WILLARD K. TOM
General Counsel

LISA D. ROSENTHAL, Bar # 179486
KERRY O'BRIEN, Bar # 149264
EVAN ROSE, Bar # 253478
ERIC EDMONDSON, D.C. Bar # 450294
Federal Trade Commission
901 Market Street, Ste. 570
San Francisco, CA 94103
(415) 848-5100 (voice)
(415) 848-5184 (fax)
lrosenthal@ftc.gov
kobrien@ftc.gov
erose@ftc.gov

Attorneys for Plaintiff
Federal Trade Commission

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Jose Division

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

SWISH MARKETING, INC., a corporation,

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

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

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

Defendants.

Case No. C09-03814 RS

PLAINTIFF'S OPPOSITION TO DEFENDANT MARK BENNING'S MOTION TO DISMISS FIRST AMENDED COMPLAINT AND TO STRIKE PARAGRAPH 39

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES & RULES

I. INTRODUCTION

Defendant Mark Benning has moved to: (1) dismiss Counts I and II of the FTC's First Amended Complaint (Dkt. #82) ("FAC") pursuant to Rules 8 and 9(b) of the Federal Rules of Civil Procedure; (2) dismiss Count III of the FAC pursuant to Rule 8; and (3) strike Paragraph 39 of the FAC pursuant to Rule 12(f). Motion to Dismiss (Dkt. #86) ("Motion"); *see* FED. R. CIV. P. 8, 9(b), 12(f). As described below, the FAC contains more than sufficient particularity to meet the liberal pleading requirements of Rule 8 and even the strict pleading requirements of Rule 9(b) as to Counts I and II. Likewise, the FAC pleads sufficient facts to withstand a Rule 8 challenge to Count III. Finally, Paragraph 39 of the FAC alleges pertinent and material information related to Benning's liability and should not be stricken. For these reasons, the Court should deny Benning's Motion.

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

A. Do the allegations in Counts I and II of the FAC satisfy the requirements of Rules 8 and 9(b)?

B. Do the allegations in Count III of the FAC satisfy the requirements of Rule 8?

C. Does Paragraph 39 of the FAC constitute an impertinent and immaterial allegation that may be stricken under Rule 12(f)?

III. ARGUMENT

A. The allegations in Counts I and II satisfy Rules 8 and 9(b).

The allegations in Counts I and II of the FAC more than satisfy the pleading standards of Rule 8 and—assuming *arguendo* that Rule 9(b) applies to the FAC[1]—Rule

[1] The allegations in Counts I and II of the FTC's First Amended Complaint against Benning need not satisfy the requirements of Rule 9(b). As a general matter, as set forth in detail in the FTC's Opposition to Defendant Benning's Motion to Dismiss (Dkt. #48), an allegation of deception under the FTC Act is not a claim of fraud and does not sound in fraud as that concept is applied under Ninth Circuit law, and thus need not satisfy the heightened pleading requirements of Rule 9(b). The FTC incorporates by reference the

9(b) as well. In evaluating a complaint, a court is obligated to take all allegations of material fact as true and to construe those facts in the light most favorable to the non-moving party. *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 919 (9th Cir. 2008); *Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997). To satisfy Rule 8, a complaint must state "a plausible claim for relief" beyond a "formulaic recitation of the elements of a cause of action," and the factual allegations must "permit the court to infer more than a mere *possibility* of misconduct." Order at 6 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 544, 555 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009)). In addition, a plaintiff seeking to comply with Rule 9(b) must allege the "who, what, where, when, and how" of the charged misconduct. Order at 2 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). If liability for corporate fraud is attributed to individual defendants, "the allegations should include the misrepresentations themselves with particularity and, where possible, the roles of the individual defendants in the misrepresentations." *See* Order at 3 (quoting *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989)); *see also Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (Rule 9(b) requires a plaintiff to provide "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations."). As described below, the FAC meets these standards.

1. The FAC satisfies Rules 8 and 9(b) with respect to the corporate defendant and the misrepresentations.

In its Order, the Court held that the FTC's original Complaint met the Rule 8 standard with respect to the allegations concerning the corporate defendant and its unlawful practices. In particular, the Court found that the original Complaint "describe[s] in considerable detail the websites operated by Swish, the relationship between Swish and

---

arguments made in that brief as if fully set forth herein. In any event, for the reasons set forth below, the Court need not reach the issue on this motion to dismiss. Even assuming *arguendo* that Rule 9(b) does in fact apply to Counts I and II, the FAC easily satisfies the heightened pleading requirement as to Benning.

VirtualWorks, and the circumstances behind the material omission and misrepresentations that comprise Counts I and II." Order at 6–7. The Court's finding implies that the original Complaint "include[d] the misrepresentations themselves with particularity," *see Moore*, 885 F.2d at 540, and thus also met the Rule 9(b) particularity standard with respect to the corporate defendant and the misrepresentations at issue.

The FAC nevertheless proffers additional particularity about the "who, what, where, when, and how" of the deceptive practices perpetrated by Swish. *See Cooper*, 137 F.3d at 627. For example, going to the "where" of the deception, the FAC lists the specific websites Swish used to disseminate the deceptive offers. FAC ¶¶ 22, 28. As for the "who," the FAC alleges that Defendants "designed, operated, and maintained control over the appearance of [the offer], including but not limited to the size, prominence, color, and placement of text and images and whether radio buttons were pre-clicked 'Yes" or 'No.'" *Id.* ¶¶ 20, 27, 30. The FAC also more precisely quantifies the number of Swish's consumer victims, referring to "hundreds of thousands" and "tens of thousands" where appropriate, and alleging that "thousands" of victims filed complaints. *Id.* ¶¶ 17, 18, 24(e), 25, 29.

Such staggering numbers of deceived consumers indicate that the offers were deceptive, and thus also go to the "what" and the "how" of the deception. Other extrinsic evidence of deception includes the new allegation that "[o]nly a tiny fraction of consumers . . . ever activated the card." *Id.* ¶ 19. The FAC attaches a third example of Swish's deceptive offers as Exhibit C, and provides pinpoint citations to the portions of all four exhibits that are referred to in the allegations. *Id.* ¶¶ 23–24, 28. The FAC also makes clear that Swish did not provide consumers with any notice of the impending debit beyond the fine print disclosures in the offer box. *Id.* ¶¶ 26, 29.

These examples of additional detail in the FAC, layered on top of the already "considerable detail" in the original Complaint, *see* Order at 6, demonstrate that the FAC satisfies the requirements of Rules 8 and 9(b) with respect to the misrepresentations themselves and the corporate defendant's role in making them.

2. The FAC satisfies Rules 8 and 9(b) with respect to Benning's liability.

The FAC bolsters the allegations concerning Benning's liability, rendering the charges impervious under both Rule 8 and Rule 9(b). In general, to establish individual liability for injunctive relief, the FTC must show authority to control the deceptive acts. Order at 5 (citing *FTC v. Publ'g Clearing House*, 104 F.3d 1168, 1170 (9th Cir. 1997)). Once authority to control is established, the FTC may recover equitable monetary relief from the individual defendant by showing the defendant "was actually aware of 'material representations, was recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth.'" *Id.* (quoting *Publ'g Clearing House*, 104 F.3d at 1171). The Court specifically suggested in its Order that "[a]dditional facts such as the number of consumers who complained directly to Benning, or the size and structure of Swish reflecting senior management involvement might render any amended complaint adequate" under Rule 8. Order at 8. The FAC thus includes allegations establishing Benning's awareness of consumer complaints and his active involvement in the corporate affairs of Swish, a small and closely held firm. These allegations, along with other new allegations going to Benning's authority to control Swish and his knowledge of the EverPrivate Card scheme, easily satisfy the level of particularity required by both Rule 8 and Rule 9(b). Benning's attempt to undermine these allegations by putting a spin on the underlying documents is unconvincing. The tactic also fails at this stage in the litigation because courts have held that any ambiguity in attached documents must be resolved in favor of the plaintiff. *See Int'l Audiotext Network, Inc. v. AT&T Co.*, 62 F.3d 69, 72 (2d Cir. 1995); *Hearn v. R.J. Reynolds Tobacco Co.*, 279 F. Supp. 2d 1096, 1102 (D. Ariz. 2003).

a. The FAC alleges Benning's authority to control Swish with sufficient detail to satisfy Rules 8 and 9(b).

New allegations in the FAC demonstrate, with sufficient particularity to comply with Rules 8 and 9(b), that Benning had authority to control Swish. The Court suggested

in its Order that additional facts concerning the "size and structure of Swish reflecting senior management involvement" could satisfy Rule 8 as to Benning's authority to control. *See* Order at 8. The Court also cited to various FTC cases for examples of facts that establish authority to control, including among others: being a principal shareholder and an officer, creating the business, controlling the company's financial affairs, and reviewing sales reports. Order at 8 n.1. The FAC supplies more than enough facts along these lines to survive Benning's Motion, including Swish's small size, Benning's 30% ownership stake, and Benning's role in controlling Swish's finances and acting as a member of Swish's executive management team.

The FTC's allegations about the size and structure of Swish, as well as Benning's official positions and ownership stake, support an inference that Benning was involved in the company's business affairs and had authority to control the company. *See* Order at 8 & n.1. Swish was a closely held corporation with twenty-five or fewer employees, all of whom worked at a common location and were managed by the three individual defendants. FAC ¶¶ 7, 31. The three individual defendants founded Swish together and were its sole directors. *Id.* ¶ 31. Benning, Patterson, and Strober each had more than a 30% ownership interest in Swish, for a combined ownership of over 90%. *Id.* The three founders held themselves out as Swish's executive management team. *Id.* Benning was CEO, Chairman, President, and Treasurer. *Id.* ¶¶ 8, 33. Organization charts maintained and distributed by Swish placed him at the top of the chain of command. *Id.* ¶ 33. For their efforts, the individual defendants each earned more than $1 million from Swish during the time period covered by the FAC. *Id.* ¶¶ 39, 48, 54. Together, these facts paint the picture of a small company actively controlled by its three founders. *See* Order at 8 n.1 (citing, among others, *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 574 (7th Cir. 1989), in which the individual defendants founded the businesses, were principal shareholders and officers, and controlled the companies' financial affairs.); *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1206–07 (C.D. Cal. 2000) (finding that large salary indicates individual defendant is not merely a nominal officer).

The allegations concerning Benning's actual practices as CEO, Chairman, President, and Treasurer further substantiate his authority to control Swish. Benning led the overall business strategy. FAC ¶ 33. He also acted as the de facto CFO; he kept and maintained corporate financial records and had bank account and check-signing authority. *Id.* ¶ 34. Courts have found that such involvement in the corporate defendant's business plans and financial affairs supports a finding of authority to control. *See* Order at 8 n.1 (citing, among others, *FTC v. Innovative Mktg., Inc.*, 654 F. Supp. 2d 378, 387 (D. Md. 2009), in which the CEO "personally handled" finances.). Moreover, the EverPrivate Card offer was a major profit center, FAC ¶ 21, and a court recently found that such an allegation can substantiate a company president's authority to control the deceptive practices. *See FTC v. Commerce Planet, Inc.*, Case No. SACV 09-01324 CJC (RNBx), at 3 (C.D. Cal. Feb. 12, 2010) (Order denying the defendant's motion to dismiss) (attached to Dkt. #59) ("Based on judicial experience and common sense, it is certainly plausible for a president of a company to . . . have authority to control a deceptive public website that brings in $60 a month per customer.").

In fact, Benning essentially concedes that the FAC establishes his authority to control Swish; he instead prematurely attempts to rebut the FTC's allegations. *See* Motion at 15–19. As discussed below, Benning's attempt fails on the merits. It also fails procedurally. At best, his efforts create a dispute, but any ambiguity in the documents Benning attaches must be resolved in favor of the FTC. *See Int'l Audiotext Network*, 62 F.3d at 72; *Hearn*, 279 F. Supp. 2d at 1102. In the course of litigation, Benning will be free to marshal his arguments to dispute the FTC's contentions, but as a matter of the pleading standard, the FTC has sufficiently alleged Benning's authority to control Swish.

In any event, Benning's purported rebuttal evidence does not establish that he lacked authority to control Swish. The EverPrivate Card scheme came to a crashing halt for reasons unrelated to the turmoil at Swish, FAC ¶ 38, so there is no way of knowing what would have happened if the discussion between the individual defendants, as evidenced by the emails cited by Benning, had not been rendered moot. Moreover, a few

self-serving emails, sent late in the game, do not undermine the mountain of evidence establishing that Benning did indeed have authority, including for example: his grip on the purse strings, numerous titles, large ownership stake, hefty compensation, and active participation in the small company's business affairs. He had other options available to him beyond merely issuing commands via email. One obvious example is that Benning, as the de facto CFO, could have unilaterally exerted control by withholding payments. More telling than Benning's self-consciously "exculpatory" emails were his later efforts to collect unpaid funds from VirtualWorks, revenue derived from practices he had previously branded as fraud and identity theft. FAC ¶ 38.[2]

The cluster of facts alleged in the FAC related to Benning's authority to control Swish are more than sufficiently detailed under Rules 8 and 9(b). Benning's premature attempt to rebut the FTC's allegations fails both procedurally and substantively. Therefore, the Court should find that the FTC's allegations concerning Benning's authority to control Swish satisfy Rule 8 and—whether or not Rule 9(b) applies—Rule 9(b) as well.

b. The FAC alleges Benning's knowledge of Swish's EverPrivate Card scheme with sufficient detail to satisfy Rules 8 and 9(b).

The allegations in the FAC going to Benning's knowledge are pled with more than enough particularity to meet the requirements of Rules 8 and 9(b). The Court suggested in its Order that the FTC could satisfy Rule 8 by adding facts such as the "number of consumers who complained directly to Benning, or the size and structure of Swish reflecting senior management involvement." *See* Order at 8 ("As *Amy Travel* explained, 'the degree of participation in business affairs is probative of knowledge.'"). Per the Court's roadmap, the FAC includes considerable additional detail concerning Benning's awareness of consumer complaints, his active participation in Swish's business affairs,

[2] Benning's position also suggests a perverse outcome in which *none* of the three individuals who ran Swish could be held liable because each of them could potentially be outvoted by the other two. *See* Motion at 18 n.4.

and the small size of Swish, as well as the profitability of the EverPrivate Card scheme. Rule 9(b) does not in fact require that knowledge be pled with particularity. *See* Order at 4–5 (quoting *United States of America ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 551–52 (D.C. Cir. 2002)); FED. R. CIV. P. 9(b) ("[K]nowledge . . . and other conditions of a person's mind may be alleged generally."). Nevertheless, the level of detail in the FAC establishing Benning's knowledge easily satisfies the Rule 9(b) particularity standard as well.

As detailed in the FAC, Benning was well aware of consumer complaints concerning the EverPrivate Card scheme. His contentions to the contrary in his Motion are disingenuous at best. The FAC sets forth five examples of communications making Benning aware of consumer complaints. *See* FAC ¶ 35. In his Motion, Benning conspicuously omits any mention of two of the examples and mounts feeble rebuttals to the other three.

The first of the two examples that Benning did not mention in his Motion is the incriminating instant message transcript from January 2007, attached to the declaration of Kelly Ortiz as Exhibit A ("Ortiz Exh. A"). *See also* FAC ¶ 35(a). Swish's EverPrivate Card scheme started in November 2006 and ran until August 2007, so Benning was made aware of consumer complaints no later than three months into the approximately nine-month campaign. The transcript is also impossible to dismiss as mere "innuendo." *See* Motion at 15. The instant message conversation with Patterson highlights the key problematic aspects of the scheme: (1) that the EverPrivate Card offer is "defaulted to yes"; (2) that "customer[s] don't see it"; (3) that customers are charged for the EverPrivate Card; and (4) that the customers then "kinda go ball[i]stic." *See* Ortiz Exh. A; FAC ¶ 35(a). Patterson essentially lays out a prima facie case for a Section 5 violation, and Benning signals his comprehension by responding with "understandable." *See* Ortiz Exh. A; FAC ¶ 35(a).

Benning's Motion similarly tries to avoid the FTC's allegation that he received an email from a payday lender affiliate reporting a "significant number of customer

complaints" associated with the EverPrivate Card offer, attached to the declaration of Kelly Ortiz as Exhibit B ("Ortiz Exh. B"). *See also* FAC ¶ 35(e). The affiliate plainly sets forth the core problem with Swish's EverPrivate Card offer: "[T]he method by which these additional offers are being presented confuses the customer - namely they mistakenly sign up for these additional services when they did not intend to do so." *See* Ortiz Exh. B; FAC ¶ 35(e).

In response to the other three allegations that establish Benning was informed of consumer complaints, *id.* ¶¶ 35(b)–(d), Benning conjures weak rationalizations. First, Benning acknowledges, *see* Motion at 14, that he received an email containing a link to a news story critical of the EverPrivate Card campaign, attached to the declaration of Kelly Ortiz as Exhibit C ("Ortiz Exh. C"). *See also* FAC ¶ 35(b). However, the content of the email is not, as Benning contends, "innocuous." *See* Motion at 14. The email's author believes that Swish's offer for the EverPrivate Card causes "issues," and is hopeful that the company has "dropped" EverPrivate Card. Ortiz Exh. C. The hyperlink itself has the word "crime" in it. *Id.* Moreover, in this context, the author's sarcasm—in claiming EverPrivate Card is "getting some nice publicity"—is palpable. *See id.* Benning's argument that it is "unclear" whether he followed the link and actually read the story is spurious because later in the same paragraph Benning himself introduces evidence that he understood the article was a "news stor[y] about rip-offs." *See* Motion at 14. Benning also forwarded the email to Strober, indicating that he had read the article and considered it noteworthy. *See id.*

Second, Benning does not dispute that he had an instant message exchange with an employee in which she said she had found "many" complaints online about EverPrivate Card. *See* FAC ¶ 35(c). Benning instead claims this conversation does not suggest his knowledge concerning the "nature or substance" of the complaints. *See* Motion at 14. On the contrary, the fact that the nature and substance of the complaints go unmentioned more likely implies that they were already understood. In addition, because Benning had been briefed by Patterson months before, and had recently received the email with the

hyperlink to the crime article, it is disingenuous for Benning to suggest he did not know "the nature or substance of the complaints." *See* Motion at 14. In any case, Benning's failure to ask about the nature or substance of the complaints—in the unlikely event he did not know—would be a textbook example of conscious avoidance.

Finally, Benning does not dispute that he was forwarded an email from a payday lender affiliate who characterized Swish's EverPrivate Card offer as "customer manipulation," attached to the declaration of Kelly Ortiz as Exhibit D. *See also* FAC ¶ 35(d). In another strained argument, Benning contends it would be reasonable to infer he "refrained from performing his own parallel inquiry in deference to his subordinate's ongoing investigation." *See* Motion at 15. Benning did not need to perform a "parallel inquiry" because Patterson and others had explained the scheme to him several times prior. Moreover, this email thread was in March, but the scheme did not come to a halt until August. Benning does not—and cannot—justify deferring to his "subordinate's ongoing investigation" for over four months.

Further, as discussed above, *see supra* Section III.A.2.a, the FAC alleges the size and ownership structure of Swish and Benning's considerable financial compensation, as well as facts establishing his active involvement in Swish's business affairs, from which Benning's knowledge of the offending offers may be inferred. *See* Order at 8; *J.K. Publ'ns, Inc.*, 99 F. Supp. 2d at 1206–07. Moreover, the FAC adds that Swish's EverPrivate Card offer was distinctly lucrative, FAC ¶ 21, and that Benning was aware that it was one of the largest sources of Swish's profit margin. *Id.* ¶ 36. As head of Swish's finances, he "tracked and prepared reports quantifying and comparing sources of revenue" and sounded the alarm when technical problems threatened to cut off the flow of money from the EverPrivate Card offer. *Id.* Therefore, it is plausible that Benning, as CEO, President, and de facto CFO of Swish, was well aware of this significant profit center, including how it appeared on Swish's websites. *See Commerce Planet*, Case No. SACV 09-01324 CJC (RNBx), at 3 ("Based on judicial experience and common sense, it is certainly plausible for a president of a company to know about . . . a deceptive public

website that brings in $60 a month per customer.").

In sum, the FAC's allegations that Benning was made aware of "many" consumer complaints—and in numbers great enough to raise the ire of Swish's other affiliates—in conjunction with numerous other allegations that support a presumption of Benning's knowledge, far exceed the Rule 8 and Rule 9(b) standards.

B. The allegations in Count III satisfy the requirements of Rule 8.

The FAC also satisfies Rule 8 as to Count III. Count III of the FAC alleges that the defendants' practice of selling consumers' bank account information to VirtualWorks without obtaining the express, informed consent of the consumers for such sale or use of their bank account information is an unfair act or practice in violation of Section 5 of the FTC Act. The FAC alleges factual detail which "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *See Iqbal*, 129 S. Ct. at 1940 (citing *Twombly*, 550 U.S. at 556). Thus, Benning's argument that the FAC does not satisfy Rule 8 is baseless.

In addition to prohibiting deceptive conduct, Section 5 of the FTC Act prohibits unfair acts or practices. 15 U.S.C. § 45(a)(1) (2006). An act or practice is "unfair" if it "[1] cause[s] or is likely to cause substantial injury to consumers [2] which is not reasonably avoidable by consumers themselves and [3] not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n); *see FTC v. Neovi, Inc.*, 2010 U.S. App. LEXIS 9888, at *7–8 (9th Cir. May 14, 2010). Courts have held in other cases that unauthorized billing practices, such as debiting consumers' bank accounts without the consumers' authorization, are unfair practices in violation of the FTC Act. *Neovi*, 2010 U.S. App. LEXIS 9888, at *24; *J.K. Publ'ns*, 99 F. Supp. 2d at 1200; *FTC v. Windward Mktg.*, 1997 U.S. Dist. LEXIS 17114, at *37–38 (N.D. Ga. Sept. 30, 1997).

The FAC alleges facts relating to all three elements of an unfairness violation. First, the FAC alleges that the defendants caused substantial injury to consumers. To establish substantial injury, the FTC must show that "consumers were injured by a practice for which they did not bargain." *J.K. Publ'ns*, 99 F. Supp. 2d at 1201. Courts

have held that injury is substantial even when the amount of injury to individuals is small if a large number of consumers are affected. *See, e.g.*, *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1115 (S.D. Cal. 2008) (citing *J.K. Publ'ns*, 99 F. Supp. 2d at 1201, and *Windward*, 1997 U.S. Dist. LEXIS 17114, at *31–32), *aff'd*, 2010 U.S. App. LEXIS 9888 (9th Cir. 2010); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (1994)).

The FAC alleges facts sufficient to establish that a significant number of consumers who applied for a payday loan on the defendants' websites did not provide express, informed consent to have their bank accounts debited. FAC ¶¶ 16, 22–27, 28–30. The FAC further states that:

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

Id. ¶ 17. From these facts, the FAC alleges a plausible claim of substantial injury.

Second, the FAC alleges that consumers could not reasonably avoid this substantial injury. The FAC describes in detail why the EverPrivate Card offer was not clear and conspicuous to consumers who visited Swish's websites. *Id.* ¶¶ 16, 22–30. The FAC further alleges that a significant portion of consumers sought to have these debits reversed and complained that these debits were unauthorized. *Id.* ¶ 18. If consumers did not see the offer, they could not reasonably avoid the debit. *See Neovi*, 598 F. Supp. 2d at 1115 ("If consumers do not have a 'free and informed choice that would have enabled them to avoid the unfair practice, the injury was not reasonably avoidable.'") (quoting *J.K. Publ'ns*, 99 F. Supp. 2d at 1201). From these facts, the FAC alleges a plausible claim that this injury was not avoidable.

Finally, the FAC alleges that this injury is not outweighed by countervailing benefits to consumers or to competition. This element is "easily satisfied 'when a

practice produces clear adverse consequences for consumers that are not accompanied by an increase in services or benefits to consumers or by benefits to competition.'" *Neovi*, 598 F. Supp. 2d at 1116 (quoting *J.K. Publ'ns*, 99 F. Supp. 2d at 1201). Charging consumers for a product that they do not want does not result in any benefit to consumers or competition. *See FTC v. Inc21.com Corp.*, 2010 U.S. Dist. LEXIS 14688, at *31–32 (N.D. Cal. Feb. 19, 2010) (finding no benefit to either consumers or competition when "consumers are completely unaware of any services or products they have 'purchased'").

As alleged in the FAC, hundreds of thousands of consumers incurred debits of between $39.95 and $54.95 as a result of the defendants' conduct. A significant portion of those consumers did not consent to these debits. As alleged in the FAC, "only a tiny fraction of consumers . . . ever activated the card" for which they were charged. FAC ¶ 19. Moreover, Swish could have prevented this injury simply by making the EverPrivate offer clear and prominent and asking consumers to expressly consent to the debit. Thus, the FAC alleges a plausible claim that, if the defendants' practice resulted in any benefits to consumers or competition, they do not outweigh the consumer injury.

The FAC also alleges sufficient facts to make a plausible claim as to the liability of Benning. Courts have applied the same standard for individual liability for unfair corporate conduct as they have for deceptive corporate conduct. *See, e.g.*, *Neovi*, 598 F. Supp. 2d at 1117; *FTC v. Kennedy*, 574 F. Supp. 2d 714, 724 (S.D. Tex. 2008); *J.K. Publ'ns, Inc.*, 99 F. Supp. 2d at 1203–04. The FAC, as discussed above, *see supra* Section III.A.2, describes in detail Benning's role at Swish and his knowledge of the conduct. Thus, the FAC's allegations of unfair conduct as to Benning satisfy Rule 8, and his Motion to have the FAC dismissed on this basis should be denied.

C. Paragraph 39 of the First Amended Complaint provides material information related to Benning's liability and should not be stricken.

Benning's final request, that the Court should strike Paragraph 39 of the FAC, similarly lacks merit and should be denied. The fact that Benning earned more than $1 million for his work at Swish for a period that spans less than a year is relevant to his role

at the company and his knowledge. *See supra* Section III.A.2. In *J.K. Publications*, the court cited the salary earned by an individual defendant both in reaching its conclusion that she was not simply a nominal officer, and in finding that, at a minimum, she acted with reckless indifference with regard to whether the challenged practices were fraudulent. 99 F. Supp. 2d at 1206–07. The size of Benning's compensation strongly suggests that he was not merely a nominal officer or otherwise insignificant player at Swish. Rather, at a minimum, it gives rise to a presumption of his direct and significant participation in the management and operations of Swish, which presumably would include one of Swish's largest sources of profit margin—the EverPrivate Card campaign. It also indicates that Benning was aware of the EverPrivate Card offer. As the highly paid CEO of a small company, he knew or should have known where the money for his compensation was coming from. *See Commerce Planet*, Case No. SACV 09-01324 CJC (RNBx), at 3. Benning has specifically sought out the inclusion of more detailed factual allegations to support the FTC's claim that he is liable for the bad acts of his company. He should not now be allowed to have stricken those very allegations.

IV. CONCLUSION

For the reasons stated above, the FTC respectfully requests that the Court deny Benning's Motion.

DATED: June 3, 2010

/s/ Evan Rose

LISA D. ROSENTHAL
KERRY O'BRIEN
EVAN ROSE

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION