figure 5 - excerpt from Exhibit 163**

19 As demonstrated by the websites themselves, Swish disclosed the fee only in fine print  
 20 below the submit button. (See Exs. 85, 163) In numerous instances, consumers would not have  
 21 been able to see this text without affirmatively scrolling down past the submit button before  
 22 clicking it. (See Exs. 85, 163) Moreover, as shown in Figure 6 below, there was nothing  
 23 immediately above or on the button signaling that any information appeared below the button.<sup>11</sup>  
 24 (See Exs. 85, 163)

25

26

27

28

---

<sup>11</sup> Unlike the websites at issue here, the sites featuring the National Platinum Card, discussed above, apparently disclosed the fee both above and below the submit button, which made it more likely to be seen. (See Ex. 186) Despite this precedent, the “BONUS” sites that advertised the EverPrivate Card disclosed the fee only below the submit button. (See, e.g., Ex. 85)

1

2 **Your second reference:**

3 1 Name

4 2 Relationship to you: Friend

5 3 Phone Number: (  ) -  -

6 **Apply For A Payday Loan and Get Your Prepaid Debit MasterCard®**

7 \* Everyone Qualifies for a \$2,500- Prepaid debit MasterCard – NO credit check, NO SSN required to enroll. Secret Cash Card members receive a Virtual PrivaCash® prepaid debit MasterCard®, the only way to shop online without anyone else knowing. Just load the card with cash and make purchases privately. NO credit check, NO link to personal credit information, NO bill mailed. INSTANT APPROVAL AND ISSUE. It's the perfect solution to protect your privacy. Also receive lifetime free access to Secret Cash Card privacy tools to protect your identity.

8

9 YOU HEREBY AUTHORIZE SECRET CASH CARD to debit your bank account for the one time enrollment fee of \$39.95. ([href](#)) See FAQs for additional details ([href](#)).

10

11 **Figure 6 - excerpt from Exhibit 163**

12 In addition to the websites, the FTC also introduces the declaration of Professor Shimp, who  
 13 describes how consumers were unlikely to read the disclosures described above. (Shimp Dec. ¶¶  
 14 27–30) He remarks that “[c]onsumers are acculturated to be cautious when something is *sold*  
 15 *to them, but that is not the case when a marketing transaction is presented to them as being*  
 16 *free, which certainly is the suggestion when an offer is presented as a bonus.*” (*Id.* ¶ 30  
 17 (bolded emphasis added)) As further extrinsic evidence that these websites were deceptive, the  
 18 FTC submits evidence of low activation rates, high rates of returns, and complaints from  
 19 consumers and payday lenders, as set forth in Section II.C *infra*.

20 **C. Additional extrinsic evidence of deception**

21 **1. More than 100,000 consumers lost a total of more than \$6 million.**

22 From September 2006 to August 2007, Swish sent VirtualWorks approximately 418,773  
 23 leads for an EverPrivate Card. (*Data Stip.* ¶ 5) In those instances, Swish transferred to  
 24 VirtualWorks consumer information, which included the bank account information that such  
 25 consumers had provided on their loan application form, discussed above. (Answer ¶ 26) There  
 26 is no evidence in the record that Swish provided consumers any notice of the debit beyond the  
 27 fine print disclosures in the EverPrivate Card offers, discussed above. (*See Ex. 240* (describing  
 28

1 the process by which consumers are signed up for the Card)) “Barring technical difficulties, the  
2 transfer was automatic and almost instantaneous.” (*Data Stip.* ¶ 5)

3 VirtualWorks used this information to debit, or attempt to debit, between \$39.95 and  
4 \$54.95 from 290,503 bank accounts. (*Id.* ¶ 7.a) Consumers ultimately paid for 117,632 cards  
5 (*id.* ¶ 15), for an aggregated total of approximately \$6,108,872 (*id.* ¶ 16).<sup>12</sup>

6 **2. Less than 1% of purchasers activated their Card.**

7 Only a tiny fraction of the 117,632 consumers who paid for a Card ever activated it.  
8 Between September 2006 and May 2007, only **one** purchaser activated his Card. (*Data Stip.*  
9 ¶¶ 5 (dates), 18) Between May 2007 and August 2007, only 891 purchasers redeemed their  
10 Card. (*Id.*) Thus, only 892 of the 117,632 cards that were purchased were ever activated or  
11 redeemed – a rate of less than 1%. (*Id.* ¶ 18)

12 **3. The transactions yielded a massive return rate.**

13 It is undisputed that more than half of the approximately 290,503 initial attempted  
14 transactions were returned or refunded. (*Data Stip.* ¶¶ 8–10) More specifically, approximately  
15 19,091, or 6.6%, of such transactions were returned as unauthorized (*id.* ¶¶ 9.c, 10), and  
16 approximately 94,781, or 32.6%, were not completed due to insufficient funds, or “NSFs” (*id.*  
17 ¶¶ 9.a, 10). An additional 5.9% of these transactions were refunded to consumers. (*Id.* ¶¶ 8.a,  
18 10) In fact, more than 18% of initial transactions that reached a valid bank account were either  
19 returned as unauthorized or refunded to consumers. (*Id.* ¶ 17)

20 To understand how extreme these figures are, it is instructive to look at average return  
21 rates for transactions using the Automated Clearing House (“ACH”) network, such as debit card  
22 transactions. Defendant agrees that the ACH system is comparable to the system of remotely  
23

---

24  
25 <sup>12</sup> This figure includes only those transactions that were completed and that were not reversed  
26 or returned. (*Data Stip.* ¶¶ 7–8 ) It does include associated expenses incurred by consumers,  
27 such as bank fees and penalties. Many of the affected consumers, who, as payday loan  
28 applicants, were struggling to make ends meet, incurred fees and penalties from their banks  
because they did not have sufficient funds in their accounts to cover this debit. (Shimp Dec. ¶ 40  
(25.5% of 800 complaints reviewed))



1 created check drafts (RCCs) used here.<sup>13</sup> (*Id.* ¶ 53) For internet transactions, ACH return rates  
 2 for 2006 averaged 0.06% for unauthorized transactions (versus 6.6% here), and averaged 1.09%  
 3 for NSF's (versus 32.6% here). (*Id.*)

4 High levels of both unauthorized transactions and NSF's are probative of deception. It is  
 5 undisputed that “[h]igh levels of insufficient funds returns can be indicators of lack of  
 6 authorization and/or fraud as they can indicate that customers were not aware money would be  
 7 withdrawn from their account.” (*Data Stip.* ¶ 52.a) Professor Shimp states, “[M]any of these  
 8 over-drafted consumers would never have intentionally signed up for the prepaid debit cards  
 9 when their bank accounts contained insufficient funds.” (Shimp Dec. ¶ 40) “This is perhaps the  
 10 most damning evidence that many consumers were misled by Swish’s websites.” (*Id.*)<sup>14</sup>

#### 11 **4. The transactions triggered voluminous complaints.**

12 Thousands of consumers complained to VirtualWorks, police departments and law  
 13 enforcement agencies, the Better Business Bureau, banks, payday lenders, and Swish that the  
 14 debit was unauthorized. (Ortiz Dec. ¶ 34) Based on his analysis of the complaints, Professor  
 15 Shimp concluded that the vast majority of the consumers who complained indicated that “they  
 16 did not intentionally place orders for the prepaid debit cards and felt they had been misled into  
 17 ordering something nonvolitionally.” (Shimp ¶ 37) It is noteworthy that all of the complaints  
 18 concerned the **process of being signed up** for the Card – **none** were about the Card itself. (*See*  
 19 *id.* ¶ 36 (No category of complaint deals with the Card itself.))

20 The structure of the transaction made it unlikely that consumers would have known to  
 21 complain directly to Swish. The “Secret Cash Card” or “EverPrivateCard” was identified as the  
 22 source of the debit on consumers’ bank account documentation. (Exs. 255–57) Neither Swish’s  
 23 name nor contact information appeared. (Answer ¶ 32) Nevertheless, throughout the relevant  
 24

---

25  
 26 <sup>13</sup> Data on the return rate for RCCs is unavailable because RCCs are cleared in the same  
 27 manner as checks. (*Id.* ¶ 53) However, return data is available for ACH transactions. (*Id.*)

28 <sup>14</sup> Notably, Swish knew that VirtualWorks was experiencing high NSF rates from leads that  
 Swish sold to VirtualWorks. (*See, e.g.*, Exs. 243, 245 at 2)

1 period, Swish’s principals, were aware of, or informed that, the manner in which Swish  
2 presented the Card offer was problematic, including that:

- 3 • A similar practice of “opting in” undertaken by an employee’s former employer “**led to**  
4 **angry customers, attorney general investigations, class action lawsuits.**” (12/06)  
5 (Exs. 116 (emphasis added); *see* Ex. 233 at 85:2–87.7 (*re* Ex. 116))
- 6 • VirtualWorks’ customer service website was enjoying “**decent volume.**” (1/07) (*See*  
7 Ex. 247 at 9 (emphasis added))
- 8 • A lender affiliate **wanted the practice “to end and end now”** due to threats by  
9 consumers to “go to the police, file regulatory complaints, etc.” (1/07) (Ex. 4 (emphasis  
10 added); *see* Ex. 230 at 51:13–52:1 (*re* Ex. 4))
- 11 • **Complaints** about the Card to one payday lender had “**increased exponentially.**” (2/07)  
12 (Ex. 244 (emphasis added))
- 13 • A CBS affiliate published an online story in which the Better Business Bureau had  
14 warned that **EverPrivate Card may be “ripping off consumers without their**  
15 **knowledge.”** (3/07) (Exs. 229 (emphasis added); 6; *see* 230 at 58:11–60:18 (*re* Ex. 6))
- 16 • “Many” complaints about the Card appeared online. (3/07) (Ex. 141 at 1)
- 17 • A lender affiliate described the offer as “customer manipulation.” (3/07) (Ex. 142 at 1)
- 18 • A lender affiliated asserted that “**the method by which these additional offers are**  
19 **being presented confuses the customer – namely they mistakenly sign up for these**  
20 **additional services when they did not intend to do so,**” and instructed its lead  
21 providers who were exposing his customers to these products to “**cease the practice**  
22 **immediately.**” (4/07) (Ex. 147 (emphasis added))

23 Matthew Patterson aptly summed up the problem with Swish’s EverPrivate Card offer in  
24 a January 2007 instant message exchange with co-founder Mark Benning: “[I]t is **defaulted to**  
25 **yes . . . and customer’s [sic] don’t see it . . . and hit ‘take me to my payday loan’ . . . and**  
26 **boom they become [an EverPrivate Card] customer . . . [the payday lender] doesn’t like the**  
27 **legal heat because the customers kinda go ballistic [sic] . . . the last one called the cops . . .**  
28 **who turned it over to the AG.**” (Ex. 240 (emphasis added))

1           **D.     Swish profited handsomely from its unlawful conduct.**

2           Swish profited handsomely from selling leads to VirtualWorks for the EverPrivate Card.  
3 Swish typically received \$13 to \$15 per lead. (Answer ¶ 21) In total, Swish charged  
4 VirtualWorks approximately \$4 million for the sale of this information, of which it collected  
5 approximately \$3.3 million. (*Data Stip.* ¶ 6) At several points between January 2007 and  
6 August 2007, such lead sales constituted one of the largest sources, if not the largest source, of  
7 Swish’s revenue (Answer ¶ 21; Kelly Dec. ¶ 6; *see* Ex. 151, 239) and profit margin (Kelly ¶¶  
8 7–9). Considering the entire eleven-month period that Swish marketed the Card, VirtualWorks  
9 was Swish’s largest customer in terms of revenue out of 173 affiliates. (Kelly Dec. ¶ 6) Swish’s  
10 principals were well aware of the critical impact that the Card campaign had on Swish’s bottom  
11 line. (*See* Answer ¶ 21; Exs. 238, 230 at 65:2–67:25) Notwithstanding affiliate and consumer  
12 complaints (*see* Section II.C.4. *supra*), and concerns raised by those internal to Swish, Patterson  
13 and Strober refused to stop the program. (Answer ¶ 21; Ex. 238)

14           **III.    THE FTC IS ENTITLED TO SUMMARY JUDGMENT**

15           **A.     The FTC meets the summary judgment standard.**

16           Summary judgment is proper if “the movant shows that there is no genuine dispute as to  
17 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
18 56(a). The moving party “always bears the initial responsibility of informing the district court of  
19 the basis for its motion . . . .” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When the  
20 moving party has met this burden of production, the nonmoving party must go beyond the  
21 pleadings and, by its own affidavits or discovery, set forth specific facts showing that there is a  
22 genuine dispute for trial. If the nonmoving party fails to produce enough evidence to show a  
23 genuine dispute as to a material fact, the moving party wins. *Celotex*, 477 U.S. at 323; *Nissan*  
24 *Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

25           In this case, there is no genuine dispute that: (1) Swish represented that consumers could  
26 submit their loan application without incurring a fee or, alternatively, that they could obtain a  
27 debit card at no charge; (2) consumers who submitted an application in fact incurred a fee of  
28 between \$39.95 and \$54.95 for a debit card; and (3) information concerning the fee was material



1 to consumers. Accordingly, summary judgment is appropriate as to Counts I and II of the FTC's  
2 Complaint. Likewise, there is no genuine dispute that Swish failed to obtain consumers'  
3 express, informed consent before selling their bank account information to VirtualWorks, and  
4 that: (1) this practice caused or was likely to cause substantial injury to consumers; (2)  
5 consumers could not reasonably avoid the injury themselves; and (3) the injury was not  
6 outweighed by countervailing benefits to consumers or competition. Thus, summary judgment  
7 is appropriate as to Count III as well.

8 **B. Jurisdictional and venue requirements are met.**

9 This Court has jurisdiction over cases brought under Section 45(a) of the FTC Act.  
10 *See* 28 U.S.C. § 1331 (2006). Swish transacted business in this district. Therefore, venue is  
11 proper under 28 U.S.C. § 1391(b)–(c) (2006). Swish's advertising and marketing of prepaid  
12 debit cards on its websites to consumers throughout the United States are "in or affecting  
13 commerce," as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44 (2006).

14 **C. Swish's deceptive and unfair conduct violated the FTC Act.**

15 The Complaint alleges that Swish violated Section 5(a) of the FTC Act, 15 U.S.C.  
16 § 45(a), in three ways. Count I alleges that Swish's websites failed to disclose adequately to  
17 consumers who submitted an application that they were also buying an EverPrivate Card.  
18 (Complaint ¶¶ 58–60) Count II alleges that Swish falsely claimed on its websites that consumers  
19 who submitted a payday loan application would receive a "BONUS" prepaid card at no charge.  
20 (*Id.* ¶¶ 61–63) Finally, Count III alleges that Swish's practice of selling consumers' bank  
21 account information to VirtualWorks without obtaining the express, informed consent of those  
22 consumers for such use of their bank account information was unfair. (*Id.* ¶¶ 64–66)

23 Swish participated directly in the challenged conduct and is liable for the resulting injury,  
24 as described below, even though other entities may have participated as well. A company that  
25 violates the FTC Act is not discharged from liability simply because more than one perpetrator  
26 was involved. *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1155–57 (9th Cir. 2010); *FTC v. Inc21.com*  
27 *Corp.*, 2010 U.S. Dist. LEXIS 98944, at \*66, 2010-2 Trade Cas. (CCH) ¶ 77,174 (N.D. Cal.

1 Sept. 21, 2010). If a company causes harm through its own deeds, the actions of third parties  
2 will not affect the extent of its liability under the FTC Act. *Neovi*, 604 F.3d at 1157.

3 **1. Swish’s deceptive conduct violated the FTC Act (Counts I and II).**

4 Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits deceptive or unfair acts or  
5 practices in or affecting commerce. To establish that Swish engaged in a deceptive act or  
6 practice in violation of Section 5(a), the FTC need satisfy only three prongs: (1) that Swish made  
7 a representation or omission; (2) that the representation or omission was likely to mislead  
8 consumers acting reasonably under the circumstances; and (3) that the representation or  
9 omission was material. *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001) (citing *FTC v. Pantron I*  
10 *Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994) (adopting standard from *In re Cliffdale Assocs., Inc.*,  
11 103 F.T.C. 110, 164–65 (1984))). The FTC need not prove that Swish intended to deceive  
12 consumers or acted in bad faith. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020,  
13 1029 (7th Cir. 1988); *Feil v. FTC*, 285 F.2d 879, 896 (9th Cir. 1960).

14 Nor is the FTC required to show that every reasonable consumer would have been, or in  
15 fact was, misled. See *FTC v. Stefanichik*, 559 F.3d 924, 929 (9th Cir. 2009) (holding that the  
16 FTC is not required to show that all consumers were deceived). “The reasonableness of an  
17 interpretation is not contingent upon its being shared by a majority of consumers. A claim  
18 would likely mislead a reasonable consumer if at least ‘a significant minority of consumers’  
19 would be deceived by it.” *In re Novartis Corp.*, 127 F.T.C. 580, 684 (1999). Indeed, even a  
20 small minority of deceived consumers may be sufficient to establish the likelihood to mislead  
21 prong if the sheer number of consumers deceived is significant. *FTC v. Cyberspace.com, LLC*,  
22 453 F.3d 1196, 1198–99 (9th Cir. 2006) (finding the sheer number of deceived consumers to be  
23 probative for the reasonability prong even though only 225,000 (or 5%) of 4.4 million  
24 solicitation recipients fell for the solicitation).

25  
26 **a. Count I: Swish’s practice of burying and defaulting to “Yes”  
the EverPrivate Card offer was deceptive.**

27 Count I of the Complaint alleges that Swish deceived consumers when it failed to  
28 disclose adequately that consumers who completed an online application and clicked on the

1 submit button at the bottom of the Coreg Pages were also purchasing an EverPrivate Card and  
2 that a fee would be debited from their bank accounts. There is no genuine dispute that this  
3 practice satisfies each of the deception prongs set forth above.

4 With respect to the first prong, the content of Swish's websites themselves establish that  
5 Swish represented that consumers who completed and submitted an application were only  
6 applying for a payday loan. *See* Section II.B.3 *supra*. To decide whether a defendant made  
7 certain representations or omissions, a court must first review the advertisements. *See FTC v.*  
8 *Gill*, 71 F. Supp. 2d 1030, 1043–44 (C.D. Cal. 1999), *aff'd*, 265 F.3d 944 (9th Cir. 2001). The  
9 court looks at the “overall, net impression made by the advertisement in determining what  
10 messages may reasonably be ascribed to it.” *FTC v. US Sales Corp.*, 785 F. Supp. 737, 745  
11 (N.D. Ill. 1992) (quoting *In re Kraft, Inc.*, 114 F.T.C. 40, 122 (1991)); *see also Cyberspace.com*,  
12 453 F.3d at 1200 (affirming liability for a solicitation disguised as a check, notwithstanding  
13 disclosures on back). Here, the net impression conveyed by Swish's websites was that  
14 consumers could complete the process of submitting their application without incurring a fee.

15 Courts routinely determine the existence of advertising claims or omissions on motions  
16 for summary judgment. *See, e.g., Cyberspace.com*, 453 F.3d at 1199–201; *Gill*, 71 F. Supp. 2d  
17 at 1034, 1038, 1043–44; *FTC v. Medlab, Inc.*, 615 F. Supp. 2d 1068, 1077–79 (N.D. Cal. 2009);  
18 *FTC v. Natural Solution, Inc.*, 2007 U.S. Dist. LEXIS 60783, at \*1, 9–10, 2007-2 Trade Cas.  
19 (CCH) ¶ 75,866 (C.D. Cal. Aug. 7, 2007); *FTC v. Bronson Partners, LLC*, 564 F. Supp. 2d 119,  
20 121, 127–32 (D. Conn. 2008). Extrinsic evidence that an advertisement conveys a particular  
21 claim is not required when, as is true here, the claim is conspicuous and self-evident. *In re*  
22 *Thompson Med. Co.*, 104 F.T.C. 648, 788–89 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986); *FTC*  
23 *v. QT, Inc.*, 448 F. Supp. 2d 908, 958 (N.D. Ill. 2006), *aff'd*, 512 F.3d 858 (7th Cir. 2008). Thus,  
24 this Court is empowered to examine Defendant's websites at summary judgment to determine  
25 what claims and omissions were made. Here, the representation set forth in Count I is  
26 “obvious.” *See Kraft, Inc. v. FTC*, 970 F.2d 311, 319 (7th Cir. 1992). The FTC also has  
27 introduced Dr. Shimp's testimony as extrinsic evidence in support of this allegation.

28

1 As to the second prong, the content of Swish’s websites themselves again establish that  
2 those websites were likely to mislead consumers. (*See* Section II.B.3 *supra*) Although the  
3 websites represented that consumers were only applying for a loan and could submit their  
4 application without incurring a fee, in fact, consumers were charged between \$39.95 and \$54.95  
5 for the EverPrivate Card, unless they affirmatively clicked a “No” button next to the Card offer.  
6 As set forth above, the pre-clicked “Yes” Card offer was buried among other offers that were  
7 pre-clicked “No”; prominent headlines, submit buttons, and flashing arrows directed attention  
8 away from the Card offer; and the Card’s fee was embedded at the end of a lengthy description  
9 of the Card. (*See id.*) Features such as these prevented consumers from seeing or being able to  
10 fully appreciate the potential consequences of their actions. Thus they would have hit the submit  
11 button without realizing that they would be charged for the Card. Dr. Shimp’s testimony lends  
12 further supports to this conclusion. Because Swish’s websites failed to adequately disclose the  
13 Card fee, they were likely to mislead reasonable consumers.

14 Moreover, the FTC offered extrinsic evidence that consumers were actually deceived by  
15 the challenged practices. As the Ninth Circuit has stated, “[a]lthough ‘[p]roof of actual  
16 deception is unnecessary to establish a violation of Section 5,’ such proof is highly probative to  
17 show that a practice is likely to mislead consumers acting reasonably under the circumstances.”  
18 *Cyberspace.com*, 453 F.3d at 1201 (citation omitted). *Cyberspace.com* involved the mailing of  
19 \$3.50 solicitation checks with inadequate disclosures stating that cashing the check would  
20 constitute agreement to pay a monthly fee for internet access. *Id.* at 1198. In that case, as is true  
21 here, less than one percent of consumers who were billed for the service ever attempted to use it.  
22 *See id.* at 1201. The court accordingly inferred that the remaining 99% did not realize they had  
23 contracted for the service when they cashed the check. *Id.*

24 In addition to the negligible activation rate of the Cards, the FTC introduced further  
25 extrinsic evidence to establish that Swish’s websites misled or were likely to mislead reasonable  
26 consumers, including high return rates and complaints. The Ninth Circuit has found this type of  
27 evidence to be “probative of widespread material misrepresentation and other abusive conduct.”  
28

1 *FTC v. MacGregor*, 360 Fed. Appx. 891, 894 (9th Cir. 2009) (citing high rates of return, decline,  
2 and consumer complaints).

3 As to the third prong, Swish’s failure to adequately disclose the Card fee was material.  
4 Representations and omissions are material if they involve “information that is important to  
5 consumers and, hence, likely to affect their choice of, or conduct regarding, a product.”  
6 *Cyberspace.com*, 453 F.3d at 1201 (quoting *Cliffdale*, 103 F.T.C. at 165). A representation  
7 involving the cost of a product is presumptively material. *Kraft*, 114 F.T.C. at 38; *Cliffdale*, 103  
8 F.T.C. 110 app. at 182–83 (Letter from the FTC to Hon. John D. Dingell, Chairman, Subcomm.  
9 on Oversight and Investigations, Comm. on Energy and Commerce (Oct. 14, 1983)) (“FTC  
10 Policy Statement on Deception”).

11 For these reasons, summary judgment is appropriate as to Count I.

12 **b. Count II: Swish’s practice of touting the Card as a “Bonus”**  
13 **when it was not free was deceptive.**

14 Count II alleges that Swish deceived consumers when it represented that consumers who  
15 submitted a payday loan application would receive a “BONUS” prepaid card at no charge.  
16 Again, as to prong one, that Swish made this representation is obvious from the face of the  
17 websites. (*See* Section II.B.4 *supra*) It is further supported by the testimony of Dr. Shimp. As  
18 to prong two, this claim was false because consumers did not get a card at no charge – they had  
19 to pay \$39.95 to \$54.95. Consequently, this claim was likely to mislead consumers acting  
20 reasonably under the circumstances. Finally, as to prong three, the representation relates to cost  
21 and is thus presumed material. *See, e.g., Kraft*, 114 F.T.C. at 38. For these reasons, summary  
22 judgment is appropriate as to Count II.

23 **2. Swish’s unfair practice of selling bank information without express,**  
24 **informed consent violates the FTC Act (Count III).**

25 Count III alleges that Swish engaged in the unfair practice of selling consumers’ bank  
26 account information without their express, informed consent. To establish that an act or practice  
27 is unfair, the FTC must show: (1) that it causes or is likely to cause substantial injury to  
28 consumers; (2) that the injury is not reasonably avoidable by consumers themselves; and (3) that

1 the injury is not outweighed by countervailing benefits to consumers or to competition. 15  
2 U.S.C. § 45(n) (2006); *Neovi*, 604 F.3d at 1155. Here, the FTC easily satisfies each prong.

3 As to the first prong, the challenged practice caused substantial injury. The FTC may  
4 satisfy this prong with evidence that consumers were injured “by a practice for which they did  
5 not bargain.” *Id.* at 1157; *FTC v. J.K. Publ’ns, Inc.*, 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000).  
6 Moreover, an injury may be “sufficiently substantial” if it results in a “small harm to a large  
7 class of people.” *Neovi*, 604 F.3d at 1157; *Inc21.com*, 2010 U.S. Dist. LEXIS 98944, at \*67.  
8 Here, more than one hundred thousand consumers each suffered an injury of between \$39.95 to  
9 \$54.95, for a total of more than \$6 million. *See* Section II.C.1 *supra*.

10 As to the second prong, the victims were not able to avoid the injury. To determine  
11 unavailability, “courts look to whether the consumers had a free and informed choice.” *Neovi*,  
12 604 F.3d at 1158. As described above, more than 100,000 consumers did not – and could not –  
13 consent to have their bank information sent to VirtualWorks for the simple reason that they did  
14 not see the Card offer or thought they were receiving the Card as a bonus at no charge. Swish  
15 failed to provide adequate notice of how it intended to use consumers’ bank account information.  
16 Thus, consumers could not have reasonably avoided the charge.

17 Finally, as to the third prong, it is easily satisfied “when a practice produces clear  
18 adverse consequences for consumers that are not accompanied by an increase in services or  
19 benefits to consumers or by benefits to competition.” *J.K. Publ’ns*, 99 F. Supp. 2d at 1201  
20 (citation omitted). Swish’s victims received no countervailing benefits from being forced to buy  
21 the Card without their consent. As evidenced by the complaints and low activation rates, it  
22 resulted only in consumers being charged for a card that they did not want.

23 For these reasons, summary judgment is appropriate as to Count III.

#### 24 **D. Swish’s defenses lack merit.**

25 Defendant asserts eight affirmative defenses. (Answer at 10–12) Some of these are  
26 merely denials of the Complaint allegations. The others are unfounded. The following are not  
27 valid defenses to an FTC action: Second Affirmative Defense – an advertiser’s good faith (*FTC*  
28 *v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)); Third Affirmative Defense – waiver

1 (*United States v. Reader's Digest Ass'n, Inc.*, 464 F. Supp. 1037, 1043 (D. Del. 1978), *aff'd*, 662  
2 F.2d 955 (3d Cir. 1981)); and Seventh Affirmative Defense – reliance on advice of counsel  
3 (*Cyberspace.com*, 453 F.3d at 1202). As to the Sixth Affirmative Defense, the FTC need not  
4 establish that Swish's conduct proximately caused the injury. *See, e.g., FTC v. Hope Now*  
5 *Modifications, LLC*, 2010 U.S. Dist. LEXIS 35550, at \*3 (D.N.J. Apr. 12, 2010) (citing *Pantron*  
6 *I*, 33 F.3d at 1095). Finally, as to the Eighth Affirmative Defense, the actions of others do not  
7 negate Swish's liability. *Neovi*, 604 F.3d at 1157.

8 **E. Swish is liable for injunctive and monetary relief.**

9 Pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b) (2006), the FTC seeks a  
10 permanent injunction. The second proviso of Section 13(b), states that “in proper cases the  
11 Commission may seek, and, after proper proof, the court may issue, a permanent injunction.”  
12 The FTC may seek a permanent injunction against violations of any provision of law it enforces.  
13 *Id.* This case, replete with misrepresentations of material facts in violation of Sections 5(a) of  
14 the FTC Act, qualifies as a “proper case” for injunctive relief under Section 13(b). *FTC v. H. N.*  
15 *Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982). Swish's violations of Section 5 of the FTC  
16 Act warrant permanent injunctive relief.

17 The FTC also seeks ancillary equitable relief in the form of consumer restitution. In a  
18 Section 13(b) action, a court may exercise the full breadth of its equitable authority because  
19 Congress “did not limit that traditional equitable power explicitly or by necessary and  
20 inescapable inference” when it invoked that power in passing the FTC Act. *Id.* at 1113. Thus,  
21 under Section 13(b), a court may order ancillary equitable remedies, such as rescission of  
22 contracts and restitution. *Id.* at 1112–13; *see also* Order Granting Motion to Dismiss and  
23 Denying Motion to Strike (Dkt. #60) at 15 (regarding the availability of monetary relief).  
24 “[B]ecause the FTC Act is designed to protect consumers from economic injuries, courts have  
25 often awarded the full amount lost by consumers . . . .” *Stefanchik*, 559 F.3d at 931.

26 To obtain restitution under Section 13(b), the FTC must establish that “the  
27 misrepresentations were widely disseminated (or impacted an overwhelming number of  
28 consumers) and caused actual consumer injury.” *Inc21.com*, 2010 U.S. Dist. LEXIS 98944, at



1 \*89. Here, the conduct impacted more than 100,000 consumers and cost them more than \$6  
2 million.

3  
4 **IV. THE PROPOSED ORDER PROVIDES APPROPRIATE INJUNCTIVE AND  
EQUITABLE RELIEF TO REMEDY SWISH'S LAW VIOLATIONS.**

5 The scope of the relief in the proposed order is appropriate given Swish's conduct. It not  
6 only engaged in egregious practices to begin with, but continued to do so in the face of consumer  
7 and lender complaints, motivated only by its bottom line. *See* Sections II.C.4, II.D *supra*. Thus,  
8 Swish is likely to engage in similar bad acts in the future absent strong injunctive relief. *See*  
9 *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394–95 (1965); *see also FTC v. Wolf*, 1996 U.S.  
10 Dist. LEXIS 1760, at \*26 (S.D. Fla. Jan. 30, 1996) (“Broad injunctive provisions are often  
11 necessary to prevent transgressors from violating the law in a new guise . . .”).

12 **A. Conduct provisions**

13 Part I of the proposed order bans Swish from participating in programs with a negative  
14 option feature, in which a customer's silence or failure to take an affirmative action to reject  
15 goods or services or to cancel an agreement is interpreted as acceptance of an offer. This ban  
16 would prevent Swish from using its pre-clicked “Yes” tactic in the future. Part II prohibits  
17 Swish from making the types of misrepresentations and omissions challenged here in connection  
18 with the advertising and sale of any payment card, loan, financial product or service, or any other  
19 product or service. Part III prohibits the use of billing information to obtain payment without  
20 express, informed consent. Part IV prohibits Swish from using information that consumers  
21 provide for one purpose for a different purpose (such as in the context of coregistration), without  
22 express, informed consent. These provisions bear a direct and reasonable relation to Swish's  
23 unlawful practices, yet are framed broadly enough to prevent similar illegal acts in the future.

24 **B. Monetary judgment and equitable consumer restitution**

25 Part VII imposes a monetary judgment in the amount of \$4,856,872. This figure  
26 represents the total amount of consumer injury (\$6,108,872) less amounts already paid by the  
27 other defendants in this case and in *FTC v. VirtualWorks, LLC*. (*See Ortiz Dec.* ¶¶ 37–38)



