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

14 FEDERAL TRADE COMMISSION,

15 Plaintiff,

16 v.

17 SWISH MARKETING, INC., a corporation,

18 MARK BENNING, individually and as an
19 officer of SWISH MARKETING, INC.,

20 MATTHEW PATTERSON, individually and
21 as an officer of SWISH MARKETING, INC.,
and

22 JASON STROBER, individually and as an
23 officer of SWISH MARKETING, INC.,

24 Defendants.

Case No. C09-03814 -RS

**FIRST AMENDED COMPLAINT
FOR PERMANENT INJUNCTION
AND OTHER EQUITABLE
RELIEF**

1 Plaintiff, the Federal Trade Commission (“FTC”), for its Complaint alleges:

2 1. The FTC brings this action under Section 13(b) of the Federal Trade Commission
3 Act (“FTC Act”), 15 U.S.C. § 53(b), to obtain permanent injunctive relief, rescission or
4 reformation of contracts, restitution, the refund of monies paid, disgorgement of ill-gotten
5 monies, and other equitable relief for Defendants’ acts or practices in violation of Section 5(a) of
6 the FTC Act, 15 U.S.C. § 45(a).

7 **JURISDICTION AND VENUE**

8 2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a),
9 and 1345, and 15 U.S.C. §§ 45(a) and 53(b).

10 3. Venue is proper in this District under 28 U.S.C. §§ 1391(b) and (c), and 15 U.S.C.
11 § 53(b).

12 **INTRADISTRICT ASSIGNMENT**

13 4. Defendant Swish Marketing, Inc. (“Swish”) has its primary place of business in
14 the County of Santa Clara.

15 **PLAINTIFF**

16 5. The FTC is an independent agency of the United States Government created by
17 statute. 15 U.S.C. §§ 41–58. The FTC is charged, *inter alia*, with enforcement of Section 5(a)
18 of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair and deceptive acts or practices in or
19 affecting commerce.

20 6. The FTC is authorized to initiate federal district court proceedings, by its own
21 attorneys, to enjoin violations of the FTC Act and to secure such equitable relief as may be
22 appropriate in each case, including restitution and disgorgement. 15 U.S.C. § 53(b).

23 **DEFENDANTS**

24 7. Swish is a closely held Delaware corporation with its principal place of business
25 at 555 Bryant Street, No. 349, Palo Alto, CA 94301. Swish transacts or has transacted business
26 in this District and throughout the United States. At all times material to this Complaint, acting
27 alone or in concert with others, Swish has advertised and/or marketed prepaid debit cards to
28 consumers throughout the United States.

DEFENDANTS' BUSINESS ACTIVITIES

12. Swish created, maintained, and operated numerous websites that, at all times material to this Complaint, advertised short-term, or “payday,” loan matching services. Such websites featured payday loan applications that consumers could complete and submit online.

13. Swish sold the information that consumers provided on the payday loan applications to payday lenders. The payday loan application sought, among other things, information regarding the consumer applicant’s bank account. Payday lenders use such information to directly deposit the loan funds into the consumer’s bank account.

14. In addition to payday loan matching services, Swish advertised other products and services on its websites. Swish sold the information that consumers provided on their loan applications, including consumers’ bank account information, to the sellers of such other products and services.

Defendants’ Deceptive Marketing of the EverPrivate Card

15. From about September 2006 to about August 2007, Swish actively marketed and advertised on dozens of its payday loan websites two prepaid debit cards that came with a zero balance, sold by a company called VirtualWorks, LLC (“VirtualWorks”). The first card, called the Secret Cash Card, was a MasterCard-brand debit card that sold for an enrollment fee ranging from \$39.95 to \$49.95. In early 2007, that card was replaced with a Visa-brand debit card, called the EverPrivate Card, that sold for an enrollment fee ranging from \$49.95 to \$54.95. Hereinafter, the Secret Cash Card and the EverPrivate Card are referred to collectively as the EverPrivate Card.

16. A significant number of consumers who submitted payday loan applications on Swish’s websites did not realize that an enrollment fee for the EverPrivate Card would automatically be debited from their bank account because the websites obscured the EverPrivate Card offer and the attendant fees. As described in more detail in Paragraphs 22 to 27, on one set of websites, the offer was buried and the consumer’s purported consent to pay the enrollment fee was defaulted to “Yes.” As described in more detail in Paragraphs 28 to 30, on another set of

1 websites, the offer was touted as a “bonus,” and all information about fees was hidden on the
2 portion of the webpage below the “submit” button.

3 17. Hundreds of thousands of consumers incurred debits of between \$39.95 and
4 \$54.95 for the EverPrivate Card in the course of applying for payday loans on Swish’s websites.
5 Many of these consumers, who, as payday loan applicants, were struggling to make ends meet,
6 also incurred fees and penalties from their banks because they did not have sufficient funds in
7 their accounts to cover this debit.

8 18. A significant portion of consumers identified in Paragraph 17 sought to have the
9 debits to their bank accounts reversed. Thousands of such consumers complained to
10 VirtualWorks, police departments and law enforcement agencies, the Better Business Bureau,
11 banks, payday lenders, and Defendants that the debit was unauthorized.

12 19. Only a tiny fraction of consumers identified in Paragraph 17 ever activated the
13 card.

14 20. Swish had control over the creation, maintenance, and operation of its websites,
15 including how the EverPrivate Card offer appeared.

16 21. Defendants Swish, Benning, Patterson, and Strober profited handsomely from
17 selling consumer information to VirtualWorks for the EverPrivate Card. Swish typically
18 received \$13 to \$15 for each consumer whose information it sent to VirtualWorks relating to the
19 EverPrivate Card. At several points between January 2007 and August 2007, such sale of
20 consumer information constituted one of the largest, if not the largest, sources of Swish’s profit
21 margin. For example, in arguing that Swish should not change the manner in which it presented
22 the EverPrivate Card on its websites despite consumer complaints, Strober stated, “All of the
23 margin currently comes from this product.”

24 **Swish Websites That Buried and Defaulted to “Yes” the EverPrivate Card Offer**

25 22. Defendants operated numerous websites whose homepages were materially
26 similar to the one depicted in Exhibit A. These websites had URLs such as
27 ChristianFaithFinancial.com, MagnoliaFinancial.org, ThatcherPrescott.com, PaydayUSA.org,
28 SouthernFinancialFunding.com, MtWhitneyFinancial.com, PaydayMatchup.com,

1 AdditionalEarning.com, PrescottFinancial.com, MaximumWagesNow.com, OnlinePayday.org,
2 OrchidFinancial.org, MalibuFinancial.com, SilentCashLending.com,
3 InstantPaydayMatchup.com, MyFamilyLoans.org, WomensPaychecks.com,
4 CompareAdvances.com, AtlasPeakFinancial.com, ShortTermLoanExpert.com,
5 CheckCashCentrale.com, MtVernonFinancial.com, PaydayLoanQuotes.com,
6 RockOfMaine.com, UpTo500.com, and HarborCreditCashAdvance.com.

7 23. The homepages of the websites identified in Paragraph 22 featured an application
8 form for a payday loan. These homepages conveyed the general message that the consumer, in
9 completing the application form, was merely applying for a payday loan, as opposed to
10 purchasing any good or service. For example, in numerous instances, these homepages
11 contained the following attributes or features:

- 12 a. The headlines on the homepage contained various statements in large, bolded font
13 about payday loans, such as the available loan amounts and possible uses for the
14 loan, and contained no reference to the EverPrivate Card or to any product or
15 service other than the payday loan matching service (*see* Exhibit A § 1).
- 16 b. The homepage displayed a fillable loan application form that required, among
17 other things, a consumer's bank name, bank routing number, and bank account
18 number (*see* Exhibit A § 2).
- 19 c. The homepage contained no statement suggesting that there were any charges
20 associated with submitting the payday loan application.
- 21 d. The homepage contained no reference to the EverPrivate Card or to any product
22 or service other than the payday loan matching service.
- 23 e. Below the application form, the homepage displayed a submit button, with a label
24 in bold, prominent type, such as, "**Get matched for your payday loan!**" (*see*
25 Exhibit A § 3).

26 24. In numerous instances, consumers who clicked on the submit button referred to in
27 Paragraph 23e were taken to a webpage materially similar to the webpages depicted in Exhibit B
28 and Exhibit C, which displayed offers for several products or services unrelated to the loan. The

1 webpage conveyed that these offers were not linked to the loan application process and could be
2 bypassed without consequence. For example, in numerous instances, these webpages contained
3 the following attributes:

- 4 a. The top of the webpage contained, in large, bolded text, a headline such as,
5 **“Special bonus offers just for you!”** (*see* Exhibit B § 1), or, **“Before you get**
6 **your loan, check out the limited time offers below!”** (*see* Exhibit C § 1).
- 7 b. At the bottom of the page, a prominent submit button appeared (*see* Exhibit B § 4;
8 Exhibit C § 4). It contained large, bolded text, with a label such as, **“Finish**
9 **matching me with a payday loan provider!”**
- 10 c. Sandwiched between the two prominent statements described in Paragraph 24a
11 and Paragraph 24b, this webpage displayed four boxes arranged in a two-by-two
12 grid (*see* Exhibit B § 2; Exhibit C § 2). The grid contained four offers – *e.g.*, a
13 credit repair kit, a free color printer, the EverPrivate Card, and an auto loan quote
14 – and each had tiny “Yes” and “No” option buttons, commonly referred to as
15 “radio buttons.”
- 16 d. One of the four boxes displayed an offer for the EverPrivate Card (*see* Exhibit B
17 § 3; Exhibit C § 3). The EverPrivate Card offer contained 15–17 lines of fine print
18 disclosures that appeared below the “Yes”/“No” radio buttons. This text was
19 approximately two-thirds the size of the bolded text of the headline described in
20 Paragraph 24a and of the submit button described in Paragraph 24b. The first six
21 sentences of text touted the features of the EverPrivate Card. The seventh, and
22 second to the last, sentence of the EverPrivate Card description read, “You hereby
23 authorize EverPrivate Card [Secret Cash Card] to debit your bank account for the
24 one time enrollment fee of [\$39.95–\$54.95].” The fee amount was not highlighted
25 or otherwise made prominent. The phrase “You hereby authorize EverPrivate
26 Card [Secret Cash Card]” appeared in all capitals, but shared the same font, color,
27 and prominence as the rest of the fine print disclosures.
- 28 e. In hundreds of thousands of instances, for three of the four offerings – including

1 the first one on the top left – the “No” radio button was pre-clicked. However, the
2 EverPrivate Card offer, with no commentary or special notice, was preclicked
3 “Yes.”

4 25. In hundreds of thousands of instances, consumers clicked on the submit button
5 referred to in Paragraph 24b without affirmatively clicking the “No” radio button above the
6 EverPrivate Card offer referred to in Paragraph 24d.

7 26. In such instances, Defendants transferred to VirtualWorks consumer information,
8 which included the bank account information that such consumers had provided on their loan
9 application form, and that information was used to debit, or attempt to debit, between \$39.95 and
10 \$54.95 from each of those consumers’ bank accounts. Defendants transferred such information
11 without providing consumers any notice of the debit beyond the fine print disclosures in the offer
12 box, as set forth in Paragraph 24d. Barring technical difficulties, the transfer was automatic and
13 almost instantaneous.

14 27. Defendants designed, operated, and maintained control over the appearance of the
15 webpages described in Paragraphs 22 to 24, including but not limited to the size, prominence,
16 color, and placement of text and images and whether radio buttons were pre-clicked “Yes” or
17 “No.”

18 **Swish Websites That Touted the EverPrivate Card as a “Bonus” and**
19 **Hid the Fee Disclosure on the Portion of the Webpage Below the Submit Button**

20 28. At least three of Defendants’ websites had homepages that were materially
21 similar to the one depicted in Exhibit D. These websites had URLs such as
22 WillowGlenFinancial.com, WhittierFinancial.com, and MyPayday.org/credit2. These
23 homepages characterized the EverPrivate Card as a “bonus” that comes with the payday loan.
24 For example, in numerous instances, these homepages contained the following attributes or
25 features:

- 26 a. This statement appeared as a bolded headline claim at the top of the homepage:
27 **“Apply now for a Payday Loan of up to \$1500 and a BONUS \$2,500 Prepaid**
28 **Debit Visa* [MasterCard*]”** (*see* Exhibit D § 1).

- 1 b. The word “BONUS” in the headline claim (the “BONUS headline”) appeared in
2 all capital letters. The BONUS headline was marked with an asterisk.
- 3 c. Below the BONUS headline, the homepage displayed a fillable loan application
4 form that required, among other things, a consumer’s bank name, bank routing
5 number, and bank account number (see Exhibit D § 2).
- 6 d. Below the application form, the homepage displayed a submit button with a label
7 such as, “Activate your Prepaid Debit Visa card [MasterCard] and get
8 matched for a payday loan!” (see Exhibit D § 3).
- 9 e. The submit button did not alert consumers to the fact that any information
10 appeared below the submit button.
- 11 f. In numerous instances, consumers were not able to view the entire homepage
12 without affirmatively scrolling down. In such instances, consumers would have
13 had to affirmatively scroll down past the submit button to see any information
14 that appeared below the submit button.
- 15 g. There was no statement above the submit button disclosing that consumers would
16 be charged any fee for the “BONUS” prepaid debit card.
- 17 h. Below the submit button, six lines of fine print described the EverPrivate Card
18 offer (the “card description”) (see Exhibit D § 4). The font size of the text in the
19 card description was smaller than any other text on the homepage, and was
20 approximately three-quarters the size of the font of the bolded BONUS headline.
21 The text was separated into two paragraphs, the first containing four lines and the
22 second containing two lines.
- 23 i. The card description did not disclose until the fifth line, in the second paragraph,
24 that consumers would have to pay an enrollment fee of \$39.95 to \$54.95 for the
25 “BONUS” prepaid debit card (see Exhibit D § 5). That disclosure read, “You
26 hereby authorize EverPrivate Card [Secret Cash Card] to debit your bank account
27 for the one time enrollment fee of [\$39.95–\$54.94].” The fee amount was not
28 highlighted or otherwise made prominent. The phrase “You hereby authorize

1 EverPrivate Card [Secret Cash Card]” appeared in all capitals, but shared the
2 same font, color, and prominence as the rest of the fine print disclosures.

3 j. The first paragraph of the card description was marked by an asterisk, linking it to
4 the asterisk that followed the BONUS headline. This first paragraph did not
5 disclose the enrollment fee. The second paragraph, which was not marked by an
6 asterisk, was the only place on the webpage that disclosed the enrollment fee.

7 29. In tens of thousands of instances, after consumers clicked on the submit button
8 referred to in Paragraph 28d, Defendants transferred to VirtualWorks consumer information,
9 which included the bank account information such consumers had provided on their loan
10 application form, and that information was used to debit, or attempt to debit, between \$39.95 and
11 \$54.95 from each of those consumers’ bank accounts. Defendants transferred such information
12 without providing consumers any notice of the debit beyond the fine print disclosures below the
13 submit button, as set forth in Paragraph 28i. Barring technical difficulties, the transfer was
14 automatic and almost instantaneous.

15 30. Defendants designed, operated, and maintained control over the appearance of the
16 homepages described in Paragraph 28, including but not limited to the size, font, color, and
17 placement of text and images, including the placement of the EverPrivate Card fee disclosure,
18 relative to the submit button.

19 **The Roles of the Individual Defendants**

20 31. Benning, Patterson, and Strober founded Swish in 2004. At all times material to
21 this Complaint, each of them had more than a thirty percent ownership interest in Swish and
22 were the corporation’s sole directors. They held themselves out as Swish’s executive
23 management team. Benning, Patterson, and Strober managed a total of approximately twenty-
24 five, or fewer than twenty-five, employees who worked at a common location.

25 32. The structure of the EverPrivate Card transaction made it unlikely that consumers
26 would have known to complain directly to Swish regarding the transaction. The “Secret Cash
27 Card” or “EverPrivateCard” was identified as the source of the debit on consumers’ bank
28 account documentation. Neither Swish’s name nor contact information appeared on consumers’

1 bank account documentation. Nevertheless, as set forth below in more detail in Paragraphs 35,
 2 44, and 52, Benning, Patterson, and Strober were aware of, or informed of, consumer complaints
 3 regarding unauthorized debits for the EverPrivate Card.

4 **Defendant Mark Benning**

5 33. At all times material to this Complaint, Benning was the Chairman, CEO, and
 6 President of Swish. Organizational charts maintained and distributed by Swish depicted
 7 Benning as the top of the chain of command. As CEO and President, he led Swish's overall
 8 business strategy.

9 34. During these same periods, Benning was also the Treasurer of Swish. Among his
 10 duties, he kept and maintained Swish's corporate financial records and had bank account and
 11 check-signing authority.

12 35. At various points material to this Complaint, beginning no later than January
 13 2007, Benning was informed that Swish was using the pre-clicked "Yes" tactic and that
 14 consumers were complaining about unauthorized debits relating to the EverPrivate Card.
 15 Communications that informed Benning include, but are not necessarily limited to, the following
 16 (with emphases added):

17 a. In or around January 2007, Benning engaged in the following instant message
 18 exchange with Patterson:

19 **Patterson:** [The EverPrivate Card offer] is defaulted to yes . . . and
 20 **customer's [sic] don't see it . . . and hit "take me to my payday**
 21 **loan" . . . and boom they become [an EverPrivate Card]**
 22 **customer . . . [the payday lender] doesn't like the legal heat**
 23 **because the customers kinda go ballastic [sic]**

24 **Benning:** understandable...

25 **Patterson:** the last one called the cops . . . who turned it over to the AG;

26 b. In or around March 2007, Benning received an email from a payday lender
 27 affiliate, providing a link to a story about the EverPrivate Card published on the
 28 website of a CBS affiliate. According to the story, the Better Business Bureau

1 had warned that **EverPrivate Card** may be **“ripping off consumers without**
2 **their knowledge,”** had given **EverPrivate Card** an **“F,”** its lowest rating, and
3 **characterized EverPrivate Card** as **“very worrisome”**;

4 c. In or around March 2007, Benning engaged in an instant message exchange with
5 an employee, who stated she had found **“many” complaints online about**
6 **EverPrivate Card**;

7 d. In or around March 2007, Benning was forwarded an email from a payday lender
8 affiliate, expressing concern that **consumers could not opt out of the**
9 **EverPrivate Card offer** on at least one of Swish’s websites, characterizing
10 **Swish’s EverPrivate Card offer as “customer manipulation,”** reporting that
11 **“several other large lenders, and suppliers”** were **“in agreement this type of**
12 **customer manipulation is bad for the industry,”** describing VirtualWorks’
13 **customer service as “non existent i.e. a site with no contact details, no**
14 **information, purely a template designed knowing full well people will only**
15 **have come there to complain!”**, and refusing to buy consumer information from
16 Swish if it was also sold to VirtualWorks for the EverPrivate Card; and

17 e. In or around April 2007, Benning received an email from a payday lender
18 affiliate, reporting a **“significant number of customer complaints** stemming
19 **from one (or more) of our Lead [i.e., consumer information] Providers cross**
20 **marketing the leads we purchase with Ever Private,”** expressing his understanding
21 that **“the method by which these additional offers are being presented**
22 **confuses the customer - namely they mistakenly sign up for these additional**
23 **services when they did not intend to do so,”** and instructing its lead providers
24 who were exposing his customers to these products to **“cease the practice**
25 **immediately.”**

26 36. At times between January 2007 and August 2007, Benning was aware or should
27 have been aware that the EverPrivate Card campaign was one of the largest sources of Swish’s
28 profit margin. He tracked and prepared reports quantifying and comparing sources of revenue to

1 Swish. In addition, he personally received and sent emails specifically raising concerns that
2 Swish loses a lot of money whenever there are technical problems in transferring consumer
3 information to VirtualWorks and that such problems must be fixed immediately.

4 37. In early August 2007, more than six months after first learning of the complaints
5 generated by Swish's marketing of the EverPrivate Card, Benning expressed concern to
6 Defendants Patterson and Strober about the manner in which Swish was marketing the
7 EverPrivate Card offer and their potential individual liability for such practices. Benning
8 described Swish's practice of defaulting to "Yes" as "fraud and identify theft."

9 38. Coincidentally, just days after the exchange described in Paragraph 37, a financial
10 institution shut down VirtualWorks' bank account(s), which forced VirtualWorks to stop selling
11 the EverPrivate Card. Subsequently, VirtualWorks did not pay Swish approximately \$725,000
12 for consumer information that Swish had sent to VirtualWorks in July and August 2007.
13 Benning led Swish's efforts to collect this revenue from VirtualWorks even though he had
14 characterized the practices that generated this revenue as fraud and identify theft.

15 39. During the time period material to this Complaint, Benning earned more than \$1
16 million for the role he played at Swish.

17 **Defendant Matthew Patterson**

18 40. At all times material to this Complaint, Patterson was the Vice President of
19 Marketing for Swish. As Vice President, he led Swish's marketing efforts.

20 41. Patterson was Swish's primary contact person with VirtualWorks regarding the
21 EverPrivate Card campaign. He entered into contracts on behalf of Swish, including one with
22 VirtualWorks.

23 42. Among his duties, Patterson helped design and/or program Swish's websites,
24 including the websites identified in this Complaint. Specifically, he played a key role in
25 designing and/or programming, and overseeing others design and/or program, the manner in
26 which the EverPrivate Card offer appeared on such websites.

27 \\
28 \\
29

1 43. At various points material to this Complaint, beginning no later than November
2 2006, Patterson was aware that defaulting the EverPrivate Card offer to “Yes” increased the
3 volume of sales of consumer information to VirtualWorks.

4 44. At various points material to this Complaint, beginning no later than January
5 2007, Patterson was aware that Swish was using the pre-clicked “Yes” tactic and that consumers
6 were complaining about unauthorized debits relating to the EverPrivate Card. Communications
7 that informed Patterson include, but are not necessarily limited to, the following (with emphases
8 added):

9 a. In or around January 2007, Patterson engaged in the following instant message
10 exchange with Joshua Finer, his primary contact at VirtualWorks:

11 **Finer:** [The VirtualWorks **customer service website**] **has had some**
12 **decent volume . . .**

13 **Patterson:** ha . . . I can imagine;

14 b. In or around January 2007, Patterson received an email from a payday lender
15 affiliate, who said, “**This has to end and end now. We have people threatening**
16 **to go to the police, file regulatory complaints, etc. . . . This cash card deal is a**
17 **bad deal and I really think they are trying to be deceptive** here and mix their
18 card product/transaction with getting a loan”;

19 c. In or around February 2007, Patterson received an email from a payday lender
20 affiliate, stating, “We have consistently had complaints from customers about [the
21 EverPrivate Card] and **recently the number of complaints has increased**
22 **exponentially**”;

23 d. In or around March 2007, Patterson received an email from a payday lender
24 affiliate, providing a link to a story about EverPrivate Card published on the
25 website of a CBS affiliate. According to the story, the Better Business Bureau had
26 warned that **EverPrivate Card may be “ripping off consumers without their**
27 **knowledge,” had given EverPrivate Card an “F,” its lowest rating, and**
28 **characterized EverPrivate Card as “very worrisome”;**

1 e. In or around March 2007, Patterson received an email from a payday lender
2 affiliate, expressing concern that **consumers could not opt out of the**
3 **EverPrivate Card offer** on at least one of Swish's websites, characterizing
4 **Swish's EverPrivate Card offer as "customer manipulation,"** reporting that
5 "several other large lenders, and suppliers . . . are in agreement this type of
6 customer manipulation is bad for the industry," describing VirtualWorks'
7 **customer service as "non existent i.e. a site with no contact details, no**
8 **information, purely a template designed knowing full well people will only**
9 **have come there to complain!"**, and refusing to buy consumer information from
10 Swish if it was also sold to VirtualWorks for the EverPrivate Card; and

11 f. In or around April 2007, Patterson received an email from a payday lender
12 affiliate, reporting a "**significant number of customer complaints** stemming
13 from one (or more) of our Lead [*i.e.*, consumer information] Providers cross
14 marketing the leads we purchase with Ever Private," expressing his understanding
15 that "**the method with which these additional offers are being presented**
16 **confuses the customer - namely they mistakenly sign up for these additional**
17 **services when they did not intend to do so,"** and instructing affiliates who were
18 exposing his customers to these products to "**cease the practice immediately."**

19 45. Patterson was aware that changing an offer from a default of "No" to a default of
20 "Yes" increased the volume of consumer complaints. For example, in or around July 2007,
21 during a brief time period when VirtualWorks requested that Swish remove the EverPrivate Card
22 offer due to scheduled maintenance, Patterson suggested putting in an offer for one of Swish's
23 own products, "**pre checking it yes and getting every one in the office ready for [customer**
24 **service]"** (emphasis added).

25 46. In addition to being informed of consumer complaints regarding the EverPrivate
26 Card, Patterson also relayed to others at Swish information about such consumer complaints,
27 including by email and instant message communications. For example, in or around January
28 2007, he explained to Benning that the EverPrivate Card offer "is defaulted to yes . . . and

1 customer's [sic] don't see it . . . and hit 'take me to my payday loan' . . . and boom they become
2 [an EverPrivate card] customer . . . the customers kinda go ballistic [sic] . . . the last one called
3 the cops . . . who turned it over to the AG."

4 47. At times between January 2007 and August 2007, Patterson was aware or should
5 have been aware that the EverPrivate Card campaign was one of the largest sources of Swish's
6 profit margin. He personally received and sent emails specifically raising concerns that Swish
7 loses a lot of money whenever there are technical problems in transferring consumer information
8 to VirtualWorks and that such problems must be fixed immediately.

9 48. During the time period material to this Complaint, Patterson earned more than \$1
10 million for the role he played at Swish.

11 **Defendant Jason Strober**

12 49. At all times material to this Complaint, Strober was the Vice President of Product
13 Development and/or Engineering for Swish. As Vice President, he led Swish's technology
14 development.

15 50. Among his duties, Strober helped design and program Swish's websites,
16 including the websites identified in this Complaint. Strober also supervised others at Swish who
17 helped create, design, and program the websites identified in this Complaint.

18 51. Among his duties, Strober helped design the mechanism that allowed Swish to
19 transmit consumer information to third parties, including VirtualWorks. Strober helped ensure
20 that VirtualWorks received consumer information and helped respond to technical problems that
21 arose when the information was not transmitted or received. As part of his duties, Strober had
22 direct contact with VirtualWorks.

23 52. At various points material to this Complaint, beginning no later than March 2007,
24 Strober was informed that consumers were complaining that they had not authorized the debit
25 for the EverPrivate Card. For example, in or around March 2007, he received an email from
26 Benning providing a link to a story about the EverPrivate Card published on the website of a
27 CBS affiliate. According to the story, the Better Business Bureau had warned, with emphases
28 added, that **EverPrivate Card may be "ripping off consumers without their knowledge,"**

1 **had given EverPrivate Card an “F,” its lowest rating, and characterized EverPrivate Card**
2 **as “very worrisome.”**

3 53. At times between January 2007 and August 2007, Strober was aware or should
4 have been aware that the EverPrivate Card campaign was one of the largest sources of Swish’s
5 profit margin.

6 a. Strober received emails specifically raising concerns that Swish loses a lot of
7 money whenever there are technical problems in transferring consumer
8 information to VirtualWorks; and

9 b. In or around August 2007, in response to others at Swish raising concerns about
10 continuing to default the EverPrivate Card offer to “Yes,” in light of consumer
11 complaints, Strober refused to change the practice, asserting, with emphasis
12 added, “[I]f we **immediately switch this to ‘no’, it will be tantamount to**
13 **shutting down the company. All of the margin currently comes from this**
14 **product.** We are essentially break even on the other products. Turning this off
15 will require us to fire half the company and basically restart. I don’t believe this is
16 a prudent move.”

17 54. During the time period material to this Complaint, Strober earned more than \$1
18 million for the role he played at Swish.

19 **VIOLATIONS OF THE FTC ACT**

20 55. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits “unfair or deceptive acts
21 or practices in or affecting commerce.”

22 56. Misrepresentations or deceptive omissions of material fact constitute deceptive
23 acts or practices prohibited by Section 5(a) of the FTC Act.

24 57. Acts or practices are unfair under Section 5 of the FTC Act if they cause
25 substantial injury to consumers that consumers cannot reasonably avoid themselves and that is
26 not outweighed by countervailing benefits to consumers or competition. 15 U.S.C. § 45(n).

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Count I

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2 58. In numerous instances, Defendants Swish, Benning, Patterson, and Strober have
3 represented, directly or indirectly, expressly or by implication, that consumers who completed an
4 online application and clicked on a button labeled “Finish matching me with a payday loan
5 provider” were only applying for a payday loan.

6 59. In numerous instances, Defendants Swish, Benning, Patterson, and Strober failed
7 to disclose adequately to consumers who completed an online application and clicked on a
8 button labeled “Finish matching me with a payday loan provider” that they were also purchasing
9 an EverPrivate Card for a fee, typically in the amount of \$39.95 to \$54.95, and that this fee
10 would be debited from their bank accounts. This additional information would be material to
11 consumers in deciding to accept this offer to be matched with a payday loan provider.

12 60. Defendants’ failure to disclose adequately the material information described in
13 Paragraph 59, above, in light of the representation described in Paragraph 58, above, constitutes
14 a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

Count II

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16 61. In numerous instances, Defendants Swish, Benning, Patterson, and Strober have
17 represented, directly or indirectly, expressly or by implication, that consumers who submitted a
18 payday loan application would receive a “BONUS” prepaid card at no charge.

19 62. In truth and in fact, in numerous instances, consumers who submitted a payday
20 loan application did not receive a “BONUS” prepaid card at no charge. Consumers had to pay a
21 fee for the “BONUS” prepaid card, typically in the amount of \$39.95 to \$54.95, and this fee was
22 debited from their bank accounts.

23 63. Therefore, the making of the representation set forth in Paragraph 61 of this
24 Complaint constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15
25 U.S.C. § 45(a).

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PRAYER FOR RELIEF

Wherefore, Plaintiff FTC, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and the Court's own equitable powers, requests that the Court:

A. Enter a permanent injunction to prevent future violations of the FTC Act by Defendants;

B. Award such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the FTC Act, including but not limited to rescission or reformation of contracts, restitution, the refund of monies paid, disgorgement of ill-gotten monies; and

C. Award Plaintiff the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

Respectfully submitted,

WILLARD K. TOM
General Counsel

JEFFREY A. KLURFELD
Regional Director

DATED: April 5, 2010

/s/ Lisa D. Rosenthal
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