

PUBLIC

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

**IN THE MATTER OF
EVER PRIVATE CARD**

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:
:
:



COMMISSIONERS:

Jon Leibowitz, Chairman
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch

File No. 0723241

PETITION TO QUASH CIVIL INVESTIGATIVE DEMAND

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Petitioner [REDACTED] hereby petitions the Federal Trade Commission, pursuant to 16 C.F.R. § 2.7(d), for an order quashing or, in the alternative, limiting and extending the return date of, the Civil Investigative Demand (“CID”) issued to Petitioner on May 15, 2009 pursuant to section 20 of the FTC Act, 15 U.S.C. § 57b-1.¹ Counsel for Petitioner have engaged in good-faith efforts with FTC Staff to resolve Petitioner’s objections to the CID, including his requests to withdraw the CID, modify its scope and return date, or to stay enforcement pending litigation between the Commission and Swish Marketing, Inc. (“Swish”), Petitioner’s former employer. Unfortunately, these efforts have been unsuccessful and have placed Petitioner in the untenable position of, among other things, having to elect whether to attempt to comply with the CID over Swish’s objection, thereby subjecting Petitioner to the risk of legal action by Swish, or to fail to comply with the CID, thereby subjecting Petitioner to the risk of legal action by the FTC. Accordingly, for the reasons set forth below, the Commissioners should grant Petitioner’s request to quash, limit, or defer compliance with, the CID.

INTRODUCTION AND SUMMARY

The CID was issued as part of the FTC’s investigation of the sales and marketing practices of VirtualWorks, LLC, a former customer of Swish, Petitioner’s former employer. Petitioner accepted service of the CID on May 18, 2009.

Many of the documents responsive to the CID have previously been produced to the FTC by Swish, in response to a CID issued to Swish on April 11, 2008 (the “April 11, 2008 CID”). The April 11, 2008 CID sought, *inter alia*, documents relating to advertisements that Swish placed on its websites for anonymous pre-paid debit cards offered by VirtualWorks under the names “Ever Private Card” and “Secret Cash Card.” Counsel for Swish has advised that Swish

¹ See Exh. A (May 15, 2009 CID issued to Petitioner).

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has cooperated fully with the FTC investigation, and has produced all documents in its possession that are responsive to the FTC's April 11, 2008 CID. Hence, many of the documents responsive to the CID are likely already in the possession of the FTC.

On March 19, 2009, approximately one year after the FTC issued its April 11, 2008 CID to Swish, FTC Staff advised Petitioner that it had determined that Swish violated the FTC Act by advertising these pre-paid debit cards on behalf of VirtualWorks. In their letter, FTC Staff stated that, before they would recommend to the Commission that it file a Complaint, FTC Staff would attempt to resolve the matter through a negotiated settlement. Counsel for Petitioner and FTC Staff have had preliminary settlement discussions, but no agreement has yet been reached.

On May 18, 2009, the FTC served the CID, compelling the production of documents only four days later – by May 22, 2009, and requiring Petitioner to testify at an investigational hearing on May 27, 2009 (only nine days following service of the CID). Between May 18 and May 20, 2009, counsel for Petitioner advised FTC Staff of Petitioner's objections to the CID, including the reasons why compliance with the CID by the May 22, 2009 return date would be unduly burdensome. Petitioner's counsel have also informed FTC Staff that, in a letter dated May 20, 2009 (attached as Exh. B), Swish directed Petitioner not to produce any documents, or to testify at the investigational hearing, during the pendency of Swish's challenges to the CID.

Petitioner's counsel and FTC Staff have not reached a formal agreement to extend the return date or to otherwise modify the CID in response to these concerns.

For the reasons set forth below, Petitioner seeks, pursuant to 16 C.F.R. § 2.7(d), a review of the CID by the Commission and an order quashing or modifying the CID. First, Swish has informed Petitioner that it does not consent to production of any Swish documents by Petitioner without its prior consent, which Swish has not provided. Swish contends that production of

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responsive documents could result in an unauthorized waiver of Swish's attorney-client and attorney work product privileges; result in the improper disclosure of Swish's confidential information; and violate Petitioner's contractual duties of confidentiality to Swish. Furthermore, Swish contends the FTC's insistence on compliance with the CID constitutes an improper use of its administrative powers to compel the production of documents and testimony, in circumvention of the Federal Rules of Civil Procedure, which Swish contends now apply in light of the declaratory judgment action filed by Swish against the FTC in the United States District Court for the District of Columbia. As such, Swish has directed Petitioner not to produce any documents or to provide testimony at this time.

Second, notwithstanding Swish's objections to compliance, the CID is vague and overbroad, making compliance unduly burdensome and expensive. Finally, it is unreasonable to compel Petitioner to search for, collect, and produce all documents responsive to the CID within four days, and it is unreasonable to require Petitioner to appear for an investigational hearing nine days after service of the CID.

ARGUMENTS

As a preliminary matter, this Petition to quash or limit the FTC's CID is timely. A petition to limit or quash any CID shall be filed with the Secretary of the Commission prior to the return date of the CID if the return date is less than 20 days after service of the CID. *See* 15 U.S.C. § 57b-1(f)(1); 16 C.F.R. § 2.7(d)(1). The CID was served only four days before the return date, and thus the petition must be filed prior to the return date of May 22, 2009. As this Petition was filed on May 21, 2009, it is timely.

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I. ABSENT A COURT ORDER, PETITIONER SHOULD NOT BE REQUIRED TO PRODUCE DOCUMENTS WITHOUT SWISH'S PRIOR CONSENT, OR TO TESTIFY OVER SWISH'S OBJECTION

Swish has directed Petitioner not to produce any documents in response to the CID without first providing Swish the opportunity to determine whether any documents should be withheld or redacted on the grounds of privilege, confidentiality, or relevance. *See* Exh. B. Furthermore, Swish recently filed a declaratory judgment action in the United States District Court for the District of Columbia and has advised Petitioner that it would be improper to testify or produce documents in light of that case. Although Petitioner has not had the opportunity to complete his review of potentially responsive documents, Petitioner has informed the FTC and Swish that many of the responsive documents in his possession consist of emails and other electronic documents that were created or maintained by Petitioner during his employment at Swish. Accordingly, Swish has directed Petitioner not to comply with the CID based on Swish's objections and to refrain from testifying in an investigational hearing or producing documents until Swish's objections have been resolved.

If Petitioner were compelled to produce the documents without first obtaining Swish's consent, there is a substantial likelihood that Petitioner could inadvertently waive attorney-client or attorney work product privileges that Swish may contend cover responsive documents, produce documents deemed confidential by Swish, or produce documents subject to contractual confidentiality obligations of Swish. Swish has informed Petitioner that it has previously produced all documents responsive to the April 11, 2008 CID served on Swish and that it has produced additional documents in response to FTC Staff's subsequent requests for the voluntary production of documents. As a result, any Swish documents in Petitioner's possession are likely

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duplicative of documents that Swish has already reviewed in conjunction with producing these documents.

Moreover, during the course of its document production, Swish has previously withheld certain documents (or portions thereof) on grounds of privilege or confidentiality. *See* Exh. B. Swish has further advised Petitioner that it would be inappropriate for Petitioner to make similar determinations without Swish's involvement. Accordingly, it would be wholly inappropriate to compel Petitioner – a *former* Swish officer and employee – to produce to the FTC Swish documents that Swish contends should not be produced.

Swish further objects to Petitioner's compliance with the CID on the grounds that compliance with the CID would result in a circumvention of protections afforded to Swish under the Federal Rules of Civil Procedure. Swish has filed a declaratory judgment action against the FTC in the United States District Court for the District of Columbia, and it contends that any prospective production of documents must be made in the context of that litigation and in accordance with the Federal Rules of Civil Procedure, which would allow Swish "notice and a full and fair opportunity to raise any appropriate objections to the production of any or all of these documents." Exh. B at 2. Swish also contends that it is entitled to notice and the right to attend any investigational hearings to ensure that Petitioner does not reveal privileged communications. *See id.*

In light of Swish's objections to Petitioner producing Swish's documents and testifying at an investigational hearing, Petitioner asks the FTC to quash or delay the return date of the CID pending the resolution of Swish's claims. In the alternative, Petitioner requests a continuance of the return date of the CID until July 2, 2009 (with the date of the investigational hearing to be at

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least one week thereafter),² to enable Swish's counsel to review responsive documents for privilege and confidentiality. *See* Fed. R. Civ. P. 45(c)(3)(B) (stating that to protect a person subject to a subpoena from "disclosing a trade secret or other confidential research, development, or commercial information," a court may quash or modify a subpoena).

The issuance of the CID has placed Petitioner in an untenable position. On the one hand, if Petitioner complies with the terms of the CID and produces documents that Swish contends are Swish property, he could subject himself to liability to Swish. Similarly, *counsel* for Petitioner should not be required to produce documents that are the subject of a bona fide claim of privilege by Swish. On the other hand, if Petitioner complies with Swish's instructions, he cannot comply with the CID. Given that a reasonable alternative exists – quashing the CID or granting a continuance sufficient to allow Swish time to press its legal challenges to the CID – there is no reasonable basis to refuse Petitioner's request as set forth in this Petition. Similarly, because this investigation has been ongoing for more than one year, and because the product offers that are the subject of this investigation were withdrawn from the market almost two years ago, the FTC will not be prejudiced by granting the limited relief sought by Petitioner.

It is true that the FTC generally is free to "structure its investigations, including the selection of the sources from which it seeks information, in the manner it deems most appropriate." Commission Letter Denying Petition To Limit Civil Investigative Demand at 6, *In re Exxon Mobil*, File No. 051-0243 (Jan. 10, 2006). *Exxon Mobil*, however, is distinguishable from the present situation. In that petition to quash, the petitioner argued that its CID should be quashed or limited because the FTC could obtain the information it sought from other sources instead of from the petitioner. Specifically, the petitioner argued that the information the FTC

² Swish counsel Linda Goodman has informed Petitioner that she will be unavailable until mid-June, and thus a reasonable time to comply with the CID is early July.

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requested would be unduly burdensome to produce and that the FTC could obtain the information from other entities, including other federal agencies, instead of from the petitioner. Commissioner Harbour rejected this argument, stating that the FTC has great latitude in structuring its investigation. *See id.* The instant Petition is readily distinguishable from *Exxon Mobil* because Petitioner does not contend the FTC is required to obtain the information sought by the CID from another source. Rather, Petitioner contends that he should not be compelled to produce documents within his possession, or to testify, until Swish's good-faith challenges to compliance with the CID are resolved.

II. THE CID IS VAGUE AND OVERBROAD

The relief sought by Petitioner should be granted for an independent reason. A federal agency's CID should not be enforced if it is determined that the request is "too indefinite." *See United States v. Morton Salt Co.*, 338 U.S. 632 (1950) (applying the standard in the context of an investigation against a corporation). The well-settled *Morton Salt* standard has repeatedly been applied in evaluating whether an administrative subpoena is too vague or indefinite to be enforced. *See, e.g., SEC v. Blackfoot Bituminous, Inc.*, 622 F.2d 512, 514 (10th Cir. 1980) (stating that, "[t]o obtain judicial enforcement of an administrative subpoena, an agency must show that the inquiry is not too indefinite, is reasonably relevant to an investigation which the agency has authority to conduct, and all administrative prerequisites have been met"). Additionally, a CID must "describe each class of documentary material to be produced under the [CID] with such definiteness and certainty as to permit such material to be fairly identified." 15 U.S.C. § 57b-1(c)(3)(A). Under these standards, the CID is unenforceable.

Although the FTC and Petitioner have sought to reach agreement on the specific documents covered by the CID, they have been unable to reach a formal agreement to modify the

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CID. For instance, Petitioner has challenged specifications B and E as vague and overbroad, and lacking sufficient specificity to permit the identification of responsive material. With respect to specification B, the term “creation” in the context of documents related to the formation of Swish is vague and ambiguous. The request potentially encompasses documents ranging from Swish’s articles of incorporation to every email that discusses any prospective activity of the new business. Without further clarity as to the specific documents sought by the CID, the request is overbroad and vague, and should not be enforced.

With respect to specification E, the terms “approve, modify, or discontinue” are vague, ambiguous, and overbroad. The request appears to seek virtually every document generated during the course of Petitioner’s employment at Swish. For example, the term “approve” could be interpreted to encompass any form of approval, tacit or explicit, including even a lack of a specific response. Furthermore, by its terms, the specification potentially seeks the production of documents related to every aspect of Swish’s business. Other provisions of the CID are similarly vague and ambiguous.³

III. THE FOUR-DAY RETURN DATE IS UNDULY BURDENSOME AND UNREASONABLE

Even if the Commission concludes that Swish’s objections do not justify limiting or quashing the CID, and that the CID is not vague or overbroad, compliance by the May 22, 2009 return date is patently unreasonable. As a general matter, a CID will be enforced so long as it is not unduly burdensome. *See FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992). Although the Commission is not a federal court, “the standard by which the courts would evaluate the Commission’s decision is the appropriate standard for the evaluation of the

³ While counsel for Petitioner have had productive discussions with FTC Staff and continue to do so, we unfortunately have not been able to reach a formal agreement on all outstanding issues prior to the deadline to file this Petition.

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Petition to Quash.” Commission Letter Denying Petition To Quash Civil Investigative Demand at 3, *In re Aloha Petroleum, Ltd.*, File No. 051-0131 (July 15, 2005). In federal court, a subpoena can be quashed or modified if it “fails to allow a reasonable time to comply.” Fed. R. Civ. P. 45(c)(3)(A)(i).

It is unduly burdensome to require Petitioner to search for documents responsive to the CID, review those documents for claims of privilege or confidentiality, and produce them – all within four days. The CID contains at least 15 separate requests for documents. Petitioner must review thousands of electronic and hard-copy documents, if not more. The documents in hard-copy form must be reviewed manually.

Without waiving Petitioner’s objections to the CID in general, compliance with specifications A.6, A.7, and E is particularly burdensome and unreasonable. With respect to specifications A.6 and A.7, it would take several weeks merely to review all documents that may be responsive to these two requests. Specification A.7 appears to compel, among other things, the production of plainly privileged documents created by current counsel during the representation of Petitioner in the FTC’s investigation. Compliance with this provision requires the review of every communication between Petitioner and current counsel relating to the FTC’s investigation, virtually all of which are privileged and would be included on a privilege log. *See* 16 C.F.R. § 2.8A.

Specification E – which seeks production of any document reflecting Petitioner’s ability to exert influence over operational matters at Swish – is fatally vague and overbroad. Specification E.3 requests all documents relating to any attempt by Petitioner to “[a]pprove, modify, or discontinue any product or service offered for sale by Swish.” But hundreds of product offers have appeared on Swish’s websites during Petitioner’s employment with Swish.

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To simply identify all relevant product offers and the websites on which they appeared would require a significant amount of time and expenditure of resources. To produce every document that arguably reflects the involvement of Petitioner in “[a]pprov[ing], modify[ing], or discontinue[ing]” each product offer would take even longer.

Similarly, it is unduly burdensome to expect Petitioner to prepare for and provide sworn testimony nine days after service of the CID. The three topics identified in the CID cover virtually the full period of Petitioner’s employment with Swish. Under the circumstances, it is not reasonable to expect Petitioner to be in a position to provide sworn testimony within nine days, especially considering that the full extent of the document production has yet to be resolved.⁴

⁴ Petitioner seeks the foregoing relief with a full reservation of all rights to more fully develop the arguments set forth above, and to present other arguments in opposition to the CID. Petitioner has had only approximately three days to research and investigate his objections to the CID, to evaluate the issues arising out of the filing of the declaratory judgment action, and to attempt to negotiate a resolution of his objections with FTC Staff. Accordingly, Petitioner expressly reserves his right to expand upon the arguments set forth above, and to raise additional arguments, in subsequent proceedings, including arguments based on new or changed circumstances.

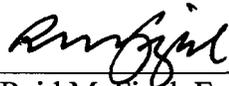
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CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Commission quash or limit the CID served on Petitioner on May 18, 2009.

Dated: May 21, 2009

Respectfully submitted,



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(408) 291-6200

Counsel for Petitioner

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CERTIFICATION

Pursuant to 16 C.F.R. § 2.7(d)(2), counsel for Petitioner hereby certifies that they have conferred repeatedly with FTC counsel by phone in a good-faith effort to resolve by agreement the modifications sought by this Petition, but have been unable to reach a formal agreement on the disputed issues set forth in the Petition to Quash. The following is a list of the date, time, and place of each such conference between counsel and the names of all parties participating:

On May 18, 2009 at approximately 1:30 p.m.,* a telephone conference call was conducted with Lisa Rosenthal (FTC Staff), Evan Rose (FTC Staff), Reid Figel (counsel for Petitioner), Elizabeth Lear (counsel for Petitioner), and Kiran Raj (counsel for Petitioner).

On May 19, 2009 at approximately 11 a.m., a telephone conference call was conducted with Lisa Rosenthal, Evan Rose, and Elizabeth Lear.

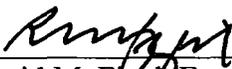
On May 19, 2009 at approximately 3:30 p.m., a telephone conference call was conducted with Lisa Rosenthal, Elizabeth Lear, Reid Figel, and Kiran Raj.

On May 20, 2009 at approximately 2:45 p.m., a telephone call was conducted with Lisa Rosenthal, Evan Rose, Elizabeth Lear, Reid Figel, and Kiran Raj.

On May 20, 2009 at approximately 4:15 p.m., a telephone call was conducted with Lisa Rosenthal, Evan Rose, Elizabeth Lear, Reid Figel, and Kiran Raj.

Dated: May 21, 2009

On May 21, 2009 at approximately 9:30 a.m., a telephone call was conducted with Lisa Rosenthal, Kerry O'Brien (FTC Staff), Elizabeth Lear, and Kiran Raj.



Reid M. Figel, Esq.

* All times are Pacific Daylight Time (PDT).

EXHIBIT A

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United States of America
Federal Trade Commission

CIVIL INVESTIGATIVE DEMAND

1. TO

CO HWAY-LING HSU, ESQ.
BERGESON, LLP
303 ALMADEN BLVD, STE 500
SAN JOSE, CA 95110-2712

This demand is issued pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, in the course of an investigation to determine whether there is, has been, or may be a violation of any laws administered by the Federal Trade Commission by conduct, activities or proposed action as described in Item 3.

2. ACTION REQUIRED

You are required to appear and testify.

<p>LOCATION OF HEARING</p> <p>FEDERAL TRADE COMMISSION WESTERN REGION-SAN FRANCISCO 901 MARKET ST, STE 570 SAN FRANCISCO, CA 94103</p>	<p>YOUR APPEARANCE WILL BE BEFORE</p> <p>LISA ROSENTHAL OR OTHER DULY DESIGNATED PERSON</p> <hr/> <p>DATE AND TIME OF HEARING OR DEPOSITION</p> <p align="center">May 27, 2009</p>
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You are required to produce all documents described in the attached schedule that are in your possession, custody, or control, and to make them available at your address indicated above for inspection and copying or reproduction at the date and time specified below.

You are required to answer the interrogatories or provide the written report described on the attached schedule. Answer each interrogatory or report separately and fully in writing. Submit your answers or report to the Records Custodian named in Item 4 on or before the date specified below.

DATE AND TIME THE DOCUMENTS MUST BE AVAILABLE

May 22, 2009

3. SUBJECT OF INVESTIGATION

SEE ATTACHED RESOLUTION.

4. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN

JEFFREY KLURFELD / LISA ROSENTHAL
FEDERAL TRADE COMMISSION
901 MARKET ST, STE 570
SAN FRANCISCO, CA 94103

5. COMMISSION COUNSEL

LISA ROSENTHAL (415 848-5150)
FEDERAL TRADE COMMISSION
901 MARKET ST, STE 570
SAN FRANCISCO, CA 94103

DATE ISSUED

5/15/09

COMMISSIONER'S SIGNATURE

J. The Rose

INSTRUCTIONS AND NOTICES

The delivery of this demand to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. The production of documents or the submission of answers and reports in response to this demand must be made under a sworn certificate, in the form printed on the second page of this demand, by the person to whom this demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances of such production or responsible for answering each interrogatory or report question. This demand does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this demand be filed within 20 days after service, or, if the return date is less than 20 days after service, prior to the return date. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 5.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this demand should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this demand and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel.

Form of Certificate of Compliance*

I/We do certify that all of the documents and information required by the attached Civil Investigative Demand which are in the possession, custody, control, or knowledge of the person to whom the demand is directed have been submitted to a custodian named herein.

If a document responsive to this Civil Investigative Demand has not been submitted, the objections to its submission and the reasons for the objection have been stated.

If an interrogatory or a portion of the request has not been fully answered or a portion of the report has not been completed, the objections to such interrogatory or uncompleted portion and the reasons for the objections have been stated.

Signature _____

Title _____

Sworn to before me this day

Notary Public

*In the event that more than one person is responsible for complying with this demand, the certificate shall identify the documents for which each certifying individual was responsible. In place of a sworn statement, the above certificate of compliance may be supported by an unsworn declaration as provided for by 28 U.S.C. § 1746.

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Janet D. Steiger, Chairman
Mary L. Azcuenaga
Deborah K. Owen
Roscoe B. Starek, III
Dennis A. Yao

RESOLUTION DIRECTING USE OF COMPULSORY
PROCESS IN NONPUBLIC INVESTIGATION

Unnamed Accessors of Consumers' Bank Accounts
File No. 912 3352

Nature and Scope of Investigation:

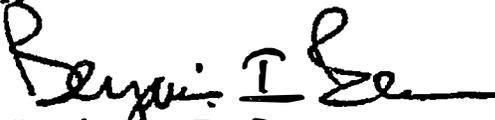
To determine whether unnamed accessors of consumers' bank accounts are or may be engaged in acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended, by accessing consumers' bank accounts without consumers' authorization, by accessing consumers' bank accounts for an amount different than the amount authorized by consumers, or by otherwise obtaining access to consumers' bank accounts through unfair or deceptive acts or practices. The investigation is also to determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation.

Authority to Conduct Investigation:

Sections 6, 9, 10, and 20 of the Federal Trade Commission Act, 15 U.S.C. 46, 49, 50 and 57b-1, as amended; FTC Procedures and Rules of Practices, 16 C.F.R. 1.1 et seq. and supplements thereto.

By direction of the Commission,


Benjamin I. Berman
Acting Secretary

Dated: August 6, 1991

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CIVIL INVESTIGATIVE DEMAND SCHEDULE FOR PRODUCTION OF DOCUMENTS AND ORAL TESTIMONY

I. DEFINITIONS

As used in this Civil Investigative Demand, the following definitions shall apply:

- A. **“Advertisement”** shall mean any written or verbal statement, illustration, or depiction that is designed to effect a sale or create interest in the purchasing of goods or services, whether it appears in a brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase material (including but not limited to a display or an item worn by salespeople), package insert, package label, fact sheet, film, slide, radio, broadcast or cable television, audio program transmitted over a telephone system, program-length commercial (“infomercial”), the Internet, e-mail, or in any other medium.
- B. **“And,”** as well as **“or,”** shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any specification in the Schedule all information that otherwise might be construed to be outside the scope of the specification.
- C. **“Any”** shall be construed to include **“all,”** and **“all”** shall be construed to include the word **“any.”**
- D. **“CID”** shall mean this Civil Investigative Demand, the attached Resolution and the accompanying Schedule, including the Definitions, Instructions, and Specifications.
- E. **“Communication”** shall mean any exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished, including but not limited to any contract, correspondence, invoice, memorandum, note, and report.
- F. **“Document”** shall mean the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, taped, recorded, filmed, punched, computer-stored, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including but not limited to any advertisement, book, pamphlet, periodical, contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, agenda, minute, code book, opened electronic mail, and

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computer material (including print-outs, cards, magnetic or electronic tapes, discs and such codes or instructions as will transform such computer materials into easily understandable form).

- G. **"Each"** shall be construed to include **"every,"** and **"every"** shall be construed to include **"each."**
- H. **"Ever Private Card"** shall mean VirtualWorks, LLC, formerly known as Private Date Finder, LLC, also d/b/a Ever Private Card and Secret Cash Card, its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, officers, employees, agents, consultants, and other persons working for or on behalf of the foregoing, including but not limited to Jerome **"Jerry"** Klein and Joshua Finer.
- I. **"FTC"** or **"Commission"** shall mean the Federal Trade Commission.
- J. **"Lead"** shall mean personally identifying information about a potential customer, including but not limited to name, address, and bank account information.
- K. **"Referring to"** or **"relating to"** shall mean discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.
- L. **"Swish"** shall mean Swish Marketing, Inc., its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all shareholders, directors, officers, employees, agents, consultants, and other persons working for or on behalf of the foregoing.
- M. **"You"** and **"Your"** shall mean the person or entity to whom this CID is issued.

II. INSTRUCTIONS

- A. **Sharing of Information:** The Commission often makes its files available to other civil and criminal federal, state, local, or foreign law enforcement agencies. The Commission may make information supplied by you available to such agencies where appropriate pursuant to the Federal Trade Commission Act and 16 CFR § 4.11 (c) and (j). Information you provide may be used in any federal, state, or foreign civil or criminal proceeding by the Commission or other agencies.
- B. **Applicable time period:** Unless otherwise directed in the specifications, the applicable time period for the request shall be from January 1, 2006, until the date of full and complete compliance with this CID.

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C. **Claims of Privilege:** If any material called for by this CID is withheld based on a claim of privilege or any similar claim, the claim must be asserted no later than the return date of this CID. In addition, pursuant to 16 C.F.R. § 2.8A(a), submit, together with the claim, a schedule of the items withheld, stating individually as to each item:

1. the type, specific subject matter, and date of the item;
2. the names, addresses, positions, and organizations of all authors and recipients of the item; and
3. the specific grounds for claiming that the item is privileged.

If only some portion of any responsive material is privileged, all non-privileged portions of the material must be submitted. A petition to limit or quash this CID shall not be filed solely for the purpose of asserting a claim of privilege. 16 C.F.R. § 2.8A(b).

D. **Document Retention:** You shall retain all documentary materials used in the preparation of responses to the specifications of this CID. The Commission may require the submission of additional documents at a later time during this investigation. Accordingly, you should suspend any routine procedures for document destruction and take other measures to prevent the destruction of documents that are in any way relevant to this investigation during its pendency, irrespective of whether you believe such documents are protected from discovery by privilege or otherwise. *See* 15 U.S.C. § 50; *see also* 18 U.S.C. §§ 1505, 1519. If, for any specification, there are documents that would be responsive to this CID, but they were destroyed, mislaid, transferred, deleted, altered, or overwritten, describe the date and the circumstances.

E. **Petitions to Limit or Quash:** Any petition to limit or quash this CID must be filed with the Secretary of the Commission no later than twenty (20) days after service of the CID, or, if the return date is less than twenty (20) days after service, prior to the return date. Such petition shall set forth all assertions of privilege or other factual and legal objections to the CID, including all appropriate arguments, affidavits, and other supporting documentation. 16 C.F.R. § 2.7(d).

F. **Modification of Specifications:** If you believe that the scope of the required search or response for any specification can be narrowed consistent with the Commission's need for documents or information, you are encouraged to discuss such possible modifications, including any modifications of definitions and instructions, with Lisa Rosenthal at (415) 848-5150. All such modifications must be agreed to in writing. 16 C.F.R. § 2.7(c).

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- G. **Certification:** You shall certify that the response to this CID is complete. This certification shall be made in the form set out on the back of the CID form, or by a declaration under penalty of perjury as provided by 28 U.S.C. § 1746.
- H. **Scope of Search:** This CID covers documents in your possession or under your actual or constructive custody or control including, but not limited to, documents in the possession, custody, or control of your attorneys, accountants, directors, officers, and employees, whether or not such documents were received from or disseminated to any person or entity.
- I. **Document Production:** You shall produce the documentary material by making all responsive documents available for inspection and copying at your principal place of business. Alternatively, you may elect to send all responsive documents to Lisa Rosenthal, Federal Trade Commission, 901 Market Street, Suite 570, San Francisco, CA 94103. Please use a courier service such as FedEx or UPS. Notice of your intention to use the alternative method of compliance shall be given by mail or telephone to Lisa Rosenthal, (415) 848-5150, at least five days prior to production.
- J. **Document Identification:** Documents that may be responsive to more than one specification of this CID need not be submitted more than once; however, your response should indicate, for each document submitted, each specification to which the document is responsive. If any documents responsive to this CID have been previously supplied to the Commission, you may comply with this CID by identifying the document(s) previously provided and the date of submission. In addition, number by page all documents in your submission and indicate the total number of documents in your submission.
- K. **Production of Copies:** Unless otherwise stated, legible photocopies may be submitted in lieu of original documents, provided that the originals are retained in their state at the time of receipt of this CID. Further, copies of original documents may be submitted in lieu of originals only if they are true, correct, and complete copies of the original documents; provided, however, that submission of a copy shall constitute a waiver of any claim as to the authenticity of the copy should it be necessary to introduce such copy into evidence in any Commission proceeding or court of law; and provided further that you shall retain the original documents and produce them to Commission staff upon request.

A complete copy of each document should be submitted even though only a portion of the document is within the terms of the specification. The document shall not be edited, cut, or expunged and shall include all covering letters and memoranda, transmittal slips, appendices, tables, or other attachments and all other documents referred to in the document or attachments.

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L. **Submission of Electronically Stored Information (“ESI”):** The following guidelines refer to any ESI you submit. But, before submitting any ESI, you must confirm with the FTC that the proposed formats and media types that contain such ESI will be acceptable to the government.

1. Magnetic and other electronic media types accepted:

- a. CD-R CD-ROMs formatted to ISO 9660 specifications.
- b. DVD-ROMs for Windows-compatible personal computers.
- c. IDE and EIDE hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data.

Note: Other types of tape media used for archival, backup, or other purposes such as 4mm & 8mm DAT and other cassette, mini-cartridge, cartridge, and DAT/helical scan tapes, DLT, or other types of media will be accepted only with prior approval.

2. File and record formats

- a. E-mail: The FTC accepts MS Outlook PST files, MS Outlook MSG files, and Lotus Notes NSF files. Any other electronic submission of email accepted only with prior approval.
- b. Scanned Documents: Image submissions accepted with the understanding that unreadable images will be resubmitted in original, hard copy format in a timely manner. Scanned documents must adhere to the following specifications:
 - (1) All images must be multi-page, 300 DPI - Group IV TIFF files named for the beginning bates number.
 - (2) If the full text of the document is available, that should be provided as well. The text should be provided in one file for the entire document or email, named the same as the first TIFF file of the document with a *.TXT extension.

Note: Single-page, 300 DPI – Group IV TIFF files may be submitted with prior approval if accompanied by an acceptable load file such as a Summation or Concordance image load file which denotes the appropriate information to allow the loading of the images into a document management system with all document breaks (document delimitation) preserved. OCR accompanying single-page TIFF submissions should be located in the same folder

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and named the same as the corresponding TIFF page it was extracted from, with a *.TXT extension.

- c. Other ESI files: The FTC accepts word processing documents in ASCII text, WordPerfect version X3 or earlier, or Microsoft Word 2003 version or earlier. Spreadsheets should be in MS Excel 2003 (*.xls) version or earlier. Database files should be in MS Access 2003 or earlier. PowerPoint presentations may be submitted in MS PowerPoint 2003 or earlier. Other proprietary formats for PC files should not be submitted without prior approval. Files may be submitted using the compressed ZIP format to reduce size and ease portability. Adobe Acrobat PDF (*.pdf) may be submitted where the normal business practice storage method is PDF.

Note: Database files may also be submitted with prior approval as delimited ASCII text files, with field names as the first record, or as fixed-length flat files with appropriate record layout. For ASCII text files, field-level documentation should also be provided and care taken so that delimiters and quote characters do not appear in the data. The FTC may require a sample of the data to be sent for testing.

3. Security

- a. All submissions of ESI to the FTC must be free of computer viruses. In addition, any passwords protecting documents or files must be removed or provided to the FTC.
- b. Magnetic media shall be carefully packed to avoid damage and must be clearly marked on the outside of the shipping container: "MAGNETIC MEDIA – DO NOT X-RAY, MAY BE OPENED FOR POSTAL INSPECTION."

M. **Sensitive Personally Identifiable Information:** Unless specifically requested by a specification in this CID, do not produce any Sensitive Personally Identifiable Information ("Sensitive PII") or Sensitive Health Information ("SHI") prior to discussing the information with Commission counsel. If any document responsive to a particular specification contains unresponsive Sensitive PII or SHI, redact the unresponsive Sensitive PII or SHI prior to producing the document.

N. **Procedures:** This CID is issued pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1. The taking of oral testimony pursuant to this CID will be conducted in conformity with that section and with Part 2A of the Commission's Rules, 16 C.F.R. §§ 2.8–2.9.

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III. SPECIFICATIONS FOR PRODUCTION OF DOCUMENTS

- A. All documents relating to Ever Private Card, including but not limited to:
 - 1. Copies of advertisements that refer to any product or service offered by Ever Private Card;
 - 2. Printouts or screenshots of websites Swish used to obtain leads for Ever Private Card;
 - 3. Communications between Swish and Ever Private Card;
 - 4. Communications between Swish shareholders, directors, officers, employees, agents, or consultants, or other persons working for or on behalf of the foregoing, relating to Ever Private Card;
 - 5. Communications between Swish and third parties relating to Ever Private Card;
 - 6. Documents relating to funds received by Swish from Ever Private Card;
 - 7. Documents relating to any investigation, legal proceeding, dispute resolution proceeding, or administrative action involving any of Ever Private Card's products or services.
- B. All documents relating to the creation of Swish.
- C. All notes or minutes of any meetings of Swish shareholders, officers, or directors.
- D. All organization charts and personnel directories for Swish as a whole and for each of Swish's facilities or divisions.
- E. All documents relating to any attempt by you, whether or not successful, to:
 - 1. Approve or modify the appearance of any Swish website;
 - 2. Approve, modify, or discontinue any advertisement appearing on any Swish website;
 - 3. Approve, modify, or discontinue any product or service offered for sale by Swish; and
 - 4. Initiate or terminate a relationship with any partner, affiliate, or customer of Swish.

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- F. Documents sufficient to show how much compensation you have received from Swish.

IV. SPECIFICATIONS FOR ORAL TESTIMONY

Subjects for oral testimony will include, but will not be limited to, the following:

- A. Your role at Swish.
- B. Swish's marketing practices, including but not limited to Swish's role in connection with any product or service offered by Ever Private Card.
- C. Your knowledge of and participation in the marketing of any product or service offered by Ever Private Card.

EXHIBIT B

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MICHAEL THURMAN
Partner

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Los Angeles, CA 90067

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Main 310.282.2000
Fax 310.919.3848
mthurman@loeb.com

Via Email and Facsimile

May 20, 2009

Reid M. Figel, Esq.
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
Summer Square
1615 M Street, N.W., Suite 400
Washington, DC 20036

Dear Mr. Figel:

We represent Swish Marketing, Inc. ("Swish") and Matthew Patterson in connection with the ongoing investigation of Swish initiated by the Federal Trade Commission ("FTC") on or about April 11, 2008. We also represent Swish and Mr. Patterson in an action filed on Monday, May 18, 2009 in the District of Columbia federal court (*Swish Marketing, Inc., et. al. v. Federal Trade Commission*, Case No. 1:09-CV-00921), in which plaintiffs seek a declaratory judgment that the FTC cannot recover from Swish and its officers, directors and/or shareholders more than the amount the company received relating to consumers that have not been reimbursed by VirtualWorks pursuant to the legal authority discussed in *FTC v. Verity International, Ltd.*, 443 F.3d 48 (2d Cir. 2006).

We understand that [REDACTED] a former officer and director and current shareholder of Swish, was served on Monday, May 18, 2009 by the FTC with a Civil Investigative Demand ("CID") (1) demanding the production of documents (including documents that appear to have been produced previously by Swish) relating to Swish by May 22, 2009, and (2) directing [REDACTED] to appear and testify in connection with the investigation on May 27, 2009. Based on his current and prior relationships with Swish, we are concerned that [REDACTED] may have in his possession documents that belong to Swish and are protected from disclosure by Swish's attorney-client communication privilege, attorney work product privilege and/or other privileges or grounds for confidentiality.

Please be advised that to the extent the CID requests the production of documents or information that is the property of Swish, including without limitation any emails, correspondence, memoranda or other documents relating to Swish's business, Swish objects to such production on the following grounds:

1. Swish has had no opportunity to review any of the documents in [REDACTED] possession to determine whether they are protected from disclosure by Swish's attorney-client communication privilege, attorney work product privilege or other grounds for privilege and/or confidentiality.

2. Given that Swish is presently engaged in litigation with the FTC relating to the same issues that are the subject of the investigation, any discovery relating to this matter must be conducted in accordance with the Federal Rules of Civil Procedure ("FRCP"), allowing the



plaintiffs notice and a full and fair opportunity to raise any appropriate objections to the production of any or all of these documents. In light of the fact that the federal court action has just been filed, the parties have not had an opportunity to meet and confer regarding scheduling discovery, including the issuance of document requests and the taking of depositions, as required by Rule 26 and/or other applicable FRCP rules.

Similarly, with respect to the demand for [REDACTED] to appear and testify, Swish objects to such appearance and testimony on the following grounds:

1. Swish is entitled to notice and an opportunity to review [REDACTED] examination and testimony to determine whether it is subject to and protected from disclosure by Swish's attorney-client communication privilege, attorney work product privilege or any other bases for privilege and/or confidentiality. Further, Swish is entitled to make any appropriate objections that may be relevant to protecting these privileges.

2. As discussed above, any discovery relating to this matter must be conducted in accordance with the FRCP, allowing the plaintiffs notice and a full and fair opportunity to attend any investigative hearings and to raise any appropriate objections to the questioning of [REDACTED]. In light of the fact that the federal court action has just been filed, the parties have not had an opportunity to meet and confer regarding scheduling discovery, including the issuance of document requests and the taking of depositions, as required by the FRCP.

Swish further objects to the CID to the extent that it seeks categories of documents that have previously been reviewed and, in some instances redacted, for privilege and/or relevance issues. By requesting these same categories of documents from [REDACTED] we are concerned that the FTC may obtain unredacted copies of documents that previously were not produced, or were redacted, by Swish on the grounds of privilege or relevance.

Swish directs [REDACTED] in his role as a former officer and director and a current shareholder of Swish to raise the above objections to the CID on behalf of Swish and to refrain from producing any documents and giving any testimony until these issues are resolved through administrative and/or legal processes. Swish further advises that it will petition the FTC to quash and/or limit the CID on the grounds stated above pending the resolution of these issues.

Thank you for your assistance.

Very truly yours,

A handwritten signature in black ink that reads "Michael A. Thurman".

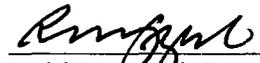
Michael A. Thurman
Partner

cc: Michael L. Mallow, Esq.
Linda Northrup, Esq.
Jean Noonan, Esq.
Linda Goodman, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 21st day of May, 2009, I caused the original and twelve (12) copies of the public version of the Petition To Quash Civil Investigative Demand and attached exhibits to be filed by hand-delivery with the Secretary of the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580.



Reid M. Fiegel, Esq.