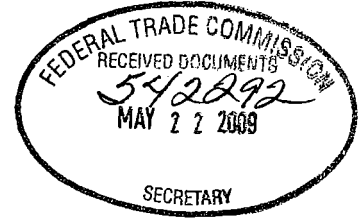


**PUBLIC
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**



_____)
IN THE MATTER OF)
EVERPRIVATECARD)
_____)

COMMISSIONERS:

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

File No. 0723241

SWISH MARKETING, INC.'S
PETITION TO QUASH OR LIMIT CIVIL INVESTIGATION DEMAND

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(310) 282-2200 (facsimile)

Counsel for Petitioner

CONFIDENTIAL
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

IN THE MATTER OF
EVERPRIVATECARD

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COMMISSIONERS:

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File No. 0723241

SWISH MARKETING, INC.'S
PETITION TO QUASH OR LIMIT CIVIL INVESTIGATION DEMAND

Pursuant to Section 2.7(d)(1) of the Federal Trade Commission's ("FTC") Rules of Practice and 15 U.S.C. § 57b-1(f)(1), Swish Marketing, Inc. ("Swish") hereby moves to quash or limit that certain Civil Investigative Demand ("CID"), File No. 0723241, that was issued on May 15, 2009, and served upon [REDACTED] on March 18, 2009 (the "[REDACTED] CID")¹, on the grounds set forth below.²

Preliminary Statement

¹ A true and correct copy of the [REDACTED] CID is attached hereto as Exhibit "A."

² Swish notes that the [REDACTED] CID contains the following additional deficiencies: (1) it fails to identify the time of the hearing examination of [REDACTED], as required by 15 U.S.C. § 57b-1(c)(6)(A); (2) it appears to identify a location for the hearing examination that is outside the judicial district where [REDACTED] resides, as required by 15 U.S.C. § 57b-1(c)(14)(C); (3) it fails to state the nature of the conduct constituting the alleged violation which is under investigation, as required by 15 U.S.C. § 57b-1(c)(2); and it fails to prescribe a return date that provides a reasonable period of time within which the material demanded may be assembled and made available, as required by 15 U.S.C. § 57b-1(c)(3)(B).

By this petition, Swish seeks to quash or, alternatively, limit the [REDACTED] CID, which arises out of the FTC's inquiries related to [REDACTED]'s knowledge of the actions, business operations, management and/or finances of Swish.

[REDACTED] is a [REDACTED]. In April of 2008 the FTC initiated an investigation of VirtualWorks, LLC, a customer of Swish, pursuant to which the FTC issued a CID to Swish on April 11, 2008 (the "Swish CID").³ The Swish CID sought, *inter alia*, advertisements placed by Swish on various websites which advertised products offered by VirtualWorks, LLC, and information pertaining to the actions, business operations, management and/or finances of Swish. To date, Swish has complied fully with the Swish CID.

Since about March 2009, Swish and its officers, directors and shareholders have been engaged in negotiations with the FTC regarding a possible settlement of potential claims by the FTC against them. On May 18, 2009, Swish filed suit in the District of Columbia (Swish Marketing, Inc., et. al. v. Federal Trade Commission, Case No. 1:09-CV-00921), seeking a declaratory judgment that the FTC cannot recover from Swish or its officers, directors and/or shareholders any value greater than any monies Swish received from activities related to the Ever Private Card that have not been returned to consumers, pursuant to the authority discussed in FTC v. Verity International, Ltd., 443 F.3d 48 (2d Cir. 2006) (the "Declaratory Judgment Action"). The Declaratory Judgment Action arises from the same factual circumstances that the [REDACTED] CID seeks to investigate.

On the same day the Declaratory Judgment Action was filed, May 18, 2009, the FTC served the [REDACTED] CID upon [REDACTED], demanding compliance therewith by May 22, 2009. The [REDACTED] CID demands the production of six specific categories of documents,

³ A true and correct copy of the Swish CID is attached hereto as Exhibit "B."

identified as Specifications A through F. All of the specifications pertain specifically to Swish, Swish's actions, business activities, finances and/or management. In addition, many of the specifications request the production of categories of documents that were previously requested in the Swish CID and responded to by Swish. The [REDACTED] CID also identifies three "specifications for oral testimony," identified as Specifications A through C, all of which pertain specifically to Swish, Swish's actions, business activities, finances and/or management.

Swish timely notified the FTC of its concerns and objections to the [REDACTED] CID – noting in particular its concerns regarding (1) the privileged nature of the requested documents and testimony, and (2) the existing Declaratory Judgment Action – and attempted in good faith to negotiate with the FTC in order to arrive at a solution to its concerns. Those negotiations have not produced a mutually acceptable solution.⁴

Thus, Swish hereby petitions the FTC to quash or limit the [REDACTED] CID for the following reasons:

(1) Swish has not had an opportunity to review any of the documents in [REDACTED] possession, has not been provided with notice or opportunity to review [REDACTED]'s testimony, and has not been provided with an opportunity to make appropriate objections relevant to the Declaratory Judgment Action. Thus, Swish has had no opportunity to determine whether such information is protected from disclosure by Swish's attorney-client communication privilege, attorney work product privilege or other grounds for privilege and/or confidentiality; and

(2) Swish is presently engaged in litigation with the FTC, in federal court, which relates to the same issues that are targeted by the [REDACTED] CID. Thus, any discovery in connection with or related to the Declaratory Judgment Action must be conducted in accordance with the Federal

⁴ See attached Statement of Michael A. Thurman Pursuant to Section 2.7(d)(2) of the Code of Federal Regulations.

Rules of Civil Procedure (“FRCP”), including Rule 26(f) which, requires Swish and the FTC to meet and confer in order to schedule discovery before discovery activity can proceed.

Legal Objections

I. OBJECTIONS BASED ON PRIVILEGE

a. The Challenged Specifications Demand Documents That Are Privileged

Specifications A(1) through A(7), B through D, E(1) through E(4), and F of the “Specifications for Production of Documents” in the [REDACTED] CID (the “Document Specifications”) request information pertaining specifically to Swish, and/or to Swish’s actions, business activities, finances and/or management. Swish has already produced, in response to the Swish CID, all non-privileged documents of which Swish is aware that pertain to the information sought by many of the requests contained in the [REDACTED] CID. [REDACTED]

[REDACTED] is now placed in the position of having to determine whether documents in his possession which pertain to Swish are privileged as attorney-client communications, attorney work product, and/or otherwise protected by other grounds for privilege or confidentiality. The Document Specifications place [REDACTED] in an untenable position and threaten Swish’s legal rights.

Swish’s compliance with the Swish CID necessitated expensive, time consuming and legally protected efforts to determine the nature of the documents previously produced by Swish, including efforts to determine whether such documents were somehow privileged and thereby protected from disclosure. Additionally, Swish responded to the Swish CID, in part, by producing redacted versions of various categories of documents. However, the Document Specifications request the same documents in unredacted form, thereby circumventing Swish’s

attorney work product, and/or otherwise protected by other grounds for privilege or confidentiality. Moreover, the FTC may contend that [REDACTED] lacks standing to assert such objections on the grounds that the privileges belong to Swish, not him. The Testimony Specifications place [REDACTED] in an untenable position and threaten Swish's legal rights.

Petitioner Swish must be afforded an opportunity to review [REDACTED]'s examination and testimony, and 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 basis for privilege and/or confidentiality. Swish must also have the opportunity to make objections on these grounds to the FTC's questions and/or to [REDACTED]'s testimony.

II. OBJECTIONS BASED ON FEDERAL RULE OF CIVIL PROCEDURE 26(f)

a. The Challenged Specifications Demand Documents Are Untimely Under the Federal Rules of Civil Procedure

Federal Rule of Civil Procedure 26(f) requires that once they are engaged in federal litigation, the parties must meet and confer as soon as practicable in order to discuss settlement of the action, disclosure of certain information under FRCP 26(a)(1), and to determine a proposed discovery plan which is to be submitted to the Court. Fed. R. Civ. P. 26(f)(2). No party may seek discovery until such conference has taken place. Fed. R. Civ. P. 26(d)(1). The district court is empowered to determine questions of discovery and enjoys broad powers under Rule 26. See generally Brune v IRS, 861 F.2d 1284 (D.C. Cir. 1988).

Swish and the FTC are presently engaged in the Declaratory Judgment Action, and have not yet met and conferred as required by Rule 26(f). Because the Declaratory Judgment Action was so recently filed, Swish and the FTC have not had an opportunity to meet and confer regarding the scheduling of discovery or to hash out a discovery plan. Indeed, the parties have

not yet had a reasonable opportunity to make their required initial disclosures. See Fed. R. Civ. P. 26(a)(1).

The Declaratory Judgment Action and the [REDACTED] CID arise from identical circumstances, and discovery pertaining to either is inextricably related to both. In particular, the Document Specifications relate specifically to the issues underlying the Declaratory Judgment Action. Thus, the Declaratory Judgment Action bars the FTC's efforts to obtain discoverable information pertaining to that action until a discovery plan has been confirmed and the parties have conferred regarding the discovery processes applicable to the Declaratory Judgment Action. See Fed. R. Civ. P. 26(f). Moreover, circumvention of Rule 26(f) by administrative investigation would be at odds with the FRCP's purposes of protecting both parties' interests in maintaining general fairness, and in particular of preserving full and fair opportunity to raise appropriate objections to the production of any and all relevant documents. See Fed. R. Civ. P. 1; see also Aluminum Co. of America v. U.S. Dept. of Justice, Antitrust Division, 444 F.Supp. 1342, 1345 (D.C. Cir. 1978) (discussing Congress's interest in maintaining a balance between administrative investigations and defenses therefrom, as announced in the 1976 Amendments to the Antitrust Civil Process Act, which protect targets of CIDs when the issuance of a CID conflicts with "the standards applicable to discovery requests under the Federal Rules of Civil Procedure").

b. The Challenged Specifications Demand Testimony That Cannot Be Heard Under the Federal Rules of Civil Procedure

The Testimony Specifications demand that [REDACTED] testify regarding his knowledge of information inextricably linked to the Declaratory Judgment Action. As stated above, the FRCP requires that Swish and the FTC meet and confer before any discovery related to the Declaratory Judgment Action can proceed. See Fed. R. Civ. P. 26(d) and (f). Depositions or examinations constitute discovery under Rule 26. Thus, the examination of [REDACTED] to the

extent that it pertains to discovery related to the Declaratory Judgment Action, cannot proceed until Swish and the FTC have met and conferred regarding discovery in the Declaratory Judgment Action.

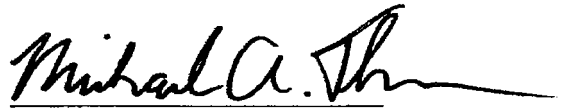
III. CONCLUSION

For the foregoing reasons, Petitioner Swish respectfully requests that

1. The FTC quash the [REDACTED] CID; or alternatively,
2. The FTC limit the [REDACTED] CID such that it:
 - a. Does not request the production of information or documents that are subject to Swish's privileges;
 - b. Does not request the production of information or documents that are the subject of the Declaratory Judgment Action;
 - c. Does not request the production of information or documents that have previously been produced by Swish;
 - d. Provides for a reasonable opportunity for Swish to review the proposed responses to the [REDACTED] CID, identify any Swish documents that are unresponsive, duplicative or subject to privilege, and remove any objectionable documents or make any necessary redactions.
 - e. Provides for Swish to have reasonable notice and the opportunity to attend the hearing examination of [REDACTED] and to assert any objections at the hearing

f. examination based on privileges that belong to Swish.

Dated: May 21, 2009

A handwritten signature in black ink, appearing to read "Michael A. Thurman", with a long horizontal flourish extending to the right.

Michael A. Thurman
LOEB & LOEB, LLP
10100 Santa Monica Blvd.
Suite 2200
Los Angeles, CA 90067-4120
(310) 282-2000



CIVIL INVESTIGATIVE DEMAND

1. TO

[REDACTED]

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.

LOCATION OF HEARING

FEDERAL TRADE COMMISSION
WESTERN REGION-SAN FRANCISCO
901 MARKET ST, STE 570
SAN FRANCISCO, CA 94103

YOUR APPEARANCE WILL BE BEFORE

LISA ROSENTHAL OR OTHER DULY
DESIGNATED PERSON

DATE AND TIME OF HEARING OR DEPOSITION

May 27, 2009

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. Th. Rosen

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 report 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.

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:

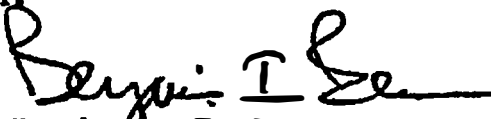
To determine whether unnamed accessors of consumers' bank accounts are or may be engaged in acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended, by accessing consumers' bank accounts without consumers' authorization, by accessing consumers' bank accounts 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

**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

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.

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).

- 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.

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

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.

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.**

- 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.



CIVIL INVESTIGATIVE DEMAND
Documentary Material

1. TO SWISH MARKETING, INC. 405 EL CAMINO, STE 628 MENLO PARK, CA 94025	2. FROM UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION
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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.

3. SUBJECT OF INVESTIGATION

See attached resolution.

You are required by this demand to produce all documentary material in the attached schedule that is in your possession, custody or control, and to make it available at your address indicated above for inspection and copying or reproduction.

4. DATE AND TIME MATERIAL MUST BE AVAILABLE <p align="center">May 5, 2008</p>	5. COMMISSION COUNSEL Lisa Rosenthal 901 Market Street, Suite 570 San Francisco, California 94103 (415) 848-5150
6. RECORDS CUSTODIAN Jeffrey Klurfeld 901 Market Street, Suite 570 San Francisco, California 94103	7. DEPUTY RECORDS CUSTODIAN Lisa Rosenthal 901 Market Street, Suite 570 San Francisco, California 94103

DATE ISSUED <p align="center">4/11/08</p>	COMMISSIONER'S SIGNATURE 
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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 documentary material 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 relating to such production. 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.

Form of Certificate of Compliance*

I/We do certify that all of the documents 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 CID has not been submitted, the objection to its submission and the reasons for the objection have been stated.

Signature _____

Title _____

Sworn to before me this day

Notary Public

***In the event that more than one person is responsible for submitting documents responsive to 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.**

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:

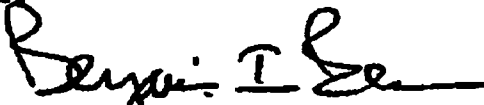
To determine whether unnamed accessors of consumers' bank accounts are or may be engaged in acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended, by accessing consumers' bank accounts without consumers' authorization, by accessing consumers' bank accounts 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

CIVIL INVESTIGATIVE DEMAND
SCHEDULE FOR PRODUCTION OF DOCUMENTARY MATERIALS

I. DEFINITIONS

As used in this Civil Investigative Demand ("CID"), 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 the word "all," and the word "all" shall be construed to include the word "any."
- D. "CID" shall mean this Civil Investigative Demand, including the following Schedule and the attached "Resolution Directing Use of Compulsory Process in Nonpublic Investigation (Unnamed Accessors of Consumers' Bank Accounts)."
- 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. "Company" shall mean Swish Marketing, Inc., 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.
- G. "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 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).

- H. **"Each"** shall be construed to include **"every,"** and **"every"** shall be construed to include **"each."**
- I. **"Ever Private Card"** shall mean VirtualWorks, LLC, f/k/a Private Date Finder, d/b/a Evcr Private Card and Secret Cash Card, its predecessors, parent, divisions, subsidiaries (whether wholly or partially owned), 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 Klein and Joshua Finer.
- J. **"Identify"** or **"the identity of"** shall be construed to require identification of (a) natural persons by name, title, present business affiliation, present business address, telephone number, and email address, or if a present business affiliation or present business address is not known, the last known business and home addresses; and (b) businesses or other organizations by name, address, telephone number, email address, website address, identities of natural persons who are officers, directors or managers of the business or organization, and contact persons, where applicable.
- K. **"Lead"** shall mean personally identifying information about a potential customer, including but not limited to name, address, and bank account information.
- L. **"Lead list provider"** shall mean any entity that sells a lead.
- M. **"Lead list source"** shall mean any entity that obtained a lead directly from a consumer.
- N. **"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.
- O. **"You"** and **"Your"** is the person or entity to whom this CID is issued and includes the **"Company."**

II. DIRECTIONS

- A. **Confidentiality:** This CID relates to an official, nonpublic, law enforcement investigation currently being conducted by the Federal Trade Commission. You are requested not to disclose the existence of this Civil Investigative Demand until you have been notified that the investigation has been completed. Premature disclosure could impede the FTC's investigation and interfere with the FTC's enforcement of the law.
- B. **Applicable time period:** shall be from January 1, 2006, until the date of full and complete compliance with this CID.
- C. **Claims of Privilege:** If any information 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 document or information is privileged, all non-privileged portions of the document or information must be submitted. A petition to limit or quash this CID shall not be filed solely for the purpose of asserting a claim or 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 FTC 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. If, for any specification, there are documents that would be responsive to this CID, but they were destroyed, mislaid, or transferred, describe the circumstances and date on which they were destroyed, mislaid, or transferred.
- 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.

- F. Modification of Specifications:** If you believe that the scope of the required search, response, or any specification can be narrowed consistent with the Commission's need for documents, you are encouraged to discuss such possible modifications of this request, including any modifications of definitions and instructions, with Lisa Rosenthal at (415) 848-5150. All such modifications must be agreed to in writing by the Commission's staff.
- G. Certification:** You or a responsible corporate officer or manager of the Company shall certify that the documents produced or identified in response to this CID are complete and accurate and that the documents represent all documents responsive to this CID. This certification shall be made in the form set out on the back of the CID, or by a declaration under penalty of perjury as provided by U.S.C. § 1746.
- H. Scope of Search:** Documents covered by this CID are those 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 Federal Express or UPS. Notice of your intention to use this 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.

L. Submission of Electronic Data: The following guidelines refer to any documents that you choose to provide in electronic form. You must confirm with the FTC that the proposed electronic data formats and media types 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-ROM for Windows-compatible personal computers.
 - c. IDE and EIDE hard disk drives up to 300GB per drive, 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 accepted only with prior approval.

2. **File and record formats:**
 - a. **Email:** The FTC accepts MS Outlook PST files and MS Outlook MSG 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 and named the same as the corresponding TIFF page it was extracted from, with a *.TXT extension.

- c. **Other PC files:** The FTC accepts word processing documents in ASCII text, WordPerfect version 10 or earlier, or Microsoft Word 2002 version or earlier. Spreadsheets should be in MS Excel 2002 (*.xls) version or earlier. Database files should be in MS Access 2002 or earlier. PowerPoint presentations may be submitted in MS PowerPoint 2002 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 electronic data 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."

III. SPECIFICATIONS

Unless otherwise specified, produce the following documents for the applicable time period, as set forth in Direction II.B above. Where documents responsive to any specification below are stored in magnetic or electronic form, produce such documents in media as set forth in Direction ILL above.

- A. Copies of all advertisements that refer to any product or service offered by Ever Private Card.
- B. Documents sufficient to identify each lead that the Company directly or indirectly furnished to Ever Private Card, including every element of consumer information that the Company furnished.
- C. For each lead identified in response to Specification III.B, documents sufficient to:
 - 1. Identify the lead source;
 - 2. Identify the lead list provider, and
 - 3. Identify each entity that purchased the lead.
- D. All documents relating to how the lead source obtained the lead identified in response to Specification III.B. If the lead source obtained such lead via a website, copies of all versions of all websites that such lead viewed, including but not limited to:
 - a. Printouts of such websites;
 - b. Screenshots of such websites;
 - c. The source code for such websites and for all programs, files, and scripts related to such websites;
 - d. All log files related to such websites and to all programs, files, and scripts related to such websites;
 - e. All archived versions of such websites and of all programs, files, and scripts related to such websites;
 - f. All documents related to the design and functioning of such websites and of all programs, files, and scripts related to such websites, including but not limited to feature descriptions, programmer documentation, developer's guides, specification documents, and version histories; and

- g. Documents sufficient to identify the individuals who designed or programmed such websites.
- E. For each website identified in response to Specification III.D, and each program, file, and script related to such website, documents sufficient to identify the dates such website or program, file, or script related to such website, was available online and all electronic addresses at which the website or program, file, or script related to such website was accessible.
- F. For each lead source and lead list provider identified in response to Specification III.C:
1. All contracts or agreements between the Company and the entity,
 2. All documents relating to all contracts or agreements between the Company and the entity, including but not limited to any documents relating to any affiliate marketing program; and
 3. All communications between the Company and the entity relating to any lead identified in response to Specification III.B, including but not limited to those relating to the nature of the lead and payment for the lead.
- G. All communications between the Company and Ever Private Card.
- H. All documents referring or relating to any complaints or inquiries concerning Ever Private Card made by any financial institution; Better Business Bureau; consumer advocacy group; or federal, state, or local government agency.
- I. All non-privileged documents referring or relating to any investigation, legal proceeding, dispute resolution proceeding, or administrative action involving any of Ever Private Card's products or services, including, but not limited to, deposition transcripts and trial transcripts. For each such document, include all corresponding, related, or attached exhibits.

Important Note Regarding the Electronic Communications Privacy Act ("ECPA"): This request does not identify the Company as a provider of an "electronic communication service" or "remote computing service" as defined by ECPA, 18 U.S.C. §§ 2510(15) and 2711(2). If you believe that you are such a provider or that the documents requested are otherwise subject to ECPA, please contact FTC staff attorney Lisa Rosenthal at (415) 848-5150 before providing such documents or information.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

IN THE MATTER OF
EVERPRIVATECARD

COMMISSIONERS:

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

File No. 0723241

**STATEMENT OF MICHAEL A. THURMAN PURSUANT TO
SECTION 2.7(d)(2) OF THE CODE OF FEDERAL REGULATIONS**

I am a Partner with Loeb & Loeb LLP (“Loeb”), counsel for Swish Marketing, Inc. (“Swish”). I submit this statement pursuant to Section 2.7(d)(2) of the Code of Federal Regulations in connection with Swish’s Petition to Quash or Limit the Civil Investigation Demand issued to [REDACTED] (the “Petition”). On May 15, 2009, the FTC issued, and on May 18, 2009, the FTC served, a Civil Investigative Demand, File No. 912 3352, upon [REDACTED] (the “[REDACTED]”), which is the subject of the Petition.

Pursuant to 16 C.F.R. § 2.7(d)(2), counsel for Petitioner Swish hereby certifies that I have conferred with FTC counsel and staff by telephone in a good faith effort to resolve by agreement the requests sought in this Petition, but have been unable to reach an agreement. Specifically, I spoke with Ms. Lisa Rosenfeld, counsel for the FTC at the Western Regional office on May 20, 2009 at approximately 3:30 p.m. In the course of these discussions, I advised Ms. Rosenfeld of

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Swish's objections to the [REDACTED] CID, as discussed above, including on the grounds of privilege and Federal Rule of Civil Procedure 26(f). Such efforts at conference and negotiation with the FTC, pursuant to 16 C.F.R. § 2.7(d)(2), were unsuccessful. Ms. Rosenfeld stated that the CID is not subject to the requirements of the Federal Rules of Civil Procedure, indicating that under 15 U.S.C. § 57b-1(c)(1) the FTC can proceed with compulsory investigation measures until it initiates a civil enforcement action. Ms. Rosenfeld expressed a willingness to allow Swish to review the documents produced by [REDACTED] and to attend the hearing examination and assert any objections relating to privilege, so long as neither of those activities delayed the return of the documents and the taking of the deposition. Ms. Rosenfeld expressed a willingness to modify the return date of the [REDACTED] CID, allowing ten additional days for the production to occur. However, we advised her that even ten additional days would be insufficient given that Swish cannot predict when it will receive the documents from [REDACTED] and because the company's attorney that has handled the prior CID responses would be unavailable from May 23 to June 10. We requested that the FTC agree to a return date of June 15 to allow the documents to be assembled and reviewed. Ms. Rosenfeld declined this request, although she stated that she would inquire about it with other FTC representatives and get back to me on the afternoon of May 20 or the morning of May 21. As of 12:30 p.m. on May 21, Ms. Rosenfeld has not contacted me to indicate that there has been any change in the FTC's position on these issues.

Dated: May 21, 2009



Michael A. Thurman
LOEB & LOEB, LLP
10100 Santa Monica Blvd.
Suite 2200
Los Angeles, CA 90067-4120
(310) 282-2000

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

IN THE MATTER OF)
EVERPRIVATECARD)
)

COMMISSIONERS:

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

File No. 0723241

REQUEST FOR CONFIDENTIAL TREATMENT

Petitioner Swish Marketing, Inc. ("Swish") joins the Request For Confidential Treatment presented by Petitioner ██████████ and requests that the Federal Trade Commission treat this petition as confidential pursuant to 16 C.F.R. § 4.2(d)(4). Swish incorporates herein the legal and factual arguments set forth in ██████████'s Request in order to respect and maintain ██████████ desired confidentiality and submits the attached proposed redacted version of Swish's petition labeled "Public" that may be placed in the FTC's public record pursuant to § 4.2(d)(4)(ii).

Dated: May 21, 2009



Michael A. Thurman
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